Date and Time: Monday, October 23, 2023 11:31:00 AM CST

Job Number: 208661110

Documents (100)

1. [TYR Sport, Inc. v. Warnaco Swimwear Inc., 2010 U.S. Dist. LEXIS 153406]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

2. [In re Ebay Seller Antitrust Litig., 2010 U.S. Dist. LEXIS 19480]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

3. [Precision CPAP, Inc. v. Jackson Hosp., 2010 U.S. Dist. LEXIS 20336]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

4. [Masimo Corp. v. Philips Elecs. N. Am. Corp., 2010 U.S. Dist. LEXIS 23057]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

5. [Midwest Agency Servs. v. JP Morgan Chase Bank, N.A., 2010 U.S. Dist. LEXIS 22457]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

6. *Dicar, Inc. v. Stafford Corrugated Prods., 2010 U.S. Dist. LEXIS 23667*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

7. *Kearse v. Kaplan, Inc., 692 F. Supp. 2d 398*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

8. *Korea Kumho Petrochemical Co. v. Flexsys Am. LP, 370 Fed. Appx. 875*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

9. *Microsoft Corp. v. Franchise Tax Bd., 2010 Cal. Super. LEXIS 2977*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

10. *Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev., Inc., 371 Fed. Appx. 719*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

11. *Westfield Ins. Co. v. Gil Behling & Son, Inc., 2010 U.S. Dist. LEXIS 24328*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

12. *TYR Sport, Inc. v. Warnaco Swimwear, Inc., 709 F. Supp. 2d 802*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

13. *Flores v. El Maint. Co., 2010 U.S. Dist. LEXIS 25583*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

14. *Grant v. Adventist Health Sys. Sunbelt Health Care Corp., 2010 U.S. Dist. LEXIS 29241*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

15. *Shipp v. Donaher, 2010 U.S. Dist. LEXIS 28409*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

16. Kroger Co. v. Sanofi-Aventis, 701 F. Supp. 2d 938

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

17. In re TFT-LCD Antitrust Litig., 267 F.R.D. 583

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

18. Davis v. Four Seasons Hotel Ltd., 122 Haw. 423

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

19. Fox v. Good Samaritan L.P., 801 F. Supp. 2d 883

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

20. King Drug Co. of Florence v. Cephalon, Inc., 702 F. Supp. 2d 514

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

21. Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.), 699 F. Supp. 2d 730

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

22. Winn v. Alamo Title Ins. Co., 372 Fed. Appx. 461

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

23. Active Disposal, Inc. v. City of Darien, 2010 U.S. Dist. LEXIS 32687

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

24. Bayer Schering Pharma Ag v. Watson Pharms., 2010 U.S. Dist. LEXIS 161986

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

25. Boyd v. J.E. Robert Co., 2010 U.S. Dist. LEXIS 140905

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

26. In re Title Ins. Antitrust Cases, 702 F. Supp. 2d 840

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

27. *Mun. Revenue Serv., Inc. v. Xspand, Inc., 700 F. Supp. 2d 692*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

28. *Univac Dental Co. v. Dentsply Int'l, Inc., 702 F. Supp. 2d 465*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

29. *Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 702 F. Supp. 2d 320*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

30. *LaFlamme v. Societe Air Fr., 702 F. Supp. 2d 136*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

31. *Compliance Mktg. v. Drugtest, Inc., 2010 U.S. Dist. LEXIS 34315*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

32. In re Evanston Northwestern Healthcare Corp. Antitrust Litig., 268 F.R.D. 56

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

33. Kilgore v. KeyBank, N.A., 712 F. Supp. 2d 939

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

34. Perinatal Med. Group, Inc. v. Children's Hosp. Cent. Cal., 2010 U.S. Dist. LEXIS 36694

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

35. Cottage Emporium, Inc. v. Broadway Arts Ctr., L.L.C., 2010 N.J. Super. Unpub. LEXIS 835

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

36. Fayus Enters. v. BNSF Ry., 602 F.3d 444

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

37. [Golden Gate Pharm. Servs. v. Pfizer, Inc., 2010 U.S. Dist. LEXIS 47896]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

38. [Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

39. [Lopez v. Wash. Mut. Bank, F.A., 2010 U.S. Dist. LEXIS 38307]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

40. [Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

41. [EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp., 711 F. Supp. 2d 1074]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

42. [Datel Holdings Ltd. v. Microsoft Corp., 712 F. Supp. 2d 974]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

43. Leggett v. Duke Energy Corp., 308 S.W.3d 843

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

44. Tyr Sport, Inc. v. Warnaco Swimwear, Inc., 2010 U.S. Dist. LEXIS 153408

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

45. Advanced Ion Beam Tech., Inc. v. Varian Semiconductor Equip. Assocs., 721 F. Supp. 2d 62

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

46. Pa. Dep't of Banking v. NCAS of Del., LLC, 995 A.2d 422

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

47. Ark. Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

48. [POURfect Prods. v. KitchenAid, 2010 U.S. Dist. LEXIS 42890]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

49. [TYR Sport, Inc. v. Warnaco Swimwear, Inc., 709 F. Supp. 2d 821]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

50. [Chavez v. Bank of Am., N.A., 2010 U.S. Dist. LEXIS 44369]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

51. [Wynne Sys. v. Mobile Storage Grp., Inc., 2010 U.S. Dist. LEXIS 153722]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

52. [Antoine v. Star Ledger, 2010 U.S. Dist. LEXIS 44294]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

53. *DCI Solutions, Inc. v. Urban Outfitters, Inc., 2010 U.S. Dist. LEXIS 44438*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

54. *Shell Co. (P.R.) v. Los Frailes Serv. Station, 605 F.3d 10*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

55. *City of New York v. Group Health, 2010 U.S. Dist. LEXIS 60196*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

56. *E-Z Roll Off, LLC v. County of Oneida, 2010 WI App 76*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

57. *Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc., 713 F. Supp. 2d 286*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

58. [ADA v. Cigna Corp., 605 F.3d 1283]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

59. [Tese-Milner v. Diamond Trading Co., 2010 U.S. Dist. LEXIS 143934]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

60. [Rochester Drug Coop. v. Braintree Labs., 712 F. Supp. 2d 308]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

61. [AstraZeneca AB v. Mylan Labs., Inc. (In re Omeprazole Patent Litig.), 2010 U.S. Dist. LEXIS 50049]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

62. [Halton Co. v. Streivor, Inc., 2010 U.S. Dist. LEXIS 50649]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

63. [Am. Needle, Inc. v. NFL, 560 U.S. 183]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

64. *Colonial Med. Group, Inc. v. Catholic Healthcare West, 2010 U.S. Dist. LEXIS 51350*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

65. *Varian Semiconductor Equip. Assocs. v. Advanced Ion Beam Tech., Inc., 2010 U.S. Dist. LEXIS 51376*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

66. *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health, 717 F. Supp. 2d 1159*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

67. *Ice Cream Distribs. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc., 2010 U.S. Dist. LEXIS 52985*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

68. *Watkinson v. MortgageIT, Inc., 2010 U.S. Dist. LEXIS 53540*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

69. [Downs v. Insight Communs. Co., L.P., 2010 U.S. Dist. LEXIS 54577]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

70. [Emulex Corp. v. Broadcom Corp., 2010 U.S. Dist. LEXIS 153231]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

71. [Warren Gen. Hosp. v. Amgen Inc., 2010 U.S. Dist. LEXIS 56220]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

72. [Danner Constr. Co. v. Hillsborough County, 608 F.3d 809]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

73. [United States v. Coleman, 609 F.3d 699]()

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

74. *In re ATM Fee Antitrust Litig., 2010 U.S. Dist. LEXIS 61160*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

75. *Rectrix Aerodrome Ctrs. v. Barnstable Mun. Airport Comm'n, 610 F.3d 8*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

76. *Sterling Merch., Inc. v. Nestle, S.A., 724 F. Supp. 2d 245*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

77. *Manabat v. Sierra Pac. Mortg. Co., 2010 U.S. Dist. LEXIS 70377*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

78. *Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820*

Client/Matter: -None-

Search Terms: "antitrust law"

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

79. [Romero v. Philip Morris Inc., 148 N.M. 713]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

80. [In re TFT-LCD (Flat Panel) Antitrust Litig., 2010 U.S. Dist. LEXIS 65023]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

81. [In re TFT-LCD (Flat Panel) Antitrust Litig., 2010 U.S. Dist. LEXIS 65037]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

82. [Fox v. Good Samaritan L.P., 2010 U.S. Dist. LEXIS 70447]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

83. [In re Wholesale Grocery Prods. Antitrust Litig., 722 F. Supp. 2d 1079]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

84. [Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

85. *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

86. *In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. 125*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

87. *Whelan v Toughman, Inc., 28 Misc. 3d 1207(A)*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

88. *Sullivan v. DB Invs., Inc., 613 F.3d 134*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

89. *Xcaliber Int'l v. AG La., 612 F.3d 368*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

90. United States v. Daily Gazette Co., 2010 U.S. Dist. LEXIS 85553

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

91. Facebook, Inc. v. Power Ventures, Inc., 2010 U.S. Dist. LEXIS 93517

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

92. Ackerman v. Coca-Cola Co., 2010 U.S. Dist. LEXIS 73156

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

93. Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp., 2010 U.S. Dist. LEXIS 152477

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

94. Baker v. Aegis Wholesale Corp., 2010 U.S. Dist. LEXIS 73760

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

95. [Championsworld LLC v. United States Soccer Fedn., Inc., 726 F. Supp. 2d 961]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

96. [Fleischman v. Albany Med. Ctr., 2010 U.S. Dist. LEXIS 73220]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

97. [Trailer Bridge, Inc. v. Ill. Nat'l Ins. Co., 2010 U.S. Dist. LEXIS 73970]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

98. [Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

99. [Race Tires Am., Inc. v. Hoosier Racing Tire Corp, 614 F.3d 57]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

100. [Bodet v. Charter Communs. Inc., 2010 U.S. Dist. LEXIS 87088]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

TYR Sport, Inc. v. Warnaco Swimwear Inc.

United States District Court for the Central District of California

March 3, 2010, Decided; March 3, 2010, Filed

SACV 08-00529-JVS (MLGx)

Reporter
2010 U.S. Dist. LEXIS 153406 *

TYR Sport Inc. v. Warnaco Swimwear Inc., et al.

Prior History: *TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120, 2009 U.S. Dist. LEXIS 66118 (C.D. Cal., May 27, 2009)*

Core Terms

swimmers, Swimming, wear, Team, disparagement, antitrust, suits, summary judgment, coach, competitors, promotion, coercion, switched, Lanham Act, endorsement, induce, antitrust violation, trade association, genuine issue, consumers, elite, contractual relationship, nonmoving party, anti trust law, material fact, collaboration, swimsuit, argues, coerce, faster

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

Attorneys for Defendants: Not Present.

Judges: James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) Order Granting in Part and Denying in Part Defendant Speedo USA's Motion for Summary Judgment , or in the alternative, for Summary Adjudication of Claims (Fld 12-29-10) and Defendant United States Swimming and Mark Schubert's Motion for Summary Judgment (Fld 1-20-10)

Defendant Warnaco Swimwear, Inc. dba Speedo USA ("Speedo") moves for for summary judgment under *Federal Rule of Civil Procedure 56* on the remaining claims for relief asserted against it by Plaintiff TYR Sport, Inc. ("TYR"). Defendants United States Swimming, Inc. ("USA Swimming") and Mark Schubert ("Schubert") also move for summary judgment under *Rule 56* on TYR's remaining claims. Speedo and USA Swimming and Schubert (collectively, "Defendants") join each others' respective motions. TYR opposes both motions.

I. BACKGROUND

TYR and Speedo both design and manufacture high-end swimwear and accessories sold to competitive swimmers. (Statement of Genuine Issues in Opp'n to USA Swimming ("SGI USA") ¶ 3.) USA Swimming is the national governing body ("NGB") of the sport of swimming, per the Ted Stevens Amateur Sports Act **[*2]** ("Sports Act"), *36 U.S.C. § 220522*. (Id. ¶ 1.) In 2006, USA Swimming hired Schubert to be the National and Olympic Team head coach and general manager, though Schubert was and remained a paid spokesperson for Speedo. (Id. ¶¶ 2, 9-10.) Speedo also has a sponsorship agreement directly with USA Swimming, as the exclusive swimwear equipment sponsor of USA Swimming since 1984. (Id. ¶¶ 6, 115.)

TYR alleges a combination between Speedo, USA Swimming, and Schubert that makes USA Swimming a de facto sales agent for Speedo. Specifically, TYR contends that Schubert, wielding extraordinary influence in the swimming community, made false statements in promoting Speedo's products and disparaging TYR's.

Much of the controversy centers on the run-up to the 2008 Olympic Games in Beijing. At the time, high-end swimsuit manufacturers were engaged in something of an arms race. (See id. ¶¶ 13-16, 173.) Each was attempting to market suits that could significantly reduce the swimming times of elite swimmers. (See id.; Young Decl., Ex. B ¶¶ 6-9.) Speedo had just released its newest suit, the LZR Racer, in February 12, 2008, an upgrade from its previous suit, the Fast Skin Pro ("FS Pro"). (SGI USA ¶¶ 13; Young Decl., Ex. B ¶¶ **[*3]** 3-6.) TYR, one of Speedo's primary competitors in the American market, was working to develop its own elite racing suit, the Tracer Rise, in time for the run-up to the Beijing Games. (SGI USA ¶¶ 14-15.)

Schubert, paid spokesman for Speedo and head coach and general manager of the National and Olympic swim teams, touted the advantages of the just-released LZR Racer. Just prior to a swim meet in Manchester, England, Schubert gathered the swimmers on the National Team and encouraged them to wear the LZR Racer, stating that it offered a "2% advantage." (Id. ¶ 17.) Schubert was also quoted in a newspaper and magazine article written by a reporter covering the meet that, "[i]f you take [the] best times of world record holders and their new times [in the LZR Racer], the difference is 2% percent." (Id. ¶¶ 22-23; Young Decl., Ex. O.) Schubert was also allegedly quoted as saying that he "would strongly advise [the swimmers] to wear the [Speedo] suit at trials, or they may end up at home watching [the Olympics] on NBC." (Complaint ¶ 16(*l*).)[1]

Erik Vendt ("Vendt"), a swimmer who signed an endorsement deal with TYR in 2006, got caught up in the arms race. (SGI USA ¶ 215.) In late 2007, training to **[*4]** make the U.S. Olympic Team and win a medal in Beijing, Vendt was dissatisfied with the suit TYR had provided. (Id. ¶ 216.) In fall 2007, he made several calls to Schubert, his coach on the National team and formerly his coach at the University of Southern California ("USC"), to complain about his TYR suit. (Id. ¶¶ 214, 216.) Schubert recalls telling Vendt to talk to TYR and to his agent. (Schubert Depo. 214:6-7, 215:4-6.)

In December 2007, Vendt and his agent met with TYR. (SGI USA ¶ 220.) TYR invited him to test the yet-to-be released Tracer Rise. (Id.) He was apparently very happy with it. (Id.) However, two weeks later, he informed TYR that he planned to wear the Speedo FS Pro at a January 2008 meet in Long Beach, California. (Id. ¶ 221.) TYR responded by canceling Vendt's endorsement deal. (Id.)

By the time of the U.S. Olympic Trials, only one of the TYR-sponsored swimmer present at the Manchester meet, Katie Carroll ("Carroll"), had switched from wearing a TYR suit to Speedo. (Statement of Genuine Issues in Opp'n to Speedo (SGI Speedo) ¶ 34.) Several swimmers wore a TYR suit at the Trials and qualified for the Olympic Team. (Id. ¶ 45.) Matt Grevers won two gold medals, a silver **[*5]** medal, and set a world record in Beijing while wearing the Tracer Rise. (Id. ¶ 164.) The Speedo-wearing swimmers experienced unparalleled success. All told, 86% of the swimming medals in Beijing, including 91% of the gold medals, were won by swimmers wearing the LZR Racer. (Id. ¶ 55.)

After the games, the arms race continued, with other market entrants gaining ground, and sometimes overtaking, Speedo and TYR. (Id. ¶ 64.) Schubert continued his promotion of the Speedo brand, at one point advising two swimmers on the Junior National Team to wear the LZR Racer because it was "faster." (Id. ¶ 155.)

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[1] Neither party pointed the Court to evidence that Schubert actually made this statement. However, as the Defendants to not contest the issue, the Court will accept the allegation as true for summary judgment purposes.

However, everything came to an end in July 2009, when FINA, the sport's international governing body, decided to ban from competitions the high-performance full body suits, including the LZR Racer and the Tracer Rise, starting on January 1, 2010. (Id. ¶ 67.) USA Swimming, meanwhile, decided to move the deadline for banning suits in its own competitions up to October 1, 2009. (Id.) This effectively ended the market for the high-performance swimsuits.

At this stage in the litigation, TYR has seven remaining claims for relief against Speedo, USA Swimming, and Schubert.[2] TYR's First and Third claims, **[*6]** asserted against all three Defendants, allege a violation of the Sherman Act *§ 1*, *15 U.S.C. § 1*, and the Cartwright Act, *Cal. Bus. & Prof. Code § 16720 et seq.* The Second claim, against Speedo alone, alleges a violation of *Section 2* of the Sherman Act. The Fourth claim, against Speedo, alleges false advertising in violation of the Lanham Act, *15 U.S.C. § 1125(a)*. The Sixth, Ninth, and Tenth claims, against all three Defendants, allege tortious interference with contractual relations, violation of the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, and seek injunctive relief.

II. LEGAL STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323*. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. See *id. at 322-23*. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000)*.

Material facts are those necessary to the proof or defense of a claim, and are **[*7]** determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex, 477 U.S. at 322*.

A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248*. To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (internal quotation marks and citations omitted). In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id. at 255*. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Am. Int'l Group, Inc. v. Am. Int'l Bank, 926 F.2d 829, 837 (9th Cir. 1991)*.

III. DISCUSSION

The Court considers two summary judgment motions, one brought by Speedo, the other by USA Swimming and Schubert. Because of significant overlap between the motions, the Court treats them here together. The Court considers the challenged **[*8]** claims in turn.

A. Federal and State Antitrust Claims (First through Third Claims)

TYR alleges a conspiracy among Speedo, USA Swimming, and Schubert to restrain trade such that USA Swimming acted as a de facto sales agent for Speedo, promoting Speedo's products to the detriment of Speedo's competitors.

1. Coercion

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[2] The claims are numbered here as they are in the body of the Complaint, rather than on the cover page.

In the Court's prior order on the Defendants' motions to dismiss (Docket No. 72), the Court clarified exactly what TYR would have to prove to demonstrate an unlawful conspiracy in violation of the Sherman Act and the Cartwright Act. (See id. at 6-9.) The Defendants had argued that TYR could not maintain a Sherman Act *§ 1* conspiracy claim where the alleged combination was between a market participant, Speedo, and an ostensibly neutral party, USA Swimming. (Id. at 6.) The Court rejected the challenge, noting that the Supreme Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)*, recognized a species of *Section 1* conspiracies involving a market participant and an ostensibly neutral party. (Docket No. 72 at 7.)

Hydrolevel involved an antitrust suit by a manufacturer of low-water fuel cutoffs for boilers against a nonprofit trade association which promulgated codes and standards for the industry. *456 U.S. at 558-59*. Although the association's codes and standards were only **[*9]** advisory, many were incorporated into federal regulations, state laws, city ordinances, and the laws of all the Provinces of Canada. *Id. at 559*. "Obviously, if a manufacturer's product cannot satisfy the applicable [association] code, it is at a great disadvantage in the marketplace." Id. The association, therefore, wielded a "powerful influence" over designers of boiler systems. Id.

An employee of the plaintiff's competitor, who also served on the association, prepared an "unofficial communication" on association letterhead, suggesting that the plaintiffs's product failed to satisfy the association's code governing low-water fuel cutoffs. *Id. at 561*. This interpretation, purportedly made by the association itself, was disseminated to potential customers, thereby discouraging the purchase of the plaintiff's product. *Id. at 562*. The Supreme Court found that the competitor "successfully used its position with [the association] ... to thwart [the plaintiff's] competitive challenge," and held the association liable under *Section 1* of the Sherman Act. Id.

On their motions to dismiss in this case, Defendants countered with *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989)*, which held that a trade association's speech critical of a product does not constitute an antitrust violation **[*10]** absent some mechanism to actually enforce a restriction on the availability of the product. *Id. at 399*. In Schachar, a trade association labeled a particular eye surgery procedure performed by the plaintiffs as "experimental." *Id. at 398*. However, as the court noted:

> [The association] did not require its members to desist from performing the operation or associating with those who do. It did not expel or discipline or even scowl at members who performed radial keratotomies. It did not induce hospitals to withhold permission to perform the procedure, or insurers to withhold payment; it has no authority over hospitals, insurers, state medical societies or licensing boards, and other persons who might be able to govern the performance of surgery.

Id. (emphasis added). Because the association did not attempt to use any enforcement mechanisms to prevent consumers from getting the surgery, i.e., did not restrict the supply, there was no antitrust violation, only speech. *Id. at 399*.

The distinction between Hydrolevel and Schachar is whether the association or neutral party actually attempts to enforce some standard—whether it punishes or threatens to punish a market actor for deviating from the standard. This distinction **[*11]** has been recognized by numerous other circuits in similar cases. See, e.g., *Int'l Healthcare Mgmt. v. Haw. Coal. For Health, 332 F.3d 600, 606 (9th Cir. 2003)* (finding no antitrust violation from comments made by professional association where it did not act to constrain anyone to follow its advice); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc., 401 F.3d 123, 132-33 (3d Cir. 2005)* (finding no antitrust violation where trade association criticized plaintiff's products, but did not coerce or restrain market actors); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 373-74 (6th Cir. 2003)* (finding that defendant professional association did not violate antitrust laws under Hydrolevel because, like Schachar, lacked mechanism to enforce standards); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 296 (5th Cir. 1988)* (finding no antitrust violation where influential trade association delayed certification of the plaintiff's product because association did not coerce customers). It is not enough to simply point out that an association has influence over the purchasing decisions of consumers: "An organization's towering reputation does not reduce its freedom to speak out." *Schachar, 870 F.2d at 399*; accord *Consolidated Metal, 846 F.2d at 296* ("Even if user reliance gives [the trade association] significant influence over the market, that influence may enhance, not reduce, competition and consumer welfare."). Such influence does not prevent an association from promoting a particular product, or disparaging another. *Schachar, 870 F.2d at 400*.

TYR attempts to distinguish Schachar **[*12]** and other trade association cases because USA Swimming, as an NGB, exercises "monolithic control" over its sport, see *JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1231-31 (11th Cir. 2006)*, unlike trade associations, which often lack comparable control over the respective trade. However, the distinction between *Hydrolevel* and *Schachar* was not the ability to restrain trade; it was that the defendant in Hydrolevel actually used its de facto force of law to do so.

TYR also argues that *Schachar* is inapplicable because it did not involve the "dual role" present here and in Hydrolevel, where an employee of a competitor also served as member or officer within the neutral NGB or trade association. The Court does not find this distinction relevant. See *Santana, 401 F.3d at 132* (analogizing to Schachar where plaintiff alleged a dual role). At most, it goes to motive, but TYR must show that Defendants actually restrained trade, not just that it wanted to.[3]

In short, TYR must prove actual coercion—that USA Swimming and Schubert set a standard with the threat of punishing actors for deviating from that standard. "There can be no restraint of trade without a restraint." *Schachar, 870 F.2d at 397*. Promotion and persuasion are not actionable as antitrust violations, even where the speaker holds extraordinary **[*13]** prestige and influence. Such speech is just part of the "[w]arfare" of competition. *Id. at 399*.

With these principles in mind, the Court turns to TYR's evidence that Speedo, USA Swimming, and Schubert coerced elite swimmers to wear Speedo suits as opposed to those of competitors.

i. The Beijing Olympics Comment

On the motion to dismiss, the Court identified a single allegation that presented the necessary coercive conduct. Schubert was quoted as saying, "I would strongly advise [the swimmers] to wear the [Speedo] suit at trials, or they may end up at home watching [the Olympics] on NBC." (Complaint ¶ 16(*l*).) The Court, at that time, recognized that this statement could be interpreted two ways: (1) a swimmer wearing a non-Speedo suit would be at a competitive disadvantage, thereby risking a loss at the Trials, or (2) Schubert would exclude a swimmer from the Olympic Team if they chose to wear a non-Speedo suit. (Docket No. 72 at 8-9.) At the pleading stage, the Court was required to accept TYR's interpretation—that the statement was a threat intended to coerce swimmers into wearing Speedo gear.

Now, on summary judgment, the defendants have presented evidence that Schubert's statement could not be **[*14]** interpreted as a threat because Schubert lacked the authority to exclude swimmers from the Olympic team. First, the defendants note that USA Swimming's Olympic International Operations Procedures Manual specifically allows swimmers to freely choose the own equipment: "Swimsuit Policy: Athletes may wear the competitive swimsuit of his/her choice." (Young Decl., Ex. D at 16.) This is consistent with the guidelines adopted by the United States Olympic Committee ("USOC"), applicable to all NGBs: "An Athlete shall have the exclusive right to select his or her Specialized Equipment for use in all Protected Competition."[4] (Id., Ex. E.) Thus, at least under USA Swimming and the USOC's rules, Schubert lacks the authority to mandate that a particular suit be worn by swimmers. TYR concedes as much. (Opp'n to USA Swimming 5.)

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[3] Furthermore, the Court notes that the plaintiffs in Schachar did allege a dual role: "Plaintiffs say that the Academy is in the grip of professors and practitioners who favor conservative treatment, forever calling for more research (the better to justify the academics' request for grants)." *Id. at 399*.

[4] The parties do not dispute that swimsuits are "Specialized Equipment" and that the Olympic Trials and Olympic Games are "Protected Competition."

Furthermore, under the official Selection Procedures for the 2008 Olympic Team, Schubert had no discretion with respect to who made the Team. The only criterion for selection is the athlete's swim time at the Olympic Trials—"the wall" decides who goes to the Olympics, not the coach. (See Young Decl., Ex. I.) Under the Selection Procedures, Schubert could not exclude a TYR-sponsored **[*15]** swimmer whose time was fast enough to qualify, even if he wanted to. Indeed, several TYR-sponsored swimmers qualified at the Trials and swam at the Beijing Olympics. (Zimmer 9/30/09 Depo. at 113:16-25.)

Every witness deposed in this suit on this issue has acknowledged that swimmers were free to wear the suit of their choice at the Olympic Trials and that Schubert had no say on who made the pool swimming team. (See, e.g., Descenza Depo. at 48:14-49:7; Furniss Depo. at 148:7-13, 149:15-150:10; Van Wie Depo. at 53:24-54-4; Zimmer 9/30/09 Depo. at 204:18-205:1.) In fact, Mary Descenza ("Descenza") directly told Schubert that she intended to continue wearing TYR suits, and he did not object or pressure her to change her mind. (Descenza Depo. at 60:6-61:14.)

The Defendants having shown evidence that Schubert lacks any coercive power—any means to punish non-Speedo swimmers—with respect to the composition of the Olympic pool team, the burden falls to TYR to produce evidence rebutting the Defendants' showing. TYR concedes that it cannot make this showing, at least with respect to the pool swimmers.[5] (SGI Speedo ¶ 40.) TYR admits that the Olympic pool swimming team is determined by who is "first **[*16]** to the wall."[6]

Instead, TYR notes that Schubert has discretion to choose swimmers for the Olympic open water swim team, which is not governed by the same "first to the wall" rules. Therefore, TYR argues, Schubert's statement could reasonably be interpreted as a threat to open water swimmers hoping to make the Olympics. Putting aside the fact that Schubert's comment was made within the context of a pool swim meet, the actual selection of the open water team belies TYR's claim of coercion. Schubert and Bill Rose, the TYR-sponsored head coach of the open water team, chose Chloe Sutton to represent the United States in Beijing over Micha Burden. (Rose Decl. ¶ 9.) Both swimmers wore TYR suits.[7] (Id. ¶ 5.) Although Burden bested Sutton at the Trials, Burden failed to qualify for the Olympics at an international Olympic qualifying competition, placing 31st. (Id. ¶¶ 4, 8.) Rose, who was the personal coach of both Burden and Sutton, told Schubert that he felt that Sutton had the best chance to succeed in Beijing. (Id. ¶¶ 9.) There is no evidence that suit choice played a role, or that either swimmer was pressured or coerced by Schubert to wear Speedo.[8]

Considering the above evidence, Schubert's **[*17]** statement that swimmers not wearing the Speedo suit "may end up at home watching [the Olympics] on NBC," cannot be reasonably interpreted as a threat to exclude swimmers who did not wear Speedo. The evidence establishes that Schubert did not have such authority, that the swimmers and other relevant persons understood that Schubert did not have such authority, and that TYR-sponsored swimmers made the U.S. team and competed in Beijing. There is no triable issue of fact as to whether Schubert's statement constituted an unlawful restraint of trade.

ii. Schubert's Attempts to Persuade Elite Swimmers

TYR argues that Schubert restrained trade by attempting to persuade several elite swimmers to wear Speedo suits from his position of "extraordinary influence." However, as discussed above, statements from a position of influence

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5 However, TYR points out that an extra swimmer was added as an alternate, even though she had not qualified based on her time at the Trials. (SGI Speedo ¶ 40.)

6 TYR offers the argument that Schubert could influence who reached the wall first through psychological means by "planting in swimmers' minds that the [Speedo suit] is superior and that other suits are inferior." (Opp'n to Speedo 7-8.) This supposed psychological trick does not constitute coercion.

7 Burden was sponsored by TYR and Sutton was an amateur that chose to wear TYR.

8 A swimmer for the men's open water team was also sponsored by TYR. (Zimmer Depo. at 113:16-21.)

alone do not constitute "restraints." A person or organization having prestige or respect does not lose the right to promote or criticize products in the market place. A statement must set some standard backed by a threat to punish to be actionable as an antitrust violation.

TYR points to several instances of Schubert attempting to persuade swimmers to switch to Speedo. **[*18]** At the Junior Pan Pacific meet in January 2009, Schubert approached Patrick Murphy ("Murphy") and Nick D'Innocenzo ("D'Innocenzo"), two swimmers on the Junior National Team who wore non-Speedo suits.[9] (King Depo. at 13:8-12, 16:6-17:1, 18:3-20:21.) Schubert "suggested in a roundabout sort of way that [the LZR Racer] was the best suit to wear, the fastest suit or the faster suit out of the suits that the boys were wearing." (Id. at 18:25-19:2.) Both swimmers subsequently switched to the LZR Racer. (Id. at 23:7-24:2.) However, Murphy immediately switched back to his TYR suit after a single race, as he did not like the feel of the LZR Racer.[10] (Id. at 24:25-25:10. 61:6-23.) TYR emphasizes that Brian King ("King"), Murphy's coach, said that Murphy "said he felt that he had to wear the LZR suit and would do it, but he didn't want to."[11] (Id. at 24:17-19.)

Schubert's statement to Murphy and D'Innocenzo that the Speedo suit was "faster" is not a restraint on trade. Schubert did not threaten to take any action against them if they chose not to wear Speedo and, as far as the record shows, no action was taken when Murphy did not so chose. Murphy continued to wear the TYR suit, after one go with the **[*19]** LZR, without repercussion. That Murphy felt pressured to wear the suit after Schubert's comments does not evidence the impropriety of Schubert's actions. Murphy did not explain why he felt pressured—whether it was pressure to conform, awe of the National Team head coach, or some other pressure—and he clearly felt free to disregard the LZR after one race. Schubert's "faster" comment was simply promotion of Speedo's product, which Schubert is entitled to do regardless of how influential he is within the swimming community.

Later in the meet, Schubert told King that Murphy was not allowed to wear his TYR swim cap at the meet and had to wear the National Team cap, which had a Speedo logo. (Id. at 20:25-22:2.) However, Schubert's objection was due to the fact that Murphy's personal cap had his name on it, which, according to Schubert, was against team rules. (Id. at 53:20-54-24.) This does not establish that Murphy was coerced to wear a Speedo swimsuit.[12]

TYR also points out efforts by Schubert to convince swimmers sponsored by Nike, including Jason Lezak, Brendan Hansen, Aaron Peirsol, Cullen Jones, and Kaitlin Sandeno to wear Speedo suits at the Beijing Games. (Young Decl., Ex. K ¶ 12-14.) **[*20]** Again, however, TYR fails to point to any threat Schubert made. Without a threat, Schubert's statements constitute mere promotion, not coercion.

TYR presents evidence that a Romanian swimmer, Razvan Florea, switched from TYR to a Speedo suit because of Schubert's comments about the LZR Racer's superior performance. (Florea Decl. ¶¶ 5-6.) TYR fails to explain how Schubert or USA Swimming could have any enforcement power against a Romanian swimmer.

Finally, TYR points to the Manchester National Team meeting where Schubert touted the advantages of the latest Speedo suit.[13] Descenza, one of the swimmers at the meeting, testified that Schubert "tried to make a very highly persuasive case and influence. He does have a lot of influence over swimmers because he is such a prominent figure in USA swimming." (Descenza Decl. at 19:23-20:1.) Two other swimmers tried the Speedo suit after the meeting. (Marshall Depo. at 56:11-13; Van Wie Depo. at 16:14-15.) However, as above, Schubert's statements at the meeting do not establish coercion. Schubert tried to be persuasive, tried to convince swimmers to try the suit,

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[9] Murphy wore a TYR and D'Innocenzo wore a Blue 70 suit. (King Depo. at 19:3-4.)

[10] The record is silent on whether D'Innocenzo stuck with the Speedo suit.

[11] This testimony presents an obvious hearsay problem. *Fed. R. Evid. 801(c)*.

[12] In any case, Murphy disobeyed Schubert and wore his personal TYR cap for the remainder for the meet, apparently without punishment. (King Depo. at 55:4-19.)

[13] The parties dispute whether Schubert was referring to an advantage the LZR Racer had over the old Speedo suit, the FS Pro, or over all suits currently in the marketplace.

but nothing indicates that he ever attempted to constrain their choice. His prominence **[*21]** within the swimming community does not lessen his ability to legally promote Speedo's product.

iii. Athlete Compensation & Non-Olympic Competitions

In their attempt to establish that Schubert could coerce swimmers to wear Speedo, TYR points to all the discretionary power Schubert has to potentially punish swimmers: (1) he has access to a discretionary fund to pay swimmers; (2) he can choose which swimmers compete on the relays in competition;[14] (3) he has discretion to designate certain swim clubs as "Post-Graduate Training Centers," entitling them to funding from USA Swimming and the USOC; and (4) he has the power to choose swimmers for certain non-Olympic Events, such as the "Duel in the Pool."

The problem is that TYR has failed to connect any threat made by Schubert to the hypothetical powers to punish. It is not enough to show that Schubert could restrain trade—TYR must come forward with evidence that he actually did so. The only potential threat Schubert made was regarding a spot on the Olympic team. However, as discussed above, Schubert lacked the authority to follow through on the supposed threat. All of the other actions identified by TYR constitute mere promotion—statements **[*22]** to swimmers that the Speedo suit was faster or provided an advantage. TYR has failed to identify any evidence demonstrating that Schubert threatened, even implicitly, to use his discretionary powers to punish a swimmer for not wearing Speedo.

iv. Research Collaboration

TYR also argues that Speedo, USA Swimming, and Schubert restrained trade by collaborating to develop faster swimwear, to the exclusion of Speedo's competitors. TYR cites no authority that such collaboration violates antitrust laws. A joint research venture alone does not violate the antitrust laws. See *United States v. Line Material Co., 333 U.S. 287, 310, 68 S. Ct. 550, 92 L. Ed. 701 (1948)*; see also *15 U.S.C. § 4302* ("In any action under the antitrust laws ... the conduct of any person in making or performing a contract to carry out a joint venture ... shall not be deemed illegal per se."). This is particularly true where one of the collaborators, USA Swimming, is not even a market participant. TYR has pointed to no anticompetitive effect of the joint research project. Indeed, such joint research is likely to have procompetitive effects.[15]

Nor does the fact that USA Swimming kept secret information gleaned from the collaboration demonstrate a restraint of trade. Secrecy is a necessary part of the collaboration; if the results **[*23]** were immediately made public, the manufacturer would have no incentive to expend the time and effort to collaborate with an NGB on research, an activity potentially beneficial to competition. Manufacturers are not required to be altruistic when working in a joint venture with a non-profit.

v. Schubert's Role as Technical Advisor

Finally, TYR complains of Schubert's role within USA Swimming to disseminate technical information to the public. TYR argues that Schubert, as "gatekeeper," only disseminated information favorable to Speedo, misstated information, and withheld information unfavorable to Speedo and favorable to Speedo's competitors. These complaints do not make out a claim of coercion. The antitrust laws do not require an ostensibly neutral party to praise competitors equally or to refrain from disparaging a competitor, subject to the limits discussed below with regard to TYR's disparagement theory. See *Schachar, 870 F.2d at 399*.

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[14] The swimmers sometimes receive bonuses from sponsors for being chosen to the relay team. (See, e.g., TYR Exs. 18 at 18, 19 at Ex. A.)

[15] The combination of resources and expertise of USA Swimming and Speedo is likely to help innovation in swimsuit technology, thereby benefitting the consumer.

Because TYR has failed to show a genuine issue of fact with regard to coercion, the Defendants are entitled to summary adjudication on that issue. *Fed. R. Civ. P. 56(d)*. While not agreeing with the Court's application of Schachar, TYR conceded at oral argument that the Defendants were entitled to **[*24]** this relief on its compulsion theory.

2. Disparagement

At the hearing, TYR argued that the Defendants had not addressed TYR's disparagement theory of antitrust liability and therefore failed to carry their initial burden under Celotex of demonstrating the absence of a genuine issue of material fact as to an essential element of TYR's claim. *477 U.S. at 323*. This argument was not specifically advanced in either of TYR's opposition briefs. It was, however, alluded to in the opposition to USA Swimming and Schubert's motion.[16]

The Defendants argue that, because they moved for summary judgment on the entire claim, the burden shifted to TYR to raise a genuine issue of material fact; in this case, raise the alternative theory of antitrust liability. However, TYR was not obligated to produce anything unless and until the Defendants carried their initial Celotex burden. "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire, 210 F.3d at 1102-03* (emphasis added). By failing to squarely address TYR's disparagement theory, the Defendants have not carried their initial Celotex burden. **[*25]** Thus, TYR's burden of production with regard to the disparagement theory was never triggered.

This is not a new theory raised for the first time to prevent or delay summary judgment. TYR's Complaint specifically alleges that the Defendants engaged in a campaign of false disparagement using the prestige and apparent impartiality of USA Swimming and Schubert. (Compl. ¶¶ 13-17.) The disparagement theory was also squarely teed up following the motions to dismiss, as evidenced by the Court's discussion of *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal, 108 F.3d 1147 (9th Cir. 1997)*, in denying dismissal of TYR's disparagement claim. (Docket No. 72 at 10.) By completely failing to address a live issue, the Defendants failed to carry their Celotex burden.

Nor has TYR waived its argument by saving it for the hearing. Although the Court has discretion to refuse to consider arguments not raised in a timely manner, see, e.g., *Brass v. County of L.A., 328 F.3d 1192, 1197-98 (9th Cir. 2003)*, the Court does not consider the argument waived here, where the disparagement theory is clearly set forth in the pleadings, remained a live issue following the Court's order on the motions to dismiss, and is alluded to—albeit rather obliquely—in TYR's opposition papers. Cf. *United States v. Fay, 545 F. Supp. 2d 1067, 1071 (E.D. Cal. 2008)* ("[T]here are cases where the Ninth Circuit has found no waiver if the issue **[*26]** was at least minimally raised in the pleadings and developed at oral argument....").

The Defendants also argue that the disparagement claim fails because TYR lacks evidence demonstrating that elite swimmers or consumers were ever restrained from purchasing TYR products. However, an antitrust disparagement claim in the Ninth Circuit does not depend on actual coercion or restraints on consumers. It stems from the recognition that "[f]alse statements about rivals can obstruct competition and possess no off-setting redeeming virtues," even if consumers are not actually constrained in their purchasing decisions. See *Harcourt Brace, 108 F.3d at 1152* (quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** ¶ 737b at 280-81 (1978)).

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[16] "USA Swimming and Schubert misread the [Court's order on the motions to dismiss] (and the referenced authorities), and they fundamentally mischaracterize—i.e., narrow the focus—of the allegations and evidence establishing defendants' coordinated anti-competitive conduct. USA Swimming and Schubert try to cast TYR's claims as limited to the 2008 Olympic team and limited to the rules regarding swimwear of choice. However, the anticompetitive conduct shown by TYR is much broader: it predates the Olympics by more than a year and encompasses behavior unrelated to team selection and technical equipment rules. Put in summary judgment parlance, USA Swimming and Schubert fail to meet their burden of negating an essential element of TYR's claims or demonstrating an absence of evidence supporting them because they miscast them in the narrow range they think falls within the 'undisputed evidence.'" (Opp'n to USA Swimming 13.)

Accordingly, the Defendants are not entitled to summary judgment on TYR's antitrust claims to the extent they rely on a disparagement theory.

3. Illegal Agreement

The Defendants contend that TYR's Sherman Act § 1 and Cartwright Act claims fail because they lack evidence of an illegal agreement. Relying on *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* and Matsushita, the Defendants argue TYR fails to raise a triable issue of fact as to whether the various agreements between Speedo, USA Swimming, and Schubert are illegal, because those agreements are entirely **[*27]** consistent with legal sponsorship agreements.

The Defendants misapply the holdings of Monsanto and Matsushita. These cases stand for the proposition that, in an antitrust conspiracy case, one cannot reasonably infer a combination or conspiracy solely from conduct that is consistent with independent action, without additional evidence of an actual agreement. See *Matushita, 475 U.S. at 588*; *Monsanto, 465 U.S. at 763-64*. Here, in contrast, there is unquestionably evidence of an agreement between the parties; TYR need not rely on an inference of agreement from evidence consistent with independent competition.

4. Market Definition

Finally, the Defendants argue that they are entitled to summary judgment because TYR cannot show a genuine issue of fact as to the relevant geographic market. TYR alleges a market for "high-end competitive swimwear and accessories" in the geographic market of "the entire United States and its territories." (Compl. ¶ 9.)

The relevant geographic market is the "area of effective competition ... where buyers can turn for alternate sources of supply." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)* (citation and quotation marks omitted). It can be demonstrated by the existence of certain barriers to entry, or insulation from a larger geographic market, such that supply **[*28]** and demand are inelastic with the larger market. Id. The boundaries of a market can also be shown by "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1204 (9th Cir. 1997)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Market definition is generally a factual determination left to the jury. *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997)*.

TYR has sufficient evidence of the United States as a geographic market to overcome summary judgment on the issue. Internal emails and memos at both Speedo and USA Swimming indicate that they consider the United States market as distinct from the international market. (TYR Exs. 37-39.) Steve Furniss ("Furniss"), the Executive Vice President of TYR and who has worked for 34 years in the performance swimwear industry, testified as to numerous barriers to competition:[17] (1) the ability to provide local technical support; (2) on-the-ground customer service networks able to quickly respond to the needs of elite swim teams; (3) relationships with athletes, coaches, and swim directors; (4) cultural differences in suit preferences; (5) **[*29]** differences in the physiology of swimmers from country to country; (6) differences in sizing and labeling requirements; (7) differences in local regulations regarding consumer protections, packaging, and the environment; and (8) differences in currency and pricing. (Furniss Decl. ¶¶ 4-6.)

Accordingly, the Court finds that the Defendants are entitled to summary adjudication on the issue of antitrust coercion, but not on TYR's antitrust theory of antitrust disparagement.

B. False Advertising Claim (Fourth Claim)

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[17] Speedo, citing Morgan, object to Furniss's declaration on the grounds that it is impermissible lay witness testimony on the technical subject of the relevant geographic market. See *924 F.2d at 1490*. This is objection is overruled because Furniss testifies only as to factual characteristics of the geographic market, which is within his competency as an industry veteran. He does not give an conclusory opinion on market definition, unlike the witnesses in Morgan. See id.

Speedo seeks summary judgment on TYR's false advertising claim under the Lanham Act. TYR's false claims are based on two statements made by Schubert: (1) a statement he made to swimmers at a swim meet and a reporter, that the LZR suit offered "a 2% advantage"; and (2) a statement to two youth swimmers that the LZR suit was "faster" than their non-Speedo suits.

For a prima facie case under the Lanham Act, the plaintiff must demonstrate the following: "(1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency **[*30]** to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1052 (9th Cir. 2008)* (quoting *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829 (9th Cir. 2002))*.

1. Schubert's Statements to Swimmers

Speedo argues that, even assuming that Schubert's statement can be proven false or misleading, TYR cannot demonstrate injury. His statement at the Manchester swim meet was to an audience of 25 swimmers, only one of whom switched from a wearing TYR to a Speedo on a regular basis.[18] (Kerska Decl. ¶¶ 1-4; Carroll Decl. ¶¶ 4-16.) The one swimmer, Katie Carroll, who did switch did so months later, at the Olympic Trials, after she had swam a poor first race in her TYR Tracer Rise suit. (Carroll Decl. ¶¶ 11-15.) She testified that Schubert's 2% comment had nothing to do with her decision. (Id. ¶ 13.)

Schubert's statement to the two youth swimmers, Murphy and D'Innocenzo, similarly failed to result in lost sales to TYR. Murphy tried the LZR Racer for one race and then **[*31]** switched back to the TYR suit, because he did not like the feel of the Speedo suit. (King Decl. at 24:25-25:10. 61:6-23.) D'Innocenzo was not a TYR customer and, instead, wore a Blue 70 suit. (Id. at 19:3.)

TYR contends that it need not prove injury because Schubert's statements were literally false. In the Ninth Circuit, "[p]ublication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1146 (9th Cir. 1997)* (quoting *U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040-41 (9th Cir. 1986)*. The presumption, however, is of "deception and reliance," i.e., causation, not injury. The presumption does not cure TYR's failure to show evidence of any actual loss of sales.

Moreover, the presumption is rebuttable. See *Jartran, 793 F.2d at 1041*. The only injury fairly traceable to Schubert's comments was Carroll's defection to Speedo several months after the Manchester comments. However, Carroll specifically stated that her choice to switch sponsors had nothing to do with Schubert's comments. TYR has no evidence rebutting this testitmony. Cf. *Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996)* ("To avoid summary judgment, [the plaintiff] must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses. She must produce specific, substantial evidence [rebutting defendant's **[*32]** evidence].")

Finally, any claim for injunctive relief under the Lanham Act is moot, as it is undisputed that there is no market for the technical swimsuits among elite swimmers following FINA's ban.

Because TYR cannot demonstrate injury based on Schubert's statement at the Manchester meet and the statements to Murphy and D'Innocenzo, TYR's Lanham Act claim based on those statements fails as a matter of law.

2. Schubert's Statement to Craig Lord

Speedo argues that Schubert's claim of a 2% advantage made to swim reporter Craig Lord ("Lord") cannot constitute a Lanham Act violation because it is not "commercial advertising or promotion." To constitute commercial

[18] At the elite level, most swimmers are sponsored by a swimwear company and do not purchase their own suits.

advertising, a statement must be: (1) commercial speech; (2) intended to influence consumers to buy defendant's goods or services; and (3) disseminated sufficiently to the relevant purchasing public. *Boule v. Hutton, 328 F.3d 84 (2d Cir. 2003)*.

Speedo, citing Boule, contends that Schubert's statement to Lord fails the first prong because the statement was made to the press about a matter of public concern. In Boule, the defendants, son and daughter-in-law of the late Russian avant garde painter Lazar Khidekel, made some statements to an art reporter questioning the authenticity **[*33]** of the plaintiffs' Khidekel collection. *Id. at 86, 88*. At the time, the defendants were attempting to sell their own collection of Khidekel works. *Id. at 87*. The statements were quoted in the reporter's magazine article about fraudulent artwork. *Id. at 88*.

The Second Circuit found that the statements in the magazine article did not constitute commercial speech:

> We have little hesitation in deciding that as a matter of law the [magazine] article, and the [defendants'] statements quoted in that article, are not commercial speech. The article itself addresses a matter of public concern—fraud in the art market—and is certainly protected. The [defendants'] statements contained in the article are inextricably intertwined with the reporters' coverage of their topic. The statements by the [defendants] in [the magazine] contribute to reporters' discussion of an issue of public importance and occur in a forum that has traditionally been granted full protection under the *First Amendment*. As always with the public expression of opinion, "we have been careful not to permit overextension of the Lanham Act to intrude on *First Amendment* values." Consequently, the defendants were entitled to a grant of summary judgment on that portion of the Lanham Act claim that **[*34]** addressed the statements by the [defendants] in [the magazine].

Id. at 91-92 (footnote and citation omitted).

Likewise, Lord's article in SwimNews.com addressed a matter of public concern; namely, the public debate, "confusion, doubt and denial" about the effect of Speedo's new high performance suit on the performance of swimmers. (Young Decl., Ex. O.) The article is clearly protected speech. And like the defendants' statements in Boule, Schubert's statement regarding the performance of athletes in the Speedo LZR Racer is "inextricably intertwined with the reporter['s] coverage of [the] topic." See *328 F.3d at 91*. As such, under Boule, Schubert's statement to Lord cannot constitute a Lanham Act violation.

In its opposition brief, TYR did not address Boule or the statement to Lord, apparently conceding that it does not constitute commercial speech actionable under the Lanham Act. Accordingly, Speedo is entitled to summary judgment on TYR's fourth claim.[19]

C. Intentional Interference with Contractual Relations (Sixth Claim)

TYR's tortious interference with contractual relations claim is predicated on the termination of the endorsement deal between TYR and swimmer Erik Vendt. During his endorsement deal with TYR, Vendt **[*35]** decided to wear a Speedo suit at a swim meet. TYR canceled his endorsement deal in response.

The elements of a tortious interference with contractual relations claim are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*.

The Defendants contend that they cannot be liable because (1) TYR, not Vendt, breached the contract, and (2) TYR has not demonstrated an intentional act on the part of any of the Defendants "designed to induce a breach or disruption." The Court need not reach the breach of contract issue, because TYR does not have sufficient evidence

[19] The Court does not reach the question of whether Schubert's statement can be proven literally false.

to create a triable issue of fact as to whether any of the Defendants intentionally induced Vendt to breach or disrupt his relationship with TYR.[20]

TYR admits that it does not have direct evidence that the defendants induced Vendt to breach. However, it points to circumstantial evidence that it claims raises a triable issue of fact as to whether Schubert and Stu Isaac, a Speedo-sponsored **[*36]** swim coach, induced Vendt to terminate his contract with TYR.

Schubert testified that Vendt called him several times in the fall of 2007 to complain about his TYR suits. (Schubert Depo. at 213:9-215:23.) He also testified that he told Vendt to talk to his agent and communicate his dissatisfaction to TYR directly. (Id. at 214:6-7, 215:4-6.) However, Vendt stated in an interrogatory response that he never discussed his TYR suits with Schubert. (TYR Ex. 47 at 2.) When pressed at a deposition, he stated that he did not recall discussing TYR suits with Schubert in 2007, but that he may have around March 2008.[21] (Vendt Depo. 148:24-149:18.)

TYR contends that a reasonable jury could find that during the calls in fall 2007, Schubert urged Vendt to end his relationship with TYR based on the following facts: (1) Vendt's evasiveness during discovery regarding the calls; (2) Schubert's public comments urging swimmers to use the LZR Racer; (3) that Schubert used money from his discretionary account to pay Vendt after TYR canceled the contract; (4) Schubert's failed negotiations with TYR for an endorsement deal in 2004; and (5) the fact that Vendt claimed to have secured an endorsement deal with **[*37]** Speedo after TYR canceled his deal.

This circumstantial evidence is insufficient to create a triable issue of fact. First, it is undisputed that Vendt initiated the calls to Schubert, not vice versa. This is, of course, not dispositive, but certainly weighs heavily against the notion that Schubert acted to intentionally induce Vendt to switch vendors.

Second, Schubert's public promotion of Speedo products does not establish that he ever urged a swimmer to breach an endorsement deal. At most, it establishes that he urged swimmers to wear Speedo suits, which Vendt had a contractual right to do. (Speedo Ex. 283 § 3.5.) Thus, assuming that the jury could infer that Schubert, during the 2007 phone calls, urged Vendt to wear a Speedo suit, that would still not establish tortious inducement, as Vendt has a right to do so under the contract.

Finally, the remaining evidence is too tenuous to establish a genuine issue of fact. The Court fails to see how Vendt's evasiveness establishes Schubert's intentional tortious conduct. The actions taken by Schubert and Speedo after the Vendt lost his TYR deal shed little light on their actions before.[22] And Schubert's alleged motive to injure TYR because of the **[*38]** failure to secure a TYR endorsement deal in 2004 is far too tenuous to provide significant probative value.

TYR also points to a meeting Vendt allegedly had with Isaac, his Speedo-sponsored coach at Club Wolverine. Vendt testified that he had only visited Isaac's home when Isaac was not there; Vendt's girlfriend at the time was good friends with Isaac's wife. (Vendt Depo. at 96:7-12.) TYR contends that this is inconsistent with Isaac's testimony that Vendt and his girlfriend once came over to cook a turkey for Thanksgiving. (Isaac Depo. at 227:1-

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[20] It is worth noting that it appears that TYR terminated Vendt—not vice versa. (See TYR Ex. 45.) TYR's action was predicated on Vendt's choice to wear a competitor's suit, but he had appears to have had a unilateral contractual right to do so. (Speedo Ex. 283 § 3.5.)

[21] Vendt's testimony is unclear as to whether the March 2008 calls were with TYR or Schubert; Vendt appears to have been confused by the question. (See Vendt Depo. at 149:2-12.). However, the Court accepts TYR's interpretation for summary judgment purposes.

[22] This is especially true because Schubert did not use his discretionary fund to pay Vendt until April 2008, roughly three months after TYR canceled his endorsement deal. (Schubert Depo. at 218:22-219:3.) And although Vendt claimed to have a Speedo deal in March 2008, (Vendt Depo., Ex. 295), Speedo did not propose a sponsorship deal until May 2008, four months after the end of his TYR deal, and, because of this suit, no deal was ever reached. (Supp. Isaac Decl. ¶¶ 4-6.)

11.) However, Isaac's testimony does not, in fact, establish that he was there or met with Vendt at that time.[23] In any case, nothing indicates that swimsuits were ever discussed.

To overcome summary judgment, TYR needs to show more than a scintilla of evidence. But that is all they have here; disconnected bits of circumstantial evidence. Even if those bits are summer, no reasonable jury could find by a preponderance of the evidence that Schubert or Isaac intentionally induced Vendt to breach his contractual relationship with TYR. Therefore, the defendants are entitled to summary judgment on TYR's **[*39]** Sixth claim.

D. Remaining State Law Claims (Ninth and Tenth Claims)

The Defendants argue that TYR's UCL claim fails because it is predicated on the TYR's other causes of action. However, because TYR's antitrust disparagement claim survives, TYR can base its UCL claim on the Defendants' alleged "unlawful" business practices constituting violating the Sherman Act and the Cartwright Act, and "unfair" business practices that "threaten[] an incipient violation of an ***antitrust law***, or violate[] the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

TYR's tenth claim seeks only injunctive relief and does not state an independent cause of action. However, because TYR's antitrust claims and UCL claim survive summary judgment, TYR's claim for injunctive relief remains as well.

IV. CONCLUSION

For the foregoing reasons, the motions for summary judgment are GRANTED in part and DENIED in part. Speedo is entitled to summary judgment with respect to TYR's Fourth and Sixth Claims, and USA Swimming and Schubert are entitled to summary judgment on TYR's Sixth Claim. Speedo, USA Swimming, **[*40]** and Schubert are entitled to summary adjudication on the remaining claims to the extent they rely on a coercion theory of antitrust liability.

As noted above, the Court concludes that the Defendants failed to carry their initial Celotex burden with respect to TYR's theory of antitrust liability for disparagement. However, the case law imposes a high burden before speech in the marketplace becomes actionable antitrust conduct. Such statements "must have a significant and enduring adverse impact on competition itself in the relevant markets to rise to the level of an antitrust violation." *Harcourt Brace, 108 F.3d at 1152*. In fact, the Ninth Circuit "insist[s] on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer)." *Id. at 1151* (internal quotation marks omitted).

The Court believes that the issue of the requisite preliminary showing should be tested before the matter proceeds to trial. To that end, the Court is willing to entertain a further summary judgment motion, even if that requires a slightly collapsed motions schedule[24] or a brief delay in the trial. The Court schedules a telephonic status conference for March 8, 2010 at 11:00 a.m. to discuss **[*41]** the issue.

IT IS SO ORDERED.

End of Document

[23] "I do believe that one time over a Thanksgiving [Vendt and his girlfriend, Kim] ... wanted to try to roast a turkey for the first time in their lives, and they brought a turkey over. And my wife helped them, and even went back to their apartment to help them finish off cooking the turkey. I was not involved in that process, thank goodness." (Issac Depo. 227:4-11.)

[24] The combination of *Rule 56(c) of the Federal Rules of Civil Procedure* and the Local Rules results in a minimum 49-day motions cycle.

In re Ebay Seller Antitrust Litig.

United States District Court for the Northern District of California, San Jose Division

March 4, 2010, Decided; March 4, 2010, Filed

Case Number C 07-01882 JF (RS)

Reporter

2010 U.S. Dist. LEXIS 19480 *; 2010-1 Trade Cas. (CCH) P76,937; 2010 WL 760433

IN RE EBAY SELLER ANTITRUST LITIGATION

Subsequent History: Sanctions disallowed by *In re Ebay Seller Antitrust Litig., 2010 U.S. Dist. LEXIS 52331 (N.D. Cal., May 25, 2010)*

Affirmed by *Malone v. eBay, Inc. (In re eBay Seller Antitrust Litig.), 433 Fed. Appx. 504, 2011 U.S. App. LEXIS 9676 (9th Cir. Cal., 2011)*

Prior History: *In re Ebay Seller Antitrust Litig., 2009 U.S. Dist. LEXIS 96531 (N.D. Cal., Oct. 16, 2009)*

Core Terms

eBay, auction, online, sellers, antitrust, format, Plaintiffs', market power, fixed-price, Reply, class certification, anticompetitive, listings, platform, relevant market, prices, overcharge, buyers, summary judgment, monopolization, submarket, elasticity, monopoly power, supracompetitive, products, causal, card, summary judgment motion, transactions, retailers

Counsel: **[*1]** Judge Read Ambler, Special Master, Pro se, San Jose, CA.

For Michael Malone, individually and on behalf of all others similarly situated, Plaintiff: Michael Andrew McShane, LEAD ATTORNEY, Aaron H. Darsky, Audet & Partners, LLP, SAN FRANCISCO, CA; Beverly Tse, Christopher S. Studebaker, Daniel Hume, David E. Kovel, Kenneth G. Walsh , Kirby McInerney, LLP, New York, NY; Christine Pedigo Bartholomew, Rosemary M. Rivas, Finkelstein Thompson LLP, San Francisco, CA; Elaine T. Byszewski, Hagens Berman Sobol Shaprio LLP, Los Angeles, CA; George W. Sampson, Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; I. Stephen Rabin, Rabin & Peckel LLP, New York, NY; Jeff D Friedman, Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Jeffrey Squire, Bragar Wexler & Eagel, P.C., New York, NY; Joseph P. Garland, Klein & Solomon LLP, New York, NY; Joseph V. McBride, Rabin and Peckel, New York, NY; Karina Kosharskyy , PRO HAC VICE, New York, NY.

For Ann Farmer, Todd Van Pelt, Plaintiffs: Beverly Tse, Christopher S. Studebaker, Kenneth G. Walsh , Kirby McInerney, LLP, New York, NY; Elaine T. Byszewski, Hagens Berman Sobol Shaprio LLP, Los Angeles, CA; George W. Sampson, **[*2]** Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jeff D Friedman, Shana E. Scarlett, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Karina Kosharskyy , PRO HAC VICE, New York, NY.

For James Donohue, Plaintiff: Aaron H. Darsky, Audet & Partners, LLP, SAN FRANCISCO, CA; Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, CA.

For Jeffrey Enebely, Plaintiff: Christopher S. Studebaker, Kirby McInerney, LLP, New York, NY; Karina Kosharskyy , PRO HAC VICE, New York, NY; Kenneth G. Walsh , Kirby McInerney LLP, New York, NY; Reginald Von Terrell, The Terrell Law Group, Oakland, CA.

For eBay, Inc., Defendant: Julie Dawn Wood, LEAD ATTORNEY, O'Melveny & Myers, San Francisco, CA; Thomas Patrick Brown, LEAD ATTORNEY, Brynly R. Llyr, Dixie Lee Noonan, Katherine Robison, Michael Frederick Tubach, Randall W. Edwards, O'Melveny & Myers LLP, San Francisco, CA.

For AOL, LLC, Attorneys for Interested Party AOL, LLC, McGuireWoods LLP, Los Angeles, CA, Interested Party: Susan L. Germaise, McGuireWoods LLP, Los Angeles, CA.

For Visa Inc., Non-Party Visa Inc., Holme Roberts & Owen LLp, San Francisco, CA, Miscellaneous: Robert L. Stolebarger, LEAD ATTORNEY, Holmes Roberts & Owen **[*3]** LLP, San Francisco, CA.

Judges: JEREMY FOGEL, United States District Judge.

Opinion by: JEREMY FOGEL

Opinion

ORDER [1] GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING AS MOOT PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[re: docket nos. 217, 397]

Plaintiffs, on behalf fo themselves and a putative class, assert claims against Defendant eBay, Inc. ("eBay") pursuant to *§ 2* of the Sherman Antitrust Act ("Sherman Act") and *§§ 1620* & *17200* of the California Business & Professional Code. The operative complaint asserts six claims: (1) abuse of monopoly power and monopoly maintenance for online auctions; (2) attempted monopolization of the market for online auctions; (3) abuse of monopoly power and monopoly maintenance in the market for person-to-person online payment systems; (4) attempted monopolization of the market for person-to-person online payment systems; (5) unlawful trust, combination, or conspiracy in restraint of trade and commerce; and (6) unfair business practices. [2] On December 1, 2009, after extensive discovery over a period of more than two-and-a-half years, the Court heard argument on Plaintiffs' motion for class certification **[*4]** and Defendant's motion for summary judgment. For the reasons set forth below, the Court will grant the motion for summary judgment and deny as moot the motion for class certification.

I. BACKGROUND

Unless otherwise indicated, the following facts are undisputed for the purpose of the instant motions.

A. eBay's Business Model

eBay is a well-known online marketplace for the sale of goods and services. eBay's website facilitates exchanges between prospective buyers and sellers listing items for sale. Originally, eBay was designed solely as an auction platform where buyers could bid for and purchase a range of products offered by sellers. However, after the company went public in September 1998, it expanded by adding a hybrid feature called "Buy It Now" in 2000 and a fixed price format in 2002.

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[1] This disposition is not designated for publication in the official reports.

[2] In an order dated March 4, 2008, the Court dismissed a seventh claim alleging *per se* unreasonable tying under *§ 1* of the Sherman Act.

The fees eBay charges for all of its services, including the auction format, are listed and published in its "rate cards." For the online auction format, sellers' fees depend on the initial listing price for a product ("insertion fee") and final value of the item sold ("final **[*5]** value fee"). Ranges for insertion fees and final value fees are listed on the rate card. The rate card is applicable uniformly to all eBay sellers.

B. PayPal

In July 2002, eBay purchased PayPal for $ 1.5 billion. Paypal is an online payment system that enables individuals and businesses to send and receive payments online by means of credit cards and bank transfers. Such systems are known as person-to-person ("P2P") online payment systems. PayPal users set up accounts that can be funded by the user's credit card or by an electronic debit from a bank account and can either establish a PayPal deposit account or receive payments through electronic transfer or checks from PayPal. Though PayPal provides the preferred payment method on eBay, it serves many other companies and institutions as well.

The Named Plaintiffs in this action are three individuals [3] who sell products actively through eBay's online marketplace and seek to represent a class of all auction sellers on eBay and a subclass of all auction sellers on eBay who accept PayPal.

C. Other eBay Acquisitions

. In 1999, prior to acquiring PayPal, eBay **[*6]** acquired Billpoint, another online payment system company. eBay publicly launched Billpoint in March 2000. Billpoint was shut down following eBay's acquisition of PayPal in 2002.
. In August 2004, eBay purchased a twenty-five percent interest in Craigslist, a provider of online classified advertisements.
. In the fall of 2005, eBay acquired Verisign's payment gateway business for $ 370 million. At the time, "Verisign's network had the most active online merchants using its payment service to transact sales online--112,000 in 2004." (Pls.' Mot. for Class Cert 16 (citing Friedman Decl. Ex. 55 at 611).)

. In October 2008, eBay acquired BillMeLater, "an online transactional credit service that instantaneously provides consumers with credit on a transaction-by-transaction basis for online purchases." (*Id.* at 17 (citing Friedman Decl. Ex.62).)

D. eBay Agreements

. Since 1997, eBay has entered into a series of agreements with America Online ("AOL"), a global internet services and media company. By 1999, the operative agreement provided for payment of $ 75 million by eBay to AOL to establish eBay as the exclusive auction site on AOL.

. In May 2006, eBay and Yahoo!, Inc., an internet services company, **[*7]** agreed to form a strategic partnership. Among other things, the agreement established eBay as the exclusive third-party provider on Yahoo! Wallet, the payment system used by Yahoo! for its various services.
. In August 2006, eBay entered into an international agreement with Google that provided that Google would be the exclusive text-based advertising producer for eBay outside the United States and that eBay and Google would integrate and jointly launch a "click-to-call" advertising platform.

E. PayPal and the Online P2P Payment System Competition

In July 2006, eBay added Google's payment service, Google Checkout, to the list of online payment methods not permitted on eBay. This list includes other online payment services such as alertpay.com, sendmoneyorder.com, and Moneygram.com. Use of one of the prohibited services can result in listing cancellation, forfeiture of eBay fees

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[3] A fourth individual, James Donohue, voluntarily dismissed his claims without prejudice.

on cancelled listings, limits on account privileges, loss of earned seller status on eBay, or suspension of the user's eBay account. In October 2008, eBay changed its policy to prohibit sellers from accepting any form of paper payment, such as cash, cashier's checks, and money orders.

eBay also has changed its online **[*8]** payment policies by reducing the monthly limits on less expensive personal (as opposed to merchant) PayPal accounts, offering buyer protection only for PayPal users, requiring sellers with PayPal accounts to offer and accept all payment options (including credit card transactions), and requiring sellers registering after January 2007 to offer PayPal or have an alternate merchant credit card account.

II. DISCUSSION

A. Motion for Summary Judgment

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Material facts are those that might affect the outcome of the case under the governing law. *Id. at 248*. There is a genuine dispute about a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The moving party bears the initial burden of informing the Court of the basis for the motion and identifying portions of the pleadings, depositions, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. **[*9]** Where the party moving for summary judgment would not bear the ultimate burden of persuasion at trial, it must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000)*. If the moving party meets its initial burden, the burden shifts to the nonmoving party to present specific facts showing that there is a genuine issue of material fact for trial. *Fed. R. Civ. P. 56(e)*; *Celotex, 477 U.S. at 324*.

The evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987)*. Summary judgment thus is not appropriate if the nonmoving party presents evidence from which a reasonable jury could resolve the material issue in its favor. *Liberty Lobby, 477 U.S. at 248-49*; *Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991)*.

eBay moves for summary judgment as to each of Plaintiffs' claims.

1. Monopolization and Attempted [*10] Monopolization of the Online Auction Market Under § 2 of the Sherman Act

"To prevail on a claim of monopolization under *Section 2* of the Sherman Act, a plaintiff must demonstrate: '(1) [p]ossession of monopoly power in the relevant [market or] submarket; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury.'" *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997)* (citing *Pac. Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992)*, *cert. denied, 506 U.S. 1034, 113 S. Ct. 814, 121 L. Ed. 2d 686 (1992))*. Similarly, to prevail on a claim of attempted monopolization under *Section 2*, "a plaintiff must demonstrate four elements: (1) specific intent to control prices or destroy competition; (2) predatory or anti-competitive conduct directed toward accomplishing that purpose; (3) a dangerous probability of success; and (4) causal antitrust injury." *Id. at 1477* (citing *Rebel Oil Co., v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995))*.

eBay moves for summary judgment as to all of Plaintiffs' Section 2 claims involving eBay's online auction platform on the grounds that: (1) Plaintiffs improperly define the relevant market; (2) eBay does not have monopoly power in a **[*11]** properly defined market; and (3) Plaintiffs have failed to demonstrate causal antitrust injury.

a. Monopoly Power and Relevant Market Definition

Plaintiffs bear the burden of proving that eBay has monopoly power. Monopoly power [4] is "the power to control prices or exclude competition." *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

> A plaintiff may demonstrate market power either by direct evidence or by circumstantial evidence. Direct proof of market power may be shown by evidence of restricted output and supracompetitive prices. Such a showing "is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power."

Forsyth, 114 F.3d at 1475 (citing *Rebel Oil Co., 51 F.3d at 1434*) (internal citations omitted). Only when there is a failure of direct proof must the plaintiff provide circumstantial evidence, which requires defining the relevant market. *Id. at 1476*.

i. Direct Evidence of Market Power

Plaintiffs contend that they have presented sufficient direct evidence of eBay's market power in the online auction market. First, they claim that the record contains empirical evidence that eBay behaves as a monopolist in the online auction market. They cite the findings of The Parthenon Group, a consulting service hired by eBay to examine price elasticity on its marketplace platform, as proof that eBay's fees for its online auction services are monopolistic. Specifically, **[*13]** Plaintiffs point to Parthenon's finding of a -1.0 price elasticity for the online auction format. They contend that Parthenon's finding that elasticities for the auction platform are different from those for the fixed-price platform demonstrates market power in the online auction format, because that difference "would not persist if sellers and buyers viewed the[] two platforms as close substitutes." (Pls.' Opp'n to Def.'s Mot. for Summ. J. ("MSJ") 5.)

Second, Plaintiffs argue that eBay's maintenance or increase of its price levels throughout the class period and eBay employees' recognition of eBay's ability to do so constitute direct evidence of market power. Third, Plaintiffs assert that other empirical evidence in the record demonstrates low cross-elasticity of demand between online auctions and fixed-price transactions. Plaintiffs' expert, Dr. Glenn Woroch ("Woroch"), examined data on a sale on fixed-price fees in July 2008. According to Woroch, "[i]f the two formats were close substitutes, auction listings would fall significantly as sellers shift to the temporarily lower fixed-price format." (Pls.' Opp'n to Def.'s MSJ 6.) However, Woroch concluded that the data showed no such **[*14]** change; Plaintiffs contend that this shows that the two formats are not economic substitutes for one another.

Fourth, Plaintiffs claim that The Parthenon Group's analysis of own-price elasticity of demand is further evidence of eBay's market power in online auctions. While Woroch asserts that own-price elasticity should not differ if auctions and fixed-price listings are close substitutes, The Parthenon Group's data show that own-price elasticity does differ between the formats.

eBay offers two principal arguments in response. First, it contends that Plaintiffs incorrectly define "market power." Second, it asserts that both Plaintiffs and Woroch misinterpret their own evidence, and that Plaintiffs define the concept of market power too broadly. In his declaration in opposition to eBay's motion for summary judgment, Woroch states:

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[4] "The Ninth Circuit Court of Appeals and the district courts of the Ninth Circuit have routinely treated 'monopoly power' and 'market power' as synonymous terms in the context of a *§ 2* Sherman Act claim." *IGT v. Alliance Gaming Corp., No. 2:04-CV-1676-RCJ-RJJ, 2008 U.S. Dist. LEXIS 111770, 2008 WL 7071468, at *10 (D. Nev. Oct. 21, 2008)* **[*12]** ; *see, e.g., United States v. LSL Biotechs., 379 F.3d 672, 696 (9th Cir.2004)* ("The power relevant to antitrust is market power, or as some economists put it 'monopoly power.'"); *Image Technical Servs., Inc. v. Wash. Natural Gas Co., 99 F.3d 937, 950 n.15 (9th Cir. 1996)* (stating, in a *§ 2* action, that "[t]he terms 'market power' and 'monopoly power' are used interchangeably herein"); *Cyntegra, Inc. v. Idexx Laboratories, Inc., 520 F. Supp. 2d 1199, 1209 (C.D. Cal.2007)* ("The first element of a § 2 claim requires monopoly power (also known as market power), which is 'the power to control prices or exclude competition.'").

> I do not draw conclusions about whether eBay has *monopoly* power in any market, which I understand to mean it would have the ability to exclude all, or nearly all, competitors from those markets. My analysis is limited to the determination of *market* power by which I mean the ability to raise price above the competitive level.

(Woroch MSJ Opp'n Decl. 2 n.3 (emphasis **[*15]** in original).) eBay contends that Woroch's definition equates market power with "the power over price possessed by every producer of a non-fungible good," a formulation that has been rejected explicitly in the antitrust literature. Instead, relying upon Judge Posner's treatise on the subject, eBay argues that "'market power' in an exclusionary conduct case means something close to monopoly power." (Def.'s MSJ Reply 17 (citing Richard A. Posner, ***Antitrust Law*** 195 (2d ed. 2001)).) According to eBay, Judge Posner has warned against adopting the definition used by Woroch precisely because "even firms 'in highly competitive markets will often have some power over price as long as they are not selling a fungible commodity.'" (*Id.* (citing Posner, ***Antitrust Law*** 195).)

eBay also challenges Plaintiffs' empirical evidence. Among other things, it argues that Plaintiffs' reliance on own-price elasticity is misplaced. In the opinion of eBay's expert, Dr. Kevin Murphy ("Murphy"), "a finding of -1.0 price elasticity is simply a reflection of the fact that eBay's marginal costs are approximately zero, and that it 'tells us nothing about the level of competition. . . . If marginal costs are zero, 100% **[*16]** of any price is a markup, no matter what the level of price.'" (*Id.* (citing Murphy Supp. Decl. PP 42, 44).) In addition, eBay argues that Woroch misinterprets the results of the July 2008 sale on fixed-price fees. According to eBay, Woroch's own analysis "show[s] that auction listings *did* in fact fall by 3.44% during the fixed price insertion fee sale, based on just two days of listing data (one before the sale and one during)" (*Id.* at 18 (citing Woroch MSJ Decl. Ex. 2) (emphasis in original)) and that the formats thus are substitutes for one another.

Viewing the evidence in the light most favorable to them, the Court concludes that Plaintiffs have failed to show "direct evidence of the injurious exercise of market power" from the facts in the record. As discussed above, the Ninth Circuit has recognized that market power "may be shown by evidence of restricted output *and* supracompetitive prices." *Forsyth, 114 F.3d at 1475* (emphasis added). Evidence that eBay has raised prices over a period of years, and that several of its employees believe that the company may have raised them too high, proves nothing with respect to whether the prices are supracompetitive. Plaintiffs have provided **[*17]** no evidence of either restricted output or supracompetitive prices, let alone both. *See, e.g., id. at 1476* (holding that "plaintiffs have failed to present direct evidence of market power" where they submitted evidence of supracompetitive prices but made "no accompanying showing of restricted output"). Nor have Plaintiffs cited any authority for the proposition that the type of evidence they have provided constitutes direct proof of market power. [5]

ii. Circumstantial Evidence of Market Power

While antitrust plaintiffs are permitted to present direct evidence of a defendant's market power, "[t]he more common type of proof is circumstantial evidence pertaining to the structure of the market." *Rebel Oil Co., 51 F.3d at 1434*. To meet their burden with circumstantial evidence, Plaintiffs must "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show **[*18]** that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id.* eBay argues that Plaintiffs have failed to define the relevant market correctly or to show, when the market is defined correctly, that eBay has a dominant share of the market.

(1) Defining the Relevant Market

Market definition is a threshold issue. Resolution of Plaintiffs' claims both for monopolization and for attempted monopolization is "dependent upon a definition of the relevant market. Without such a determination, [a court]

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[5] eBay raises evidentiary objections to certain documents cited in Plaintiffs' opposition papers as direct evidence of market power. Because the Court concludes that Plaintiffs have failed to show that there is a triable issue of fact even with the contested evidence, the objections are moot.

cannot assess whether challenged activity was anticompetitive." *Forsyth, 114 F.3d at 1477*; *see also* *id. at 1476* ("It is impossible to determine market share without first defining the relevant market."). As the Ninth Circuit has held:

> Definition of the relevant market cannot be performed with mathematical accuracy; it is simply the recognition of a field in which meaningful competition is said to exist. We have previously defined the relevant market as the group of sellers or producers who have the "actual or potential ability to deprive each other of significant levels of business."

Id. at 1476 (citation omitted). **[*19]** Put another way, "[t]he product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th 2001)* (citation omitted).

eBay argues that Plaintiffs' proffered "online auctions market" is not a proper relevant market because it does not include all reasonably interchangeable substitutes. It points to evidence in the record that the named Plaintiffs as well as other eBay buyers and sellers substitute regularly among online auctions and other sales platforms and that its online auction format is priced competitively both with its own fixed-price platform and with Amazon, its fixed-price competitor.

Plaintiffs do not dispute eBay's claim of competitive pricing, relying instead upon *Brown Shoe, Inc. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. In *Brown Shoe,* the Supreme Court held that "within [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" and that "[t]he boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate **[*20]** economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe, 370 U.S. at 325*. Plaintiffs contend that application of *Brown Shoe's* "practical indicia" leads to the conclusion that the online auctions market is an economically distinct submarket within the broader category of online marketplaces. [6]

Industry or Public Recognition

According to Plaintiffs, the record demonstrates that eBay employees, industry analysts, potential competitors such as Yahoo!, and internet bloggers all recognize the online auction market as a separate economic entity distinct from the fixed-price format. However, eBay points to Woroch's acknowledgment in his deposition testimony that such evidence "is not germane to defining the relevant market for antitrust purposes." (Def.'s MSJ Reply 11.)

Peculiar Characteristics or Uses

Plaintiffs contend that eBay's online auctions possess several characteristics and uses that make them distinct from fixed-price sales. First, they cite record evidence that online auctions are "particularly useful to enable a market for hard-to-find or **[*22]** unique types of goods, different from goods that are commodity-type goods." (Pls.' Opp'n to MSJ 11.) Second, they highlight the lack of time constraints for online auctions in comparison to offline auctions and

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[6] eBay objects to each document cited by Plaintiffs in support of the *Brown Shoe* factors. eBay asks that the documents be excluded or, in the alternative, that eBay be given the opportunity to supplement some of them to put the documents in context, on one or more of the following grounds: relevance, authentication, inadmissible hearsay, or lack of context.

The objections are overruled. Each of the documents cited meets the relevance standards of *Rules 401* and *402*. Similarly, the statements challenged as hearsay either are not offered for the truth of the matters asserted; are admissions by eBay, its employees, or its agents within the scope of the employment or agency; or are admissible under *Rule 803*. The documents all are properly authenticated either **[*21]** by virtue of their production by eBay or by a third party pursuant to discovery requests in this litigation, their publication in newspapers or periodicals, their issuance as official government reports, or through the submission of a voice recording. While *Rule 106* allows eBay to supplement the record with material it believes should be taken into consideration contemporaneously with any of Plaintiffs' submissions, it has not done so.

transactions with traditional retailers. Third, they note that online auction sellers and buyers face minimal geographical constraints, as nearly all of the transactions that occur on eBay are not local. Fourth, they argue that online auctions offer a unique and fun experience to buyers and sellers distinct from other sales formats.

While conceding that the online auction format may be unique, eBay disagrees strongly that the format represents a separate market for antitrust purposes. It argues that market definition is controlled by "commercial realities," as demonstrated by consumer behavior, and it cites unambiguous evidence in the record--particularly the testimony of the Named Plaintiffs that the relevant market for eBay sellers includes alternatives to the online format.

Unique Production Facilities

Plaintiffs claim that because eBay provides a service or venue rather than goods, the question of whether eBay has unique production facilities is irrelevant to market definition. **[*23]** eBay contends that Plaintiffs ignore this factor because it weighs against them. It notes that "eBay online auctions were born from a computer and internet connection, just like the services provided by, among others, Amazon.com, Craigslist, and Google that Plaintiffs place outside their relevant market." (Def.'s MSJ Reply 13.)

Distinct Customers

Plaintiffs assert that online auctions have distinct customers--both buyers and sellers. First, they contend that eBay's auction platform is dominated by a "core group of consumer sellers," the majority of whom, as shown by eBay's own marketing studies, sell exclusively on eBay. Second, they point to eBay survey data from 2005 showing that more than half of eBay buyers bought exclusively on the auction format while only twenty percent bought from both the fixed-price and auction formats. Third, they refer to comments by eBay employees about eBay sellers as evidence that sellers are captive to eBay because of a lack of viable alternatives. Fourth, they offer eBay corporate documents to prove that the alternatives to eBay's auction format that do exist--Amazon, Craigslist, and Overstock--are not genuinely close substitutes.

eBay points to evidence **[*24]** in the record showing that its buyers and sellers do not specialize in one format or another, either online or offline, and that, in fact, twenty-seven percent of online auctions are listed simultaneously in the fixed price format. eBay also disputes Woroch's finding that there is only small percentage of overlap between eBay's auction and fixed-price listings and claims that, when the statistics relied upon by Woroch are analyzed correctly, the overlap actually is eighty percent.

Distinct Prices

Plaintiffs argue that sales on eBay's auction platform have distinct prices (i.e., fees) that eBay itself has recognized are not competitive with alternatives. Plaintiffs attribute the similarities between pricing for the fixed-price and auction formats in previous years to "the historical development of eBay's business model rather than the conclusion that eBay's auction fee levels were competively restrained by fixed-price platforms" and point to evidence that in October 2008 "eBay finally responded to the fixed price competitive landscape by only reducing its fees for fixed-price sales, while leaving auction fee levels unchanged." (Pls. Opp'n to Def.'s MSJ 18.)

eBay notes that its fees for **[*25]** the auction and fixed-price formats have been the same for the majority of the class period, and it also argues that "as a matter of law, price differences do not establish the existence of separate product markets, when, as here, price varies along with product characteristics." (Def.'s MSJ Reply 14.) Citing authority from this district, eBay contends that "[c]ourts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are economically meaningless where the differences are actually a spectrum of price and quality differences." *In re Super Premium Ice Cream Distribution Antitrust Litig., 691 F. Supp. 1262, 1268 (N.D. Cal. 1988)*.

Sensitivity to Price Changes

Reasserting their earlier arguments with respect to elasticity of demand, Plaintiffs contend that this factor weighs toward finding a submarket of online auctions. eBay again asserts that Woroch's analysis of the fixed-price fee sale actually shows that auction sellers are sensitive to changes in price. eBay also relies on the deposition testimony of Ann Farmer, one of the Named Plaintiffs, who testified that price increases for auction listings induced her to choose **[*26]** the fixed-price format instead. (Farmer June 3, 2009, Dep. 31:14-23.)

Specialized Vendors

Plaintiffs contend that this factor favors finding a submarket for online auctions because the auction platform, which "connects millions of sellers to millions of buyers to engage in online auctions," (Pls.' Opp'n to Def.'s MSJ 9), is a "specialized method of retailing distinct from other conventional methods." *Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 714 (7th Cir. 1979)*. Plaintiffs emphasize that eBay's marketplace is different from that used by traditional retailers because eBay never takes possession or ownership of the products sold.

While it agrees that it offers a unique way of retailing, eBay points out that its "specialized method" applies equally to its fixed-price format, in that eBay never takes ownership of the products sold through either format.

Summary

The Ninth Circuit has held that the *Brown Shoe* factors are

> practical aids for identifying the areas of actual or potential competition and that their presence or absence does not decide automatically the submarket issue. [citations omitted] Whether isolating a submarket is justified turns ultimately upon whether the factors used **[*27]** to define the submarket are "economically significant." [citation omitted]

Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1375 (9th Cir. 1989).

In *Thurman Industries,* the plaintiff competitor alleged that the defendant retailer exercised market power in a submarket comprised of "home center" retail stores. Relying upon *Brown Shoe,* the plaintiff argued that home center stores were specialized vendors, that they catered to distinct customers known as "do-it-yourselfers," that they were recognized in the industry as a discrete product market, and that consumers recognized them as a discrete submarket. In rejecting plaintiffs' market definition, the Ninth Circuit held that:

> [t]he factors advanced by Thurman represent but two fundamental assumptions of fact: (1) that home centers are perceived as distinguishable from other stores by the variety of products and the trained sales staffs that home centers offer, and (2) that customers engaged in major home remodeling or home repair projects patronize home centers because of this distinction. But these factual assumptions, even if true, form an inadequate basis for concluding that home centers and other retailers lack the ability **[*28]** to attract substantial amounts of business away from each other. Stated more concretely, the factors identified by Thurman are wholly inadequate to allow a finding that specialty stores selling house paint are unable through price reductions or other marketing strategies to lure significant numbers of do-it-yourself builders into buying paint at a specialty store even if they purchase all their other supplies at a home center. This analysis applies with equal force to the marketing overlap of all other products sold both by home centers and by other retailers.

Id. at 1376.

Here, however, Plaintiff's evidence with respect to the *Brown Shoe* indicia is at least sufficient to create a triable issue of fact as to whether other, non-auction platforms have "actual or potential ability to deprive [providers of online auction formats] of significant levels of business." *Id. at 1374* (citation omitted). Many of eBay's challenges to Plaintiffs' factual showing go to the weight rather than the materiality or legal sufficiency of the evidence. Market definition "is a factual inquiry for the jury; the court may not weigh evidence or judge witness credibility." *Id.* (citation omitted). [7]

(2) Ownership of a Dominant Share of the Market

A determination as to whether eBay owns a dominant share of the market obviously depends on the definition of the relevant market. In this instance, each party has presented evidence of eBay's market share using its own definition. Accordingly, because it concludes that Plaintiffs' have presented evidence sufficient to raise a triable issue of fact as to their proposed market definition, the Court also concludes that Plaintiffs have demonstrated a triable issue of fact with respect to whether eBay controls a dominant share of that market. Indeed, eBay does not dispute Plaintiffs' assertion that it owns between eighty and ninety-nine percent **[*31]** of the online auction market. *See* *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1206 (9th Cir. 1997)* ("Courts generally require a 65% market share to establish a prima facie case of market power.").

(3) Barriers to Entry

Plaintiffs assert that there are significant barriers to entry to the online auctions market because of network effects. eBay does not contest this assertion.

b. Causal Antitrust Injury

To survive summary judgment on the issue of causal antitrust injury, Plaintiffs must "offer some evidence demonstrating the existence of an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *Forsyth, 114 F.3d at 1477* (internal citations and quotations marks omitted). eBay claims that Plaintiffs have failed to present any such evidence.

Plaintiffs allege that they have suffered antitrust injury through eBay's charging of "supracompetitive" fees for its online auction platform. (*See* Consol. Class Action Compl. ("Compl.") P 128 ("EBay auction sellers have paid or are likely to pay artificially inflated and supra-competitive fees."); Dec. 1, 2009, Oral Arg. Trans. 105:16-20 **[*32]** ("THE COURT: BUT THE BOTTOM LINE IS THAT THE CUSTOMER IS PAYING MORE THAN THE CUSTOMER SHOULD BY VIRTUE OF THE MONOPOLISTIC POSITION[?] [PLAINTIFFS' COUNSEL] MR. SAMPSON: THAT IS THE ESSENCE OF AN OVERCHARGE CASE. THIS IS AN OVERCHARGE CASE.").)

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[7] In response **[*29]** to eBay's reliance on the experience of the individual Named Plaintiffs, Plaintiffs argue that the substitutability of products should be viewed in the aggregate rather than at the individual level. To support this contention, Plaintiffs rely upon the decision of the District of Columbia Circuit in ***F.T.C. v. Whole Foods, 548 F.3d 1028, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)***. That case held that "in some situations core consumers, demanding exclusively a particular product or package of products, distinguish a submarket." ***Id. at 1041***. Plaintiffs contend that with online auctions, as with the speciality grocery stores at issue in *Whole Foods,* the existence of "fringe customers" who may not use the format exclusively does not defeat the existence of a submarket. Plaintiffs also claim that economic theory typically calculates cross-elasticity of demand in the aggregate rather than at the individual level.

eBay argues that *Whole Foods* is inapposite because, unlike the FTC, Plaintiffs have provided no evidence that eBay has discriminated against any online auction users, let alone users Plaintiffs would consider to be in the "core" subset for whom online auctions have no substitute. eBay also argues that the testimony **[*30]** of all three Named Plaintiffs demonstrates that none of them is a member of Plaintiffs' proposed "core" of eBay sellers and thus none of them has standing to assert the instant claims.

Because there are triable issues of fact as to Plaintiffs' proposed market definition based on the *Brown Shoe* factors, the Court does not address the applicability of a single out-of-circuit decision. Because eBay has not challenged the Named Plaintiffs' standing other than within the *Whole Foods* context, that issue is moot.

As a preliminary matter, the parties disagree over the appropriate measure of injury in a two-sided market such as eBay's. Consistent with their theory of recovery, Plaintiffs contend that the appropriate measure of damage is the alleged overcharge itself--that is, "the difference between the price paid for goods actually purchased and the price that would have been paid absent the illegal conduct." (Pls.' Reply in Support of Class Certification Mot. ("Pls.' Class Cert. Reply") 17 (citing 2 Phillip E. Areeda, Herbert Hovenkamp & Robert D. Blair, ***Antitrust Law*** P 394, at 521 (2d ed. 2000)).) Plaintiffs point to the Third Circuit's statement in *Howard Hess Dental Laboratories, Inc. v. Dentsply International, Inc.* ("*Dentsply*"), that "the standard method of measuring damages in price enhancement cases is overcharge, not lost profits." *424 F.3d 363, 374 (3d Cir. 2005)*.

eBay maintains that overcharge is not the appropriate measure of injury and that **[*33]** the Court should look instead to seller profit. eBay argues that unlike the one-sided market scenario considered in *Dentsply* and the cases cited therein, "in a two-sided market such as eBay's seller platform, changes to eBay's fee structure affect more than just the charge imposed on customers; there is no dispute that the level of eBay's fees determines what goods are listed, how quickly they sell and at what price they sell." (Def.'s MSJ Reply 7.) eBay cites two antitrust tying cases, *Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir. 1982)*, *cert. denied, 459 U.S. 857, 103 S. Ct. 127, 74 L. Ed. 2d 109 (1982)*, and *Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971)*, *cert. denied, 405 U.S. 955, 92 S. Ct. 1173, 31 L. Ed. 2d 232 (1972)*, in support of its position. Explaining the *Siegel* court's holding, which it then applied to the facts before it, the *Kypta* court opined that:

> *Siegel,* then, stands for the proposition that injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value. The rationale behind this requirement is apparent: A determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net **[*34]** economic harm, since a lower price might conceivably have been exacted by the franchisor for the tying product. Unless the fair market value of both the tied and tying products are determined and an overcharge in the complete price found, no injury can be claimed; suit, then, would be foreclosed.

Kypta, 671 F.2d at 1285. While recognizing that the instant case does not involve tying, eBay contends that *Kypta* and *Siegel* are relevant because they stand for the proposition that "when an antitrust plaintiff complains about the effects that flow from an allegedly anticompetitive act, injury is determined by the net effect of the act." (Def.'s MSJ Reply 8.)

While Plaintiffs contend that the same standard that courts routinely have applied in one-sided markets should apply to eBay's two-sided market, both parties acknowledged at oral argument that there is no case law that addresses directly the issue presented here. As the Third Circuit recognized in *Dentsply,* "[a] court might potentially use a lost profits measure of damages, as '[t]he Supreme Court has not explicitly held that any particular measure of damages is required or precluded.'" *424 F.3d at 374* (citing ABA Section of ***Antitrust Law***, **[*35]** Proving Antitrust Damages: Legal and Economic Issues 184 (1996)). Ultimately, however, this Court need not decide which measure of damages is appropriate here, because even assuming *arguendo* that overcharge is the correct measure, Plaintiffs have failed to raise a triable issue of fact as to whether they have been injured by eBay's alleged anticompetitive acts.

In their opposition to eBay's motion for summary judgment, Plaintiffs incorporate by reference their discussion of antitrust injury in their class certification motion and reply, together with Woroch's declarations in support of that motion. Plaintiffs emphasize repeatedly--and correctly--that in seeking class certification they "are not required to present completed damages models at the class certification stage, but merely [to] present a plausible methodology by which they will demonstrate impact on a common basis to the class." (Pls.' Class Cert. Reply 11:26-28 (citing *In re Diamonds Antitrust Litig., 167 F.R.D. 374, 384 (9th Cir. 1996))*; see also Pls.' Class Cert. Motion 42:11-13 (citing *In re Tableware Antitrust Litig., 241 F.R.D. 644, 652 (N.D. Cal. 2007)* ("It is not necessary that plaintiffs show that their expert's methods **[*36]** will work with certainty at this time. Rather, plaintiffs' burden is to present the court with a likely method for determining class damages.")).) However, to defeat eBay's motion for summary judgment, Plaintiffs still must point to admissible evidence that would permit a reasonable jury to find that they have suffered injury that was caused by eBay's alleged anticompetitive acts. Plaintiffs' proffered evidence of causal antitrust injury consists entirely of the two models Woroch offered in support of their motion for class certification.

i. Dominant-firm Model Entry Deterrence with Network Externalities Model

Using Woroch's first method, "antitrust impact may be measured through a dominant-firm model entry deterrence with network externalities model, where eBay's alleged anti-competitive actions have the effect of reducing competitive threats, enabling eBay to raise its fees (as reflected in its rate cards)." (Pls.' Mot. for Class Cert. 41 (citing Woroch Class Cert. Decl. PP 8, 73-80).) According to Plaintiffs, "[t]he key insight of the [deferred entry] model is the tradeoff facing the dominant firm between current price level and future entry." (Pls. Class Cert. Reply 11.) Woroch proposes **[*37]** that the model can "determine impact on class members by comparing eBay's actual fees with fees it would have charged if it faced competitive threats unencumbered by the anticompetitive actions." (Woroch Class Cert. Decl. P 77.)

However, while Woroch describes how his first model might work in theory, Plaintiffs make no attempt anywhere in their briefing to show that the model actually works *in practice* in this case and would permit a reasonable jury to conclude that Plaintiffs have been injured as a result of eBay's alleged anticompetitive acts. To the contrary, Woroch concludes the section of his declaration discussing this model with the following paragraph:

> To fit a dominant-firm model of entry deterrence to the facts of the online auction market *would require* rather detailed data. Detailed figures on the listings and transactions by eBay and by its active competitors *would be needed* along with complete fee structure over the sample period. It is possible, however, to characterize this equilibrium with access to reliable estimates of buyer and seller behavior, such as the price elasticity of auction listings.

(Woroch Class Cert. Decl. P 80 (emphasis added).) While Plaintiffs claim **[*38]** in their class certification papers that they did not "have the requested transactional data important to populate Plaintiffs' models" at the time they filed their motion (Pls.' Class Cert. Reply 13), they do not contend at any point in their opposition to the motion for summary judgment, nor did they indicate at oral argument, that they lack sufficient data with respect to Woroch's first model to raise a triable issue of fact as to causal antitrust injury.

ii. Reduced-form Treatment Effects Regression Model

Woroch's second method of determining antitrust injury is "a reduced-form treatment effects regression model [which] relat[es] eBay's auction 'take rates' to market conditions, comparing the take rates under different degrees of anti-competitive conduct during the class period." (Pls.' Class Cert. Mot. 41 (citing Woroch Class Cert. Decl. PP 8, 81-86).) The term "take rate" refers to "eBay's revenues as a percentage of total merchandise sold using eBay.com" and is used by Woroch as "a proxy for the amount of seller overcharge experienced by members of the class." (Pls.' Class Cert. Reply 10.) Woroch proposes that the model can determine how much sellers were overcharged by eBay as **[*39]** a result of one or more of its anticompetitive acts by comparing the actual take rate with the take rate in a "but-for world" in which eBay did not engage in these acts. Plaintiffs offer several specific examples based on the available data, including one that purports to demonstrate the overcharge associated with eBay's acquisition of PayPal. (*See id.* (citing Woroch Class Cert. Reply Decl. PP 19-20; Ex. 1).)

Plaintiffs devote several paragraphs of their class certification reply brief to lauding the merits of regression analysis in antitrust cases. However, the problem with Woroch's second model is not its general methodology but what the model purports to show. As discussed above, Plaintiffs' theory of causal antitrust injury is that they were injured by paying supracompetitive fees, or, in other words, by being "overcharged" by eBay for its services. Woroch's model explicitly uses take rate as a proxy for overcharge. Take rate, however:

> although a measure of fees collected by eBay across all transactions, is not actually a measure of the fee paid by any of the three Named Plaintiffs or any class member. eBay's take rate is determined by the volume of the goods sold on its site, the **[*40]** number of total listings, the number of successful listings, the features that sellers use to present their listings to potential buyers, and its rate schedule. Of these, only the last is of antitrust interest.

(Def.'s MSJ Reply 7.) There is no material dispute that take rate "can move up as eBay sellers add features to their listings in pursuit of higher average selling prices" or "if listings increase more rapidly than successful listings."

(Def.'s MSJ Reply 5.) Even assuming that Woroch's model shows an increase in take rate following an allegedly anticompetitive act by eBay, the model cannot--nor is it designed to--determine whether that increase resulted from an increase in fees or the imposition of supracompetitive fees.

eBay's expert, Dr. Robert Topel ("Topel"), explains this problem as follows:

> [T]he Take Rate is affected by sell-through rates--the fraction of listed goods that actually sell. Lower sell-through rates raise the Take Rate by reducing the average sale value per listing, even if fees are unchanged. Sell through rates, in turn, are influenced by sellers' own decisions. If these changes are correlated with the existence of challenged [that is, alleged anticompetitive] **[*41]** acts, then Professor Woroch's analysis will attribute impact to acts even if there is none.
> The Take Rate also increases when the average selling price for completed transactions declines, holding the levels and structure of the fees constant. If a challenged act had no anticompetitive impact on fees, but attracted more low-value items to the platform, then this association would also wrongly attribute an anticompetitive impact to the act.

(Topel Class Cert. Decl. PP 139-40.)

In response to Topel's declaration, Woroch makes the following statement:

> Dr. Topel does raise the possibility that the discrepancy between the rate card [i.e., the fees charged to eBay sellers] and take rate could be correlated with [average selling price] or with the sell through rate which, in turn, are related to the challenged act(s). Accepting for the moment that take rate is a proxy for antitrust impact, and that it is subject to such measurement error, standard techniques exist for avoiding bias that could arise as a result of correlation. The correlation that arises between an explanatory variable is a very common occurrence in applied econometrics. Perhaps the most popular remedy is to perform 'instrumental **[*42]** variable estimation.' Use of a good instrument will accommodate correlation that arises between the included indicators of the anticompetitive acts and the error term in the regression.

(Woroch Class Cert. Reply Decl. P 25.)

Woroch's response highlights the problems with Plaintiffs' attempt to show antitrust injury. First, Woroch responds to the criticism that he is using take rate as a proxy for anticompetitive injury with an explanation that assumes the same proxy. Second, as is the case with his first model, Woroch merely describes how he might use econometric techniques to reduce the error rate. While such a hypothetical analysis might be sufficient to meet the "plausible methodology" standard required for class certification, it is too indefinite and speculative to enable Plaintiffs to survive summary judgment.

Despite Plaintiffs' repeated assertion that a class certification motion is not the appropriate forum for a "battle of the experts," Plaintiffs and their expert devote an inordinate number of pages in their class certification reply to challenging Topel's theories and opinions. However, even if Topel's analysis is flawed, that fact does not help Plaintiffs carry their burden **[*43]** on summary judgment. Despite the voluminous briefing permitted in connection with both of the instant motions--which includes hundreds of pages of supporting documents--Plaintiffs have not drawn the Court's attention to any actual proof of antitrust injury caused by eBay's alleged anticompetive acts--on an individual or a classwide level. It is undisputed that Woroch's model does not measure fees, or at the very least does not measure them alone. His comparison between actual take rate and take rate in the but-for world thus is insufficient to permit a jury to determine whether the Plaintiffs were overcharged as a result of eBay's alleged anticompetitive acts. Absent any probative evidence as to this element of Plaintiffs' antitrust claims, eBay is entitled to summary judgment.

2. Monopolization and Attempted Monopolization of the Person-to-Person Online Payment Market

The foregoing discussion of causal antitrust injury applies equally to Plaintiffs' claims for monopolization and attempted monopolization of the P2P online payment market.

3. State Law Claims

As Plaintiffs acknowledge in their motion for class certification, "[t]he analysis under California's ***antitrust law*** mirrors the analysis **[*44]** under federal law." (Pls.' Class Cert. Mot. 43 (citing *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001))*.) As Plaintiffs' state law claims are predicated on violations of the federal antitrust laws, eBay is entitled to summary judgment on these claims as well.

B. Motion for Class Certification

In light of the disposition of the motion for summary judgment, Plaintiffs' motion for class certification is moot.

III. ORDER

The motion for summary judgment will be granted. The motion for class certification will be denied as moot. Judgment will be entered accordingly.

IT IS SO ORDERED.

DATED: March 4, 2010

/s/ Jeremy Fogel

JEREMY FOGEL

United States District Judge

[Precision CPAP, Inc. v. Jackson Hosp.](#)

United States District Court for the Middle District of Alabama, Northern Division

March 8, 2010, Decided; March 8, 2010, Filed

CIVIL ACTION NO. 2:05cv1096-MHT (WO)

Reporter

2010 U.S. Dist. LEXIS 20336 *; 2010-1 Trade Cas. (CCH) P76,939; 2010 WL 797170

PRECISION CPAP, INC.; MEDICAL PLACE, INC.; PHASE III VANS, INC. d/b/a EAST MEDICAL EQUIPMENT AND EQUIPMENT AND SUPPLY; and MED-EX, Plaintiffs, v. JACKSON HOSPITAL; MED-SOUTH INC.; JMS HEALTH SERVICES, LLC, d/b/a JACKSON MED-SOUTH HOME HEALTH, LLC,; BAPTIST HEALTH, INC.; BAPTIST VENTURES-AMERICAN HOME PATIENT; Defendants.

Core Terms

patients, providers, antitrust, Sherman Act, Ski, plaintiffs', anti trust law, consumers, submarket, allegations, monopolization, monopoly, relevant market, damages, captive, profits, antitrust violation, defendants', rivals, staff, enforcers, factors, joint venture, competitor, discharged, reciprocal, mountains, prices, terms, advertising

Counsel: **[*1]** For Precision CPAP, Inc., Med-Ex, Phase III Vans, Inc., doing business as East Medical Equipment and Supply, Medical Place, Inc., Plaintiffs: Brian Michael Clark, LEAD ATTORNEY, Wiggins Childs Quinn & Pantanzis, PC, Birmingham, AL; Dwayne Lamar Brown, LEAD ATTORNEY, Law Office of Dwayne L Brown PC, Montgomery, AL.

For Jackson Hospital, Defendant: Dennis Ray Bailey, LEAD ATTORNEY, Rushton Stakely Johnston & Garrett PC, Montgomery, AL; James Eugene Williams, LEAD ATTORNEY, Melton Espy & Williams, PC, Montgomery, AL.

For Med-South, Inc., Defendant: Dennis Ray Bailey, LEAD ATTORNEY, Rushton Stakely Johnston & Garrett PC, Montgomery, AL; James Eugene Williams, LEAD ATTORNEY, Melton Espy & Williams, PC, Montgomery, AL; Robert Brett Adair, Carlson & Adair, LLC, Birmingham, AL.

For JMS Health Services, LLC, doing business as Jackson Med-South Home Health, LLC, Defendant: Dennis Ray Bailey, LEAD ATTORNEY, Rushton Stakely Johnston & Garrett PC, Montgomery, AL; James Eugene Williams, LEAD ATTORNEY, Melton Espy & Williams, PC, Montgomery, AL; Robert Brett Adair, LEAD ATTORNEY, Carlson & Adair, LLC, Birmingham, AL.

For Baptist Health, Inc., Defendant: Dennis Ray Bailey, LEAD ATTORNEY, Rushton Stakely **[*2]** Johnston & Garrett PC, Montgomery, AL; Glenn B. Rose, J. David Mcdowell, LEAD ATTORNEYS, Harwell Howard Hyne Gabbert & Manner, P.C., Nashville, TN; James Eugene Williams, LEAD ATTORNEY, Melton Espy & Williams, PC, Montgomery, AL.

For American Home Patient, Inc., Baptist Ventures-American Home Patient, Defendants: Dennis Ray Bailey, LEAD ATTORNEY, Rushton Stakely Johnston & Garrett PC, Montgomery, AL; , Glenn B. Rose, J. David McdowellLEAD ATTORNEYS, Harwell Howard Hyne Gabbert & Manner, P.C., Nashville, TN; James Eugene Williams, Melton Espy & Williams, PC, Montgomery, AL.

For Lincare Inc., Defendant: Gregory Scotch Ritchey, LEAD ATTORNEY, Ritchey, Simpson & Glick, PLLC, Birmingham, AL; Richard Stephen Walker, LEAD ATTORNEY, Ritchey & Simpson, PLLC, Birmingham, AL.

Judges: Myron H. Thompson, UNITED STATES DISTRICT JUDGE.

Opinion by: Myron H. Thompson

Opinion

The plaintiffs, which are in the durable medical equipment (DME) business, bring this private antitrust suit against the defendants, which are hospitals, corporations, and affiliates, claiming violations of §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 & 2, as privately enforced through *§§ 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15* & *26*, as well as **[*3]** violations of Alabama state ***antitrust law***, 1975 *Ala. Code § 6-5-60*. The plaintiffs are as follows: Precision CPAP, Inc.; Medical Place, Inc.; Phase III Vans, Inc., d/b/a/ East Medical Equipment and Supply; and Med-Ex. The defendants are as follows: Jackson Hospital; Med-South, Inc.; JMS Health Services, L.L.C., d/b/a Jackson Med-South Home Health, L.L.C.; Baptist Health, Inc.; American Home Patient, Inc.; and Baptist Ventures-American Home Patient. Specifically, the plaintiffs allege that the defendants have illegally excluded them from the DME market. Jurisdiction over the plaintiffs' federal claims is proper pursuant to *28 U.S.C. §§ 1331* (federal question) and *15 U.S.C. § 4* (antitrust); supplemental jurisdiction over the state claims is proper under *28 U.S.C. § 1367*.

Now before the court is the defendants' motion to dismiss the plaintiffs' first amended complaint. *Fed. R. Civ. P. 12(b)(6)*. For the reasons that follow, the motion will be granted.

I. MOTION-TO-DISMISS STANDARD

In considering a defendant's motion to dismiss, the court accepts the plaintiff's allegations as true, *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*, and construes the complaint in the plaintiff's favor, *Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993)*. **[*4]** "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*. To survive a dismissal motion, a complaint need not contain "detailed factual allegations," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, but rather "only enough facts to state a claim to relief that is plausible on its face," *id. at 570*.

II. BACKGROUND

The relevant facts as alleged by the plaintiffs are as follows. The plaintiffs are corporations engaged or formerly engaged in the business of providing DME (including beds, walkers, wheelchairs, and oxygen tanks) for the home-health care of patients in and around Montgomery, Alabama. The vast majority of the plaintiffs' business results from the sale or lease of DME to patients who have been discharged from local hospitals and prescribed DME by their physicians.

Defendant Jackson Hospital, in Montgomery, and defendant Baptist Health, which operates two hospitals in Montgomery as well as a hospital in nearby Prattville, Alabama, are the primary source of hospital services for a majority of Montgomery-area residents. Until the late 1990s, the plaintiffs **[*5]** focused their DME marketing efforts on the staff at these hospitals and on patients awaiting discharge. When patients did not choose a DME provider, they were assigned to a provider on a rotating basis.

In the late 1990s, Jackson Hospital and Baptist Health each decided to enter the DME market. Jackson entered into a joint venture with defendant Med-South, Inc., a DME provider, to operate JMS Health Services. Similarly, Baptist Health entered into a joint venture with defendant American Home Patient, Inc., a DME provider, to operate Baptist Ventures-American Home Patient. Each joint venture created an in-house provider of DME for the patients at Jackson's and Baptist's respective hospitals. [1]

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[1] The amended complaint does not allege that Jackson Hospital and Baptist Health cooperated in any way with each other, only that they both entered similar joint ventures with different DME providers.

Once these joint ventures were formed, Jackson Hospital began referring its patients with DME needs to JMS, and the hospitals operated by Baptist Health began referring their patients with DME needs to Baptist Ventures. The hospitals ended their practice of assigning DME providers on a rotating basis **[*6]** to patients who do not choose a provider. Unless patients specifically requested an outside DME provider, they were referred to the hospital's affiliated DME provider.

The plaintiffs allege that their referrals from hospitals have almost vanished and that they have suffered a loss of revenue as a result of the defendants' actions. Plaintiff Med-Ex sold the assets of its business and alleges that the sale price of the assets was depressed as a result of the defendants' actions.

III. FEDERAL CLAIMS

A. Antitrust Standing

As a threshold matter, the court must address whether the plaintiffs have standing to sue under the Sherman and Clayton Acts. *Section 4* of the Clayton Act defines the class of persons who may bring a private-damages action under antitrust laws. It states:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 5. **[*7]** Despite this language, which could conceivably "encompass every harm that can be attributed directly to the consequences of an antitrust violation," *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the courts have interpreted this statute more narrowly. In considering whether a party has standing to bring suit under the antitrust laws, a court should first determine "whether the plaintiff suffered 'antitrust injury.'" *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991)*. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Specifically, "[t]he injury should reflect the anticompetitive effects either of the violation or of anticompetitive acts made possible by the violation." *Id.* Second, "the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws." *Todorov, 921 F.2d at 1449*. This requires an examination of factors including:

> "1) the existence of a causal connection between the antitrust violation and the alleged injury; **[*8]** 2) the nature of plaintiff's alleged injury; 3) the directness or indirectness of the asserted injury and the related inquiry of whether the damages are speculative; 4) the potential for duplicative recovery or complex apportionment of damages; and, finally, 5) the existence of a more direct victim of the alleged anticompetitive conduct."

Austin v. Blue Cross & Blue Shield of Alabama, 903 F.2d 1385, 1388 (11th Cir. 1990). To determine antitrust standing, "a court must review the allegations contained in the complaint." *Id. at 1387*.

The plaintiffs allege that the hospitals and their captive DME providers combined to restrict access to the market for DME sales and rentals to patients discharged from their hospitals. Specifically, the hospitals ceased the rotational assignment of patients to the plaintiffs and other DME providers; denied the plaintiffs access to the hospital staff and patients; and instructed case workers on staff to refer patients to the captive DME providers. The plaintiffs allege that, as a result, in most cases patients know of only one choice of DME provider. According to the plaintiffs, this has led to an increase in the captive DME providers' market power to the **[*9]** point where they can cut services and raise prices without any corresponding drop in usage or revenues.

The defendants contend that the plaintiffs' allegations are insufficient to establish antitrust standing. In particular, the defendants argue that the plaintiffs lack antitrust standing because they are unable to show that prices have actually risen for DME not covered by Medicare or that the quality has eroded for DME covered by Medicare. According to the defendants, the plaintiffs did not suffer an antitrust injury and, even if they had, the plaintiffs would not be the most efficient enforcers of the antitrust laws.

1. Antitrust Injury

The defendants rely on the reasoning in *Todorov* to support their contention that the plaintiffs did not suffer an antitrust injury. There, the Eleventh Circuit Court of Appeals held that a doctor lacked antitrust standing to sue a hospital for failure to grant privileges in the radiology department.

Todorov was a practicing neurologist who relied on CT scans to diagnose his patients. *Todorov, 921 F.2d at 1442*. He referred many of his patients to DCH Healthcare Authority for the procedure. DCH would receive a fee from patients' insurance companies for **[*10]** the CT scan, even though Todorov usually examined the film himself. To obtain some of the profits from the procedure, Todorov applied for privileges at DCH to administer and officially interpret CT scans. DCH, however, denied his application. Todorov brought suit against defendants for conspiracy under Section 1 of the Sherman Act and monopolization under Section 2 of the Sherman Act. Specifically, he alleged that radiologists controlled the market and were reaping supercompetitive profits.

The court held that Todorov's alleged injury was not the "type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id. at 1453*. Todorov "applied for privileges in the radiology department so that he could reap the profits that the radiologists received" from the inflated prices that patients were charged. *Id. at 1452*. Thus, his primary objective in bringing suit was to benefit from supercompetitive prices rather than create competition for consumers. This was not a cognizable antitrust injury because "[t]he antitrust laws were not enacted to permit one person to profit from the anticompetitive behavior of another person." *Id. at 1454*.

Contrary **[*11]** to the defendants' contention, this case is distinguishable from *Todorov.* Whereas Todorov failed to allege any injury to competition from DCH's denial of access to radiologist privileges, the plaintiffs' allegations in this case, that the hospitals were channeling patient choice to their captive DME providers, are sufficient to show the necessary injury to competition. *See Advanced Health-Care Servs, Inc. v. Radford Cmty Hosp., 910 F.2d 139, 149 (4th Cir. 1990)*.

In addition, the failure of the plaintiffs to allege an actual increase in prices or an actual deterioration in the quality of DME does not defeat the claim of an antitrust injury. In making a determination of whether a plaintiff has alleged antitrust injury, "a court must consider the effect on competition and not simply the effect on the ultimate consumer." *Key Enterprises of Delaware, Inc. v. Venice Hospital, 919 F.2d 1550, 1559 (11th Cir. 1990)*, *vacated as moot en banc, 9 F.3d 893 (11th Cir. 1993)*. [2] If the allegations of the plaintiffs are proven true, competition has been injured because competing DME vendors no longer have access to the discharged-hospital patients who require DME.

Finally, this court disagrees with the defendants' contention that the plaintiffs, through this action, seek only to increase their profits and therefore have not alleged a cognizable antitrust injury. Unlike *Todorov,* the plaintiffs' damages in this case are not premised on their ability to profit while patients "paid an artificially inflated price." *Todorov, 921 F.2d at 1454*. Instead, the plaintiffs seek to ameliorate the potential for an increase in price and erosion in the quality of DME by reintroducing competition into the DME market for discharged-hospital patients. While an increase in the plaintiffs' profit will be a likely byproduct of a successful suit, it does not come at the continued detriment of consumers and competition.

2. Efficient Enforcer of the Antitrust Laws

The second issue that must be addressed to determine the plaintiffs' antitrust standing is whether they would be "efficient **[*13]** enforcer[s] of the antitrust laws." *Todorov, 921 F.2d at 1449*. As stated, there is a non-exhaustive list of five factors that should be assessed in determining whether a plaintiff is an efficient enforcer of the antitrust laws.

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[2] The defendants correctly assert that *Key* ***[*12]*** *Enterprises* has no precedential authority since it was vacated on mootness grounds. However, a court can find the reasoning in vacated cases to be of persuasive value. *See e.g., United States v. Johnson, 399 F.3d 1297, 1298 n.1 (2005)* (concluding that a vacated opinion can have persuasive value).

The defendants, without addressing any particular factor, contend that the plaintiffs would not be efficient enforcers of the antitrust laws. The court will address each of the factors in turn.

The first factor this court must address is "the existence of a causal connection between the antitrust violation and the alleged injury." *Austin, 903 F.2d at 1388*. In this case, the plaintiffs allege that violations of the Sherman Act have caused a loss of business and create the potential for an increase in price and an erosion in the quality of DME. This court finds that the allegations are sufficient to show a causal connection between the asserted antitrust violation and the alleged injury. *See* 2A Phillip E. Areeda et al., ***Antitrust Law*** P 338 (hereinafter, "Areeda") ("It is … enough that the antitrust violation contributes significantly to the plaintiff's injury, even if other factors amounted in the aggregate to a more substantial cause.").

According to the second **[*14]** factor, this court must look to "the nature of plaintiff's alleged injury," *Austin, 903 F.2d at 1388*, "including the status of the plaintiff as consumer or competitor in the relevant market," *Potters Medical Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986)*, to determine whether plaintiff is an efficient enforcer of the antitrust laws. The plaintiffs in the instant case are clearly competitors in the relevant market as they allegedly lost profits as a result of the defendants' exclusionary practices. Therefore, this second factor supports a finding of antitrust standing.

The third through fifth factors raise more difficult issues. In a case that is most analogous to the present case and that addresses these three factors, *Park Ave. Radiology Assocs., P.C. v. Methodist, 198 F.3d 246, 1999 WL 1045098 (6th Cir. 1999)* (table), [3] plaintiffs, providers of outpatient-radiologist services for patients referred to them by primary-care physicians, appealed from a dismissal of their claims for lack of antitrust standing. The physicians with staff privileges at the Methodist Hospitals were members of Metrocare, Inc., a company that negotiated with third-party payors of managed health **[*15]** care programs on behalf of its member physicians. Metrocare was a member of Health Choice, Inc., which operated a preferred-provider organization. Plaintiffs alleged that Health Choice contracted with employers and insurance companies to make Methodist Health's hospital services and Metrocare physician services available at a discounted rate to beneficiaries in the relevant groups. After entering into the contract, Metrocare stopped making referrals of patients to plaintiffs. This resulted in a loss of business to the plaintiffs.

Addressing the third factor ("the directness or indirectness of the asserted injury and the related inquiry of whether the damages are speculative," *Austin, 903 F.2d at 1388*), the *Park Avenue* court held that the injury to plaintiff radiologists was indirect because "their claimed lost profits [were] derivative of the alleged harm inflicted on third parties--the health care consumers and their third-party providers," that is, insurance companies and employers. *Park Avenue, 198 F.3d 246, 1999 WL 1045089, at *5-*6*. The court also held that the damages were speculative because the number of lost referrals was difficult to measure. *198 F.3d 246, Id. at *6*.

Analogously, in the instant case, the injury of lost profits to **[*17]** the plaintiffs is indirect and derivative of the alleged harm inflicted on the discharged patients. In addition, the damages are speculative because it would be difficult for the plaintiffs to measure the number of lost referrals resulting from the hospitals' allegedly exclusionary conduct. This factor therefore weighs against affording the plaintiffs antitrust standing.

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[3] *Park Avenue,* although unpublished, obviously still can have persuasive value. Based on the similarities between *Park Avenue* and the present case, this court will look to the Sixth Circuit's treatment of the antitrust standing issue (particularly the issue of whether the plaintiffs were efficient enforcers of the ***antitrust law***) as a guide to resolution of the question of standing in this case. To support their argument that there was antitrust standing, the plaintiffs looked to two cases that addressed whether a competitor DME provider had antitrust standing to bring suit. *See* *Key Enterprises, 919 F.2d at 1559-60*; *Advanced Health-Care Services, Inc. v. Radford Community Hospital, 910 F.2d 139, 149 (4th Cir. 1990)*. **[*16]** However, in neither of the cases did the court address the second prong of the antitrust-standing determination: whether the plaintiff would be an efficient enforcer of the antitrust laws. *Todorov,* which was decided after these two cases, requires that this court look to whether plaintiffs would be efficient enforcers of the antitrust laws in order to determine whether they have antitrust standing. Therefore, this court will look to *Park Avenue* because it provides more relevant guidance on this issue.

Addressing the fourth factor, the *Park Avenue* court explained that "the potential for duplicative recovery or complex apportionment of damages exist if Plaintiffs were allowed to go forward inasmuch as the parties directly harmed would also have a cause of action." *198 F.3d 246, Id. at *7*. Here, in the instant case, if the plaintiffs were allowed to go forward with the suit, there is a risk of duplicative recovery because the patients that are directly harmed by the exclusionary conduct could also bring suits against the hospitals and the captive DME providers. In addition, if plaintiffs were awarded damages, this court would face the difficult prospect of identifying damages and apportioning them among directly victimized patients and the indirectly affected plaintiffs. *See Associated General, 459 U.S. at 545*. This factor therefore **[*18]** weighs against affording the plaintiffs antitrust standing.

Addressing the fifth and final factor ("the existence of a more direct victim of the alleged anticompetitive conduct," *Austin, 903 F.2d at 1388*), the *Park Avenue* court identified the healthcare consumers and third-party insurers as the direct victims of the alleged antitrust violations. *198 F.3d 246, Id. at *6-*7*. Similarly, in this case, the patients are the direct victims of the allegedly exclusionary conduct that limits their choice of DME providers and could have the potential of increasing the price and eroding the quality of DME.

Thus, three of the five factors identified in *Austin* (including the indirectness of the asserted injury and the speculative nature of the damages; the potential for duplicative recovery or complex apportionment of damages; and the existence of a more direct victim of the anticompetitive conduct) weigh against judicial enforcement of the plaintiffs' antitrust claim. However, as discussed above, the factors identified in *Austin* should not be considered exhaustive.

Prominent antitrust commentators Phillip Areeda and Herbert Hovenkamp have identified additional factors that are relevant to this case. These commentators **[*19]** argue that competitor antitrust standing serves antitrust policy when "(a) the rival is in a position to detect a violation earlier than consumers are; or (b) the rival's injury is large, while the injuries of individual consumers are likely to be very small or the consumers have collective action problems making their suit cumbersome or less likely." 2A Areeda P 348.

Addressing first whether the plaintiffs are in a position to detect a violation earlier than the patients, the plaintiffs allege that patients rarely have a preferred DME provider. As a result, the system of hospital-staff referral to the captive DME providers combined with the denial to competing DME providers of access to hospitals to market their services results in a situation in which patients, "with very few exceptions, know of only one choice for durable medical equipment." Plaintiffs' First Amended Complaint, at P 24 (doc. no. 21). Without knowledge of alternatives, patients will not be able to detect the evidence of an antitrust violation, including higher prices and an erosion in the quality of services.

The *Park Avenue* court addressed a similar issue and explained that the role of third-party payors (employers **[*20]** and insurance companies) was an important element not addressed in the radiologists' argument that they were the most efficient enforcers of ***antitrust law***. In particular, the court surmised that, "if Plaintiffs are providing a superior and more cost efficient product as they allege, then the third-party providers … will direct their members to Plaintiffs, and those patients who may not have any third party coverage will do the same in a competitive market." *Park Avenue, 198 F.3d 246, 1999 WL 1045098, at *5*.

For those covered by insurance, such as Medicare, the holding in *Park Avenue* is persuasive that the third-party payor would be as well positioned as rivals to detect an antitrust violation. However, for those not covered by insurance, it is not clear how the method of detection identified in *Park Avenue* would operate. In cases involving uninsured patients who do not have knowledge of DME prior to their entry into the hospital and to whom non-captive DME providers are unable to market their services in the hospital, there is no third-party payor to direct patients to the most cost-efficient DME provider. Thus, uninsured patients are poorly positioned relative to rival DME providers to detect an **[*21]** antitrust violation.

In addition, even if the captive DME providers ultimately raised the prices or allowed their services to erode, the harm to individual patients is likely to be very small in comparison to the plaintiffs' loss of profits resulting from the defendants' anticompetitive conduct. As a result, the likelihood that patients will bring suit to ameliorate the allegedly anticompetitive conduct is minimal.

While it is a close call, this court finds that the plaintiffs are efficient enforcers of the ***antitrust law***. The plaintiffs are much better positioned than consumers to detect an antitrust violation earlier. In addition, consumers would suffer from collective-action problems in bringing a suit because of the relatively small injury experienced by individual consumers by the rise in price or decline in the quality of DME.

On the basis of the finding that the plaintiffs are efficient enforcers of the antitrust laws combined with the finding above that the plaintiffs have demonstrated antitrust injury, this court concludes that the plaintiffs have antitrust standing to sue for damages under the Sherman and Clayton Acts. This court now addresses whether the plaintiffs have stated **[*22]** claims under §§ 1 and 2 of the Sherman Act for which relief can be granted.

B. Sherman Act § 1

Under § 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. [4] "Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,'" the Supreme Court "has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. The plaintiffs bring a claim of coercive reciprocity and concerted refusal to deal under § 1 of the Sherman Act.

1. Coercive Reciprocity

Count I of the plaintiffs' amended complaint alleges restraint of trade in violation of § 1 of the Sherman Act; more specifically, the plaintiffs allege that the defendants have engaged in an illegal restraint of trade by contracting, combining, or conspiring to use their control of hospital **[*23]** services to coerce patients into buying or renting DME from their joint-venture affiliates. The plaintiffs term their claim "coercive reciprocity," or "the practice of using economic leverage in one market coercively to secure competitive advantage in another." Plaintiff's Opposition to Motion to Dismiss (doc. no. 33) at 3 (citing *Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1360 (Fed. Cir. 1999))*.

Courts have recognized that reciprocal dealing can constitute an illegal restraint of trade under § 1. Typically, reciprocal dealing involves two parties who "face each other as both buyer and seller. One party offers to buy the other party's goods, but only if the second party buys other goods from the first party." *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 424 (5th Cir. 1978)*. [5]

Reciprocal dealing is not, by itself, illegal. *Spartan Grain & Mill, 581 F.2d at 423*. Rather, reciprocal-dealing arrangements illegally restrain trade only **[*24]** when they are coercive--that is, only when a defendant uses its market power, or leverage, over one product to induce the purchase or sale of a second product, a transaction that would not otherwise take place in a competitive market. "In each case one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market." *Spartan Grain & Mill, 581 F.2d at 425*.

Here, the plaintiffs allege that the defendant hospitals use their market power over hospital services to coerce patients into dealing exclusively with the hospitals' respective affiliated DME provider. That is, patients who receive hospital services at Jackson Hospital are coerced into buying or renting DME from JMS, and patients who receive hospital services at Baptist hospitals are coerced into buying or renting DME from Baptist Ventures, even though those patients would buy or rent from the plaintiffs in a competitive market.

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[4] Although the Sherman Act itself does not provide a private right of action, the Clayton Act permits private parties to seek damages or injunctive relief for antitrust violations. *15 U.S.C. §§ 15*, *26*.

[5] In *Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

As support for their argument, the plaintiffs rely on the holding in the vacated Eleventh Circuit opinion, *Key Enterprise.* In that case, the defendant hospital pressured home-health-care nurses to refer patients to the hospital's **[*25]** DME provider. *919 F.2d at 1561-63*. The home-health-care nurses were not employees of the hospital and relied on access to patients to remain in business. The court determined that the act of the hospital constituted coercive reciprocity as it involved a buyer (the hospital) conditioning the purchase of services from the sellers (home-health-care nurses) on the sellers' marketing of the buyers' service.

Here, the plaintiffs argue that the defendants "coerce, pressure, or otherwise unduly influence the patients, doctors, nursing homes and home health care agents to select or recommend only the captive DME companies to the exclusion of Plaintiffs." Plaintiff's First Amended Complaint, at P 37 (doc. no. 21). The only factual allegation that the plaintiffs make to support this conclusory statement is that the hospitals have instructed "case workers and staff to steer patients to the captive DME companies." *Id. at P 24*. This factual allegation is not sufficient to support a coercive-reciprocity claim. *See* *Twombly, 550 U.S. at 570* (requiring at the pleading stage factual allegations that plausibly suggest a violation of the antitrust laws). Unlike the independent home-health-care nurses in **[*26]** *Key Enterprise* who felt that their access to the hospital was conditioned on patient referrals to the DME provider, the plaintiffs in this case make no allegations that the hospitals similarly coerced hospital staff or case workers into referring the hospital's DME providers to patients; in particular, there is no allegation that the hospital staff's continued employment, pay, or benefits at the hospital or access to the hospital were in any way conditioned on them referring patients to their hospital's DME providers. Moreover and perhaps most importantly, there is nothing the complaint to suggest that the hospitals and their staff otherwise had a buyer-seller or other comparable commercial relationship. *See* *Spartan Grain & Mill, 581 F.2d at 423* ("A reciprocal dealing arrangement exists when two parties face each other as both buyer and seller."). In the absence of any such factual allegations in the complaint of coercion arising out of a buyer-seller relationship or something comparable, the plaintiffs' coercive-reciprocity claim fails to state a claim upon which relief can be granted. *See* *Fed. R. Civ. P. 12(b)(6)*.

2. Concerted Refusal to Deal

Count II of the amended complaint alleges **[*27]** that the defendants have acted in concert in refusing to deal with the plaintiffs by failing to provide access to the discharged patients in violation of § 1 of the Sherman Act. The plaintiffs in their brief opposing the dismissal motion have clarified that it is the concerted actions of the hospitals and their respective captive DME providers that is at issue; they do not allege that the four hospitals engaged in any illegal concerted actions among themselves.

The plaintiffs have made sufficient allegations of agreements between the three hospitals and their captive DME provider to state a claim that they were acting in concert. However, the more difficult question is whether the allegation in the complaint that the hospitals and captive DME providers refused to deal with the plaintiffs states a claim under § 1 of the Sherman Act for which relief can be granted. This court concludes that it does not.

The plaintiffs allege that the hospitals unilaterally ceased the DME rotational assignment that existed prior to the entry into the market of their DME providers. In addition, the plaintiffs allege that, since the hospitals entered into the joint ventures, they have refused to provide the **[*28]** plaintiffs with access to the hospitals so that they can market their DME. The plaintiffs contend that these acts constituted a refusal to deal in violation of the Sherman Act.

The plaintiffs rely on two Supreme Court cases to support their refusal-to-deal claim. In *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*, the Court held that a newspaper publisher that enjoyed a substantial monopoly in the mass dissemination of news and advertising in Lorain, Ohio, engaged in unlawful exclusionary conduct when it refused to accept any local advertisements from any entity that advertised on a radio station run by the Elyria-Lorain Broadcasting Company. As a result, numerous advertisers refrained from advertising on the radio. The Court explained that the newspaper publisher's actions "not only reduced the number of customers available to [the radio station] in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to destroy and eliminate [the radio station] altogether." *Id. at 149*.

The newspaper publisher argued that it had a right "to select its customers and to refuse to accept advertisement from whomever it pleases." **[*29]** *Id. at 155*. The Court agreed that there was such a right, but explained that the right was not unqualified. In particular, the Court explained that the publisher could not exercise that right in a manner contrary to the Sherman Act. *Id.* The Court therefore held that the publisher's action violated the Sherman Act.

In the second case cited by the plaintiffs, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*, the Court added greater specificity to the refusal-to-deal standard. In *Aspen Skiing,* two ski companies, Ski Co. (which operated three ski mountains) and Highland (which operated a fourth ski mountain), offered an all-Aspen ski ticket, in which customers could ski on any of the four mountains. The revenues from sales were divided between the companies based on usage of the mountains. This arrangement lasted for 15 years, when Ski Co. proposed a fixed-revenue-sharing arrangement that it knew Highland would not accept. As expected, Highland rejected the offer. Ski Co. discontinued the all-Aspen ski ticket and instead offered ski tickets limited to the three mountains that it operated.

In addition to the discontinuance of the all-Aspen ski ticket, Ski Co. also refused **[*30]** to sell any lift tickets to Highland either at the tour operator's discount or at retail. *Id. at 593*. Highlands then developed the "Adventure Pack," which consisted of a three-day ski pass at Highlands and three vouchers equal to the price of a daily lift ticket at a Ski Co. mountain. Ski Co. refused to accept the vouchers. Unable to offer a package that included access to the Ski Co. mountains, Highlands' share of the market for downhill skiing services declined dramatically.

The Court reiterated that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Id. at 601*. A firm's refusal to deal is unlawful "[i]f [it] has been attempting to exclude rivals on some basis other than efficiency." *Id. at 605* (internal quotation marks omitted). The Court identified two indicators that Ski Co. was attempting to exclude rivals on a basis other than efficiency. First, Ski Co. "elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id. at 603*. Such a change was contrary to consumer demand, as "skiers demonstrably preferred four mountains **[*31]** to three." *Id. at 606*. Second, Ski Co. decided to forgo daily ticket sales from vouchers obtained by Skiers contained in Highlands' Adventure Pack. From this conduct, it was proper to infer that "Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitors." *Id. at 608*.

In the present case, the plaintiffs, relying on the reasoning in *Aspen Skiing,* argue that the defendants can point to no increased efficiency resulting from refusing to deal with the plaintiffs. However, the plaintiffs ignore the subsequent modification of the refusal-to-deal standard in *Verizon Communications, Inc. v. Trinko, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, where the Court broadened the right of firms to refuse to deal with rivals.

In *Trinko,* the Court explained that "[c]ompelling … firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficially activities." *Id. at 407-08*. The Court was concerned about the fact that "[e]nforced sharing also requires antitrust **[*32]** courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are ill suited." *Id. at 408*. Therefore, the Court held that, "as a general matter, the Sherman Act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom it will deal." *Id.* (citation and internal quotation marks omitted). The Court explained that only under certain circumstances will a refusal to deal with rivals constitute an antitrust violation under the Sherman Act.

The Court identified *Aspen Skiing* as being "at or near the outer boundary of [antitrust] liability." *Id. at 409*. This *Aspen Skiing* exception applies only if: "(a) the defendant engaged in a prior course of dealing with its rival; *and* (b) the unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* (emphasis added).

In the present case, there allegedly was a prior course of dealing between the plaintiffs and defendant hospitals as demonstrated **[*33]** by the rotational system. However, the unilateral termination of a voluntary course of dealing by the hospitals in this case does not suggest a willingness to forsake short-term profits. The hospitals terminated the course of dealing after entering into a joint venture with their respective DME providers, and there is nothing in the plaintiffs' complaint, outside of conclusory allegations, plausibly suggesting that the decision to cease the rotational system and exclude competitor DME providers from access to the hospital was for any purpose other than increasing both the short-term and long-term profits of their DME providers. This case is thus distinguishable from *Aspen Skiing* in which Ski Co. decided to forgo short-term profits in the form of redeeamable vouchers provided by its competitor.

In light of the clear direction from the Supreme Court not to extend the refusal-to-deal exception beyond *Aspen Skiing*, the plaintiffs' concerted-refusal-to-deal claim fails to state a claim upon which relief can be granted. *See Fed. R. Civ. P. 12(b)(6)*.

C. Sherman Act § 2

The plaintiffs assert four claims under § 2 of the Sherman Act. Under § 2, it is unlawful to "monopolize, or attempt to monopolize, **[*34]** or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2. Section 2 "covers behavior by a single business as well as coordinated action taken by several businesses." *Spanish Broad. Sys. of Florida, Inc. v. Clear Channel Communications, Inc., 376 F.3d 1065, 1074 (11th Cir. 2004)*. A violation of § 2 "requires harm to competition that must occur within a relevant ... market, with a specific set of geographical boundaries and a narrow delineation of the products at issue." *Id.* Therefore, this court must first identify the relevant market in this case.

1. Relevant Market

A relevant market consists of both a product market and a geographic market. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. The parties agree that the geographic market is Montgomery and Prattville, Alabama. The dispute concerns the definition of the product market.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 824 (11th Cir. 1991)*. **[*35]** Within broader product markets, "well-defined submarkets may exist which, in themselves constitute product markets for antitrust purposes." *Id.* The boundaries of a submarket are determined by "examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

The plaintiffs allege that the relevant product market in this case includes two submarkets that consist of the sale and rental of DME for patients discharged from Jackson Hospital and the Baptist Health hospitals, respectively. The defendants contend that the plaintiffs' definition of the relevant market is implausible and the market should instead be understood more broadly to consist of the sale and rental of DME to all outlets in the geographic market.

Based on an examination of the practical indicia for determining a relevant market, the court finds that the plaintiffs have identified the relevant product submarket as the rental and sale of DME in hospitals. However, the plaintiffs' argument that the submarket **[*36]** is disaggregated as between the two sets of hospitals, such that two product submarkets exist within the one geographic market, lacks merit.

The complaint alleges that the market is bounded by a distinct method of distribution to a distinct segment of customers. In particular, it is a method of distribution whereby hospital patients are prescribed DME while in the hospital, and those DME needs are arranged through staff at the hospital.

Several courts have found a method of distribution to be a relevant submarket for antitrust purposes. *See e.g., Henry v. Chloride, 809 F.2d 1334, 1342 (8th Cir. 1087)* (batteries sold by route salespersons are a distinct submarket from batteries sold from warehouses or stores); *Greyhound Computer Corp., Inc. v. Int'l Bus. Mach. Corp., 559 F.2d 488, 494 (9th Cir. 1977)* (lease of computers a distinct submarket from the sale of computers); *Columbia Broad. Sys., Inc. v. F.T.C., 414 F.2d 974, 979 (7th Cir. 1969)* (records sold through record clubs are a distinct submarket); *F.T.C. v. Staples, Inc., 970 F.Supp. 1066, 1080 (D.D.C. 1997)* (sale of consumable office supplies through office supply superstores a distinct submarket from the sale of consumable office **[*37]** supplies through other outlets); *Eastern Dental Corp. v. Isaac Masel Co., Inc., 502 F.Supp. 1354, 1361 (E.D. Pa. 1980)* (sale of facebows wholesale a distinct market from sale of facebows retail).

This court finds this case law persuasive and finds that the method of distribution of DME to hospital patients is the relevant product submarket for antitrust purposes. The indicia that the sale and rental of DME in hospitals constitute a relevant submarket include the plaintiffs' allegations that there is industry recognition that the sale and rental of DME to hospitals is a distinct market. In addition, the hospital DME providers service a distinct class of discharged patients, and there is allegedly less sensitivity of consumer demand to changes in the price or quality of the DME to discharged patients in hospitals.

However, the court cannot agree with the plaintiffs' suggestion that the sale and rental of DME in the two sets of hospitals represent two separate and distinct submarkets. The plaintiffs seek not only to define the submarket by the method of distribution, which as described above is recognized in the case law, but also on the basis of the position or location of the consumers. **[*38]** In particular, they argue that the two sets of hospitals constitute two separate submarkets because the hospitals have two separate sets of discharged patients that are referred to two different DME providers. This court has not found any cases in which the relevant product market is defined on the basis of the position or location of consumers.

The one case cited by plaintiffs is inapposite. The Ninth Circuit Court of Appeals in *Greyhound Computer Corp.* held that the leasing of computers constitutes a distinct submarket separate from other methods of distribution of computers, including the sale of computers. *559 F.2d at 494*. The court did address whether leases and sales served different customer needs; however, this was in the context of an examination of one of the indicia for determining the existence of a leasing submarket. The court ultimately defined the submarket in terms of the leasing method of distribution, not in terms of the class or group of consumers to whom computers were leased.

The only case that this court has been able to find that is somewhat analogous holds that submarkets cannot be defined in terms of the location or position of the consumers. In *Rohlfing v. Manor Care, Inc., 172 F.R.D. 330 (N.D. Ill. 1997)*, **[*39]** the plaintiffs alleged that the relevant market consisted of "the sale of pharmaceutical products to residents of Manor Care nursing home facilities." *Id. at 345*. The court explained that "it is improper to define a market simply by identifying a group of customers who have purchased a given product; rather the market consists of the array of 'interchangeable' products that those consumers confronted when making their product selection, plus those products which could quickly be supplied as interchangeable alternatives." *Id.* The court recognized that it was particularly inappropriate to define the market on the basis of a particular set of consumers in that case because Manor Care residents who are unhappy with the pharmaceutical service supplied by their nursing home could simply transfer to a different nursing home that does not utilize that service. *Id. at 346*.

This court finds the reasoning in *Rohlfing* persuasive. It is inappropriate to define the product submarket on the basis of a particular set of patients because the market is defined by the interchangeability of the use of the product itself, not the users of the product. Patients in hospitals are in a sense a captured audience; **[*40]** nonetheless, if they are dissatisfied with the DME supplied by their hospital, they could either express their preference for an alternative DME provider to the hospital staff or transfer to another hospital that does not utilize that DME provider. This ability of hospital patients to access DME from other sources demonstrates that the relevant market, at the very least, includes both of the DME providers that are involved in joint ventures with the respective sets of hospitals.

In sum, this court concludes that the relevant market for purposes of determining whether defendants have violated § 2 of the Sherman Act is the distribution of DME through hospitals in Montgomery and Prattville, Alabama.

2. Shared Monopoly

On the basis of this definition of the relevant market, the court concludes that the plaintiffs' four asserted claims under § 2 of the Sherman Act should be dismissed. As discussed above, in order to prove a violation of § 2 of the

Sherman Act, the plaintiffs must demonstrate either that a single entity or multiple entities acting in concert engaged in monopolizing activity. The plaintiffs have not alleged a violation of § 2 by a "single hospital" or concerted activity by the **[*41]** two hospital distributors of DME.

The relevant market consists of two hospital distributors of DME, Jackson Med-South and Baptist Ventures-American Home Patient. [6] Plaintiffs have not alleged any agreement or concerted activity between the two distributors. The only allegation is that of parallel conduct derived from the fact that the hospitals entered into the joint ventures with their respective DME providers during the same broadly defined time period (the late 1990s). The Supreme Court has clearly held, that, "[w]hile a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense." "While a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement,' it falls short of 'conclusively establish[ing] agreement or … itself constitut[ing] a Sherman Act offense.'" *Twombly, 550 U.S. at 553* (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*. Allegations of parallel conduct, without more, are not sufficient to survive **[*42]** a motion to dismiss. *Twombly, 550 U.S. at 556-57*.

The complaint vaguely alleges that defendants have engaged in a series of unlawful and wrongful activities and communications that constitute monopolization, attempted monopolization, and conspiracy to monopolize. In the absence of any **[*43]** allegations of concerted activity between the hospitals' two DME providers, the only theory that could possibly support these claims would be one based on shared monopoly.

Under a theory of shared monopoly, "a group of firms that collectively possess monopoly power can be found liable for joint monopolization." ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments (5th ed. 2002), at 312. The former Fifth Circuit Court of Appeals, consistent with other courts that have addressed the issue, has rejected any claim of violation of § 2 of the Sherman Act predicated on a theory of shared monopoly. *See American Tel. and Tel. Co. v. Delta Communications Corp., 579 F.2d 972 (5th Cir. 1978)*, *adopting opinion, 408 F.Supp. 1075 (S.D. Miss. 1976)* (rejecting a claim that networks constituting an oligopoly can violate § 2 of the Sherman Act and explaining that "[t]he Sherman Act neither mentions nor regulates oligopolies."); [7] *see also Kramer v. Pollock-Krasner Foundation, 890 F.Supp. 250, 256 (S.D.N.Y. 1995)* (rejecting a shared monopoly claim and explaining that "the offense of monopolization under Section 2 refers to market dominance by a 'single firm.'"); *Sun Dun, Inc. v. Coca-Cola Co., 740 F.Supp. 381, 391 (D. Md. 1990)* **[*44]** ("An examination of the history of the Sherman Act reveals that Congress' concept of 'monopoly' did not include 'shared monopolies' or 'oligopolies' at all, but rather the complete domination of a market by a single economic entity."); *H.L. Hayden Co. v. Siemens Medical Systems, Inc., 672 F.Supp. 724, 741 (S.D.N.Y. 1987)* ("Two competitors could conspire to oligopolize … but it would not constitute an offense under a literal reading of section 2 [of the Sherman Act]."); *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F.Supp. 225, 228-29 (S.D.N.Y. 1982)* ("An oligopoly or a shared monopoly, does not in itself violate § 2 of the Sherman Act.").

Not only must the monopolization and attempted monopolization claim fail as a result of this court's rejection of a theory of shared monopoly, but so must any claim of conspiracy to monopolize. The court in *Sun Dun,* addressing a conspiracy to monopolize claim in a similar context, persuasively held that

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[6] Because there are two hospital distributors in the relevant market, this case is distinguishable from the cases relied upon by that plaintiffs that involved claims of monopolization of DME markets under § 2 of the Sherman Act. In *Key Enterprise,* the claim of monopolization was brought against a single hospital, with monopoly power in the relevant market, and its affiliated DME supplier. *919 F.2d at 1552*. In *Advanced Health-Care Services,* the claim of monopolization was brought against three separate hospitals and their affiliated DME suppliers in three different geographic markets in which the hospitals had monopoly power. *910 F.2d at 141-43*. Finally, in *M&M Medical Supplies and Services, Inc., v. Pleasant Valley Hospital, Inc.,* the claim of monopolization was brought against a single hospital, with monopoly power in the relevant market, and its affiliated DME supplier. *981 F.2d 160, 162 (4th Cir. 1993)*.

[7] *See supra* note 5.

> "[w]hen … two or more competitors conspire to create a market environment in which competition and market entry is improperly restricted, but in which market power continues to be shared among these otherwise **[*45]** unrelated entities, … there is no conspiracy to monopolize claim stated under Section 2, and the claim must therefore be dismissed."

740 F.Supp. at 392. In other words, a conspiracy to monopolize claim requires either actions by a single firm or concerted activity by multiple firms. Neither has been alleged in the complaint.

In sum, the plaintiffs' Count III claim of monopolization, Count IV claim of attempted monopolization, Count V claim of conspiracy to monopolize, and Count VI claim of conspiracy to monopolize based on the so-called essential facility doctrine all fail to state a claim upon which relief can be granted. *See* *Fed. R. Civ. P. 12(b)(6)*. Each of these claims requires either allegations of concerted activity or sufficient monopoly power by a single firm that are not set forth in the complaint.

IV. STATE CLAIMS

In Count VII, the plaintiffs assert violations of Alabama ***Antitrust Law***. They state that their state claims and their governing law are the same as their federal claims and their governing law. *See* *Ex parte Rice, 259 Ala. 570, 67 So.2d 825, 829 (1953)* (per curiam) ("The federal statutes … prescribe the terms of unlawful monopolies and restraints of trade as they should also be administered **[*46]** in Alabama."); *see also* *Avery Freight Lines, Inc. v. Alabama Pub. Serv. Comm'n, 267 Ala. 646, 104 So.2d 705, 709 (1958)* ("In construing the terms and provisions of Alabama statutes derived from federal statutes, such terms and provisions will usually be considered as having the meaning given by the federal courts."). Therefore, the plaintiffs' state claims fail for the same reasons that their federal ones do.

V. CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss will be granted on the plaintiffs' federal and state claims.

An appropriate judgment will be entered.

DONE, this the 8th day of March, 2010.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

End of Document

Masimo Corp. v. Philips Elecs. N. Am. Corp.

United States District Court for the District of Delaware

March 11, 2010, Decided; March 11, 2010, Filed

Civil Action No. 09-80-JJF-MPT

Reporter

2010 U.S. Dist. LEXIS 23057 *; 2010-1 Trade Cas. (CCH) P77,016

MASIMO CORPORATION, Plaintiff, v. PHILIPS ELECTRONICS NORTH AMERICA CORPORATION and PHILIPS MEDIZIN SYSTEME BOBLINGEN GMBH, Defendants. PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, Counterclaim-Plaintiff, v. MASIMO CORPORATION, Counterclaim-Defendant.

Subsequent History: Motion denied by *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2010 U.S. Dist. LEXIS 27530 (D. Del., Mar. 23, 2010)*

On reconsideration by, Reconsideration denied by, in part, Modified by, in part *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2010 U.S. Dist. LEXIS 38520 (D. Del., Apr. 19, 2010)*

Motion granted by *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2010 U.S. Dist. LEXIS 38518 (D. Del., Apr. 20, 2010)*

Motion denied by *Masimo Corp. v. Philips Elecs. N. Am. Corp., 742 F. Supp. 2d 492, 2010 U.S. Dist. LEXIS 106637 (D. Del., 2010)*

Magistrate's recommendation at *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2011 U.S. Dist. LEXIS 18277 (D. Del., Feb. 18, 2011)*

Motion granted by, Stay denied by *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2012 U.S. Dist. LEXIS 52941 (D. Del., Apr. 16, 2012)*

Later proceeding at *Masimo Corp. v. Philips Elecs. N. Am. Corp., 918 F. Supp. 2d 277, 2013 U.S. Dist. LEXIS 8716 (D. Del., 2013)*

Magistrate's recommendation at *Masimo Corp. v. Philips Elecs. North America Corp., 2013 U.S. Dist. LEXIS 47469 (D. Del., Apr. 2, 2013)*

Magistrate's recommendation at *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2013 U.S. Dist. LEXIS 70745 (D. Del., May 20, 2013)*

Magistrate's recommendation at *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2013 U.S. Dist. LEXIS 83704 (D. Del., June 14, 2013)*

Magistrate's recommendation at *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2013 U.S. Dist. LEXIS 123134 (D. Del., Aug. 29, 2013)*

Motion denied by *Masimo Corp. v. Philips Elec. North Am. Corp., 2014 U.S. Dist. LEXIS 90034 (D. Del., July 2, 2014)*

Motion denied by, Motion denied by, As moot, Request granted, Motion granted by *Masimo Corp. v. Philips Elec. N. Am. Corp., 2014 U.S. Dist. LEXIS 195264 (D. Del., Aug. 27, 2014)*

Motion granted by, Request granted *Masimo Corp. v. Philips Elec. North America Corp., 2014 U.S. Dist. LEXIS 121840 (D. Del., Sept. 2, 2014)*

Later proceeding at *Masimo Corp. v. Philips Elec. North Am. Corp., 2014 U.S. Dist. LEXIS 127847 (D. Del., Sept. 12, 2014)*

Motion denied by *Masimo Corp. v. Philips Elec. N. Am. Corp., 2015 U.S. Dist. LEXIS 64462 (D. Del., May 18, 2015)*

Findings of fact/conclusions of law at *Masimo Corp. v. Philips Elec. N. Am. Corp., 2015 U.S. Dist. LEXIS 64464 (D. Del., May 18, 2015)*

Motion denied by, Motion for new trial denied by *Masimo Corp. v. Philips Elec. N. Am. Corp., 2015 U.S. Dist. LEXIS 64468 (D. Del., May 18, 2015)*

Patent interpreted by *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2015 U.S. Dist. LEXIS 160645 (D. Del., Dec. 1, 2015)*

Motion denied by *Masimo Corp. v. Philips Elec. N. Am. Corp., 2016 U.S. Dist. LEXIS 107476 (D. Del., Aug. 15, 2016)*

Summary judgment granted, in part, summary judgment denied, in part by, Motion granted by, in part, Motion denied by, in part *Masimo Corp. v. Philips Elecs. N. Am. Corp., 2016 U.S. Dist. LEXIS 154520 (D. Del., Oct. 31, 2016)*

Core Terms

patent, antitrust, counterclaims, pulse, sensors, bifurcation, oximetry, discovery, cables, monitors, technology, oximeter, anticompetitive, patient, anti trust law, third party, exclusionary, Electronics, manufacture, infringing, settlement, contends, products, juror

Counsel: **[*1]** For Masimo Corporation, Plaintiff: Jack B. Blumenfeld, LEAD ATTORNEY, Jeremy Alexander Tigan, Julia Heaney, Morris, Nichols, Arsht & Tunnell, Wilmington, DE; Deborah Croyle, Douglas G. Muehlhauser, Irfan A. Lateef, Jon Gurka, Joseph S. Cianfrani, Joseph R. Re, M. Lawrence Popofsky, Michelle E. Armond, Perry D. Oldham, Robert A. Rosenfeld, Scott A. Westrich, PRO HAC VICE.

For Philips Electronics North America Corporation, Defendant: Richard L. Horwitz, LEAD ATTORNEY, David Ellis Moore, Doungamon Fon Muttamara-Walker, Potter Anderson & Corroon, LLP, Wilmington, DE; Brian Rosenthal, Clayton Scott Hataway, Russell B. Hill, PRO HAC VICE.

For Philips Medizin Systeme Boblingen Gmbh, Defendant, Counter Claimant: Richard L. Horwitz, LEAD ATTORNEY, David Ellis Moore, Doungamon Fon Muttamara-Walker, Potter Anderson & Corroon, LLP, Wilmington, DE.

For Philips Electronics North America Corporation, Counter Claimant, Counter Defendant: Richard L. Horwitz, LEAD ATTORNEY, David Ellis Moore, Doungamon Fon Muttamara-Walker, Potter Anderson & Corroon, LLP, Wilmington, DE; Brian Rosenthal.

For Masimo Corporation, Counter Defendant, Counter Claimant: Jack B. Blumenfeld, LEAD ATTORNEY, Julia Heaney, Morris, **[*2]** Nichols, Arsht & Tunnell, Wilmington, DE; Irfan A. Lateef; Jon Gurka, Joseph S. Cianfrani, Joseph R. Re, PRO HAC VICE.

Judges: Mary Pat Thynge, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Mary Pat Thynge

Opinion

MEMORANDUM ORDER

I. INTRODUCTION

Plaintiff Masimo Corporation ("Masimo") and defendants Philips Electronics North America Corporation and Philips Medizin Systeme Boblingen GMBH manufacture competing products in pulse oximetry. Pulse oximetry is a non-invasive procedure for measuring the level of oxygen saturation in a patient's arterial blood. Pulse oximtery systems are standard equipment in many clinical settings, either as stand-alone devices, or, more commonly, as components of integrated multi-parameter patient monitors which track pulse, temperature, and other physiological vital signs. Pulse oximetry systems are composed of a sensor, which collects data by shining a light through a patient's tissue, a "monitor," also sometimes referred to as a "board," "socket," or "pulse oximeter," which contains the electronics that process the signal and produce a saturation reading, and sometimes a cable which connects the sensor and monitor.

II. BACKGROUND

On February 3, 2009, plaintiff Masimo filed a complaint for **[*3]** infringement of its pulse oximetry-related patents, including its patent on signal extraction technology, [1] against defendants Philips Electronics North America Corporation and Philips Medizin Systeme Boblingen GMBH. Masimo filed a first amended complaint on May 12, 2009. Philips Electronics North America Corporation and Philips Medizin Systeme Boblingen GMBH filed their answer and Philips Electronics North America Corporation ("Philips") filed its counterclaims on June 15, 2009. Philips' counterclaims include seven antitrust counterclaims, which focus on four purported categories of misconduct by Masimo. First, Philips' antitrust counterclaims allege that Masimo inserted anticompetitive restrictions into its licensing agreements with independent pulse oximeter companies and distributors. Second, Philips contends that Masimo improperly excludes competition from the sensor and patient cable markets via ProCal, a proprietary interface that creates a technological tie between Masimo oximeters and sensors and thereby precludes customer use of non-Masimo sensors and patient cables. Third, Philips alleges anticompetitive effects of a 2006 Masimo-Nellcor settlement agreement. Fourth, Philips **[*4]** alleges that Masimo has engaged in exclusionary pricing and bundling practices designed to lock hospitals into Masimo pulse oximetry products. On July 9, 2009, Masimo filed its answer to Philips' counterclaims, asserting its own counterclaims and defenses. On August 3, 2009, Philips filed its answer to Masimo's counterclaims and a motion to strike certain of Masimo's antitrust affirmative defenses. On August 8, 2009, Masimo filed a motion to bifurcate and stay discovery of Philips' antitrust counterclaims. The court heard arguments from the parties on this motion on September 24, 2009. This is the court's decision on Masimo's August 8, 2009 motion.

III. DISCUSSION

A. MOTION TO BIFURCATE

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[1] According to Masimo, signal extraction technology was the first pulse oximetry technique that could measure through motion. D.I. 23.

The court has broad discretion to order separate trials "for convenience, to avoid prejudice, or to expedite and economize." [2] "Courts, when exercising their broad discretion to bifurcate issues for trial under *Rule 42(b)*, **[*5]** should consider whether bifurcation will avoid prejudice, conserve judicial resources, and enhance juror comprehension of the issues presented in the case." [3] "In the context of patent cases, experienced judges use bifurcation and trifurcation both to simplify the issues in patent cases and to maintain manageability of the volume and complexity of the evidence presented to the jury." [4] Bifurcation of patent and antitrust claims is not mandatory, but is common. [5]

The court's interest in juror comprehension weighs in favor of bifurcation in this case. There are currently 24 patents involved in this litigation. A jury will be called upon to determine whether these patents are valid and infringed. If Philips' antitrust counterclaims are tried at the same time, the jury will have to consider, at a minimum, intricate factual and economic analyses regarding (1) the alleged relevant markets before and after Masimo's purported anticompetitive behavior; (2) actual and potential shares in such markets; (3) barriers to entry in such markets; (4) the terms of Masimo's contracts with multi-parameter patient monitor manufacturers and whether such contracts violated antitrust laws; (5) antitrust damages; and (6) all remaining concomitant antitrust considerations. [6] To add such issues to the patent case "would pose a difficult task for even the most astute of juries." [7] Masimo also maintains that it possesses non-asserted patents which provide defenses to Philips' counterclaims. Explanation and presentation **[*7]** of the existence and relevance of these non-asserted patents to the jury would only further complicate trial and inevitably lead to juror confusion. In addition, the court notes that, at trial, Philips' allegations of monopolization could bias the jury when it evaluates Masimo's patent claims. [8]

The court's interest **[*8]** in efficiency also weighs in favor of bifurcation. First, "[t]here is a strong likelihood that consideration of the patent validity issues will be delayed significantly if tried together with the antitrust issues. Major antitrust litigation is often enormously time-consuming." [9] Second, the court finds, as discussed in more detail below, that there is a possibility that a trial on Masimo's patent claims will simplify some of Philips' antitrust

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[2] *Fed. R. Civ. P. 42(b)*; *see also* *Ricoh Co., Ltd. v. Katun Corp., No. 03-2612, 2005 U.S. Dist. LEXIS 46493, at *3 (D.N.J. July 14, 2005)* ("The court has broad discretion in deciding whether to separate issues and claims for trial, in accordance with its broad power to manage its trial calendar.") (citing *Enzo Life Sciences, Inc. v. Digene Corp., No. 02-212, 2003 U.S. Dist. LEXIS 10202, at *4 (D. Del. June 10, 2003)*; *Barr Labs. v. Abbott Labs., 978 F.2d 98, 115 (3d Cir. 1992))*.

[3] *Ciena Corp. v. Corvis Corp., 210 F.R.D. 519, 2002 U.S. Dist. LEXIS 20826, **3 (D. Del. 2002)*.

[4] *Ricoh Co., Ltd., 2005 U.S. Dist. LEXIS 46493, at *3* (citing *Enzo Life Sciences, Inc., 2003 U.S. Dist. LEXIS 10202, at *5)*.

[5] *See id.* (noting, while deciding whether **[*6]** to bifurcate and stay a defendant's antitrust counterclaims, that "[b]ifurcation of complex patent disputes has become a common occurrence.") (citation ommitted).

[6] *See* *Dentsply Intern. Inc. v. New Technology Co., No. 96-272, 1996 U.S. Dist. LEXIS 19846, 1996 WL 756766, at *5 (D. Del. 1996)* (deciding to bifurcate patent and antitrust claims in part due to the risk that the jury would be confused if called upon to consider patent validity and infringement along with a host of antitrust issues).

[7] *Ricoh Co., Ltd., 2005 U.S. Dist. LEXIS 46493, at *4*.

[8] *See* *Monsanto Co. v. E.I. Du Pont de Nemours & Co., No. 4:09CV00686, 2009 U.S. Dist. LEXIS 84512, at *7 (E.D. Mo. Sept. 16, 2009)* ("[T]he court agrees with Plaintiffs that Defendants' allegations of monopolization could bias the jury when it evaluates Plaintiffs' patent claims.") (citing *Hunter Douglas, Inc. v. Comfortex Corp., 44 F. Supp. 2d 145, 154 (N.D.N.Y. 1999)*, where the court noted that other courts had accepted a "prejudice-from-a-'negative label' theory" in deciding whether to sever infringement and antitrust claims).

[9] *Akzona, Inc. v. E. I. Du Pont de Nemours & Co., 607 F. Supp. 227, 236 (D. Del. 1984)*; *see also* *Dsm Desotech Inc. v. 3D Sys. Corp., No. 08-CV-1531, 2008 U.S. Dist. LEXIS 87473 (D. Ill. Oct. 28, 2008)* ("As the Supreme Court, the Seventh Circuit, and this court have all recognized, discovery in any antitrust case can quickly become enormously expensive and burdensome to defendants.") (collecting cases).

counterclaims. [10] A trial will determine, at the very least, the validity and scope of Masimo's asserted patents, and the scope of Masimo's patent protection may affect its liability under antitrust laws. [11]

Finally, there is little indication that bifurcation will substantially prejudice Philips. Masimo correctly asserts that Philips could have brought its antitrust counterclaims years ago, yet instead waited until this litigation. Thus, Philips' claim that it **[*10]** will be substantially prejudiced from bifurcation and any resulting delay in the trial of its antitrust counterclaims "rings somewhat hollow." [12] The court recognizes that one of the bases for Philips' antitrust counterclaims--the allegedly anticompetitive 2006 Masimo-Nellcor settlement agreement--is relatively recent, but the court nonetheless finds that its interest in efficiency and in enhancing juror comprehension outweighs any purported prejudice to Philips that might result from bifurcation. Bifurcation will limit the number of legal issues the jury must address at any particular time and will result in the presentation of evidence in a manner that is easier for the jurors to understand. [13]

For the above reasons, Masimo's motion to bifurcate Philips' antitrust counterclaims is granted.

B. MOTION TO STAY DISCOVERY

"Although separate trials have been ordered, **[*11]** there remains a distinct and important issue: whether the Court should order a stay in discovery on the antitrust counterclaims." [14] On one hand, the court fears that a stay in discovery on Philips' antitrust counterclaims will "most likely devolve into a series of time-consuming and expensive discovery disputes as to whether particular discovery is directed at the patent or antitrust claims." [15] On the other

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[10] *See* *Monsanto Co., 2009 U.S. Dist. LEXIS 84512, at *5* (deciding to bifurcate patent and antitrust claims in part because of the possibility **[*9]** that trial of the plaintiff's patent claims would simplify some of the defendant's antitrust counterclaims). *See also* *Dentsply Intern. Inc., 1996 U.S. Dist. LEXIS 19846, 1996 WL 756766, at *3*, where the court discusses how a jury's resolution of patent claims can moot antitrust counterclaims:

> There is a possibility that all aspects of the antitrust counterclaim . . . could be resolved by a first trial on patent infringement. A patent gives a patent owner the right to exclude others from the marketplace for a statutory number of years. Accordingly, a patent confers upon its owner the ability to bring monopolistic characteristics to the marketplace--the very antithesis of a prime purpose of antitrust legislation.

[11] *SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir. 1981)*, *cert denied* ***455 U.S. 1016, 102 S. Ct. 1708, 72 L. Ed. 2d 132 (1982)*** ("[W]here a patent has been lawfully acquired, subsequent conduct permissible under the patent laws cannot trigger any liability under the antitrust laws.").

[12] *See* *ASM Am., Inc. v. Genus, Inc., No. 01-2190, 2002 U.S. Dist. LEXIS 1351, at *18 (N.D. Cal. Jan. 9, 2002)* ("[Defendant's] allegation of irreparable harm rings somewhat hollow, however, in light of its failure to bring its antitrust claims against [Plaintiff] independently.").

[13] *Ricoh Co., Ltd., 2005 U.S. Dist. LEXIS 46493, at *4*

[14] *Dentsply Intern. Inc., 1996 U.S. Dist. LEXIS 19846, 1996 WL 756766, at * 5*.

[15] *1996 U.S. Dist. LEXIS 19846, [WL] at *6*. In *Densply,* the court decided to bifurcate patent and antitrust claims but not to stay discovery on the antitrust counterclaims:

> [A] stay of discovery on antitrust issues would most likely devolve into a series of time-consuming and expensive discovery disputes as to whether particular discover is directed at the patent or antitrust claims. Efficiency dictates that discovery on all claims, including the antitrust counterclaims, continue apace.

Id.

hand, the court is cognizant of the need to prevent the parties from conducting discovery that will ultimately prove unnecessary. [16]

Philips asserts that staying its antitrust counterclaims is inadvisable because resolution of Masimo's patent claims will have no impact on the viability of its antitrust counterclaims. Philips maintains that (a) Masimo's "system claims" do not immunize Masimo from antitrust liability; (b) Masimo's patents do not confer any right to "police" the sale of sensors and cables through exclusionary conduct; (c) Masimo's separate patent protection for its oximetry components confers no independent right to violate ***antitrust law***; and (d) Masimo's license agreements, settlement agreements, and other contracts are plainly subject to antitrust scrutiny. [17]

Masimo contends that a stay should be ordered because resolution of Masimo's patent claims will moot or at least simplify many of Philips' antitrust claims. First, Masimo contends that, assuming its asserted system patents are valid, "the licensing and distribution agreements of which Philips complains . . . **[*13]** cannot have an anticompetitive effect." [18] Masimo maintains that an agreement between Masimo and a third party manufacturer of pulse oximetry equipment prohibiting the third party from selling non-Masimo sensors or cables for use with Masimo pulse oximetry monitors could not violate antitrust laws as it would be within the scope of Masimo's patent rights. [19] Masimo recognizes that "a patent owner may not take the property right granted by a patent and use it to extend his power in the marketplace improperly," [20] but contends that its patents cover pulse oximetry systems as an integrated whole and therefore entitle it to exclude all others from a market covering monitors, sensors, and cables which incorporate its pulse oximetry technology. [21]

The scope of Masimo's patents will be determined at trial. Although a patent does not permit a patentee to condition use of the patented product on the surrender of a monopoly in some other unpatented product, should Masimo's patents on signal extraction technology and pulse oximetry equipment cover using such **[*14]** patented products in concert with unpatented products (say, sensors and cables) in pulse oximetry systems, then Masimo may be entitled to monopolize those systems. [22] Accordingly, there is a possibility that a trial on Masimo's patent claims will

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[16] *Cf. Monsanto Co., 2009 U.S. Dist. LEXIS 84512, at *8* ("Because these claims cannot be mooted by resolution of the infringement action, allowing **[*12]** discovery to proceed does not increase the potential that the parties will conduct discovery that will ultimately prove unnecessary, and such a course will likely reduce delay in resolving all issues before the court.").

[17] D.I. 31 at 6-16.

[18] D.I. 23 at 13.

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

[20] *Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990)*.

[21] D.I. 23 at 12-13.

[22] *Cf. Schor v. Abbott Labs., 457 F.3d 608, 614 (7th Cir. Ill. 2006)* (discussing, in dicta, how Abbott's patents could potentially shield it from antitrust liability).

> Abbott's patents do more to support its position than to assist Schor. Recall that the patents cover not only ritonavir administered by itself but also ritonavir administered in combination with another protease inhibitor. Abbott therefore could take control of the market in combination treatments until the patents expire. A patent does not permit its owner to condition use of the patented product on the surrender of a monopoly in some other unpatented product. But the product "ritonavir in combination with another protease inhibitor" is patented to Abbott, which therefore is entitled to monopolize the **[*15]** combination.

Id. (internal citations omitted).

potentially eliminate or simplify Philips' antitrust counterclaims alleging anticompetitive licensing restrictions. It follows that discovery on such claims should be stayed. [23]

Second, Masimo argues that there can be no illegal tie or any other possible antitrust claim based on Procal, its allegedly exclusionary technological interface, because (a) as Masimo has a right to exclude third parties from its entire pulse oximetry system under [its] patents, there is no potential antitrust violation from Masimo requiring that hospitals using its pulse oximetry monitors also use Masimo sensors and connector cables and (b) "[i]f using an unlicensed sensor with a Masimo-technology monitor infringes--and it does--then a technology that identifies an unauthorized combination merely reinforces the patent right." [24] Once again, the validity of this argument and its resulting capacity to provide Masimo with a defense to Philips' antitrust counterclaims turns, at least in part, on the scope of Masimo's patents. The court therefore finds that Philips' **[*17]** antitrust counterclaims alleging that Masimo illegally uses exclusionary technological interfaces should be stayed.

Third, Masimo maintains that its 2006 settlement agreement with Nellcor could not support antitrust liability as alleged by Philips. Masimo argues that it has the right under its patents to preclude Nellcor from permitting third parties to manufacture and sell sensors for use with Nellcor's pulse oximeter monitors because such third party sensors would be infringing products and Nellcor would thus be a contributory infringer. [25] Should Masimo's patents entitle Masimo to exclude others from its allegedly patented pulse oximetry system (including monitors, sensors and cables using its signal extraction technology), then Maximo may be entitled to restrict both Nellcor's continued sale of its allegedly infringing pulse oximeter and its manufacture of such pulse oximeters that are compatible with third-party sensors. It follows that Philips' antitrust counterclaims concerning the 2006 Masimo-Nellcor settlement agreement may potentially be eliminated or narrowed by a determination of the scope of Masimo's patents. Thus, again, a stay of discovery is warranted.

Lastly, **[*18]** Masimo contends that it is entitled to offer hospitals a package price for its patented system without raising any issue under ***antitrust law***. [26] Philips' antitrust counterclaims concerning Masimo's dealings with hospitals are primarily concerned with the effect that Masimo's alleged tying of cables and sensors to its oximeters has on the market for non-Masimo sensors and cables. As explained above, the legality of this allegedly anticompetitive action may be affected by the scope of Masimo's patents, which will be determined at the trial of Masimo's patent claims. Thus, a stay of Philips' antitrust counterclaims alleging exclusionary pricing and bundling is warranted.

IV. CONCLUSION

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[23] *See* *Monsanto Co., 2009 U.S. Dist. LEXIS 84512, at *5* (deciding to stay discovery on defendants' antitrust counterclaims alleging sham litigation, fraud on the patent office, misrepresentations of patent rights, *and* anticompetitive licensing restrictions). At the September 24, 2009 hearing on the present motion, counsel for Philips asserted that the court in *Monsanto Co.* (1) distinguished between patent-related antitrust claims that are sham litigation or *Walker* Process-based and independent antitrust claims and (2) "decided to go ahead and proceed with those independent antitrust claims staying discovery only on the sham litigation claims." D.I. 65-1 at 7. The distinction drawn in *Monsanto Co.,* however, is more accurately characterized as one between antitrust counterclaims that could potentially be eliminated or narrowed by resolution of the plaintiff's patent claims and those that could not be so affected. The court in *Monsanto Co.* notes that through a separate trial on the plaintiffs' patent claims "there is the possibility of simplifying those claims alleging that Plaintiffs' license restrictions are anticompetitive." *Monsanto Co., 2009 U.S. Dist. LEXIS 84512, at *5*. **[*16]** The court later concludes, "In sum . . . a stay of discovery and a separate trial of Defendants' antitrust counterclaims is warranted. Discovery should proceed, however, on Defendants' antitrust counterclaims that will not potentially be eliminated or narrowed by resolution of Plaintiffs' patent claims . . . ." *Id. at *8-*9*.

[24] *Id.* at 14.

[25] *Id.*

[26] *Id.*

For the foregoing reasons, Masimo's motion to bifurcate and stay discovery of Philips' antitrust counterclaims (D.I. 22) is hereby GRANTED. The patent and antitrust issues in this case will be bifurcated. Discovery of the antitrust issues will be stayed pending trial on the patent issues.

Date: March 11, 2010

/s/ Mary Pat Thynge

UNITED STATES MAGISTRATE JUDGE

Midwest Agency Servs. v. JP Morgan Chase Bank, N.A.

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

March 11, 2010, Decided; March 11, 2010, Filed

Civil Action No. 2: 09-165-DCR

Reporter

2010 U.S. Dist. LEXIS 22457 *; 2010-1 Trade Cas. (CCH) P76,940; 2010 WL 935450

MIDWEST AGENCY SERVICES, INC., Plaintiff, v. JP MORGAN CHASE BANK, N.A., et. al., Defendants.

Core Terms

gap, credit transaction, insurance product, tying arrangement, antitrust, buyer, alleges, approved list, dealers, financing, purchases, fails, Sherman Act, reciprocal-dealing, exclusive-dealing, vendor, lending, subsidiary, bank holding company, anti trust law, tied product, sells, alleged facts, extend credit, car dealer, car buyer, products, counts, buy

Counsel: **[*1]** For Midwest Agency Services, Inc., Plaintiff: Matthew D. Hemmer, Scott Rowland Thomas, LEAD ATTORNEYS, Hemmer, Pangburn, DeFrank PLLC, Fort Mitchell, KY.

For Premier Dealer Services, Inc., Intervenor Plaintiff: Scott Rowland Thomas, LEAD ATTORNEY, Matthew D. Hemmer, Hemmer, Pangburn, DeFrank PLLC, Fort Mitchell, KY.

For JP Morgan Chase Bank, N.A., Chase Auto Finance Corp., Chase Insurance Agency, Inc., Defendants: Matthew C. Blickensderfer, LEAD ATTORNEY, PRO HAC VICE, Frost Brown Todd LLC - Cincinnati, Cincinnati, OH; Sheryl G. Snyder, LEAD ATTORNEY, Frost Brown Todd LLC - Louisville, Louisville, KY.

Judges: Danny C. Reeves, United States District Judge.

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM OPINION AND ORDER

This matter is pending for consideration of the motion to dismiss filed by Defendants JP Morgan Chase Bank, N.A., Chase Auto Finance Corporation, and Chase Insurance Agency, Inc. [Record No. 14] The Defendants assert that Plaintiff Midwest Agency Services, Inc.'s ("Midwest") Complaint does not contain sufficient facts to plausibly suggest that Plaintiff is entitled to relief. [Record No. 14] However, Midwest contends that its has alleged enough facts to permit a reasonable inference that it is entitled **[*2]** to relief. [Record No. 19, p. 1] After reviewing the relevant authorities, the Court agrees that the claim should be dismissed for failure to state a claim upon which relief can be granted.

I.

Defendant JP Morgan Chase Bank, N.A. ("Chase") is a wholly-owned subsidiary of JP Morgan Chase & Co. ("JP Morgan"). Chase is also one of the largest banking institutions in the United States and one of the world's largest financial service firms. [Record No. 1, P 7] Defendant Chase Auto Finance Corporation ("CAF") is a wholly-owned subsidiary of Chase. CAF purchases retail installment contracts from automobile dealers across the United States. [Record No. 1, P 8] Defendant Chase Insurance Agency, Inc. ("CIA") is a wholly-owned subsidiary of JP Morgan Insurance Holdings, LLC, which is a wholly-owned subsidiary of JP Morgan. [Record No. 1, P 9] Midwest sells different types of insurance, including gap insurance products. [Record No. 1, P 18]

When purchasing a car, buyers typically have a number of financing options including funding the purchase through "indirect auto lending." [Record No. 1, P 10] This occurs when a dealer sells the vehicle on credit to the buyer ("Credit Transaction"). [Record No. **[*3]** 1, P 11] In this situation, the dealer is the creditor, and the buyer is the debtor. [Record No. 1, P 11] However, dealers typically enter into these transactions with the expectation they will be able to transfer the rights and obligations under the Credit Transaction to another entity. [Record No. 1, P 11] Chase is the largest institution that acquires Credit Transactions from automobile dealers. It usually acquires these Credit Transactions shortly after the original transaction is completed. [Record No. 1, P 12] Chase acquires the Credit Transactions directly and indirectly through CAF, its agent and subsidiary. [Record No. 1, P 12] Before purchasing Credit Transactions, Chase and CAF notify dealers of the terms on which they are willing to conduct the purchase. [Record No. 1, P 13] Midwest alleges that because of their size and presence within the market, Chase and CAF do not negotiate with dealers over purchase terms. [Record No. 1, P 13]

In any vehicle sale, dealers will generally offer to sell the buyer ancillary products and services, including gap insurance. [Record No. 1, P 14] Gap insurance protects the car buyer from certain risks in the event of loss. [Record No. 1, P **[*4]** 15] In the event that a car is "totaled," the buyer's primary insurance carrier will generally only pay the market value of the vehicle at the time of loss, which may be less than what the buyer owes under the Credit Transaction. [Record No. 1, P 15] Gap insurance covers the difference between the market value and the amount owed under the Credit Transaction. [Record No. 1, P 15]

Many gap insurance products are available in the Kentucky vehicle market, and vehicle buyers decide whether to purchase gap insurance. [Record No. 1, P 16] If the buyer decides to purchase the insurance product, he or she will usually purchase whichever product is suggested by the dealer at the point of sale. [Record No. 1, P 16] If the buyer purchases gap insurance, the purchase price is included in the total amount financed by the dealer, and in turn, sold to the entity purchasing the Credit Transaction. [Record No. 1, P 17]

Both Midwest and CIA sell gap insurance products and compete against each other in this market. [Record No. 1, P 19] Midwest sells a product called "Premier Gap." Its customers include more than 300 motor vehicle dealers in Kentucky, Ohio, Indiana, Tennessee, and West Virginia (collectively, **[*5]** the "Territory"). [Record No. 1, P 18] CIA sells two gap insurance products, but does not dominate the gap insurance market, having less than a ten percent market share in the relevant Territory. [Record No. 1, P 19] Midwest alleges that its gap insurance products are superior to those of CIA in every commercial respect. [Record No. 1, P 22] Specifically, Midwest's gap insurance product is backed by an insurance company with a superior rating to the insurance carrier backing CIA's gap insurance. [Record No. 1, P 22]

On or after June 1, 2009, Chase and/or CAF announced an "internal policy change" regarding Credit Transactions they would be willing to acquire. [Record No. 1, P 20] Specifically, CAF advised Kentucky dealers it would not purchase Credit Transactions that included gap insurance products unless the product was included on CAF's Approved List ("Approved List"). [Record No. 1, P 21] Midwest's products were not included on this Approved List, but other vendors' products including CIA gap insurance products were listed. [Record No. 1, P 21] Midwest alleges that the criteria used by the Defendants to determine which gap insurance products to include on the Approved List have nothing **[*6]** to do with the reliability of the product, strength of the company backing the product, or any other factor affecting any risk undertaken by Chase and/or CAF. [Record No. 1, P 23] The company also asserts that the Defendants' Approved List is simply a way to funnel business to their affiliate, CIA. [Record No. 1, P 24]

Midwest contends that the Approved List is a tool Chase and CAF use to coerce dealers into refraining from offering car buyers other gap insurance products, including Midwest's gap insurance products. [Record No. 1, P 24] It further contends that Defendants have rejected Credit Transactions that contained Midwest gap insurance products, have returned the paperwork to the dealer, and have verbally suggested that the dealer substitute the CIA gap insurance product. [Record No. 1, P 25] Once this substitution was made, Defendants then purchased the Credit Transaction from the dealer. [Record No. 1, P 25]

Midwest's Complaint contains six claims. Count one contends that the Defendants violated *§ 1* of the Sherman Act. Count two alleges that the Defendants violated the Bank Holding Company Act ("BHCA"). Counts three and four are brought pursuant to *K.R.S. § 304.9-135* and *K.R.S. § 304.12-140(1)*. **[*7]** Count five is based on a claim of unfair competition under Kentucky common law. Finally, count six asserts a claim of tortious interference with a business relationship.

II.

Under *Rule 12 of the Federal Rules of Civil Procedure*, a court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *See* *Ley v. Visteon Corp., 540 F.3d 376, 380 (6th Cir. 2008)*; *Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 724 (6th Cir. 1996)*. However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation" *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*. "Factual allegations contained in a complaint must raise a right to relief above the speculative level." *Bassett v. Nat'l Coll. Athletic Ass'n, 528 F.3d 426, 430 (6th Cir. 2008)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. In other words, a plaintiff's arguments "require[] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*. Heightened **[*8]** fact pleading of specifics is not required -- only enough facts to state a claim to relief that is plausible on its face. *See* *Bassett, 528 F.3d at 426*. The Court may consider the complaint as well as "any exhibits attached thereto, public records, [and] items appearing in the record of the case." *Amini v. Oberlin Coll., 259 F.3d 493, 502 (6th Cir. 2001)* (citation omitted).

III.

A. The Sherman Act

Midwest alleges the Defendants violated the Sherman Act through an unlawful tying arrangement, an unlawful reciprocal-dealing, and an unlawful exclusive-dealing arrangement. An a preliminary matter, to avoid dismissal, a plaintiff must have standing to assert this claim. And to have standing, a plaintiff must allege an antitrust injury. On the substantive claims, the complaint also fails to allege the necessary facts to establish a *prima facie* case that Defendants violated the Sherman Act by an unlawful tying arrangement, an unlawful reciprocal-dealing, or an unlawful exclusive-dealing arrangement.

1. No Antitrust Injury

As noted above, to have standing to assert an antitrust violation, the plaintiff must allege an antitrust injury. *See* *Buyer's Corner Realty, Inc. v. N. Ky. Ass'n of Realtors, 410 F. Supp. 2d 574, 579 (E.D. Ky. 2006)*. **[*9]** This element is so important that it is specifically required even when a plaintiff can demonstrate an unlawful tying arrangement. *Id.* The elements of an antitrust injury are: (1) the injury is the type of injury that antitrust laws were intended to prevent, and (2) the injury must flow from the characteristic which makes the defendant's acts unlawful. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *see also* *CTUnify, Inc. v. Nortel Networks, Inc., 115 F. App'x 831, 835-36 (6th Cir. 2004)* (*citing* *Valley Prods. Co. v. Landmark, a Div. of Hospitality Franchise Sys., Inc., 128 F.3d 398, 402-03 (6th Cir.1997))* (noting that the Sixth Circuit has been "reasonably aggressive" in dismissing cases where the injury flows from conduct that is not an antitrust violation). Moreover, an inference of consumer injury is essential. *See* 2 Phillip E. Areeda, ***Antitrust Law**,* § 358d, at 467 (2000). In *Jefferson Parish,* the Supreme Court dismissed the plaintiff's complaint because it failed to show that consumers were worse off as a result of the arrangement. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. If the market remains competitive, then an antitrust injury **[*10]** has not occurred. *See* Areeda, § 358d, at 467-68. Furthermore, a complaint alleging only that an individual competitor is injured, but not the market, does not establish an antitrust injury. *See* *B&H Med. v. ABP Admin., 526 F.3d 257, 265 (6th Cir. 2008)*; *Care Heating & Cooling, Inc. v. Am. Standard, 427 F.3d 1008, 1014 (6th Cir. 2005)*.

Applying these principles in the present case, Midwest has failed to allege an antitrust injury. Midwest alleges only that it incurred damages as a result of Defendants' efforts "to unreasonably restrain competition in the gap insurance industry," [Record No. 1, P 27] and that Plaintiff's injury is "a consequence of the diminished competition proximately caused by Defendants' scheme." [Record No. 1, P 48] It has failed to allege an injury that is the type of injury that antitrust laws were intended to prevent. Midwest's allegation of an injury only to its ability to sell gap insurance products is not an antitrust injury. *Care Heating & Cooling, Inc., 427 F.3d at 1014*. The law is settled that injury only to a competitor and not to the market does not create an antitrust injury because the purpose of antitrust laws is to protect competition, not competitors. **[*11]** *See* *Brunswick, 429 U.S. at 488*. Therefore, even if Defendants' actions cause Midwest to lose business, this alleged injury alone is not an antitrust injury because no injury occurred either to the consumer or to competition as a whole. *See* *B&H Med., 526 F.3d at 265-66*; *Care Heating & Cooling, Inc., 427 F.3d at 1014*.

Although Midwest does allege that the Defendants' conduct decreased competition within the market, it does not allege facts that demonstrate that competition was actually diminished. Midwest has failed to state how many gap insurance providers exist and how many were listed on the Defendants' Approved List. Therefore, it is impossible to tell the extent to which competition may have been affected. *See* *Norte Car Corp. v. Firstbank, 25 F. Supp. 2d 9, 21 (D. P.R. 1998)* (noting that alleging that competition was reduced, without citing specific facts demonstrating this decrease would not carry the pleading burden). Rather, Midwest only alleges facts that demonstrate that it was removed from competition in the market -- not that competition within the entire market was diminished. Therefore, it fails to allege an injury that is of the type that antitrust laws were intended to **[*12]** prevent because the facts do not demonstrate that competition was harmed, as required to establish an antitrust injury.

Midwest also fails to allege an injury that flows from that which makes the Defendants' acts unlawful. It alleges that the Defendants were engaged in an unlawful tying arrangement. However, Midwest's alleged injury flows from its exclusion from the Approved List, not from the alleged tying arrangement itself. Use of an approved list by a buyer of a product is not an antitrust violation and does not cause an antitrust injury. *See* *CTUnify, Inc., 115 F. App'x at 836* (noting that the plaintiff's injuries flowed from its exclusion from a preferred vendor list, not an alleged tying agreement). Further, *Section 1* of the Sherman Act does not restrict a buyer's freedom to select the entity from whom it will purchase products. *See* *Expert Masonry, Inc. v. Boone County, 440 F.3d 336, 347 (6th Cir. 2006)*. Rather, such selections are the nature of the marketplace. *Id.* Therefore, the Defendants' actions were not unlawful but were part of the normal environment of business and competition. As a result, Midwest has failed to allege facts that demonstrate an antitrust injury. Such failure **[*13]** if fatal to its first claim for relief.

2. The Tying Arrangement Claim

The Defendants also contend that Midwest has failed to establish a *prima facie* case that it created an unlawful tying arrangement and that this failure constitutes an alternative ground for dismissing this claim. The relevant part of *Section 1* of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. This section has been interpreted to restrict only "unreasonable" restraints of trade, and thus is the section used as the basis for a tying arrangement claim. *See* *Buyer's Corner Realty, 410 F. Supp. 2d at 578*. A tying arrangement is defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak v. Image Technical Servs., Inc., 504 U.S. 451, 461, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. A tying arrangement violates ***antitrust law*** only if a "substantial volume of commerce is foreclosed thereby." *Jefferson Parish, 466 U.S. at 16*.

Accordingly, **[*14]** a plaintiff must allege that a tying arrangement exists and must demonstrate that the arrangement is unlawful. The elements required to demonstrate an unlawful tying arrangement claim are: (1) the seller has "appreciable economic power" in the tying product market; (2) the tying arrangement "affects a substantial volume of commerce in the tied market"; (3) "the seller has a direct economic interest in the sale of the tied product"; and (4) the plaintiff has suffered an antitrust injury resulting from the tying arrangement. *See Buyer's Corner Realty, Inc., 410 F. Supp. 2d at 578* (*citing CTUnify, 115 F. App'x at 834*). In the present case, Midwest has failed to demonstrate that a tying arrangement exists.

Midwest alleges that the Defendants condition their purchase of Credit Transactions on the dealers' use of gap insurance products from an Approved List. Accordingly, it alleges that the tying product is the service of purchasing of the Credit Transactions, and the tied product is the gap insurance product. However, this alleged arrangement fails to satisfy the definition of a tying arrangement. First, the Defendants are the purchasers of the Credit Transactions. They are not selling a **[*15]** product in this situation and, therefore, do not have the requisite selling power to coerce buyers to accept a tied product as required in a tying arrangement. *See Jefferson Parish, 466 U.S. at 13* (noting that the "essential characteristic" of an unlawful tying arrangement is the seller's "exploitation of control" to force the buyer to purchase the tied product). This situation, in which a buyer uses his power to induce a supplier to buy his product, is arguably reciprocity, not a tying arrangement. *See* Areeda, § 17G, at 448. Defendants have created certain standards for Credit Transactions they would be willing to buy, which is not an antitrust violation. *See Expert Masonry, Inc., 440 F.3d at 347* (noting that a buyer can decide with whom they do business without running afoul of the Sherman Act). Midwest has cited no authority which applies a tying arrangement to a situation in which a buyer is the one allegedly tying products.

Second, even if the court accepts Midwest's argument that the Defendants are supplying a service, they do not require the purchase of any gap insurance product and, therefore, there is no coercion. Midwest admits that car buyers may or may not choose to purchase **[*16]** gap insurance. [Record No. 1, p. 16] The Defendants do not require the Credit Transactions they purchase to include gap insurance. Thus, by definition, a tie cannot exist because a "tied product" is not being forced on the buyer. However, if a car buyer purchases gap insurance products and the car dealer intends to sell the Credit Transaction to Defendants, the gap insurance product must be from a vendor on the Approved List. Further, the Approved List includes several vendors, only one of which is CIA. This is an example of a buyer creating terms on which it is willing to do business. Therefore, Midwest has failed to allege an unlawful tying arrangement in violation of the Sherman Act.

3. Reciprocal and Exclusive Dealing Claims

Midwest also alleges that the Defendants' arrangement constitutes both an unlawful reciprocal-dealing and an unlawful exclusive-dealing arrangement. A reciprocal-dealing arrangement exists when one party agrees to buy a second party's goods, provided that the second party buys a particular product from the first party. *See* Areeda, § 1775a, at 448-49. Reciprocal-dealing arrangements are only unlawful when one party employs its market power to "coerce" the second **[*17]** party to buy the first party's product. *Id.* at 449. An exclusive-dealing arrangement exists when one buyer agrees to purchase a product from only one supplier for a specific amount of time. *See Norte Car Corp., 25 F. Supp. 2d at 17*.

In this case, Midwest does not establish that either a reciprocal-dealing arrangement or an exclusive-dealing arrangement exists because the Defendants did not require the purchase of CIA gap insurance products. The Defendants agreed to purchase Credit Transactions that either: (1) did not include a gap insurance product, or (2) if it did, the gap insurance product must have been purchased from a vendor on the Approved List. Although CIA was on the Approved List, it was not the only vendor listed. Because the Defendants did not condition their purchase of Credit Transactions on the purchase of CIA gap insurance product, a reciprocal-dealing arrangement did not exist. Similarly, because the Defendants purchased Credit Transactions that included gap insurance products from any vendor on the Approved List, not just those that included CIA gap insurance products, an exclusive dealing agreement did not exist.

The Court also notes that even if it were to find that **[*18]** an exclusive-dealing agreement exists, it would not be unlawful. An exclusive-dealing arrangement is unlawful when "the competition foreclosed by the contract [is] found to constitute a substantial share of the relevant market." Tampa Elect. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961). As a matter of law, courts have concluded that foreclosure levels of less than 30 or 40 percent are not a substantial share. *See* B&H Med., 526 F.3d at 266. Plaintiff alleges in its complaint only that "the tie foreclosed a substantial amount of commerce in the market for the tied product." [Record No. 1, P 42] However, this assertion includes no percentages or other evidence supporting this statement. As such, it constitutes a conclusory statement of law which does not carry the pleading burden. *See* Twombly, 550 U.S. at 555.

In summary, Midwest's first claim fails for two separate reasons: (1) it fails to allege an antitrust injury and (2) it fails to allege the necessary facts to establish a *prima facie* case that Defendants violated the Sherman Act by an unlawful tying arrangement, an unlawful reciprocal-dealing, or an unlawful exclusive-dealing arrangement.

B. The Bank Holding Company Act ("BHCA")

Midwest **[*19]** alleges in the second count of its Complaint that the Defendants violated the BHCA by establishing an unlawful tying arrangement. The BHCA provides, in relevant part, that:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement--
>
> > (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
> >
> > (B) that the customer shall obtain some additional credit, property, or service from a bank holding company of such bank, or from any other subsidiary of such bank holding company; . . .
> >
> > (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

12 U.S.C. § 1972(1) (2010). The elements of an unlawful tying arrangement under the BHCA are: (1) the bank imposed an anti-competitive tying arrangement by **[*20]** conditioning an extension of credit upon borrower's obtaining additional credit or services from the bank; (2) the arrangement was unusual or nontraditional in the banking industry; and (3) the practice benefitted the bank. Highland Capital, Inc. v. Franklin Nat'l Bank, 350 F.3d 558, 565 (6th Cir. 2003).

Midwest is unable to establish the first of these elements because the Defendants did not extend any credit or provide a service. The Defendants purchased Credit Transactions that had already been completed between the car dealer and the car buyer. Accordingly, the Defendants' purchase of the Credit Transaction from the car dealers does not constitute an extension of credit or provision of a banking service to satisfy the first element of a BHCA claim. In addition, as discussed above, Midwest cannot demonstrate that a tying arrangement existed. While the standard for a tying arrangement under a BHCA claim does not require coercion, the statutory language prohibits the "extension of credit" based on a "condition or requirement" of additional actions. *See* 12 U.S.C. § 1972(1) (2010). Accordingly, Midwest must establish that the Defendants required car dealers to purchase certain gap insurance **[*21]** products in order for the Defendants to purchase the Credit Transactions. *See* Highland Capital, Inc., 350 F.3d at 567-68 (noting that demonstrating that borrowers purchased additional products because it pleased the lender did not establish that the purchase was a requirement for purposes of establishing a claim).

Even assuming that the purchase of the Credit Transaction constitutes an extension of credit for the purposes of the BHCA claim, the Defendants did not require car dealers to include any gap insurance products in the Credit Transactions they purchased. Rather, the Defendants required that if a gap insurance product was included in the Credit Transaction, it must be from a vendor on the Approved List. Because the Defendants would purchase Credit Transactions without a gap insurance product, the purchase was not conditioned on the inclusion of CIA gap insurance products.

C. *K.R.S. § 304.9-135*

The Defendants argue that Midwest's claim based on *K.R.S. § 304.9-135* should be dismissed because the insurance statute does not apply to the facts alleged. The statute states: "An officer or employee of a financial institution shall not directly or indirectly delay or impede the completion **[*22]** of a loan transaction or any other transaction with a financial institution for the purpose of influencing a consumer's selection or purchase of any insurance." *K.R.S. § 304.9-135(3)* (2010). In its Complaint, Midwest asserts that the Defendants' conduct violates this statute but it fails to allege specific facts concerning what conduct violated the statute.

The Defendants' alleged actions, taken as true, do not violate the statutory language. The Defendants were not involved with a loan transaction. Instead, they purchased Credit Transactions after the loan was completed. Additionally, the Defendants did not require the purchase of any gap insurance products, as demonstrated by the fact that they purchased Credit Transactions that did not include gap insurance products. Because the loan was completed before the Defendants purchased the Credit Transactions, the Defendants could not delay or impede the completion of such transaction. Accordingly, Midwest cannot establish a violation of *K.R.S. § 304.9-135*.

D. Counts Four and Five

Midwest alleges in count four that the Defendants violated *K.R.S. § 304.12-140(1)*. [Record No. 1, p. 15] This statute restricts coercion in requiring insurance. **[*23]** It states:

> (1) No person engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property shall require, as a condition to financing or lending, or varying the terms and conditions of the financing or lending, or as a condition to the renewal or extension of any loan or credit or to the performance of any other act in connection with financing or lending, that the purchaser or borrower, or his successors, shall negotiate through a particular insurer, agent, or type of insurer, any policy of insurance or renewal insuring the property or the life or health of the borrower.
> (2) This section shall not prevent the reasonable exercise by any vendor or lender of its right to approve or disapprove the insurer selected to underwrite the insurance, and to determine the adequacy of the insurance offered.

K.R.S. § 304.9-135 (2010). Count five alleges that the Defendants committed unfair competition under Kentucky common law. Both of these counts are premised on the alleged tying arrangement claim which, as discussed above, is legally insufficient. Midwest did not allege any additional facts to support these counts.

In addition, **[*24]** *K.R.S. § 304.12-140(1)* prohibits the conditioning of lending or financing on the purchase of a particular insurance product. And as discussed above, the Defendants did not lend or finance the purchase of the car. Instead, they purchase Credit Transaction after the lending occurs. Also, count four alleges that the Defendants' conduct injured Midwest by "taking its business or impairing its good will." [Record No. 1, P 74]. However, Midwest fails to allege any facts that demonstrated that it lost business or that the Defendants' creation and/or use of the Approved List impaired its goodwill. Accordingly, these counts will also be dismissed.

E. Tortious Interference With a Business Relationship

The Defendants assert that Midwest's claim of tortious interference with business relationships also should be dismissed. To state a claim for tortious interference, a plaintiff must allege facts that the interference occurred through "unlawful means, such as fraud, deceit or coercion." *Henkin v. Berea Bank & Trust Co., 566 S.W.2d 420, 425 (Ky. Ct. App. 1978)*; *see also* *AMC v. Cincinnati Milacron, Inc., No. 3:97-CV-343-H, 2000 U.S. Dist. LEXIS 22918, 2000 WL 33975582, at *7 (W.D. Ky. Jan. 25, 2000)* (noting that "impropriety should **[*25]** not be confused with aggressive, competitive business practices). Midwest's Complaint alleges that the Defendants "improperly and intentionally interfered" with existing business relationship, but the basis that Midwest cites for the impropriety is the alleged tying arrangement scheme. Again, because an unlawful tying cannot be established under the facts presented, Midwest cannot prove that any alleged interference was the result of unlawful means.

IV.

Midwest correctly notes that the appropriate standard for dismissal is that the complaint contains enough information to permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft, 129 S. Ct. at 1937, 1940*. Here, however, Midwest's Complaint fails to allege an antitrust injury and fails to allege the necessary facts to establish a *prima facie* case that the Defendants violated the Sherman Act by an unlawful tying arrangement, an unlawful reciprocal-dealing, or an unlawful exclusive-dealing arrangement. In addition, Midwest's Complaint does not allege facts necessary to establish an unlawful tying arrangement. Finally, even if the Defendants' actions are taken as true, they would **[*26]** not violate *K.R.S § 304.9-135*. Accordingly, it is hereby **ORDERED** as follows:

1. Defendants JP Morgan Chase Bank, N.A., Chase Auto Finance Corporation, and Chase Insurance Agency, Inc.'s motion to dismiss [Record No. 14] is **GRANTED.**

2. All claims asserted in this action by Plaintiff Midwest Agency Services, Inc. are **DISMISSED,** with prejudice.

3. This case is **DISMISSED** and **STRICKEN** from the Court's docket.

4. A final, appealable Judgment will be entered this date.

This 11th day of March, 2010.

/s/ Danny C. Reeves

United States District Judge

Dicar, Inc. v. Stafford Corrugated Prods.

United States District Court for the District of New Jersey

March 12, 2010, Decided; March 12, 2010, Filed

Civil Action No. 2:05-cv-5426 (DMC)(MF)

Reporter

2010 U.S. Dist. LEXIS 23667 *; 2011-1 Trade Cas. (CCH) P77,482

DICAR, INC., and ROBUD, Plaintiffs, v. STAFFORD CORRUGATED PRODUCTS, INC., and RODICUT ROTARY DIECUTTING, Defendants.

Notice: NOT FOR PUBLICATION

Prior History: *Dicar, Inc. v. Stafford Corrugated Prods., 2009 U.S. Dist. LEXIS 52245 (D.N.J., June 22, 2009)*

Core Terms

blanket, locking, patent, compressible, counterclaims, anvil, coupled, specification, Defendants', antitrust, channel, motion to dismiss, die cutter, Plaintiffs', geographic, interlock, relevant market, probability, cutting, invention, consumer, manufactured, rotary, failure to state a claim, disputed term, allegations, inequitable conduct, extrinsic evidence, monopoly power, elasticity

LexisNexis® Headnotes

Patent Law > Infringement Actions > Claim Interpretation > General Overview

Patent Law > Infringement Actions > Claim Interpretation > Scope of Claim

HN1[] **Infringement Actions, Claim Interpretation**

Claim construction is a matter of law to be determined solely by the court. Analysis of a patent infringement claim is a two-step process. A court must first construe the meaning and scope of the patent claims and then compare the claims as construed to the alleged infringing product. At this stage, the court will only engage in the first step. To construe the terms of a patent, a court should look first to the language of the claim itself. Terms within a claim are generally given their ordinary and customary meaning. The ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.

Patent Law > ... > Claims > Claim Language > General Overview

HN2[] **Claims, Claim Language**

To determine how a person of skill in the art would understand a patent's claim language, a court must first examine the intrinsic record----the patent itself, including the claims, the specification and the prosecution history. The specification acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication. Indeed, the United States Court of Appeals for the Federal Circuit has explained that the specification is usually dispositive and is the best guide to the meaning of a disputed term. It is proper for a court to rely heavily on the written description for guidance as to the meaning of the claims.

Patent Law > Infringement Actions > Claim Interpretation > Aids & Extrinsic Evidence

HN3[] **Claim Interpretation, Aids & Extrinsic Evidence**

A patent's prosecution history is a critical source of guidance, as it provides evidence of how the United States Patent and Trademark Office (PTO) and the inventor understood the patent. The prosecution history is the complete record of the proceedings before the PTO, and can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be. The United States Court of Appeals for the Federal Circuit has repeatedly emphasized the need to consult the prosecution history to exclude any interpretation that was disclaimed during prosecution. In exchanges with the PTO, a patent applicant may disavow or disclaim certain claim coverage, thereby precluding any claim interpretation that would encompass the disavowed or disclaimed subject matter.

Patent Law > Infringement Actions > Claim Interpretation > Aids & Extrinsic Evidence

HN4[] **Claim Interpretation, Aids & Extrinsic Evidence**

After consulting intrinsic evidence, a district court may also examine extrinsic evidence--i.e., all evidence external to the patent and prosecution history. The United States Court of Appeals for the Federal Circuit has authorized district courts to rely on extrinsic evidence. Such evidence consists of testimony by the inventor or by experts, dictionaries, and treatises. However, extrinsic evidence is generally less significant than the intrinsic record in determining the legally operative meaning of claim language. Extrinsic evidence, when relied upon, must be considered in view of the specification and prosecution history. Extrinsic evidence may be useful to the court, but it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of intrinsic evidence.

Patent Law > Infringement Actions > Claim Interpretation > Aids & Extrinsic Evidence

HN5[] **Claim Interpretation, Aids & Extrinsic Evidence**

To determine the proper construction of a disputed term, the court will consider the intrinsic evidence, the (1) claims/specification; and (2) the prosecution history of the patent; as well as (3) relevant extrinsic evidence, e.g., dictionaries and treatises.

Patent Law > Claims & Specifications > General Overview

HN6[] **Patent Law, Claims & Specifications**

The patent specification is the single best guide to the meaning of a disputed term, and that claims should be construed so as to be consistent with the specification.

Patent Law > Claims & Specifications > General Overview

HN7[] **Patent Law, Claims & Specifications**

35 U.S.C.S. § 112 states that the specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Patent Law > Infringement Actions > Claim Interpretation > Aids & Extrinsic Evidence

HN8[] **Claim Interpretation, Aids & Extrinsic Evidence**

With respect to the prosecution history, an alleged statement or modification must strictly demonstrate the applicant's intent to limit the claim to have such effect: the alleged disavowing actions or statements must be both clear and unmistakable. A statement that is vague or ambiguous as to whether the applicant intended to limit his or her claim will not give rise to a disclaimer of claim scope.

Patent Law > Infringement Actions > Claim Interpretation > General Overview

HN9[] **Infringement Actions, Claim Interpretation**

Terms within a patent must be read in view of the specification (i.e., the written description of the invention, its embodiments, and the drawings), of which they are a part.

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

The New Jersey Antitrust Act was patterned after the Sherman Act, and courts have previously acknowledged the significance of federal antitrust decisions in the interpretation of state ***antitrust law***. Indeed, the New Jersey Antitrust Act itself requires that it be construed in harmony with federal antitrust laws.

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

HN11[] **Motions to Dismiss, Failure to State Claim**

In deciding a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)*, all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. If, after viewing the allegations in the complaint in the light most favorable to the plaintiff, it appears beyond doubt that no relief could be granted under any set of facts which could prove consistent with the allegations, a court shall dismiss a complaint for failure to state a claim. In Bell Atlantic Corp. v. Twombly the United States Supreme Court clarified the *Rule 12(b)(6)* standard. Specifically, the court "retired" the language contained in Conley v. Gibson, that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. Instead, the Supreme Court has instructed that factual allegations must be enough to raise a right to relief above the speculative level. Ultimately, the question is whether the claimant can prove a set of facts consistent with his or her allegations that will entitle him or her to relief, not whether that person will ultimately prevail.

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

HN12[] Motions to Dismiss, Failure to State Claim

Although the *Fed. R. Civ. P. 12(b)(6)* pleading requirements are liberal, facts must be pleaded with reasonable particularity in order to permit an inference that an antitrust claim is cognizable. In an antitrust case, a district court must retain the power to insist upon some specificity in the pleading before allowing a potentially massive factual controversy to proceed. It is not proper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

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

HN13[] Actual Monopolization, Claims

A claim for monopolization/attempted monopolization under *15 U.S.C.S. § 2* of the Sherman Act requires allegations (1) that the defendant has engaged in predatory or anticompetitive conduct with; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power in the relevant market. Accordingly, to determine whether a claim of monopolization or attempted monopolization exists, an inquiry into the relevant product and geographic market is required. An antitrust plaintiff, then, must plead facts sufficient to demonstrate a viable relevant market so that the effects of the allegedly anticompetitive conduct can be measured. A plaintiff bears the burden of defining the relevant market which is comprised of a relevant product market and a relevant geographic market. Both markets must be defined in the pleadings.

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

HN14[] Market Definition, Relevant Market

With regard to a claim of monopolization, once a relevant market is properly established, a plaintiff must plead facts indicating that there is a dangerous probability that the defendants will achieve monopoly power in the relevant market. To determine whether there is a dangerous probability of achieving monopoly power, a court considers the Barr Labs., Inc. v. Abbott Labs., factors: the size of the defendant's "market share" as well as the strength of competition, probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN15[] Private Actions, Sherman Act

With regard to an antitrust claim, a plaintiff must make a threshold showing of "antitrust injury."

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN16[] **Actual Monopolization, Claims**

To prevail on its antitrust claim, Defendants must established that (1) that the defendant has engaged in predatory or anticompetitive conduct with; (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power in the relevant market.

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

HN17[] **Market Definition, Relevant Market**

With regard to an antitrust claim, to determine the bounds of a relevant geographic market, elasticity is the paramount consideration. In other words, the question is how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location. A party must plead the geographic market.

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

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

With regard to an antitrust claim, where there is no indication that a consumer would be unable to purchase a product abroad, the court will not arbitrarily limit the geographical market to the United States.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN19[] **Actual Monopolization, Claims**

With regard to an antitrust claim, a mere assertion that market access is restricted, without more, is insufficient to withstanding a motion to dismiss.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN20[] **Actual Monopolization, Claims**

With regard to an antitrust claim, dismissal is appropriate where a plaintiff has failed to provide a plausible explanation as to why a market should be limited in a particular way.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN21[] **Actual Monopolization, Claims**

To assess whether a dangerous probability that a party will achieve monopoly power exists, a court considers the Barr Labs factors: (1) the size of the defendants' market share; (2) the strength of competition; (3) probable development of the industry; (4) the barriers to entry; (5) the nature of the anticompetitive conduct; and (6) the elasticity of consumer demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN22[] **Actual Monopolization, Claims**

To prevail on its antitrust claim, a plaintiff must established that (1) that the defendant has engaged in predatory or anticompetitive conduct with; (2) a specific intent to monopolize; and (3) a dangerous probability of achieving monopoly power in the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN23[] **Actual Monopolization, Claims**

With regard to an antitrust claim, a plaintiff must show that there was some significant reduction in the number of manufacturers in the market during the relevant time period because of the plaintiffs' allegedly anti-competitive conduct, for instance, by showing that a competitor was forced out of the market or that prices fluctuated.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN24[] **Relief From Judgments, Altering & Amending Judgments**

Motions for reconsideration are governed by D.N.J., Civ. R. 7.1(i). A motion pursuant to Local Rule 7.1(i) may be granted if (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. Such relief is "an extraordinary remedy" that is to be granted very sparingly.

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

HN25[] **Inequitable Conduct, Burdens of Proof**

To state a claim of inequitable conduct, a party must allege that the patent applicant: (1) made an affirmative misrepresentation of material fact, failed to disclose material information, or submitted false information; and (2) intended to deceive the United States Patent and Trademark Office (PTO). *Fed. R. Civ. P. 9(b)* requires that a pleading set forth: (1) who made the misrepresentation to whom and the general content of the misrepresentation; and (2) either the date, place, or time of the misrepresentation or other measure of substantiation of the allegations.

Counsel: [*1] For DICAR, INC., ROBUD, Plaintiffs: JOHN G. GILFILLAN, III, LEAD ATTORNEY, CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI, STEWART & OLSTEIN, PC, ROSELAND, NJ; STEPHEN R. BUCKINGHAM, LEAD ATTORNEY, DAVID L. HARRIS, LOWENSTEIN SANDLER, PC, ROSELAND, NJ.

For STAFFORD CORRUGATED PRODUCTS, INC., Defendant: ANTHONY R. MAUTONE, JR., LEAD ATTORNEY, MAUTONE & HORAN, WEST ORANGE, NJ.

For STAFFORD CORRUGATED PRODUCTS, INC., Counter Claimant: ANTHONY R. MAUTONE, JR., LEAD ATTORNEY, MAUTONE & HORAN, WEST ORANGE, NJ.

For DICAR, INC., Counter Defendant: MICHAEL J. HAHN, LEAD ATTORNEY, DAVID L. HARRIS, STEPHEN R. BUCKINGHAM, LEAD ATTORNEY, LOWENSTEIN SANDLER, PC, ROSELAND, NJ.

For ROBUD, Counter Defendant: STEPHEN R. BUCKINGHAM, LEAD ATTORNEY, DAVID L. HARRIS, LOWENSTEIN SANDLER, PC, ROSELAND, NJ.

For DICAR, INC., ROBUD, Counter Defendants: JOHN G. GILFILLAN, III, LEAD ATTORNEY, CARELLA, BYRNE, BAIN, GILFILLAN, CECCHI, STEWART & OLSTEIN, PC, ROSELAND, NJ; STEPHEN R. BUCKINGHAM, LEAD ATTORNEY, DAVID L. HARRIS, LOWENSTEIN SANDLER, PC, ROSELAND, NJ.

Judges: Hon. Dennis M. Cavanaugh, United States District Judge.

Opinion by: Dennis M. Cavanaugh

Opinion

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon motions of Plaintiffs **[*2]** Dicar, Inc. and Robud ("Plaintiffs"). Plaintiffs move to dismiss Counts Two and Three of the Amended Counterclaims of Defendants Stafford Corrugated Products, Inc. and Rodicut Rotary Diecutting ("Defendants") for failure to state a claim upon which relief can be granted, pursuant to *FED. R. CIV. P. 12(b)(6)*. Plaintiffs also move for reconsideration of a portion of this Court's June 22, 2009 Opinion, wherein Plaintiffs' Motion to Dismiss Defendant's First Counterclaim and Second and Third Affirmative Defenses was denied. A hearing was held on March 2, 2010. Prior to addressing Plaintiffs' motions, however, the Court must construe a term contained in claim 13 of U.S. Patent No. 5,720,212 (hereinafter "the '212 patent").

After carefully considering the written and oral arguments of the parties, and based upon the following, it is the finding of this Court that Plaintiffs' Motion to dismiss Counts Two and Three of Defendants' Amended Counterclaims is **granted** (see Section III), Plaintiffs' motion for Reconsideration is **granted** (Section IV), and the disputed term of claim 13 is construed as set forth below (Section II).

I. BACKGROUND [1]

A. PROCEDURAL HISTORY

Plaintiff Dicar is in the business of manufacturing and selling products for use in the rotary die cutting industry. One such product is the die cutter blanket. Plaintiff Robud is the owner of patents related to the die cutter blanket. Robud has sold an exclusive license to Dicar to manufacture the die cutter blanket. Defendants Stafford and Rodicut are also in the rotary die cutting industry. Stafford sells and imports a die cutter blanket manufactured by Rodicut.

In 1997, Robud prosecuted a patent application that eventually became the '212 Patent entitled "Locking Arrangement For Die Cutter Blanket." On April 15, 1997, during prosecution of the '212 patent, the patent examiner rejected claim 18 of the patent application. Robud, in claim 18, described a discrete portion of the locking arrangement as a "locking member including a compressible means." On April 25, 1997, in response to the rejection, Robud amended the language of claim 18 to read: "a locking member and compressible means coupled to the locking member." After Robud's amendment, the patent examiner approved claim 18 (which later became claim 13 of the patent). On February 24, **[*4]** 1998, the United States Patent and Trademark Office ("USPTO") issued the '212 patent.

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[1] The facts set forth in this Opinion are taken from the **[*3]** parties' moving papers.

On November 16, 2005, Plaintiffs commenced an action alleging infringement of the '212 patent against Stafford. After proceeding through discovery for approximately two years, Plaintiffs moved on November 28, 2007 for summary judgment on their '212 patent infringement claim. At the Court's instruction, and after Plaintiffs withdrew their motion, both parties filed amended pleadings. Discovery continued until May 5, 2008, at which time Plaintiffs filed an Amended Complaint and added Rodicut as a Defendant. Defendants Stafford and Rodicut filed their Answer and Counterclaims on July 3, 2008.

Stafford and Rodicut's counterclaims consist of: (1) declaratory judgment of non-infringement, invalidity and unenforceability of the '212 patent; (2) violation of Section 1 of the Sherman Antitrust Act, *15 U.S.C. § 1*; (3) violation of Section 2 of the Sherman Antitrust Act, *15 U.S.C. § 2*; and (4) violation of New Jersey Antitrust laws, *N.J. Stat. §§ 56:9-1 et seq.* Stafford and Rodicut also assert the following affirmative defenses: (1) laches and estoppel; (2) invalidity and unenforceability of the '212 patent; (3) **[*5]** inequitable conduct before the USPTO; and (4) unclean hands as a result of Plaintiffs' impermissible broadening of the scope of the '212 patent.

On November 3, 2008, Dicar and Robud filed a motion to dismiss the counterclaims and strike the affirmative defenses. On June 22, 2009, the Court dismissed the antitrust counterclaims, and permitted Defendants to replead. In the same Opinion, the Court denied Plaintiffs' motion to dismiss Defendants' First Counterclaim and Second and Third Affirmative Defenses (relating to inequitable conduct). Defendants subsequently replead, and Plaintiffs moved to dismiss the claims on September 4, 2009.

B. DIE CUTTER BLANKETS

A continuous sheet of material, such as corrugated paperboard, can be cut to a desired shape and size using a machine called a rotary die cutter. Once cut, the paperboard can be folded into, for example, cardboard boxes. A typical way to cut the corrugated paperboard is by passing it between a cutting roller and an anvil (i.e., a cylindrical drum). Cutting blades, which are commonly called dies, are attached to, and rotate along with, the cutting roller. Eight to twelve die cutter blankets are wrapped around the length of the anvil. **[*6]** The spacing between the cutting roller and the anvil is set so that the cutting blades penetrate the surface of the die cutter blanket--this ensures that the blades completely cut through the corrugated paperboard. If the blanket was formed from a material that was too hard, the blades would quickly become dull since the blades are positioned to cut into the blanket. If, on the other hand, the blanket was too soft or spongy, the corrugated paperboard could move while being cut and thereby cause either incomplete or improper cutting of the paperboard. Accordingly, the die cutter blanket needs to be constructed of a deformable material that is sufficiently rigid to give adequate support to the paperboard, yet soft enough so that the cutting blades will not wear or be damaged when they impact the blanket. The material that has been favored in the industry for fabricating blankets is polyurethane. Polyurethane blankets are fabricated by pouring liquid polyurethane into a mold that is designed to produce a blanket of the desired dimensions. The polyurethane cools, shrinks, and hardens to form the blanket.

The penetration of the cutting blades into the blankets causes more wear in some areas **[*7]** than others. The life of the blankets can be extended by rotating them on the anvil so that the dies' impact is distributed to various locations of the blankets. Even with periodic rotations of the blankets, after a few rotations the blankets need to be replaced. The rotation and replacement requires stopping production. This is of particular concern because, in the rotary die cutting field, the machines normally operate at relatively high speeds, thereby generating enormous output with relatively small labor requirements. Any work stoppages or added labor can be very costly.

A problem that has received attention over the years is the mechanism that attaches (*i.e.,* locks) the blanket to the anvil. Before the invention disclosed in the '212 patent, the typical way to attach the blanket to the anvil was through the use of bolts. To accommodate the bolts, a slot (often called a channel) with threaded holes is formed in the anvil. These holes accept bolts that are inserted through the blanket. The time and labor required by bolting and unbolting the blankets caused the machine to be out of service for an hour or more.

Another method of attachment was to design the ends of the blanket to **[*8]** interlock with one another. In this design, one end of the blanket is physically held in place in the anvil's channel while attempting to wrap the other end around the anvil. The interlocking ends are then pushed together. A problem with this design is that the end of the blanket may pop out of the channel while the other end is being wrapped around the anvil.

C. THE '212 PATENT

The '212 patent discloses a unique design for a die cutter blanket. In the claimed blanket, one end contains a projection that is designed to deform/compress when it is inserted into a channel in the anvil. The compression of the projection causes enough friction so as to retain the end of the blanket within the channel, and prevent the blanket from sliding along the anvil while the machine is operating. Figure 1 of the '212 patent, which is reproduced below, discloses one embodiment of the invention. In the Figure the anvil is labeled with the number 6 and its channel is labeled with the number 8. Here, a locking mechanism, which is called a "composite structure" in the '212 patent, is formed of two components (i.e., a "member" and an "element," which are labeled with the numbers 30 and 46, respectively). Figure **[*9]** 1 of the '212 patent shows the composite structure partially inserted into the anvil's channel.

[SEE DRAWING IN ORIGINAL]

As depicted in Figure 2 of the '212 patent, shown above, although the composite structure (30 and 46) is wider than channel (8), the structure can be fully inserted in the channel. This occurs because element (46) is made from a compressible material. The compression of element (46) forces the composite structure (30 and 46) to become tightly engaged (i.e., locked) within the channel when inserted. Once the first end (22) is locked to the anvil, the second end (24) can be wrapped around the anvil.

Figure 10 of the '212 patent, which is reproduced below, discloses another embodiment of the invention. Here, the composite structure is formed from one piece of material--in fact, the entire blanket (130) is formed from one piece of material. Thus, in this embodiment, the locking mechanism that projects from one end of the blanket (136) is formed from one single piece of material.

[SEE DRAWING IN ORIGINAL]

II. CLAIM CONSTRUCTION

Prior to considering Plaintiff's motion to dismiss and motion for reconsideration, the Court will construe a disputed term in the '212 patent. The term, **[*10]** contained in claim 13 (previously claim 18 during prosecution), is: "compressible means coupled to the locking member." The claim containing the disputed term is provide in Section II.B, infra.

A. APPLICABLE LAW

HN1[] Claim construction is a matter of law to be determined solely by the court. *Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed. Cir. 2005)*, cert. denied, *546 U.S. 1170, 126 S. Ct. 1332, 164 L. Ed. 2d 49 (2006)*. Analysis of a patent infringement claim is a two-step process. *Tate Access Floors, Inc. v. Interface Architectural Resources, Inc., 279 F.3d 1357, 1365 (Fed. Cir. 2002)*. A court must first construe the meaning and scope of the patent claims, *Markman v. Westview Instruments, Inc., 52 F.3d 967, 978 (Fed. Cir. 1995)* (en banc), aff'd, *517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996)*, and then compare the claims as construed to the alleged infringing product. *Tate, 279 F.3d at 1365*. At this stage, the Court will only engage in the first step. To construe the terms of a patent, a court should look first to the language of the claim itself. *Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996)*. Terms within a claim "are generally given their ordinary and customary meaning." Id. "[T]he ordinary and customary meaning of a **[*11]** claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application." *Phillips, 415 F.3d at 1313*.

HN2[] To determine how a person of skill in the art would understand a patent's claim language, a court must first examine the intrinsic record----the patent itself, including the claims, the specification and the prosecution history. Vitronics, 90 F.3d at 1582 (citing Markman, 52 F.3d at 979). The specification "acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication." Id. Indeed, the Federal Circuit has explained that the specification is "usually . . . dispositive . . .[and is the] best guide to the meaning of a disputed term." Phillips, 415 F.3d at 1315 (quoting Vitronics, 90 F.3d at 1582)(internal quotations omitted). It is proper for a court to "rely heavily on the written description for guidance as to the meaning of the claims." Id. at 1317.

HN3[] A patent's prosecution history is also a critical source of guidance, as it "provides evidence of how the PTO and the inventor understood the patent." Id. The prosecution **[*12]** history is the complete record of the proceedings before the PTO, and "can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." Id. The Federal Circuit has repeatedly emphasized the need to consult the prosecution history to "exclude any interpretation that was disclaimed during prosecution." See Rhodia Chimie v. PPG Indus., 402 F.3d 1371, 1384 (Fed. Cir. 2005) (recognizing that, in exchanges with the PTO, a patent applicant may disavow or disclaim certain claim coverage, thereby precluding any claim interpretation that would encompass the disavowed or disclaimed subject matter).

HN4[] After consulting intrinsic evidence, a district court may also examine extrinsic evidence--i.e., "all evidence external to the patent and prosecution history." Markman, 52 F.3d at 980; Phillips, 415 F.3d at 1317-18 (stating that the Federal Circuit "ha[s] authorized district courts to rely on extrinsic evidence"). Such evidence consists of testimony by the inventor or by experts, dictionaries, and treatises. Markman, 52 F.3d at 980. **[*13]** However, extrinsic evidence is generally "less significant than the intrinsic record in determining the legally operative meaning of claim language." C.R. Bard, Inc. v. U.S. Surgical Corp., 388 F.3d 858, 862 (Fed. Cir. 2004) (quotations omitted). Extrinsic evidence, when relied upon, must be considered in view of the specification and prosecution history. Phillips, 415 F.3d at 1320. ("[E]xtrinsic evidence may be useful to the court, but it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of intrinsic evidence.")

B. THE DISPUTED TERM

The '212 patent is titled "Locking arrangement for die cutter blanket." The '212 patent contains 20 claims, dependant and independent. Claim 13 of the patent recites:

> A blanket for mounting on a cylindrical anvil means rotatable about an axis, the anvil means having a channel in a surface thereof extending substantially parallel to said axis, said channel having opposing side walls, said blanket comprising:
>
> a flexible strip having first and second ends, said flexible strip for wrapping about the anvil means such that the ends are adjacent to each other;
>
> a locking member connected to the first end for insertion **[*14]** into said channel and for locking said first end to said anvil means;
>
> **compressible means coupled to the locking member,** said locking member and compressible means for compressive interference engagement with and between said channel side walls for locking the locking member and said first end of the strip to the anvil means in compressive interference friction engagement with the channel side walls; and
>
> interlock means for locking said ends together.

The parties disagree as to the meaning of the highlighted term. Specifically, they dispute the meaning of the term "coupled."

C. ANALYSIS

Plaintiffs assert that, in accordance with claim 13, the compressible means can be "coupled" to the locking member by either: (a) fabricating the compressible means and the locking member together from the same material so that they are permanently joined to each other, **or** (b) fabricating the compressible means and the locking member separately and thereafter joining them together. Defendants assert that only the latter definition is a correct construction of the claim. That is, Defendants argue that for the compressible means to be "coupled" to the locking member, they must be fabricated separately and then **[*15]** joined together.

HN5[] To determine the proper construction of the disputed term, the Court will consider the intrinsic evidence, the (1) claims/specification and (2) the prosecution history of the '212 patent, *Vitronics, 90 F.3d at 1582* (citing *Markman, 52 F.3d at 979*), as well as (3) relevant extrinsic evidence, e.g., dictionaries and treatises. *Phillips, 415 F.3d at 1320*.

1. The Claims/Specification of the '212 Patent

As the Federal Circuit has explained, ***HN6***[] the patent specification is "the single best guide to the meaning of a disputed term," and that claims should be "construed so as to be consistent with the specification." Accordingly, the Court will begin its analysis with the specification. *Id. at 1315-16*.

The term "coupled" is used in the patent's specification to mean "attached." Based on the usage of the term throughout the patent specification, this Court finds that the term need not refer to the attachment of two separately manufactured elements. The Court finds that "coupled," here, can refer to the attachment of two elements of a single structure. Three specific instances with the patent support such a construction.

First, the specification, in one instance, explains that "interlock **[*16]** means [are] **coupled** to the first and second ends for locking the ends together." See '212 Patent, at col. 2, lines 49-50 (emphasis added). The "interlock means" are the male and female interlocking portions depicted in many of the figures contained in the patent. See, e.g., Figs. 1, 2, 10, supra. In Figure 1, for example, the interlock means are the ends of the blanket themselves----i.e., the portion of Figure 1 that is cross-hatched with heavy stripes. [2] As the Figure illustrates, the interlock means are formed from the same structural element as the blanket. Indeed, the specification describes the female interlocking member as "a molded integral homogenous one piece depending member." Id. at col. 4, lines 35-38. Despite the fact that the female interlock portion is "integral" to the blanket portion, in describing the interlock portion, the specification states that the means are "coupled" to the first and second ends of the blanket. Accordingly, the specification uses the term "couple" to mean attached--even where the two "coupled" elements are not structurally distinct units. See *Phillips, 415 F.3d at 1314* (observing that "the usage of a term in one claim can often illuminate the **[*17]** meaning of the same term in other claims").

Second, the term "coupled" is utilized in the same way in claim 17. In claim 17, the patent claims interlock means that are, again, integrally-molded to the ends of the blanket. The claim recites "interlock means **coupled** to the first and second ends for locking said ends together." Id. at col. 10, lines 46-47 (emphasis added). This confirms the Court's previous discussion regarding the term "coupled" in the '212 patent specification. The specification, then, uses the term couple to mean attached, and does not impart a requirement that the attached portions be structurally separate (i.e., manufactured separately and then attached to each other).

Third, the Court notes that the "interlock means" are depicted in the patent as part of the blanket structure (i.e., attached to the ends of the blanket). See '212 patent, at Fig. 10. If possible, the Court should construe the term "coupled" in a manner which would not exclude examples in the specification. See *Verizon Servs. Corp. v. Vonage Holdings Corp., 503 F.3d 1295, 1305 (Fed. Cir. 2007)* **[*18]** (construing terms in a manner that does not exclude examples in the specification); *Oatey Co. v. IPS Corp., 514 F.3d 1271, 1277 (Fed. Cir. 2008)* (same). Accordingly, the Figure supports the Court's construction.

In construing the term "coupled," the Court must utilize a definition that is broad enough to cover all uses of the term "coupled" within the patent. See *Acromed Corp. v. Sofamor Danek Group, Inc., 253 F.3d 1371, 1381-82 (Fed. Cir.*

[2] In Figure 1, the male and female portion of the interlocking means are labeled as (24) and (42), respectively.

2001) ("These three uses of the term require a meaning broad enough to apply to each of these [uses]."). The Court finds that the '212 patent's claims and specification indicate that the "compressible means" need not be structurally separate from the locking member in order for the two elements to be accurately described as "coupled."

2. The Prosecution History

Defendants assert that the prosecution history supports their assertion that the term "coupled" in claim 13 indicates that the "compressible means" and the locking member must be structurally distinct elements. The Court does not agree.

On September 27, 1996, claim 13 of the '212 patent (appearing in the patent application as claim 18) [3] read as follows:

> A blanket for mounting on a cylindrical **[*19]** anvil means rotatable about an axis, the anvil means having a channel in a surface thereof extending substantially parallel to said axis, said blanket comprising:
> a flexible strip having first and second ends, said flexible strip for wrapping about the anvil means such that the ends are adjacent;
> a locking member connected to the first end for insertion into said channel and for locking said first end to said anvil means;
>
> **said [locking] member including compressible means** for compressive interference engagement with said channel for locking the locking member and said first end of the strip to the anvil means in said compressive interference friction engagement with the anvil means; and
> interlock means for locking said ends together.

The claim was amended in response to the examiner's rejection. The relevant portion of the amended claim, reads:

> **compressible means coupled to the locking member,** said locking member and compressible means for compressive interference engagement with and between said channel side walls for locking the locking member and said first end of the strip to the anvil means in compressive interference friction engagement with the channel side walls; . . .

Defendants **[*20]** argue that this modification shows that the compressible means must, post-modification, be separate structures which are then attached to each other. The Court cannot agree.

The examiner made the rejection under 35 U.S.C. § 112. This provision explains ***HN7***[] that "[t]he specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." This rejection, then, was for a lack of clarity in the claim language rejection under § 112 (in contrast to a rejection under § 103, where an applicant might modify the claim language to distinguish the invention from the prior art). [4] Accordingly, the Court will not find that the applicants were intentionally limiting their claim.

Moreover, ***HN8***[] with respect to the prosecution history, the Court notes that an alleged statement or modification must strictly demonstrate the applicant's intent to limit the claim to have such effect: "[T]he alleged disavowing actions or statements … must be both clear and unmistakeable." *Omega Eng'g v. Raytek Corp., 334 F.3d 1314, 1325-26 (Fed. Cir. 2003)*. A statement that is vague or ambiguous as to whether the applicant intended to limit his

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[3] The claim herein referred to as claim 13 was previously claim 18. Prior to several modifications, the patent contained additional claims that were subsequently removed.

[4] The examiner's focus during examination of claims for compliance with the requirement for definiteness of 35 U.S.C. 112, second paragraph, is whether the claim meets the threshold requirements of clarity and precision. Manual of Patent Examining Procedure **§** 2173.02. **[*21]** In responding to an obvious rejection under 35 U.S.C. 103, an applicant would amend his claims and argue against the references that form the basis for the rejection. See, e.g., *Unique Concepts, Inc. v. Brown, 939 F.2d 1558 (Fed. Cir. 1991)*. Frequently, this would consist of narrowing the claim to distinguish over the prior art. See, e.g., id.

or her claim will not give rise to a disclaimer of claim scope. *Id. at 1324-25*. Here, the Court cannot find an unambiguous intention to limit the scope of the claim.

The prosecution history of the '212 patent's does not indicate that the "compressible means" must be structurally separate from the locking member in order to be "coupled" to each other.

3. Lexicographical Sources

As to the extrinsic evidence, Defendant **[*22]** provides a number of citations to dictionaries and scientific treatises. Regarding the verb "couple," the sources generally indicate that the word means to connect, link, join, or associate two things. Here, the "locking member" and the "compressible means" can be considered connected, linked, joined or associated, regardless of whether they are two separate structures or are one physical structure (comprised of two elements). See *Cannon Rubber Ltd. v. First Years, Inc., 163 Fed. Appx. 870, 877 (Fed. Cir. 2005)* ("[T]he court's construction of those limitations requires that both be embodied by the same single structure, . . . [; t]ellingly, TFY does not cite any case law prohibiting a claim from reciting two limitations embodied by the same structural component"); *Intellectual Property Development, Inc. v. UAColumbia Cablevision, 336 F.3d 1308, 1320 n. 9 (Fed. Cir. 2003)* (noting that two limitations hypothetically can read on the same structure) (citing *In re Kelley, 305 F.2d 909, 915-16, 49 C.C.P.A. 1359, 1962 Dec. Comm'r Pat. 681 (C.C.P.A. 1962))*.

The extrinsic evidence is, at best, ambiguous as to whether the verb "couple" requires a connection of two structurally distinct elements.

* * * *

Having considered the intrinsic and **[*23]** extrinsic evidence, the Court finds that the '212 patent uses the term "coupled" to mean the attachment of two elements, that (1) are separately manufactured and then attached **or** (2) are both part of a single structural unit. [5] Accordingly, claim 13 of the '212 patent includes within its scope locking members and compressible means that are formed together at the same time from the same material, as well as locking members and compressible means that are formed separately and later mechanically/physically joined together

III. PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' ANTITRUST COUNTERCLAIMS FOR FAILURE TO STATE A CLAIM

As noted above, Plaintiffs brought this suit alleging infringement of the '212 patent. In response, Defendants **[*24]** asserted a number of counterclaims, including: (1) declaratory judgment of invalidity of the '212 patent based upon inequitable conduct before the U.S. Patent and Trademark Office ("PTO"); (2) violation of Section 2 of the Sherman Antitrust Act, *15 U.S.C. § 2*; and (3) violation of New Jersey Antitrust laws, *N.J. Stat. §§ 56:9-1, et seq.* [6]

Plaintiffs move to dismiss Defendants' Second and Third counterclaims (i.e., the antitrust counterclaims). Plaintiffs previously moved to dismiss counterclaims two and three for failure to state a claim. On June 22, 2009, the Court dismissed Defendants' counterclaims pursuant to *FED. R. CIV. P. 12(b)(6)*. Defendants, however, were permitted to

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[5] As discussed above, the Court found the specification to be the most instructive source in defining the term. See *Phillips, 415 F.3d at 1314-16* (explaining that***HN9***[ ] terms within a patent "must be read in view of the specification [(i.e., the written description of the invention, its embodiments, and the drawings)], of which they are a part."). As such, the specification and the other claims in the patent were relied upon to arrive as the construction set forth above.

[6] Plaintiff moved to dismiss Defendants' first Counterclaim, and this motion was denied on June 22, 2009. Plaintiff requests reconsideration of this motion, which the Court will address in Section IV, infra.

replead. The Court will now consider Plaintiffs' motion to dismiss Defendants' antitrust counterclaims in light of the Amended Complaint. [7]

A. Standard of Review

HN11[] In deciding a motion to dismiss pursuant to *FED. R. CIV. P. 12(b)(6)*, all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. See *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*; *Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir.1998)*. If, after viewing the allegations in the complaint in the light most favorable to the plaintiff, it appears beyond doubt that no relief could be granted "under any set of facts which could prove consistent with the allegations," a court shall dismiss a complaint for failure to state a claim. *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. In Bell Atlantic Corp. v. Twombly the Supreme Court clarified the *Rule 12(b)(6)* standard. *550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)*. **[*26]** Specifically, the Court "retired" the language contained in *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief." *Twombly, at 1968* (citing *Conley, 355 U.S. at 45-46*). Instead, the Supreme Court instructed that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id. at 1965*. Ultimately, the question is whether the claimant can prove a set of facts consistent with his or her allegations that will entitle him or her to relief, not whether that person will ultimately prevail. *Semerenko v. Cendant Corp., 223 F.3d 165, 173 (3d Cir. 2000)*.

HN12[] Although the 12(b)(6) pleading requirements are liberal, facts must be pleaded with reasonable particularity in order to permit an inference that an antitrust claim is cognizable. See *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (in an antitrust case, "a district court must retain the power to insist upon some specificity in the pleading before allowing **[*27]** a potentially massive factual controversy to proceed"); Commonwealth of Pennsylvania ex. *Rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 179 (3d Cir. 1988)* ("'It is not … proper to assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.'") (quoting *Associated General, 459 U.S. at 526 n.11*).

B. Applicable Law

HN13[] A claim for monopolization/attempted monopolization under Section 2 of the Sherman Act requires allegations "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power" in the relevant market. *Spectrum Sports v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. Accordingly, to determine whether a claim of monopolization or attempted monopolization exists, an inquiry "into the relevant product and geographic market" is required. *Id. at 459*; see *Schuykill Energy Resources, 113 F.3d at 415*; *Ideal Dairy Farms, 90 F.3d at 750*. An antitrust plaintiff, then, must plead "facts sufficient to demonstrate a viable relevant market." *Syncsort Inc. v. Sequential Software, Inc., 50 F.Supp.2d 318, 327 (D.N.J. 1999)* **[*28]** (citations omitted), so that the effects of the allegedly anticompetitive conduct can be measured. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 29, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*; *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 994 (11th Cir. 1993)*. A plaintiff bears the burden of defining the relevant market, see *Brokerage Concepts, 140 F.3d at 513*; *Queen City Pizza, 124 F.3d at 436*; *Pastore, 24 F.3d at 512*; *Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715,*

[7] The Court will consider Plaintiffs' motion to dismiss Defendants' federal and state antitrust claims together. ***HN10***[] The New Jersey Antitrust Act was "patterned after the Sherman **[*25]** Act, and [courts] have previously acknowledged the significance of federal antitrust decisions in the interpretation of our State ***antitrust law***." *Monmouth Chrysler-Plymouth, Inc. v. Chrysler Corp., 102 N.J. 485, 494, 509 A.2d 161 (1986)*; *Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 50-51 (3d Cir. 2007)*. Indeed, the Act itself requires that it be construed in harmony with federal antitrust laws. See *N.J.S.A. § 56:9-18*.

726 (3d Cir.), cert. denied, 505 U.S. 1221, 112 S. Ct. 3034, 120 L. Ed. 2d 903 (1992), which is comprised of a relevant product market and a relevant geographic market. See Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). Both markets must be defined in the pleadings. Syncsort, 50 F.Supp.2d at 327

HN14[] Once a relevant market is properly established, a plaintiff must plead facts indicating that there is a dangerous probability that the defendants will achieve monopoly power in the relevant market. Spectrum, 506 U.S. at 456. To determine whether there is a dangerous probability of achieving monopoly power, a court considers the Barr Labs factors: the size of the defendant's "market share" as well as "the strength of competition, probable development **[*29]** of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand." Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 112 (3d Cir. 1992).

HN15[] In addition to the elements of an antitrust claim discussed above, a plaintiff must make a threshold showing of "antitrust injury." Trans World Techs., Inc. v. Raytheon Co., 2007 U.S. Dist. LEXIS 82118, at *13-15 (D.N.J. November 1, 2007); Tunis Bros., 952 F.2d at 728 ("[T]he plaintiffs must have demonstrated some harm to the competitive landscape from Ford Motor's termination of the Tunis Brothers franchise.").

C. Analysis

Plaintiffs assert that Defendants' antitrust counterclaims must be dismissed for failure to state a claim. Specifically, Plaintiffs assert that Defendants failed to adequately plead (1) the definition of the relevant geographic market, (2) the basis for inferring that there is a dangerous probability of achieving monopoly power in said market, and (3) antitrust injury. Defendants respond that their Amended Complaint now satisfies the pleading requirement of 12(b)(6).

For the reasons stated below, Plaintiffs' motion to dismiss Defendants' antitrust counterclaims is granted. [8]

1. Definition of a Relevant Geographic Market

HN16[] To prevail on its antitrust claim, Defendants must established that "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power" in the relevant market. Spectrum Sports, 506 U.S. at 456. Defendants have defined the relevant product market as covering "die cutter blankets for rotary die-cutting machines." Amended Counterclaim ("Am. Counterclaim") P 13.

Defendants assert that they have properly plead the relevant market, as they must. With respect to the relevant product market, they contend that "[t]here are no reasonably interchangeable products for the die cutter blankets, [and t]herefore, there is no cross-elasticity of demand as there is **[*31]** no other product that a purchaser can buy if the price of the rotary die cutter blanket increases." Id. With respect to the geographic market, Defendants explain that "[t]he geographic market is the United States, as that is the geographic scope of the alleged patent protection asserted by Plaintiffs Robud and Dicar." Id.

HN17[] To determine the bounds of a relevant geographic market, elasticity is the paramount consideration. In other words, the question is "how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location." Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006). Defendants must plead the geographic market. Cf. Queen City Pizza,

[8] The **[*30]** Court has determined that Defendants failed to adequately plead (1) the definition of the relevant geographic market, and (2) the basis for inferring that there is a dangerous probability of achieving monopoly power in said market. See Sections III.C(1)-(2), infra. Accordingly, the Court need not assess Plaintiffs' argument regarding Defendants' alleged failure to plead antitrust injury.

Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997) (requiring dismissal where a plaintiff fails to plead cross elasticity of demand). Here, Defendant has failed to do so.

Defendants assert that the relevant geographic market is the United States. They argue that the market is restricted to the U.S. **[*32]** because that is the area wherein Plaintiffs can assert patent protection over their die cutter blanket product. This market definition focuses impermissibly on the specific geographic market in which **Plaintiffs** (i.e., manufactures) conduct their business [9] --as opposed to the geographic market that **consumers** would be willing to access to purchase die cutter blankets. See *Borough of Lansdale v. Philadelphia Elec. Co., 692 F.2d 307, 311-13 (3d Cir. 1982)* (rejecting plaintiff's argument that, as a matter of law, the geographic market was defendant utility's service area to the exclusion of nearby utility companies); *Tunis Bros. Co. v. Ford Motor Co., Inc., 952 F.2d 715, 726 (3d Cir. 1991)* ("Consequently, the geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where his customers would look to buy such a product."). Defendants have not focused on the elasticity of demand (i.e., consumer behavior), and therefore have not adequately plead a geographic market.

Moreover, the Court is unaware of any circumstances that limit consumers to the U.S. market. As both parties acknowledge, "numerous other entities compete in the international market." Am. Counterclaim P 25; see Brief in Support of Plaintiffs' Motion to Dismiss ("Pl. Br.") at 10. ***HN18***[] Where, as here, there is no indication that a consumer would be unable to purchase a product abroad, the Court will not arbitrarily limit the geographical market to the U.S. See *E&E Co., Ltd. v. Kam Hing Enterprises, Inc., 2008 U.S. Dist. LEXIS 65323, *8 (N.D. Cal. August 25, 2008)* (dismissing a plaintiff's antitrust claims because the "plaintiff fail[ed] to indicate why similar bed coverings originating from other countries would not be reasonably interchangeable by consumers for the same purposes"). Defendants have asserted that there are barriers to entry into the U.S. market. However, the Court has not been apprised of any facts indicating that it would be cost-prohibitive **[*34]** to have goods sold/shipped to the U.S. In fact, it appears that a foreign distributor (Max Dura) has in fact established a small presence in the U.S. market. [10] In any case,***HN19***[] a mere assertion that market access is restricted, without more, is insufficient to withstanding a motion to dismiss. See *St. Clair v. Citizens Fin. Group, 340 Fed. Appx. 62, 2009 U.S. App. LEXIS 16465, *8-9 (3d Cir. July 23, 2009)* (finding that plaintiff's allegation that the defendants "effectively barricaded entry into the market," was too conclusory to be sufficient under Twombly).

For the reasons stated, the Court cannot find that Defendants' pleadings sufficiently delineate **[*35]** the geographic market. See *Bansavich v. McLane Co., 2008 U.S. Dist. LEXIS 89071, at *7 (D. Conn. Oct. 31, 2008)* ("Thus, ***HN20***[] dismissal is appropriate . . . [where] a plaintiff has failed to provide a plausible explanation as to why a market should be limited in a particular way."); *Brown Shoe Co. v. United States, 370 U.S. at 324*; *Syncsort, 50 F.Supp.2d at 327*. As such, Plaintiffs' motion to dismiss Defendants' Sherman Act counterclaim must be dismissed for failure to state a claim.

2. A Dangerous Probability of Achieving Monopoly Power in the Relevant Market

Even if the Court found that the relevant geographical market for die cutter blankets is the United States, as Defendants' contend, Defendants must also plead facts suggesting that there is a dangerous probability that Plaintiffs will achieve monopoly power in said market. [11] ***HN21***[] To assess whether such a probability exists, a

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[9] For example, Defendants assert that their "designation of the relevant geographic market as the United States" is proper because "the unfair actions **[*33]** taken by Dicar, and the impact of those actions on competitors, stem from Dicar's unlawful and bad-faith assertion of two United States Patents." See Defendants' Brief in Opposition to Plaintiffs' Motion to Dismiss ("Def. Opp."), at 9.

[10] The fact that Max Dura has not gained a significant share of the market does not alone demonstrate that there are barriers to entry--the fact that it has a U.S. presence indicates the opposite. See *Korkala v. Allpro Imaging, Inc., 2009 U.S. Dist. LEXIS 70727, *16-17 (D.N.J. August 12, 2009)* (unpublished) ("Korkala has not set forth facts sufficient to demonstrate that the Scanx System is unique. In fact, Korkala has inconsistently provided that Logos Imaging, LLC, FUJI NDT…are all companies that manufacture products in 'competition' with the Scanx System.")

court considers the Barr Labs factors: (1) the size of the defendants' market share (2) the strength of competition, (3) probable development of the industry, (4) the barriers to entry, (5) the nature of the anticompetitive conduct, and (6) the elasticity of consumer demand. See *978 F.2d at 112*.

Defendants plead facts as to the first factor. They emphasize, significantly, that Plaintiffs' control a 70% share of the relevant market. Beyond this allegation, however, Defendants' pleadings are conclusory. As this Court explained in its previous dismissal of Defendants' antitrust counterclaims, market share alone does not establish a threat of monopoly.

With respect to the second and third factors----strength of competition and probable development of the market--Defendants assert that "Dicar has substantial market power in the relevant market, including the power to exclude competitors, control pricing, and limit output." Am. Counterclaim P 15. [12] They contend that "[t]he relevant [U.S.] market is highly concentrated[; as u]pon information **[*37]** and belief, three companies--Dicar, Inc., Day Incorporated, and Custom Urethane Elastomers--account for more than 90% of the commerce in the relevant market, while Stafford accounts for less than 10% of the commerce in the relevant market." Id. P 17. [13] Day, Inc. and Custom Urethane Elastomers each control between 15% and 20% of the U.S. market for rotary die-cutter blankets. Id. P 21. These facts alone, however, do not indicate that there is a lack of competition in the U.S. market. Moreover, these market share figures do not account for the numerous other entities that compete in the international market, such as Astan and Max Dura. Id. P 25. Although market share is significant, as the Third Circuit explained, ***HN23***[] a plaintiff must show "that there was [some] significant reduction in the number of manufacturers in the market during the relevant time period because of [plaintiffs'] allegedly anti-competitive conduct," for instance, by showing that a competitor was forced out of the market or that prices fluctuated. See *Barr Labs., 978 F.2d at 114*; *U.S. v. Empire Gas Corp., 537 F.2d 296, 305 (8th Cir. 1976)* (finding no dangerous probability of success in absence of evidence that competitors **[*38]** decided not to enter or leave market because of defendant's actions). [14]

With respect to barriers to market entry, the fourth Bars Labs factor, as noted above, Defendants have not made any specific assertions that could suffice to demonstrate that there are barriers to entry into the U.S. market. The Court is particularly reluctant to accept the pleading as sufficient where, as here, it appears that a foreign **[*39]** distributor (Max Dura) has in fact established a small presence in the U.S. market. As such, the Court finds that Defendants' assertions are not enough to show that Plaintiffs "effectively barricaded entry into the market." See *St. Clair v. Citizens Fin. Group, 340 Fed. Appx. 62, 2009 U.S. App. LEXIS 16465, *8-9 (3d Cir. July 23, 2009)*.

As to the fifth factor, the nature of the anticompetitive conduct, Defendants contend that Plaintiffs are asserting their patent rights in bad faith. The only assertion regarding such conduct is that Robud and Dicar have an exclusive license arrangement with each other, and that there are previous and present court actions regarding Robud's patents. This Court previously determined that these statements were insufficient to plead the "barrier to entry" Barr Lab factor. See *Dicar, 2009 U.S. Dist. LEXIS 52245, at *22-23* (citing *Ethyl Gas Corp. v. U.S., 309 U.S. 436, 456, 60 S. Ct. 618, 84 L. Ed. 852, 1940 Dec. Comm'r Pat. 758 (1940)*).

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[11] ***HN22***[] To prevail on its antitrust **[*36]** claim, Defendants must established that "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power" in the relevant market. *Spectrum Sports, 506 U.S. at 456*; see *Dicar, Inc. v. Stafford Corrugated Prods., 2009 U.S. Dist. LEXIS 52245, at *21-22 (D.N.J. June 22, 2009)*. The dispute, here, is with respect to the third element. See id.

[12] Plaintiffs assert that "Dicar's claimed exclusive licenses under Robud's patents enhance Dicar's market power while also raising barriers to entry in the relevant market." Id. P 16.

[13] Robud and Dicar acknowledge that Dicar controls more than 50% of the market for die-cutter blankets. Id. P 19.

[14] The only allegation indicating that any market player was restricted or removed from the market is Defendants' contention that "[upon] information and belief, when Alan Kirkpatrick, Jr. developed a diecutter blanket to compete with Dicar, Dicar initiated a lawsuit against Mr. Kirkpatrick[; and o]n information and belief, although Mr. Kirkpatrick prevailed in that lawsuit, the resulting litigation expenses made it impossible for him to continue to develop and market his blanket." Id. P 24.

Lastly, as to the elasticity of consumer demand, Defendants assert that "there is practically no elasticity of consumer demand, as there is no substitute for the diecutter blankets." This allegation is conclusory, and in any case, the pleadings themselves indicate that there are other sources for **[*40]** the die cutter blankets. See Am. Counterclaim P 12 (noting that Day, Inc. and Custom Urethane Elastomers each control between 15% and 20% of the U.S. market for rotary die-cutter blankets.).

In summary, Defendants have not adequately alleged facts suggesting that there is a dangerous probability that Plaintiffs will achieve a monopoly. Therefore, Plaintiffs' motion to dismiss Defendants' antitrust counterclaims is granted.

IV. PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S DISMISSAL OF THEIR MOTION TO DISMISS DEFENDANTS' SECOND AND THIRD AFFIRMATIVE DEFENSES AND FIRST COUNTERCLAIM

Plaintiffs previously moved to dismiss Defendants' First Counterclaim and Second and Third Affirmative Defenses (all based upon inequitable conduct), for failure to state a claim. This motion was denied on June 22, 2009. See *Dicar, 2009 U.S. Dist. LEXIS 52245, at *21-22*, and Plaintiff requests reconsideration of this decision.

A. STANDARD OF REVIEW

HN24[] Motions for reconsideration are governed by *L. Civ. R. 7.1(i)*. See *U.S. v. Compaction Sys. Corp., 88 F. Supp. 2d 339, 345 (D.N.J. 1999)*. A motion pursuant to *Local Rule 7.1(i)* may be granted if (1) an intervening change in the controlling law has occurred; (2) **[*41]** evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. *Database Am., Inc. v. Bellsouth Adver. & Pub. Corp., 825 F. Supp. 1216, 1220 (D.N.J. 1993)*. Such relief is "an extraordinary remedy" that is to be granted "very sparingly." See *NL Indus. Inc. v. Commercial Union Ins. Co., 935 F. Supp. 513, 516 (D.N.J. 1996)*.

B. APPLICABLE LAW

HN25[] To state a claim of inequitable conduct, a party must allege that the patent applicant: (1) made an affirmative misrepresentation of material fact, failed to disclose material information, or submitted false information and (2) intended to deceive the PTO. *Cargill, Inc. v. Canbra Foods, Ltd., 476 F.3d 1359, 1363 (Fed. Cir. 2007)*. *Rule 9(b)* requires that a pleading set forth: (1) who made the misrepresentation to whom and the general content of the misrepresentation and (2) either the date, place, or time of the misrepresentation or other measure of substantiation of the allegations. *Lum v. Bank of America, 361 F.3d 217, 223-24 (3d Cir. 2004)*.

C. ANALYSIS

Defendants assert that '212 patent is void or unenforceable by reason of Robud's inequitable conduct before the PTO. Defendants **[*42]** allegations consist of the following:

> Robud, through its attorneys, employees, and agents, intentionally misrepresented the invention to the examiner in that on April 25, 1997, Robud amended claim 18 of the application to call for a separate locking member and compressible means for its invention. Robud's amendment was made in response to the examiner's April 15, 1997 rejection of that claim because the claim previously called for a locking member "including" a compressible means. **After Robud amended the claim to call for a separate locking member and compressible means, the examiner allowed the claim. Now, after the patent has issued, Robud . . . states that the locking member and compressible means are not necessarily separate.**

Am. Complaint, at 5 (emphasis added). Defendants, then, assert that statements made in connection with Plaintiffs' claim construction argument illustrate that Robud (the patent applicant) made false statements to the PTO.

Specifically, they argue that Robud initially indicated to the examiner that the "locking member" and "compressible means" were separate, and now are asserting that the two components need not be separate.

The Court must reject Defendants' contentions **[*43]** for two reasons. First, the Court disagrees with Defendants' characterization of the applicants' statements before the PTO. As discussed above, the applicants did not assert that the "locking member" and "compressible means" must be separate components----just that they could be. See Section II, supra (finding that the "locking member" and "compressible means" could be **either** separate elements that are part of the same structure **or** two separate structures attached after individual manufacture). [15] Accordingly, the positions taken before the PTO and this Court are not necessarily inconsistent.

Second, and more importantly, even if the Court were to find that the two statements are inconsistent, Defendants' claim must still fail. Defendants have not alleged that the patent applicant breached its duty of candor to the PTO "by failing to disclose material information, or submitting false material information." *Kingsdown Medical Consultants, Ltd. v. Hollister, Inc., 863 F.2d 867, 872 (Fed. Cir. 1988)*. Instead, the only allegation of misconduct is premised entirely on attorney arguments----i.e., arguments regarding the meaning of proposed patent claims during prosecution, and arguments relating to claim construction after the patent was granted. Such statements, even if inconsistent, do not constitute inequitable conduct, as it is "clear that an applicant is free to advocate its interpretation of its claims and the teachings of prior art." *Innogenetics N.V. v. Abbott Laboratories, 512 F.3d 1363, 1379 (Fed. Cir. 2008)*; see *Rothman v. Target Corp., 556 F.3d 1310, 1329 (Fed. Cir. 2009)*.

For **[*45]** the reasons discussed, Plaintiffs' motion for reconsideration is granted.

V. CONCLUSION

For the reasons stated, Plaintiffs' motion to dismiss Counts Two and Three of Defendants' Amended Counterclaims is **granted;** Plaintiffs' motion for reconsideration is **granted;** and the disputed term of claim 13 is construed as set forth above.

/S/ Dennis M. Cavanaugh

Dennis M. Cavanaugh, U.S.D.J.

Date: March 12, 2010

End of Document

[15] The Court will not repeat the analysis above, however, to summarize: the patent applicants initially claimed a locking member wherein "said [locking] member **includ[ed]** compressible means for compressive interference engagement with said channel." After rejection for lack of clarity, the applicants claimed "compressible means **coupled** to the locking member." Defendants assert that this was a statement by the applicants that the locking member/compressible means were initially one unit, and then the applicant modified their claims to indicate that the two elements are separate structural units. **[*44]** The Court disagreed and determined that under these circumstances, the locking member and compressible means do not have to be two structurally distinct units to be "coupled" to each other. See Section II, supra

Kearse v. Kaplan, Inc.

United States District Court for the Southern District of New York

March 12, 2010, Decided; March 12, 2010, Filed

09 Civ. 4176 (LAK)

Reporter

692 F. Supp. 2d 398 *; 2010 U.S. Dist. LEXIS 23201 **; 2010-1 Trade Cas. (CCH) P76,948

COREY KEARSE, Plaintiff v. KAPLAN, INC., Defendant.

Core Terms

preparation, fraudulent concealment, four year, courses, allegations

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

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

HN1[] **Sherman Act, Defenses**

The statute of limitations governing private damage actions under the federal antitrust laws is four years. *15 U.S.C.S. § 15(b)*. A person injured by an antitrust violation therefore must sue within four years after the date of the injury.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN2[] **Heightened Pleading Requirements, Fraud Claims**

Fraudulent concealment claims are averments of fraud and must be alleged with the particularity required by *Fed. R. Civ. P. 9(b)*. Specifically, plaintiff does not get the benefit of a fraudulent concealment toll absent particularized allegations that: (1) a defendant concealed the challenged conduct; (2) plaintiff was ignorant of the conduct until less than four years prior to the commencement of this action; and (3) plaintiff exercised due diligence in discovering the challenged conduct. Where fraudulent concealment is established, the statute of limitations does not begin to run until the plaintiff knew, or in the exercise of reasonable diligence should have known, of the existence of his cause of action.

Counsel: **[**1]** For Plaintiff: Gary B. Friedman, Tracey Kitzman, FRIEDMAN LAW GROUP LLP; Richard Rouco, Sara C. Hacker, Joe R. Whatley, WHATLEY DRAKE & KALLAS, LLC.

For Defendant: Gordon Schnell, David A. Scupp, CONSTANTINE CANNON LLP.

Judges: Lewis A. Kaplan, United States District Judge.

Opinion by: Lewis A. Kaplan

Opinion

[*399] MEMORANDUM OPINION

LEWIS A. KAPLAN, *District Judge*.

Plaintiff took a Law School Aptitude Test ("LSAT") preparation course offered by defendant Kaplan, Inc. ("Kaplan"), the well known test preparation company, in August 2003. He brought this action in 2009. He here claims that the price he paid for the LSAT prep course six years before was greater than otherwise would have been the case as a result of an alleged 1996 market allocation agreement between Kaplan and BAR/BRI, in violation of *Section 1* of the Sherman Act, pursuant to which BAR/BRI is said to have agreed to withdraw from the LSAT prep course business. Kaplan moves to dismiss the complaint on the grounds, among others, that it is barred by the statute of limitations and by a release in a prior class action settlement.

Facts

As this is a motion to dismiss, the Court assumes the truth of the well pleaded factual allegations of the complaint and, in certain **[**2]** instances specifically noted below, facts of which it takes judicial notice and materials effectively incorporated in the complaint by reference.

The Alleged Antitrust Violation

In or about 1995, West Publishing Corporation ("West"), through a division or subsidiary called West Bar, competed with the well known BAR/BRI in offering bar review courses to candidates for admission to the bar. [1] BAR/BRI in addition offered other examination preparation courses, including courses to prepare aspiring law students for the LSAT. [2]

In 1996, Thomson Corporation, now Thomson Retuers, acquired West, decided to sell West Bar and negotiated a letter of intent to sell West Bar's assets to defendant Kaplan. [3] At that point, BAR/BRI allegedly learned of the impending sale of West Bar and contacted Kaplan. This allegedly resulted in an agreement pursuant **[*400]** to which BAR/BRI agreed to cease offering LSAT preparation courses. Kaplan, for its part, allegedly agreed to withdraw from its impending acquisition of West Bar and to keep out of the bar examination preparation course business. [4] According to plaintiff, this eliminated BAR/BRI as a competitor in and allowed Kaplan to dominate the

[1] Cpt P 2.

[2] *Id*.

[3] *Id. P 3*.

[4] *Id. P 4*.

LSAT preparation **[**3]** business while cementing BAR/BRI's alleged dominance over the bar examination preparation business. [5]

Plaintiff's Alleged Grievance

Plaintiff claims that he purchased an LSAT preparation course from Kaplan during the time period covered by the complaint and that the price he paid was negatively affected by the lack of competition from BAR/BRI. [6] While the complaint does not disclose the date of his purchase, the Court takes judicial notice of the fact that it took place on August 12, 2003. [7]

The Rodriguez Action

On April 29, 2005, Ryan Rodriguez sued defendant, BAR/BRI and West under the antitrust laws in the Central District of California on behalf of himself and other purchasers of BAR/BRI bar review courses. The complaint and amended complaint in that action, in very similar language, alleged precisely the market division scheme between BAR/BRI and Kaplan that is alleged in this complaint -- the alleged agreement to eliminate Kaplan as a competitor **[**4]** in the bar examination course business and to eliminate BAR/BRI as a competitor in the LSAT examination course business. [8]

In 2006, the *Rodriguez* court certified a plaintiff class comprised of all persons who had purchased a bar review course from BAR/BRI. [9] In February 2007, the parties agreed upon a settlement of *Rodriguez*. [10] Under its terms, West and Kaplan agreed to pay the plaintiff class $ 49 million and terminate their co-marketing relationship. [11] In return, plaintiffs released West and Kaplan from all claims "that have been asserted *or could have been asserted* . . . for any conduct alleged in the [*Rodriguez*] complaint." [12] The district court approved the settlement on April 23, 2009, and the Ninth Circuit subsequently affirmed. [13]

Discussion

HN1[] The statute of limitations governing private damage actions under the federal antitrust laws is four years. [14] A person **[**5]** injured by an antitrust violation therefore must sue within four years after the date of the injury. [15]

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[5] *Id*. PP 5-6.

[6] *See id*. PP 10, 53.

[7] Defendant furnished a document so indicating and requested that the Court judicially notice that fact. Def. Mem. 6 n.6. Plaintiff neither disputed the date nor objected to its judicial notice.

[8] Scupp Decl. Ex. C *(Rodriguez* complaint) PP 4, 34-35, 58-63; Ex. D (*Rodriguez* amended complaint) PP 4, 37-38, 64-69.

[9] *Id*. Ex. F, at 3.

[10] *Id*. at 4; Ex. G (settlement agreement).

[11] *Id*. Ex. F, at 7-8; Ex. G PP 27-28.

[12] *Id*. Ex. F, at 7-8; Ex. G P 56 (emphasis added).

[13] *Rodriguez v. West Publ'g Corp., 563 F.3d 948 (9th Cir. 2009)*.

[14] *15 U.S.C. § 15(b)*.

Here, plaintiff allegedly was injured on August 12, 2003, the date of his Kaplan LSAT purchase for which he claims to **[*401]** have paid an inflated price. [16] He therefore had four years from that date within which to bring suit. His April 28, 2009 filing was one year and eight months too late.

Plaintiff seeks to avoid the bar of the statute by alleging fraudulent concealment which, if sufficiently alleged, might toll the running of the four year period. ***HN2***[] Fraudulent concealment claims, however, are averments of fraud and must be alleged with the particularity required by *Federal Rule of Civil Procedure 9(b)*. [17] Specifically, plaintiff does not get the benefit of a fraudulent concealment toll absent particularized allegations that (1) Kaplan concealed the challenged conduct, (2) plaintiff was ignorant of the conduct until less than four years prior to the commencement of this action, and (3) plaintiff exercised due diligence in discovering the challenged conduct. "Where fraudulent **[**6]** concealment is established, the statute of limitations does not begin to run until the plaintiff knew, or in the exercise of reasonable diligence should have known, of the existence of his cause of action." [18]

The fraudulent concealment allegations in this complaint are limited to the following:

> "37. Throughout the relevant time, the Defendant and its co-conspirators have affirmatively and wrongfully concealed their unlawful conduct from Plaintiff and the Class.
>
> "38. Plaintiff and members of the class had no actual or constructive knowledge until April 29, 2005 of the illegal contract, combination or conspiracy that is the subject of this Complaint or of any facts that might have led to the discovery thereof in the exercise of reasonable diligence.
>
> "39. Because Defendant's conspiracy was actively **[**7]** concealed and kept secret by Defendant and its co-conspirators, Plaintiff and Class members were unaware of Defendant's unlawful conduct that is the subject of this complaint and did not know that they were paying artificially high prices for LSAT test preparation services."

It is apparent almost at inspection that these allegations do not satisfy *Rule 9(b)*.

Paragraph 37 is entirely conclusory. Moreover, it is in considerable tension with paragraph 30 of the complaint, which alleges that Kaplan and BAR/BRI "publicly announced" their joint marketing relationship within weeks of their accession to the Co-Marketing Agreement, with Kaplan's open promotion of BAR/BRI's bar review courses, and with BAR/BRI's conspicuous absence from the LSAT prep course business.

Paragraphs 38 and 39 likewise are entirely conclusory. And they too are in tension with the known facts. The *Rodriguez* action was filed on April 29, 2005. Common sense suggests that the complaint in that action was not born, fully grown and fully armed, from the brow of Zeus in an instant on that day. Rather, its filing on April 29, 2005 approaches conclusive proof that the plaintiffs in that case and their attorneys knew of the alleged **[**8]** market division agreement that is the common root of *Rodriguez* and this case at least as early as April 27, 2005 and thus more than four years before the filing of **[*402]** this action on April 28, 2009. And if the *Rodriguez* plaintiffs and counsel knew of it by April 27, 2005, plaintiff and his counsel in this case quite likely also could have known of it. At any rate, their burden under *Rule 9(b)* would seem to include a showing that they could not have known it by then had they exercise due diligence.

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[15] *See e.g., Zenith Radio Corp. v. Hazeltine Res., Inc., 401 U.S. 321, 338-39, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

[16] *See* Cpt P 53.

[17] *See e.g., Four Seasons Solar Prods. Corp. v. Southwall Techs., Inc., 100 Fed. Appx. 12 (2d Cir. 2004)*; *Caputo v. Pfizer, Inc., 267 F.3d 181, 191 (2d Cir. 2001)*; ***Breiner v. Stone, No. 96-9091, 122 F.3d 1055*** (table), [published in full-text format at *1997 U.S. App. LEXIS 19236, 1997 WL 416942, at *1 (2d Cir. July 25, 1997); Armstrong v. McAlpin, 699 F.2d 79, 88-90 (2d Cir. 1983)*.

[18] ABA SECTION OF ***ANTITRUST LAW***, ***ANTITRUST LAW*** DEVELOPMENTS 866 (6th ed. 2007).

Conclusion

For the foregoing reasons, defendant's motion to dismiss the complaint on the ground that it is barred by the statute of limitations is granted. As I cannot exclude the possibility that plaintiff could sufficiently allege fraudulent concealment, the dismissal is without prejudice to the filing, on or before March 25, 2010, of an amended complaint amending only the fraudulent concealment allegations.

SO ORDERED.

Dated: March 12, 2010

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge

Korea Kumho Petrochemical Co. v. Flexsys Am. LP

United States Court of Appeals for the Ninth Circuit

February 10, 2010, Argued and Submitted, San Francisco, California; March 15, 2010, Filed

No. 09-15003

Reporter

370 Fed. Appx. 875 *; 2010 U.S. App. LEXIS 5347 **; 2010-1 Trade Cas. (CCH) P76,930

KOREA KUMHO PETROCHEMICAL CO., LTD., Plaintiff - Appellant, v. FLEXSYS AMERICA LP; FLEXSYS N.V., Defendants - Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. 3:07-cv-01057-MMC. Maxine M. Chesney, Senior District Judge, Presiding.

Korea Kumho Petrochemical v. Flexsys Am. LP, 2008 U.S. Dist. LEXIS 68559 (N.D. Cal., Mar. 11, 2008)

Disposition: AFFIRMED.

Core Terms

district court, alleges, amend, anti trust law, leave to amend, manufacturers, competitors, threats, seller, third amended complaint, patent infringement, illegal conspiracy, high prices, horizontal, customers, effective, chemical, commerce, buyers, futile, volume, costs, fails

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

HN1[] **Sherman Act, Claims**

Injury to competition is a requisite of claims under §§ 1 and 2 of the Sherman Act. It is competition, not competitors, which the Act protects.

Antitrust & Trade Law > Sherman Act > Claims

HN2[] **Sherman Act, Claims**

To assess injury to competition, courts should take into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] **Sherman Act, Claims**

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4[] **Amendment of Pleadings, Leave of Court**

Although district courts should freely give leave to amend when justice so requires, where amendment is futile, leave may be denied. *Fed. R. Civ. P. 15(a)(2)*. When a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad.

Counsel: For KOREA KUMHO PETROCHEMICAL CO., LTD., Plaintiff - Appellant: William H. Forman, Esquire, Attorney, Robert G. Badal, Esquire, Attorney, Bethany Marvin Stevens, Attorney, Wilmer Cutler Pickering Hale & Dorr LLP, Los Angeles, CA.

For FLEXSYS AMERICA LP, FLEXSYS N.V., Defendants - Appellees: D. Jarrett Arp, Esquire, Adam Joseph DiVincenzo, GIBSON DUNN & CRUTCHER, LLP, Washington, DC; Andrew Edelstein, Daniel Glen Swanson, Attorney, GIBSON DUNN & CRUTCHER, LLP, Los Angeles, CA; Ann Stewart Robinson, Counsel, Office of the Chief Counsel for Employment, United States Senate, Washington, DC.

Judges: Before: HALL, THOMPSON and McKEOWN, Circuit Judges.

Opinion

[*876] MEMORANDUM [*]

Plaintiff-appellant Korea Kumho Petrochemical Co., Ltd. ("KKPC"), a seller of the rubber chemical 6PPD, appeals the dismissal of its third amended complaint alleging that the defendants (collectively, "Flexsys") **[**2]** violated *sections 1* and *2 of the Sherman Act* and California ***antitrust law***, *California Business and Professions Code § 16700 et seq.* KKPC specifically alleges that Flexsys, a competing seller of 6PPD, coerced two potential buyers of 6PPD into boycotting KKPC and publicly threatened a patent infringement lawsuit to further intimidate customers.

We have jurisdiction under *28 U.S.C. § 1291*, and we AFFIRM.

I. Injury to Competition

[*] This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

HN1[] Injury to competition is a requisite of claims under *§§ 1* and *2 of the Sherman Act*, *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988)*, and of KKPC's claims under California ***antitrust law***, *County of Tuolumne v. Sonora Cmty.* ***[*877]*** *Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)* (explaining that the analysis under state law "mirrors the analysis under federal law"). "It is competition, not competitors, which the Act protects." *Brown Shoe Co. v. United States, 370 U.S. 294, 344, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*.

KKPC argues that it adequately alleged an injury to competition by identifying two potential customers that allegedly succumbed to Flexsys's threats. In support of this argument, KKPC relies on *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*.

In *Klor's,* several manufacturers **[**3]** and distributors conspired among themselves and with a major retailer, Broadway-Hale, either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms. *Id. at 208-09*. *Klor's* is distinguishable in that it alleges a widespread vertical and horizontal combination. KKPC fails to allege any such widespread combination and specifically fails to allege the existence of a horizontal agreement among competitors.

In its operative complaint, KKPC alleges that: (1) the market of 6PPD purchasers consists of only a handful of major tire manufacturers; (2) Flexsys dominates that market with a 48-55% share; and (3) KKPC itself suffered injury. KKPC also alleges that certain costs (*e.g.,* tariffs and costs of constructing chemical plants) limit entry into the market. KKPC does not, however, plausibly allege that it is a low price competitor or that it provides a superior product. *Compare* *Pinhas v. Summit Health, Ltd., 894 F.2d 1024, 1032 (9th Cir. 1989)* ("[If Pinhas provides cheaper services], the preclusion of Pinhas from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services.").

Nor are KKPC's **[**4]** additional allegations sufficient to allege an injury to competition. KKPC does not allege that it lacks market strength relative to Flexsys, nor that a substantial portion of the 6PPD market was foreclosed by Flexsys's threats. KKPC does not allege any injury to other sellers of 6PPD or to the 6PPD market. *See* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 329, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* (explaining that, ***HN2***[] to assess injury to competition, courts should take into account "the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein"). Furthermore, KKPC does not allege that 6PPD buyers suffer from higher prices or the lack of access to a superior product. Thus, the decisions of two manufacturers to buy from Flexsys do not suggest an illegal conspiracy. *See* *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1049 (9th Cir. 2008)* (***HN3***[] "Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy **[**5]** are insufficient to plead a violation of the antitrust laws."). Because KKPC has failed to allege an injury to competition, we affirm the district court's dismissal of the complaint on this ground. [1]

II. Motion to Supplement

KKPC challenges the district court's denial of KKPC's motion to supplement its complaint with allegations that Flexsys subsequently initiated sham patent infringement litigation and an improper **[*878]** associated publicity campaign. We disagree. The district court did not abuse its discretion in concluding that the proposed supplemental allegations would address only the nature of the threats directed at KKPC, not an injury to competition, which is needed to save the complaint.

III. Leave to Amend

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[1] Because we affirm the district court's dismissal on this ground, we need not and do not consider Flexsys's contention that alternate grounds support dismissal.

HN4[] Although district courts should "freely give leave [to amend] when justice so requires," where amendment is futile, leave may be denied. *Fed. R. Civ. P. 15(a)(2)*; *Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009)*. *See also* *Chodos v. West Publ'g Co., 292 F.3d 992, 1003 (9th Cir. 2002)* ("[W]hen a district **[**6]** court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad." (quotation marks omitted)).

The district court denied leave to amend on the ground of futility. The district court criticized KKPC for its inability to allege an injury to competition after two dismissals and five iterations of amendment, despite clear case law and a previous warning that the district court would not be inclined to permit further amendment. Moreover, both in the district court and in this court, KKPC has failed to assert how it might remedy the complaint. We conclude that the district court acted within its discretion in denying KKPC an additional opportunity to amend the complaint.

CONCLUSION

We AFFIRM the district court's dismissal of KKPC's third amended complaint. We also AFFIRM the district court's denials of KKPC's motions to supplement and to amend.

AFFIRMED.

Microsoft Corp. v. Franchise Tax Bd.

Superior Court of California, County of San Francisco

March 15, 2010, Decided; March 15, 2010, Filed

CASE NO.: CGC-08-471260

Reporter

2010 Cal. Super. LEXIS 2977 *

MICROSOFT CORPORATION, Plaintiff, Vs. FRANCHISE TAX BOARD, Defendant.

Subsequent History: Reversed by, Remanded by, Petition denied by *Microsoft Corp. v. Franchise Tax Bd., 212 Cal. App. 4th 78, 150 Cal. Rptr. 3d 770, 2012 Cal. App. LEXIS 1284 (Cal. App. 1st Dist., Dec. 18, 2012)*

Core Terms

disqualified, antitrust, entertain, disqualification, impartial, anti trust law

Judges: **[*1]** WILLIAM H. FOLLETT, J.

Opinion by: WILLIAM H. FOLLETT

Opinion

RULING ON MOTION TO DISQUALIFY JUDGE; ORDER (*CCP § 170.3(c)(2)*)

Plaintiff's motion to disqualify the trial judge presents a difficult question involving the tension in discerning the line between the duty of a judge to hear all cases assigned to him unless disqualified and the disqualification of the judge whenever "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." *Compare* *Cal. Code Civ. Proc. § 170* *with* *Cal. Code Civ. Proc. § 170.1 subd. (a)(6)(A)*(iii.

FACTUAL BASIS

The objective, underlying facts in this case are not in dispute, having been admitted in the Verified Answer. Judge Karnow of the Superior Court of California, County of San Francisco, was assigned on January 19, 2010, by the Master Calendar Judge to preside at the trial of the above-entitled matter. The case involves Microsoft Corporation's claim to recover corporate taxes paid in fiscal years 1995 and 1996. In off-the-record discussions and later on the record shortly after the case was assigned for trial, Judge Karnow disclosed that he briefly owned Microsoft stock in late 2009 but had disposed of it in December 200.

He did not disclose at that time that he had served as one of multiple attorneys representing **[*2]** Sun Microsystems, Inc. against Microsoft more than eight years ago in multidistrict litigation in federal court. Plaintiff in that case claimed Microsoft violated antitrust laws. Judge Karnow states he was one of "many dozens" of lawyers from several law firms representing Sun Microsystems, Inc. Judge Karnow states his responsibility in the litigation dealt with "marketing and technical design" of the Internet Explorer web browse.

The antitrust litigation was "long and contentious," but settled before trial. According to a press release issued by Judge Karnow's former law firm when he was appointed to the bench, he was a member of the trial team in this "landmark antitrust litigation which resulted in one of the largest antitrust recoveries in history." The press release mentioned no other specific case Judge Karnow handled in his tenure with the fir.

When the instant case was called for trial on January 21, 2010, two days after the initial meeting with Judge Karnow, Microsoft's counsel moved for the Judge to recuse himself based upon his representation of Microsoft's adversary in the antitrust litigation and due to public comments that Judge Karnow made before taking the bench opining **[*3]** that Microsoft violated ***antitrust law***.

After review of the relevant statutes, Judge Karnow denied Microsoft's request to disqualify himself. Both the Judge and Microsoft's counsel agreed, after discussion, that a peremptory challenge under *California Code of Civil Procedure section 170.6* would not then have been timel.

Judge Karnow, before taking the bench, authored a number of published articles and a book of essays on computer technology and the law. In analyzing whether he was disqualified, the Judge stated that he had expressed views before taking the bench five years ago that Microsoft had "done things in the past that indicated antitrust intent - that is, intent to monopolize the market or continue a monopoly or to have an illegal monopoly of a market." He stated that his writings with regard to Microsoft dealt with ***antitrust law***.

> "I think a person who read my materials would probably believe that I felt that… up to a couple of years ago when I was in practice, that Microsoft has intentionally done actions which are in violation of federal and state ***antitrust law***.

Reporter's Transcript of Proceedings of January 21, 2010, pp. 6-7. Microsoft herein also complains that before becoming a judge that he was quoted in an Associated Press **[*4]** report as stating that Microsoft was "guilty" of antitrust allegations investigated by the U.S. Justice Departmen.

Judge Karnow states in his Verified Answer to the charge that his views were shared by many others at the time (pp. 2-4) but that he has no views today as to whether Microsoft is in compliance with antitrust or any other laws. (Verified Answer ¶ 7) In his analysis Judge Karnow notes that the issues in the case at bar, having to do with refund of corporate taxes previously paid to the state, are not pertinent to whether Microsoft violated antitrust laws. Judge Karnow specifically avers that he is not biased against Microsoft and denies that Microsoft cannot receive a fair trial before hi.

ANALYSIS

As stated above, unless disqualified, a judge must hear all cases assigned to him. *Cal. Code Civ. Proc. § 170*; Cal. Code of Jud. Ethics, canon 3B(2), But a judge is disqualified if a "person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." *Cal. Code Civ. Proc. § 170*.l(a)(6)(A)(iii) "The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified." *Flier v. Superior Court (1994) 23 Cal. App. 4th 165, 17*.

Judge Rothman in his treatise briefly discusses the general situation at issue:

> "Occasionally **[*5]** a judge will see a party in court that the judge has sued or prosecuted before becoming a judge. In such a situation, absent actual bias, the judge is not required by any of the specific provisions in *Code of Civil Procedure section 170.1* to disqualify himself or herself. A judge should, however, consider whether the particular circumstances of the prior case and contact with the party was such that disqualification is appropriate under *Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii)*. Only after concluding that disqualification is not necessary would disclosure be necessary." Rothman, California Judicial Conduct Handbook § 7.38 (3d ed. 2007.

Thus, while having represented a former adverse party against a current litigant usually does not require recusal, the "particular circumstances" of the prior case and relationship with the party may trigger disqualification because a person aware of the facts *might* entertain a doubt about whether the judge may be impartial. No *actual* bias is required for the judge to be disqualified. "If an average person could entertain doubt about the judge's impartiality, disqualification is mandated." California Judge's Benchguide No. 2 § 2.15 (citing *Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 246, 42 Cal. Rptr. 2d 440* (disapproved on other grounds in *People v. Freeman (2010) 47 Cal. 4th 993, 103 Cal. Rptr. 3d 723, 222 P.3d 177*). This is an objective standard, not dependent upon the **[*6]** judge's subjective bias or lack thereof. *Briggs v. Superior Court(2001) 87 Cal. App. 4th 312, 31*.

This statutory ground:

> "…represents a legislative judgment that due to the sensitivity of the question and inherent difficulties of proof as well as the importance of public confidence in the judicial system, the issue is not limited to the existence of an actual bias. Rather, if a reasonable man or woman would entertain doubts concerning the judge's impartiality, disqualification is mandated." *Catchpole v. Brannon, supra, at 246* (citations, internal quotations, and brackets omitted.

In this case, the Judge had a history before taking the bench as an adversary and public critic of one of the parties. As a litigator he was on the trial team in "landmark" antitrust litigation that resulted in one of the "largest antitrust recoveries in history." That litigation was long and contentious, and apparently so significant in the Judge's prior career that it was the only case mentioned in the press release issued when he was appointed to the bench. As a news source he was quoted by a wire service as opining that Microsoft was "guilty" of antitrust allegations investigated by the U.S. government. In his published articles on technology and the law, Attorney Karnow at least implied that **[*7]** Microsoft *intentionally* violated antitrust laws and illegally monopolized some aspect of the technology marke.

All the comments predated Judge Karnow taking the bench. There is no evidence presented that the comments and opinions were unfounded or resulted from anything other than reasoned and informed analysis. Nevertheless, such public and repeated statements that Microsoft intentionally violated the law, combined with his involvement in suing the corporation in particularly contentious litigation, might cause a reasonable person to entertain a doubt as to whether the Judge could be impartial to Microsoft in the present proceedings. While there is no hint that the Judge is prejudiced in any way with regard to the issues in the case at bar, prior statements may indicate that the Judge has negative opinions as to Microsoft's predilection to follow the laws and in general act as a responsible corporate citizen. How exactly that would play out in deciding the issues in the case at bar is unclear; however, doubts about the Judge's impartiality toward the plaintiff might be reasonably entertained. Judge Karnow's belief that Microsoft's perceived law breaking was intentional, rather than **[*8]** some inadvertent transgression, lends force to this conclusio.

Counsel for Judge Karnow argue that *Code of Civil Procedure section 170.2, subdivision (6)*, provides "that it is not grounds for disqualification that a judge has expressed an opinion on a legal or factual issue, even when the legal or factual issue is presented in the proceeding." The undersigned has not been able to find where *section 170.2* has been applied to comments made by a judge other that in performance of the judge's duty in some official capacity. While the statute does not clearly so state, it appears intended to provide a judge is not disqualified in a proceeding once he has expressed views or made a ruling in that case or a related case. Thus a judge is not disqualified for statements arising from the judge's participation in the case, such as hearing evidence, ruling on an issue, or presiding at a settlement conference. See Rothman California Judicial Conduct Handbook. *supra,* at § 7.1.

Nothing herein should be taken to indicate that the undersigned believes that Judge Karnow is prejudiced against Microsoft or that the parties could not receive a fair trial before him. The decision herein merely reflects that a reasonable person might entertain a doubt on that issu.

ORDER

For **[*9]** the reasons set forth above, Judge Karnow is hereby disqualified from sitting and acting in the above-entitled matte.

DATED: MAR 11 20.

/s/ William H. Folle.

WILLIAM H. FOLLE.

Judge of the Superior Court, County of Del Norte, Sitting on Assignmen.

CERTIFICATE OF SERVICE BY MAIL [*Code of Civil Procedure 1013a(4)*]

I, Alisa Hollander, Secretary to the Presiding Judge of the San Francisco Superior Court, certify that I am over the age of 18 years and not a party to the within actio.

On March 15, 2010, I served the attached *Ruling on Motion to Disqualify Judge; Order (CCP § 170.3(c)(2))* on all parties in said action by placing a true copy in a sealed envelope with postage thereon fully prepared in the United States mail at San Francisco, California, addressed as follow.

James P. Kleier, Es.

Reed Smith L.

101 Second Street, Suite 18.

San Francisco, CA 941.

David L.

Office of the Attorney Gener.

1515 Clay Street, Suite 20.

Oakland, CA 94612-05.

and .

Hon. Curtis E.A. Karn.

San Francisco Superior Cou.

400 McAllister Street, Department 6.

San Francisco, CA 941.

By interoffice mail on March 15, 2010, at San Francisco, California 9410.

DATED: March 15, 20.

/s/ Alisa Holland.

ALISA HOLLAND.

Secretary to the Presiding Judge of the San Francisco Superior Cou.

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Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev., Inc.

United States Court of Appeals for the Ninth Circuit

March 5, 2010, Argued and Submitted, Pasadena, California; March 15, 2010, Filed

No. 08-56953

Reporter
371 Fed. Appx. 719 *; 2010 U.S. App. LEXIS 5331 **; 2010-1 Trade Cas. (CCH) P76,938

PLUSH LOUNGE LAS VEGAS LLC, Plaintiff - Appellant, v. HOTSPUR RESORTS NEVADA INC., Defendant - Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [1]** Appeal from the United States District Court for the Central District of California. D.C. No. 2:06-cv-02626-GW-JTL. George H. Wu, District Judge, Presiding.

Plush Lounge Las Vegas LLC v. Hotspur Resorts Nev. Inc., 2008 U.S. Dist. LEXIS 128840 (C.D. Cal., Sept. 23, 2008)

Disposition: AFFIRMED.

Core Terms

declarations, district court, resort, summary judgment, jury verdict, antitrust, expert testimony, relevant market, legal standard, large portion, lay opinion, Sherman Act, illogical, purported, portions

Counsel: For PLUSH LOUNGE LAS VEGAS LLC, Plaintiff - Appellant: John C. Kirkland, Esquire, Luce Forward Hamilton & Scripps, LLP, Los Angeles, CA; Steven S. Fleischman, Esquire, Attorney, ROBIE & MATTHAI, APC, Los Angeles, CA.

For HOTSPUR RESORTS NEVADA INC., Defendant - Appellee: Andrew Stuart Pauly, GREENWALD PAULY FOSTER & MILLER, Santa Monica, CA.

Judges: Before: GOULD, IKUTA and N.R. SMITH, Circuit Judges.

Opinion

[*720] MEMORANDUM [*]

Plush Lounge Las Vegas, LLC appeals the district court's grant of summary judgment to Hotspur Resorts Nevada, Inc. on Plush's antitrust action under Section 2 of the Sherman Act, *15 U.S.C. § 2*. We have jurisdiction under *28 U.S.C. § 1291*, and we affirm.

---

[*] This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

Plush argues that the district court erred in granting Hotspur summary judgment on Plush's Sherman Act claim. At summary judgment, an antitrust plaintiff asserting a claim under Sherman Act Section 2 must submit admissible evidence of the relevant product **[**2]** and geographic market that would be sufficient to sustain a jury verdict on the issue of market definition. *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1435 (9th Cir. 1995)* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*; *see also* *Fed. R. Civ. P. 56(e)*. Absent such evidence, summary judgment is appropriate. *Rebel Oil, 51 F.3d at 1435*.

Plush submitted the declarations of Roland Katavic and Jerrold S. Pressman in support of a proposed market definition of "cocktails and hors d'oeuvres in an entertainment atmosphere within the [Hotspur] Resort." The district court ruled that neither Katavic nor Pressman qualified as an expert under *Federal Rule of Evidence 702* and struck the portions of each declaration that purported to define the relevant market. We review the district court's decision to exclude expert testimony for an abuse of discretion. *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. A district court abuses its discretion when it applies an incorrect legal standard, or when it applies the correct legal standard but does so in a manner that is illogical, implausible, or without support in the record. *United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)* **[**3]** (en banc).

The district court did not abuse its discretion in striking large portions of the Katavic and Pressman declarations. Neither declarant provided adequate foundational information about what training--whether in the classroom or on the job--gave rise to their ability to define a market for antitrust purposes. The declarants' reference to their business experience, without more, was insufficient. The declarations presented legal conclusions without underlying factual support, and therefore constitute "unsupported speculation." *See* *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Finally, neither declarant provided an explanation of the methodology used to arrive at the proposed market definition. *See* *Kumho Tire, 526 U.S. at 151*. Given these deficiencies, it was not illogical for the district court to determine that the declarations fell short of the reliability and relevancy **[*721]** requirements for the admissibility of expert testimony under *Rule 702*. *See* *id. at 152*. The district court did not abuse its discretion in sustaining Hotspur's objections to the portions of the Katavic and Pressman declarations that purported to define the relevant market.

With large portions **[**4]** of the Katavic and Pressman declarations stricken, Plush had insufficient evidence to sustain a jury verdict on its proposed market definition. The applicable market definition is not an opinion based on Katavic's or Pressman's sensory perception, so, contrary to Plush's argument, the district court could not have admitted their market definitions as lay opinions. *See* *Fed. R. Evid. 701(a)*; *United States v. Durham, 464 F.3d 976, 982 (9th Cir. 2006)* (explaining that an admissible lay opinion must be predicated on facts perceived with the witness's own senses). Outside of the Katavic and Pressman declarations, Plush's only evidence of market definition was a citation to two statements made by Hotspur's managers during their depositions. In these statements Mr. Roberts stated "yes" when asked whether there was a market within the resort and a larger market outside the resort, and Mr. Roughley stated that 75-85% of hotel guests and conventioneers use the resort's food and beverage services. Neither statement, however, refers to the relevant product market, so even if the statements were admissible at trial they would be insufficient to sustain a jury verdict on the issue of market definition. **[**5]** [1]

AFFIRMED.

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[1] Because we resolve this appeal on the basis of affirming the evidentiary rulings and our view of the lack of admissible evidence on relevant product market, we need not and do not reach other issues of ***antitrust law*** raised by the parties and urged to be pertinent to the summary judgment.

Westfield Ins. Co. v. Gil Behling & Son, Inc.

United States District Court for the Northern District of Indiana

March 15, 2010, Decided; March 15, 2010, Filed

CAUSE NO: 2:08-CV-317-TS

Reporter

2010 U.S. Dist. LEXIS 24328 *; 2010-1 Trade Cas. (CCH) P77,040; 2010 WL 989933

WESTFIELD INSURANCE COMPANY, Plaintiff, v. GIL BEHLING & SON, INC., et al., Defendants.

Core Terms

coverage, disparagement, advertising injury, duty to defend, Antitrust, bodily injury, property damage, bidding, damages, insured, defamation, allegations, products, personal injury, occurrence, summary judgment, seek damages, Umbrella, no duty, indemnify, slander, libel, provisions, defamatory, policy period, reputation, collusion, summary judgment motion, treble damages, bidders

Counsel: **[*1]** For Westfield Insurance Company, Plaintiff: Mark R Smith, LEAD ATTORNEY, Smith Fisher Maas & Howard PC, Indianapolis, IN.

For Gil Behling & Son Inc, Larry Behling, Defendants: Stephen M Maish, LEAD ATTORNEY, Maish and Mysliwy, Hammond, IN.

Judges: THERESA L. SPRINGMANN, UNITED STATES DISTRICT JUDGE.

Opinion by: THERESA L. SPRINGMANN

Opinion

OPINION AND ORDER

In this action, Plaintiff Westfield Insurance Company (Westfield) seeks a declaratory judgment that it has no duty to defend or indemnify Defendants Gil Behling & Son, Inc. (GBS) and Larry Behling in a state court civil action brought by Defendant Gariup Construction Company (Gariup) against Defendants GBS and Larry Behling and others. This matter is before the Court on a Verified Motion for Default Judgment Against Gariup Construction Company [DE 15], filed by Westfield on August 21, 2009; a Motion for Summary Judgment Against Gil Behling & Son, Inc. and Larry Behling [DE 16], also filed by Westfield on August 21, 2009; and a Cross-Motion for Partial Summary Judgment [DE 20], filed by Defendants GBS and Larry Behling on September 19. These Motions are now ripe for ruling.

BACKGROUND

On March 13, 2008, Gariup filed a Complaint for Damages [DE 1-7] (Gariup Complaint) **[*2]** in Cause Number 45C010803PL00037 in the Lake Circuit Court, Crown Point Division. In this state civil action, Gariup sued Carras-Szany-Kuhn & Associates, P.C., Thomas Kuhn, Dan Szany, GBS, and Larry Behling. The Complaint alleges that on or about September 20, 2007, Gariup and GBS submitted separate bids for a public construction project; that Carras-Szany-Kuhn & Associates, P.C., worked as the project architect and was responsible for receiving and evaluating bids and recommending contract awards to the owner of the project; and that Gariup submitted the lowest bid on the project. It also claims that the defendants in that action "schemed and/or combined to restrict bidding in relation to the Project," and "intentionally violated numerous requirements relating to public work bidding statutes and otherwise wrongly rejected Gariup's bid for the Project all in order to restrict bidding such that the second lowest bidder, . . . Gil Behling & Son, Inc. received the contract . . . rather than Gariup, despite having submitted a higher bid." (Gariup Compl. P 10, DE 1-7.) Gariup claims to have suffered substantial damages as "a result of this scheme and combination to restrain bidding perpetrated **[*3]** by the Defendants on the Project." (Gariup Compl. P 11, DE 1-7.) As relief in that action, Gariup requests "a judgment against the Defendants which includes compensatory damages, treble damages pursuant to *I.C. 24-1-2-7*, attorney fe[e]s and all other just and proper relief in the premises." (Gariup Compl. Prayer for Relief, DE 1-7.)

On October 29, 2008, Westfield instituted this action by filing its Complaint for Declaratory Judgment [DE 1], seeking a declaration that it has no duty under the policy issued to GBS to defend or indemnify GBS or Larry Behling against the state court civil lawsuit. Westfield also named Gariup as a Defendant based upon its interest in the resolution of these disputed duties.

On January 5, 2009, the Clerk entered Default [DE 9] against Gariup because it has not defended in this action. On August 21, Westfield filed a Verified Motion for Default Judgment Against Gariup Construction Company [DE 15] and a Motion for Summary Judgment Against Gil Behling & Son, Inc. and Larry Behling [DE 16]. Westfield also filed a Brief in Support of Its Motion for Summary Judgment [DE 19] and evidentiary materials. On September 19, GHS and Larry Behling filed a Cross-Motion for **[*4]** Partial Summary Judgment [DE 20] as well as a Response Brief in Opposition to Westfield's Motion for Summary Judgment and in Support of [Their] Cross-Motion for Partial Summary Judgment [DE 21]. On October 3, Westfield filed a Reply Brief in Support of Its Motion for Summary Judgment [DE 22] and additional evidentiary material. On November 4, GBS and Larry Behling filed a Reply Brief in Support of [Their] Cross-Motion for Partial Summary Judgment [DE 25].

SUMMARY JUDGMENT STANDARD

The Federal Rules of Civil Procedure provide that motions for summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. A genuine issue of material fact exists when "'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *AA Sales & Assocs. v. Coni-Seal, Inc., 550 F.3d 605, 608-09 (7th Cir. 2000)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. Under *Rule 56(e)(2)*, a party opposing a properly made and supported motion for summary **[*5]** judgment "may not rely merely on allegations or denials in its own pleading; rather its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial." If appropriate, summary judgment should be entered against a party who fails to so respond. *Fed. R. Civ. P. 56(e)(2)*; *see also* *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (holding that a court should enter summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). A court's role on summary judgment is not to weigh the evidence, make credibility determinations, or decide which inferences to draw from the facts, but instead to determine whether there is a genuine issue of triable fact. *Anderson, 477 U.S. at 255*; *Washington v. Haupert, 481 F.3d 543, 550 (7th Cir. 2007)*; *Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003)*. Thus, a court in ruling on a summary judgment motion construes all facts in the light most favorable to the nonmoving party and draws all reasonable inferences in **[*6]** that party's favor. *AA Sales & Assocs., 550 F.3d at 609*. However, the court is not required to draw every conceivable inference from the record--only reasonable ones. *Spring v. Sheboygan Area Sch. Dist., 865 F.2d 883, 886 (7th Cir. 1989)*. Under local rule, facts that are submitted by the moving party and supported by admissible evidence are considered to exist without controversy, except to the extent that such facts are controverted in a "Statement of Genuine Issues" filed in opposition to the motion. *L.R. 56.1*.

FACTS

On or about January 1, 2007, Westfield issued GBS Commercial Package Policy No. TRA 3 816 339. GBS was the named insured, and the dates of coverage were January 1, 2007, to January 1, 2008. The Package Policy included a Commercial General Liability (CGL) policy and a Commercial Umbrella policy.

A. The Commercial General Liability Policy

Under the CGL Bodily Injury and Property Damage (BI/PD) coverage, which is known as Coverage A in the insurance industry, Westfield agreed to the following:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the **[*7]** right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section III -- Limits Of Insurance; and
>
> (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under coverage C.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments -- Coverages A and B.
>
> b. This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;"
>
> (2) The "bodily injury" or "property damage" occurs during the policy period . . . .

(Policy, DE 18-2 at 29.) The term "occurrence" is defined as "an accident, including continuous or repeated **[*8]** exposure to substantially the same general harmful conditions." (Policy, DE 18-2 at 42.) The term "bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." (Policy, DE 18-2 at 41.) The term "property damage," in relevant part, is defined as follows: "Physical injury to tangible property, including all resulting loss of use of that property[, and a]ll such loss of use shall be deemed to occur at the time of the physical injury that caused it"; or "Loss of use of tangible property that is not physically injured[, and a]ll such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it." (Policy, DE 18-2 at 43.)

Under the CGL Personal and Advertising Injury (PAI) coverage, which is known as Coverage B in the insurance industry, Westfield agreed to the following:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against **[*9]** any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may at our discretion investigate any offense and settle any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section III -- Limits of Insurance; and
>
> (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

> b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

(Policy, DE 18-2 at 33-34.) The term "personal and advertising injury" is defined as "injury, including consequential 'bodily injury' arising out of one or more of the following offenses":

> a. False arrest, detention or imprisonment;
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the **[*10]** right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
> f. The use of another's advertising idea in your "advertisement"; or
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

(Policy, DE 18-2 at 43.)

B. The Commercial Umbrella Policy

Under the Commercial Umbrella policy, Westfield agreed to the following:

> a. We will pay "ultimate net loss" in excess of the "retained limit" that the insured becomes legally obligated to pay as damages because of "personal injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal injury" or "property damage" to which this insurance does not apply. We may, at our discretion, **[*11]** investigate any "occurrence" and settle any "claim" or "suit" that may result. But:
>
> > (1) The amount we will pay for damages is limited as described in (Section III) LIMITS OF INSURANCE; and
> > (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided under Defense, Settlement and Supplementary Payments.
>
> b. This insurance applies only if the "personal injury" or "property damage" occurs during the policy period and is caused by an "occurrence" and prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no "employee" authorized to give or receive notice of an "occurrence" or claim, knew that the "personal injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "personal injury" or "property damage" occurred, then any continuation, change or resumption of such "personal injury" or "property damage" during or after the policy period will be deemed to have been known **[*12]** prior to the policy period.

(Policy, DE 18-4 at 17.) The term "occurrence" is defined as "an accident or offense resulting in 'personal injury' or 'property damage'" and as follows:

> a. With respect to "bodily injury" and "property damage", an accident includes continuous or repeated exposure to substantially the same general harmful conditions.
> b. With respect to subsections b., c., d., e., f., g., and h. of the definition of "personal injury", an offense includes a series of offenses of the same or similar nature.
> c. With respect to subsections e., f., g., and h. of the definition of "personal injury", an offense includes a series of offenses in which the same or similar advertising material is used regardless of the number or kind of media used.
> All "personal injury" and "property damage" resulting from an accident or offense shall be considered as resulting from one "occurrence".

(Policy, DE 18-4 at 30.) By endorsement, the Commercial Umbrella policy defines the term "personal injury" as "any of the following offenses including death and care and loss of services resulting therefrom: A. 'Bodily injury' or B. "'Personal and Advertising injury'." (Policy, DE 18-4 at 39.) The term "bodily **[*13]** injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." (Policy, DE 18-4 at 28.) The term "property damage" is defined as follows:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(Policy, DE 18-4 at 31.) The term "personal and advertising injury" is defined as "injury including consequential 'bodily injury', arising out of one or more of the following offenses":

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products **[*14]** or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

(Policy, DE 18-4 at 30-31.)

C. The State Lawsuit, Denial of Coverage, and Additional Undisputed Facts

On or about May 30, 2008, GBS and Larry Behling provided Westfield with a copy of the Complaint filed in the state court civil action and requested that Westfield defend and indemnify them under the policies. Westfield has denied coverage and declined to defend GBS and Larry Behling in the state court civil action. Any of the relevant conduct of GBS and/or Larry Behling that provides the basis for the Gariup Complaint occurred during the policy period and within the coverage territory. GBS and Larry Behling, as an officer and owner of GBS, are insureds covered under the CBL and Commercial Umbrella policies provided by Westfield. Westfield is not relying or basing its denial of coverage or its denial of its duty to defend or indemnify on any specific coverage exclusion under the CGL policy or the Commercial Umbrella policy.

DISCUSSION

A. [*15] The Parties' Arguments

Westfield argues that it is entitled to summary judgment on the following issues: that, under the CGL bodily injury/property damage coverage, the Gariup Complaint does not allege a covered "occurrence," a covered "bodily injury," or covered "property damage"; that the Gariup Complaint does not trigger the CGL personal and advertising injury coverage; that, under the Commercial Umbrella coverage, the Gariup Complaint does not allege a covered "occurrence," a covered "bodily injury," covered "property damage," or a covered "personal and advertising injury"; and that the treble damage claim is not covered. Thus, Westfield contends that, under the language of the policy, it does not have any duty to defend or indemnify Defendant GBS and Larry Behling in the state court civil action brought by Gariup. GBS and Larry Behling argue that they are entitled to summary judgment on the following issues: that Westfield has a duty to defend them under the personal and advertising injury provisions of the policy; and that a determination of Westfield's obligation to indemnify is premature and not ripe for adjudication in the absence of a finding of liability on the claims in **[*16]** the underlying dispute with Gariup. GBS and Larry Behling also assert that because Westfield has a duty to defend them under the personal and advertising injury provisions, it is unnecessary for the Court to determine whether Westfield has a duty to defend under other provisions of the policies. Westfield responds that the Gariup Complaint does not allege a covered personal and advertising injury offense of disparagement and that the duty to indemnify issue is ripe. GBS and Larry Behling reply that the Gariup Complaint does not clearly show facts that bar recovery under the personal and advertising injury provisions based on disparagement of another's goods or services and does not relieve Westfield of its obligation to defend them from even unmeritorious claims, that Indiana and federal case law concerning personal and advertising injury coverages supports a finding that Westfield has a duty to defend them against Gariup's claims, and that a lack of specificity in the Gariup Complaint does not excuse Westfield from its duty to defend against damages claimed by Gariup.

Because the focus of the parties' submissions is on the personal and advertising injury provisions, the Court will **[*17]** address the duty to defend issues relative to those provisions and then address Westfield's duties under other policy provisions. However, the Court will begin by setting forth the relevant standards governing insurance contracts.

B. The Relevant Standards Governing Insurance Contracts

As a federal court siting in diversity, this Court applies state law to resolve substantive questions. *Harper v. Vigilant Ins. Co., 433 F.3d 521, 525 (7th Cir. 2005)*. The parties agree that Indiana law applies, and thus this Court will apply the substantive law of Indiana in addressing the pending summary judgment motions. *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc., 136 F.3d 1116, 1120 (7th Cir. 1998)* (stating that "the operative rule is that when neither party raises a conflict of law issue in a diversity case, the federal court simply applies the law of the state in which the federal court sits"). When the Indiana Supreme Court has not confronted a particular issue, this Court is to predict how that court would decide the issue if presented with it. *Harper, 433 F.3d at 525*.

Generally, the interpretation or construction of a written contract such as an insurance policy is a question of law for which **[*18]** summary judgment is appropriate. *Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., 865 N.E.2d 571, 574 (Ind. 2007)*; *see also* *Fed. Ins. Co. v. Stroh Brewing Co., 127 F.3d 563 (7th Cir. 1997)* (interpreting insurance policy and determining insurer's duty to defend as a matter of law). Under Indiana law, insurance policies are subject to the same rules of construction as other contracts. *See* *Motorists Mut. Ins. Co. v. Wroblewski, 898 N.E.2d 1272 (Ind. Ct. App. 2009)*. Contracts are interpreted to ascertain and effectuate the intent of the parties as reasonably manifested in the agreement, and if the language of the contract is clear and unambiguous, it should be given its plain and ordinary meaning. *Reuille v. E.E. Brandenberger Constr., Inc., 888 N.E.2d 770, 771 (Ind. 2008)*. Courts give effect to the intentions of the parties as expressed in the four corners of the agreement, and courts determine the meaning of a contract from an examination of all of the contract's provisions, and not from a consideration of individual words, phrases, or paragraphs read alone. *Moore, 903 N.E.2d at 531*. Parol, or extrinsic evidence, is inadmissible to add to, vary, or explain clear and unambiguous **[*19]** terms of a written instrument. *Evan, 873 N.E.2d at 101*. An ambiguity does not arise simply because the parties disagree on the interpretation; rather, contract language is ambiguous only if reasonable people could come to different conclusions about its meaning. *Id. at 98*; *Simon Prop. Group, L.P. v. Mich. Sporting Goods Distribs., Inc., 837 N.E.2d 1058, 1070 (Ind. Ct. App. 2005)*.

Accordingly, clear and unambiguous words in insurance contracts are given their plain and ordinary meaning, but ambiguous language is construed in favor of the insured. *Beam v. Wausau Ins. Co., 765 N.E.2d 524, 528 (Ind. 2002)*; *Eli Lilly & Co. v. Home Ins. Co., 482 N.E.2d 467, 470 (Ind. 1985)*; *see also* *Schenkel & Shultz, Inc. v. Homestead Ins. Co.., 119 F.3d 548, 550 (7th Cir. 1997)* (applying Indiana law and instructing that courts must enforce unambiguous insurance contracts according to their plain meaning, even if that limits the coverage available). Ambiguity in an insurance contract exists when it is reasonably susceptible to more than one interpretation and reasonable people would honestly differ as to its meaning. *Beam, 765 N.E.2d at 528*; *Indiana Bell Tel. Co. v. Time Warner Commc'ns of Ind., 786 N.E.2d 301, 309-10 (Ind. Ct. App. 2003)*.

An **[*20]** insurer's duty to defend is a contractual duty, and this duty is broader than its duty to indemnify. *Federal Ins., 127 F.3d at 566* (citing *Seymour Mfg. Co. v. Commercial Union Ins. Co., 665 N.E.2d 891, 892 (Ind. 1996))*; *Nat'l Fire & Cas. Co. v. West By & Through Norris, 107 F.3d 531, 535 (7th Cir. 1997)*; *Hoosier Ins. Co. v. Audiology Foundation of Am., 745 N.E.2d 300, 306 (Ind. Ct. App. 2001)*. Although an insurance company can limit its duty to defend, *cf.* *Walton v. First Am. Title Ins. Co., 844 N.E.2d 143, 147 (Ind. Ct. App. 2006)* (stating that if the pleadings reveal that a claim is excluded under the policy, then no defense is required), an insurer is generally obligated to defend its insured against suits alleging facts that might fall within the coverage of the policy, *Federal Ins., 127 F.3d at 566*.

Under Indiana law, an insurer's "duty to defend is determined solely by the nature of the complaint," and "[w]hen the nature of the claim is obviously not covered by the policy of insurance, there is no duty to defend." *Transamerica Ins. Servs. v. Kopko, 570 N.E.2d 1283, 1285 (Ind. 1991)*. When a complaint sounds in intentional tort as well as in negligence, "the insurance company is **[*21]** required to defend even though it may not be responsible for all of the damages assessed, so long as there is an element of negligence to be determined." *Id*. Furthermore, "[w]here an insurer's independent investigation of the facts underlying a complaint against its insured reveals a claim is patently outside of the risk covered by the policy, the insurer may properly refuse to defend." *Freidline v. Shelby Ins. Co., 774 N.E.2d 37, 42-43 n.6 (Ind. 2002)*. If proof of any of the allegations could lead to coverage, then a duty to defend exists regardless of the merits of the allegations, making the duty to defend broader than the duty to indemnify. *Federal Ins., 127 F.3d at 566* (stating that "there is essentially only one standard--that the allegations of the complaint, including the facts alleged, give rise to a duty to defend whenever, if proved true, coverage would attach"). [1]

C. The Duty to Defend Under the Personal and Advertising Injury Coverages

The parties largely **[*22]** agree that the personal and advertising injury coverages under the CGL policy and the Commercial Umbrella policy are essentially the same. However, the parties have very different views of whether the Gariup Complaint alleges a claim that would come within the personal and advertising injury coverages so as to trigger Westfield's duty to defend. Westfield contends that the Gariup Complaint alleges a state antitrust violation that does not trigger any duty to defend under these coverages, and GBS and Larry Behling argue that Gariup Complaint seeks damages that involve or relate to a disparagement of a competitor's services that triggers Westfield's duty to defend.

In order for Westfield to have a duty to defend (and indemnify) under the personal and advertising injury coverages, the damages sought in the Gariup Complaint must result from a "personal and advertising injury" that arises out of one of seven enumerated offenses, which are identified in the Facts Section of this Opinion and Order. Although GBS and Larry Behling argue that courts have broadly interpreted personal and advertising injury coverage in favor of insureds and although they cite cases addressing various offenses that **[*23]** constitute personal and advertising injury, their argument comes to rest on one particular offense (the defamation/disparagement offense), and thus they argue that the Gariup Complaint alleges injury that arises out of the offense of an oral or written publication, in any manner, of material that disparages a person's or organization's goods, products, or services. [2] GBS and Larry Behling propose the following "publication" in an attempt to trigger a duty to defend under this coverage: "the essence of Gariup's allegations are that GBS[] and Behling allegedly promoted GBS[] through oral or written statements (which is within the definition of 'advertising') in a manner that wrongfully discredited Gariup's goods, products and/or services (which is within the definition of 'disparages')." [3] (GBS Resp. Br. & Br. in Supp. 13, DE 21.)

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[1] The Court finds persuasive Judge Tinder's reconciliation of *Kopko, Freidline*, and similar authorities. *See* *Trinity Homes LLC v. Ohio Cas. Ins. Co., No. 1:04-CV-1920, 2007 U.S. Dist. LEXIS 24370, 2007 WL 1021825, at *4-7 (S.D. Ind. Mar. 30, 2007)*.

[2] This offense also includes an oral or written publication, in any manner, of material that slanders or libels a person or organization, but GBS and Larry Behling focus on the aspect of the offense related to disparaging goods, products, or services.

They also argue that "the basic premise of Gariup's claims must be that GBS[] and Behling participated in communications of some sort with the Library Board that served to disparage Gariup's bid for services, so that the Library Board would not accept Gariup's bid for services." (GBS Reply 5, DE 25.) Additionally, they seek a broad reading of the Gariup Complaint **[*24]** so that the complaint is understood to seek both relief under the Indiana Antitrust Act and more general damages, and in support of this broader reading, they point to the demand for "compensatory damages" in the prayer for relief. They also argue that no language or allegation in the Gariup Complaint "expressly limit[s] such claims" to the Indiana Antitrust Act. (GBS Resp. Br. & Br. in Supp. 13-14, DE 21.) Nevertheless, they contend that Westfield has a duty to defend against antitrust claims under the personal and advertising injury coverages.

1. *The Gariup Complaint and the Indiana Antitrust Act*

Turning first to the Gariup Complaint, the Court notes that the allegations focus on the submission of bids by Gariup and GBS for a public construction project; Gariup's lower bid; GBS's higher bid; the conduct of GBS, Larry Behling, and other defendants in scheming or combining to restrict bidding; the intentional violation of bidding statutes by GBS, Larry Behling, and other defendants; the wrongful rejection of Gariup's bid to restrict bidding and to ensure that GBS received the contract; and the damage sustained by Gariup as a result of scheme and combination of GBS, Larry Behling, and other defendants to restrain bidding. The Gariup Complaint specifically **[*26]** references *Indiana Code § 24-1-2-7* in seeking treble damages, but it also seeks damages and attorney's fees. Nothing in the Gariup Complaint suggests that Gariup is seeking damages or proceeding against any of the defendants on a theory of negligence.

The statute referenced in the Gariup Complaint is part of the Indiana Antitrust Act (*Indiana Code § 24-1-2*). *Indiana Code § 24-1-2-1* makes illegal (a Class A misdemeanor) schemes, contracts, or combinations in restraint of trade or commerce. *Indiana Code § 24-1-2-2* prohibits any person "monopoliz[ing] any part of the trade or commerce" in the state. *Indiana Code § 24-1-2-3* provides that a "person who engages in any scheme, contract, or combination to restrain or restrict bidding for the letting of any contract for private or public work, or restricts free competition for the letting of any contract for private or public work, commits a Class A misdemeanor." *Indiana Code § 24-1-2-4* addresses remedies for "collusion or fraud" among contract bidders "as provided in *section 3*." *Indiana Code § 24-1-2-7(a)* authorizes any "person whose business or property is injured by a violation of this chapter [to] bring an action . . . , and is entitled **[*27]** to recover a penalty of threefold the damages awarded in the action, together with the costs of suit, including reasonable attorney's fees."

The Indiana Supreme Court has provided the following discussion regarding this statute:

> *Sections 1* and *2* of the Indiana Antitrust Act, *I.C. § 24-1-2-1, et seq*., are comparable to the federal Sherman Act, *15 U.S.C. sections 1* and *2*, respectively. Like section 1 of the Sherman Act, *Indiana Code section 24-1-2-1* addresses combinations in restraint of trade. Similarly, section 2 of the Sherman Act and *Indiana Code section 24-1-2-2* both deal with monopolization. Indiana has two additional provisions for which there is no federal counterpart. Section 3, *I.C. § 24-1-2-3*, prohibits the restraint of bidding for letting of contracts whether public or private, and Section 4, *I.C. § 24-1-2-4*, addresses remedies for "collusion or fraud" among contract

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[3] In discussing issues related to Westfield's duty to indemnify, GBS and Larry Behling provide additional indications of their theory for how Westfield's duty to defend is triggered. They state:

> [T]o determine if Westfield is obligated to indemnify GBS[] or Behling under its policy, it must first be ascertained whether GBS[] or Behling is legally obligated to pay any damages arising out of the lowering **[*25]** in esteem or discrediting (i.e., disparagement) of Gariup's goods, products or services that were offered to be performed under Gariup's bid to the owner of the project.
>
> Such a determination necessarily involves adjudicating whether GBS[] or Behling are responsible for alleged statements concerning Gariup's bid that may have caused Gariup's bid to be rejected by the owner, or that caused the owner to accept GBS[]'s bid over that of Gariup's bid.

(GBS Resp. Br. & Br. in Supp. 17, DE 21.)

> bidders. Specifically, Section 4 of the Indiana Antitrust Act provides that in cases of "collusion or fraud . . . among the bidders at the letting of any contract or work as provided in [Section 3] . . . the principal who lets the contract . . . shall not be liable for such letting or on account of said contract **[*28]** . . ." Section 4 thus frees the principal who lets a contract tainted by "collusion or fraud" among bidders from liability on the contract. By its terms, Section 4 applies only if there is "collusion or fraud . . . as provided in [Section 3]." It thus does not prohibit any conduct. Rather, it deals with remedies for violations of Section 3.
> Section 3 of the Indiana Antitrust Act does not use the term "collusion or fraud," but does prohibit certain conduct. . . .

Brownsburg Cmty. Sch. Corp. v. Natare Corp., 824 N.E.2d 336, 339 (Ind. 2005). The Indiana Supreme Court also indicated that Sections 1, 2, and 3 of the Indiana Antitrust Act are the only portions of the act that "contain substantive prohibitions" and that these "sections are framed similarly to provisions of the Criminal Code and provide that it is a Class A Misdemeanor to engage in the actions prohibited." *Id. at 341*. In discussing *Section 7*, the court explained that this "section, tracking *section 15* of the Clayton Act, provides treble damages and attorneys fees for those injured in their 'business or property' by a violation of the Indiana Antitrust Act. This section purports to give a right to treble damages to any 'person' **[*29]** injured by any 'person' doing 'any thing forbidden or declared to be unlawful' by any of the first three sections of the Indiana Antitrust Act." *Id. at 343*. The Indiana Court of Appeals has more recently stated:

> *Indiana Code section 24-1-2-3* makes unlawful acts which operate to restrain open and free competition in bidding to obtain contracts for public and private work. Pursuant to *I.C. § 24-1-2-7*, a person injured in his business or property by a violation of this statute may bring a civil action seeking treble damages, costs and attorney fees. Due to the dearth of decisions under the Indiana statute, our courts use decisional law under the similar federal ***antitrust law***, section 4 of the Clayton Anti-Trust Act, *15 U.S.C. Section 15*. *City of Auburn Through Bd. of Public Works and Safety v. Mavis, 468 N.E.2d 584, 585 (Ind. Ct. App. 1984)*. Federal case law requires a plaintiff to prove three essential elements: 1) a violation of the statute, 2) injury to a person's business or property proximately caused by the violation, and 3) actual damages. *Id*.

Thompson v. Vigo County Bd. of County Comm'rs, 876 N.E.2d 1150, 1155 (Ind. Ct. App. 2007).

Considering the allegations (including the facts **[*30]** alleged) and the prayer for relief in the Gariup Complaint, the Indiana Antitrust Act, and the Indiana appellate court opinions interpreting that act, the Court finds that the Gariup Complaint premises Gariup's legal theory and claim to recover on the Indiana Antitrust Act, which is a state law claim. The Gariup Complaint seeks damages from GBS and Larry Behling for unlawfully scheming and combining to restrain or restrict bidding on the public construction project. The allegations include specific statutory terminology from the Indiana Antitrust Act, and the prayer for relief references a specific statutory section in the Indiana Antitrust Act and seeks damages, treble damages, and attorney's fees, as contemplated by Section 7 of the act. Indeed, Gariup's claim fits well within the statutory paradigm for an Indiana antitrust claim brought pursuant to *Indiana Code § 24-1-2-7* for an alleged violation of *Indiana Code § 24-1-2-3*. As the Indiana Supreme Court in interpreting the Indiana Antitrust Act has explained, a claim under *Indiana Code § 24-1-2-7* for a violation of *Indiana Code § 24-1-2-3* seeks remedies for "collusion or fraud" in the letting of any contract for private or public **[*31]** work. *Natare Corp., 824 N.E.2d at 339*. Consequently, the Court disagrees with GBS and Larry Behling's assertion that the Gariup Complaint "is a bare bones notice pleading that alleges no operative facts within its eleven (11) rhetorical paragraphs from which one can discern any particular legal theory or basis for any claim of damages that Gariup is seeking against [them]" and "is a generic pleading that seeks monetary relief from [them] for alleged damages to Gariup's business services, without relying on any particularized legal theory or stated cause of action." (GBS & Behling Reply Br. 2, DE 25.)

2. *The Personal and Advertising Injury Coverage and the Defamation/Disparagement Offense*

Westfield's policies broadly define the publication component of the defamation/disparagement offense such that it includes any manner of oral and written publication of material that qualifies under the defamation (slander or libel) component or the disparagement component. To understand the defamation/disparagement offense, it is helpful to begin by considering defamation law. Under Indiana defamation law, a plaintiff must prove a communication with defamatory imputation, malice, publication, and damages, **[*32]** and any statement actionable for defamation must not only be defamatory, but also false. *Trail v. Boys & Girls Clubs of Northwest Ind., 845 N.E.2d 130, 136 (Ind. 2006)*; *see also* *Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 261 (Ind. 1994)* ("To maintain an action for defamation, a plaintiff must show a communication with four elements: 1) defamatory imputation; 2) malice; 3) publication; and 4) damages."); *Ind. Code § 34-15-1-1* ("In an action for libel or slander, it is sufficient to state generally that the defamatory matter published or spoken was about the plaintiff. If the defendant denies the allegation, the plaintiff must prove at trial the facts showing that the defamatory matter was published or spoken about the plaintiff."); *Ind. Code § 34-15-1-2* ("In an action for libel or slander, the defendant may allege: (1) the truth of the matter charged as defamatory; and (2) mitigating circumstances to reduce the damages; and give either or both in evidence."). "'Defamatory' means 'defaming or tending to defame,'" and "[t]o 'defame' is [] 'to attack or injure the reputation or honor by false and malicious statements; malign, slander, or libel.'" *Ind. Ins. Co. v. North Vermillion Cmty. Sch. Corp., 665 N.E.2d 630, 635 (Ind. Ct. App. 1996)* **[*33]** (quoting Webster's New World Dictionary 361 (3d ed. 1988)). "Defamatory words are not actionable unless they refer to some ascertained or ascertainable person, and that person must be the plaintiff." *Schrader, 639 N.E.2d at 261*. Additionally, "'[d]efamation is that which tends to injure reputation and to diminish esteem, respect, goodwill or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff.'" *Sanderson v. Ind. Soft Water Servs., Inc., No. IP 00-0459, 2004 U.S. Dist. LEXIS 15671, 2004 WL 1784755, at *6 (S.D. Ind. July 23, 2004)* (quoting *Branham v. Celadon Trucking Servs., Inc., 744 N.E.2d 514, 522 (Ind. Ct. App. 2001))*. Thus, defamation is a tort that "seeks to redress reputational harm suffered by a *person." Sanderson, 2004 U.S. Dist. LEXIS 15671, 2004 WL 1784755, at *6* (emphasis in original).

As for disparagement of goods, products, or services, the plain and ordinary meaning of the term "disparage" is "'[t]o dishonor (something or someone) by comparison' or '[t]o unjustly discredit or detract from the reputation of (another's property, product or business).'" *Rain v. Rolls-Royce Corp., Cause No. 1:07-cv-1233, 2010 U.S. Dist. LEXIS 1258, 2010 WL 107270, at *5 (S.D. Ind. Jan. 7, 2010)*, and *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc., 97 F. Supp. 2d 913, 932 (S.D. Ind. 2000)* **[*34]** (both quoting Black's Law Dictionary (7th ed. 1999)). "To disparage is to 'lower in esteem; discredit'." *Ind. Ins. Co., 665 N.E.2d at 635* (quoting Webster's New World Diction 135 (3d ed. 1988)). "Disparagement" is "[a] derogatory comparison of one thing with another"; "[t]he act or an instance of castigating or detracting from the reputation of, esp. unfairly or untruthfully"; "[a] false and injurious statement that discredits or detracts from the reputation of another's character, property, product, or business"; and "[r]eproach, disgrace, or indignity." Black's Law Dictionary (9th ed. 2009).

Judge Hamilton has provided the following discussion of the nature of disparagement of goods, products, and services claims:

> What [the plaintiff] calls "product disparagement" has also been described by commentators as "disparagement of property," "slander of goods," "commercial disparagement," "trade libel," and "injurious falsehood." See Prosser and Keaton on the Law of Torts § 128, at 963 (5th ed.1984); *Restatement (Second) of Torts §§ 623A*, *624* (1977). Although [the plaintiff] has not cited any application of the tort in Indiana, it appears that there is at least some limited recognition of **[*35]** the cause of action in the state. See generally, *Raybestos Products Co. v. Younger, 54 F.3d 1234, 1236 (7th Cir.1995)* (applying Indiana law; affirming without discussion of relevant merits jury's verdict in favor of plaintiff on defamation and injurious falsehood claims). The tort differs from defamation in that it seeks to protect economic interests rather than reputational interests. *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1323 (7th Cir.1991)* (applying Illinois and Ohio law). But as under the law of defamation, a statement is not actionable unless it is clear from its content and context that it refers specifically to the plaintiff's products. See Speiser, Krause & Gans, The American Law of Torts § 33.5, at 1021 (1992); see also *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc.., 97 F. Supp. 2d 913, 932 (S.D.Ind.2000)* (collecting cases interpreting "product disparagement" in the context of insurance policies insuring against advertising injury; "[t]he insured's lack of any direct reference to a competitor's goods or products repeatedly has compelled courts to find that the underlying plaintiff has not alleged an advertising injury under this **[*36]** disparagement offense.").

Sanderson, 2004 U.S. Dist. LEXIS 15671, 2004 WL 1784755, at *7. Thus, disparagement of goods, products, or services involves the denigration, discrediting, or belittling of a person's or organization's goods, products, or services. *See* Heritage Mut. Ins. Co., 97 F. Supp. 2d at 932.

Considering the "personal and advertising injury" terms of the Westfield policy and the defamatory/disparagement offense, the "slanders or libels" term would apply if Gariup (as a person or organization) alleged reputational harm or injury based upon alleged defamation by any manner of oral or written publication by GBS. The "disparages" term would apply if Gariup alleged harm or injury to economic interests by any manner of oral or written publication by GBS that denigrated, discredited, or belittled Gariup's goods, products, or services.

The Court must now determine whether the allegations of the Gariup Complaint seek damages for this sort of personal or advertising injury, and thus the Court must compare the nature of the claim and the facts alleged in the Gariup Complaint to the personal and advertising injury provisions of the policies. In performing its analysis, the Court looks beyond any labels used by **[*37]** Gariup in its complaint to the substance of Gariup's claim and the facts alleged in the complaint. As determined above, the Gariup Complaint presents a claim under the Indiana Antitrust Act, is brought pursuant to Indiana Code § 24-1-2-7 for an alleged violation of Indiana Code § 24-1-2-3, and seeks damages from GBS and Larry Behling for unlawfully scheming and combining to restrain or restrict bidding on the public construction project. The Gariup Complaint contains no factual allegation that GBS or Larry Behling made any false, libelous, slanderous, misleading, or defamatory statement that disparaged Gariup's goods, products, or services. Even liberally construed, the complaint provides no possible factual basis upon which Westfield might eventually be obligated to indemnify under the policy. Simply put, the Gariup Complaint does not contain any allegations of defamation or disparagement and states no claim for defamation or disparagement against GBS or Larry Behling. Furthermore, no defamatory or disparaging communication is required (or even suggested) to establish a Section 3 violation and entitlement to relief under Section 7 of the Indiana Antitrust Act. Additionally, the theory **[*38]** of "publication" offered by GBS and Larry Behling is speculative and unsupported by the facts alleged in the Gariup Complaint. For the Court to find a duty to defend based upon the disparagement offense as GBS and Larry Behling propose, the Court would be required to speculate about extraneous "facts" regarding potential liability and stretch the allegations beyond reason to impose a duty on Westfield.

GBS and Larry Behling's suggestion that a disparagement claim is somehow implicit in the state antitrust claim advanced by Gariup under the Indiana Antitrust Act also fails. *See* BASF AG v. Great Am. Assurance Co., 522 F.3d 813, 822 (7th Cir. 2008) (emphasizing the need to focus on the allegations in the underlying complaint and stating that "[i]f we allow [the insured] to shoehorn these collateral claims into the umbrella policies' coverage of slander, libel, or disparagement, then an insured could easily transform a run-of-the-mill antitrust or securities action into a suit seeking redress of libel, slander, or disparagement"). Section 7 of the Indiana Antitrust Act permits unsuccessful bidders to challenge the award of a contract when a plaintiff alleges collusion or fraud. Natare Corp., 824 N.E.2d at 340 **[*39]** (discussing Shook Heavy & Envtl. Constr. Group v. City of Kokomo, 632 N.E.2d 355, 358 (Ind. 1994)). It "purports to give a right to treble damages to any 'person' injured by any 'person' doing 'anything forbidden or declared to be unlawful' by any of the first three sections of the Indiana Antitrust Act." Natare Corp., 824 N.E.2d at 343. Thus, Section 7 of the Indiana Antitrust Act permits unsuccessful bidders to seek recovery for injury and harm to their businesses and property and to obtain treble damages, costs of suit, and attorney's fees from those who, among other things, unlawfully scheme, contract, or combine to restrain or restrict bidding for the letting of contracts for private or public work or who restrict free competition for those the letting of such contracts. *See* Shook, 632 N.E.2d at 358 (stating that Section 7 "confers on private individuals the right to challenge the award of a government contract where the governmental entity and successful bidder have engaged in collusion" and "addresses the concern . . . that a 'bidder invests considerable time, effort and money in submitting a bid and is pecuniarily damaged if illegal procedures are used to his disadvantage.'") **[*40]** (citing City of Auburn v. Mavis, 468 N.E.2d 584, 585 (Ind. Ct. App. 1984), and quoting Gariup v. Stern, 254 Ind. 563, 261 N.E.2d 578, 581 (Ind. 1970); Mavis, 468 N.E.2d at 586 ("The purpose of the antitrust act is to: '. . . prevent fraud and collusion in the letting of contract and to protect trade and commerce against unlawful restraints and monopolies. To accomplish these ends the legislature has seen fit to incorporate into the statute different remedies and drastic measures for the punishment of those who violate its provisions, and for the relief of those who suffer on account thereof."). The act does not seek to promote the interest a business has in preserving the reputation of its goods, products, or services such as a disparagement action would protect. *Cf. BASF AG v. Great Am. Assurance Co., 522 F.3d 813, 821 (7th Cir. 2008)* (applying Illinois law (including the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1, et seq*.), finding no implicit claim for disparagement, determining that personal injury and advertising injury coverage was not triggered, and stating that "[t]he [act] seeks to vindicate the rights of consumers by creating a cause of action that protects **[*41]** consumers from deceptive trade practices, fraud, and other abusive acts by businesses that market products to the public. In other words, the [act] allows consumers to recover damages for the economic injuries they suffer. It does not directly advance the interest another business has in preserving the reputation of its products that a disparagement action protects. Thus, the [act] does not expand a common-law disparagement plaintiff's avenues for legal relief . . . . Instead, the [act] fortifies the economic interests of consumers, who would not have standing to pursue relief for the libel, slander, or disparagement injury of a third party.") (internal citations omitted). Accordingly, it "seems extremely unlikely" that Westfield and GBS (the parties to this insurance contract) intended antitrust claims "to be covered--or even potentially covered--by a policy definition that sounds in libel, slander, and disparagement." *Id. at 822*.

For these reasons, the Court finds that the Gariup Complaint alleges no facts that GBS or Larry Behling defamed or disparaged Gariup's goods, products, or services through any manner of oral or written publication, and that the facts alleged in the Gariup **[*42]** Complaint do not fall within, or potentially within, the personal and advertising injury coverages. [4] Because there is no allegation of disparagement of Gariup's goods, products, or services, the Court finds that the personal and advertising injury coverage is not triggered under the CGL policy or the Commercial Umbrella policy and that Westfield has no duty to defend.

D. The Duty to Defend Under the Bodily Injury, Property Damage, and Personal Injury Coverages

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[4] GBS and Larry Behling cite a number of Indiana Court of Appeals and Seventh Circuit opinions in support of their view that personal and advertising injury coverage is triggered because, in their view, the Gariup Complaint comes within the defamation/disparagement offense. However, the cases cited by GBS and Larry Behling are distinguishable from this case in important respects that render the holdings and reasoning in those cases inapplicable here. Some cases are distinguishable because they involved different offenses from the defamation/disparagement offense at issue in this case. *See, e.g., Stroh Brewing Co., 127 F.3d at 566-68* (finding a duty to defend under personal injury or advertising injury provision if caused by an offense of humiliation or discrimination, which was found to include alleged price discrimination, **[*43]** which was alleged in the underlying complaint); *Auto Owners Ins. Co. v. La Oasis, Inc., No. 2:04-CV-174, 2005 U.S. Dist. LEXIS 43565, 2005 WL 1313684, at *5-10 (N.D. Ind. May 26, 2005)* (analyzing advertising injury coverage based upon offenses of misappropriation of advertising ideas or style of doing business and infringement of copyright, title, or slogan); *Audiology Found. of Am., 745 N.E.2d at 306-08* (finding a duty to defend under advertising injury provision based upon the offense of misappropriating advertising ideas or style of doing business, not the defamation/disparagement offense). Other cases are distinguishable because the facts alleged in the underlying complaints in those cases involved allegations of defamation and disparaging statements. *See, e.g., Cincinnati Ins. Co. v. Eastern Atl. Ins. Co., 260 F.3d 742, 744-45 (7th Cir. 2001)* (finding a duty to defend under coverage involving the defamation/disparagement offense because of allegations of the underlying counterclaim referenced a letter that expressed concern over a particular person's character, suggested defamation by false notification and disparagement of services, and charged tortious interference with an agreement); *Tews Funeral Home, Inc. v. Ohio Cas. Ins. Co., 832 F.2d 1037, 1040-41 (7th Cir. 1987)* **[*44]** (per curiam) (finding a duty to defend under personal injury and advertising offense coverage in a case alleging federal and state antitrust claims in addition to common law business torts including claims that the insured conspired to make false, misleading, and defamatory statements disparaging plaintiffs' products and services and wilfully disparaged goods, services, or business of plaintiffs in advertisements); *Liberty Mut. Ins. Co. v. OSI Indus., 831 N.E.2d 192, 199 (Ind. Ct. App. 2005)* (finding a duty to defend under personal injury provision that included the defamation/disparagement offense because the underlying complaint alleged that the insureds disparaged a particular product, technology, and ownership of the product or technology; *North Vermillion Cmty. Sch. Corp., 665 N.E.2d at 634-35* (finding a duty to defend under personal injury coverage when policy provided coverage for the publication or utterance of a libel or slander or of other defamatory or disparaging material and when underlying complaint alleged humiliation, embarrassment, and damages to reputation caused by defendants' conduct, which included impugning plaintiff's good reputation, harassing plaintiff, subjecting **[*45]** plaintiff to ridicule and humiliation, making derogatory evaluations, and alleging incompetency and neglect of duty by plaintiff).

Westfield sought summary judgment against GBS and Larry Behling as to coverage for bodily injury and property damage under the CGL policy and the Commercial Umbrella policy. As Westfield correctly notes, GBS and Larry Behling "did oppose Westfield's contention that Gariup's Complaint failed to allege 'bodily injury' or 'property damage' caused by an 'occurrence'." (Westfield Reply Br. 2, DE 22.) Because there appears to be no genuine issue of material fact, the Court will determine as a matter of law whether Westfield is entitled to judgment on these coverage issues.

Under the CGL policy, Westfield agreed to defend and indemnify GBS in a suit seeking damages because of "bodily injury" and "property damage" caused by an "occurrence" in the coverage territory and during the policy period. Under the Commercial Umbrella policy, Westfield agreed to defend and indemnify GBS in a suit seeking damages because of "personal injury" (i.e., bodily injury or personal and advertising **[*46]** injury) or "property damage" caused by an "occurrence" during the policy period. Westfield argues that Indiana has not yet addressed whether a claim under the Indiana or federal antitrust statutes qualifies as a covered "occurrence," but the Court does not need to determine that issue because the Gariup Complaint does not seek damages for "personal injury" (that is, bodily injury or personal and advertising injury), "bodily injury" (that is, bodily injury, sickness, or disease sustained by a person) or "property damage" (that is, physical injury to tangible property, resulting loss of use of that property, and loss of use of tangible property) as these terms are defined in the policies. Because Gariup is not seeking damages for "personal injury," "bodily injury" or "property damage" as defined in the policies, the Court finds that the personal injury, bodily injury, and property damage coverages are not triggered under the CGL policy or the Commercial Umbrella policy and that Westfield has no duty to defend.

E. The Duty to Indemnify

Having determined that Westfield has no duty to defend under the CGL policy or the Commercial Umbrella policy and considering that the duty to defend is **[*47]** broader than the duty to indemnify, it follows that Westfield has no duty to indemnify GBS or Larry Behling. Consequently, Westfield is also entitled to a declaration that it has no duty to indemnify GBS or Larry Behling in the state civil lawsuit instituted by Gariup.

CONCLUSION

For the foregoing reasons, the Court GRANTS Westfield's Verified Motion for Default Judgment Against Gariup Construction Company [DE 15] and Westfield's Motion for Summary Judgment Against Gil Behling & Son, Inc. and Larry Behling [DE 16], and the Court DENIES GBS and Larry Behling's Cross-Motion for Partial Summary Judgment [DE 20]. The Court DECLARES:

(1) Westfield has no duty to defend GBS or Larry Behling under Commercial Package Policy No. TRA 3 816 339 in the lawsuit brought by Gariup as Cause Number 45C010803PL00037 in the Lake Circuit Court, Crown Point Division.

(2) Westfield has no duty to indemnify GBS or Larry Behling under Commercial Package Policy No. TRA 3 816 339 in the lawsuit brought by Gariup as Cause Number 45C010803PL00037 in the Lake Circuit Court, Crown Point Division.

The Court ORDERS the Clerk of this Court to enter judgment accordingly.

SO ORDERED on March 15, 2010.

/s/ **[*48]** Theresa L. Springmann

THERESA L. SPRINGMANN, JUDGE

UNITED STATES DISTRICT COURT

FORT WAYNE DIVISION

TYR Sport, Inc. v. Warnaco Swimwear, Inc.

United States District Court for the Central District of California

March 16, 2010, Decided

CASE NO: SACV 08-529 JVS (MLGx)

Reporter

709 F. Supp. 2d 802 *; 2010 U.S. Dist. LEXIS 27566 **; 2011-1 Trade Cas. (CCH) P77,494

TYR SPORT, INC., Plaintiff(s), v. WARNACO SWIMWEAR, INC., et al., Defendant(s).

Subsequent History: Summary judgment granted by, Motion denied by *TYR Sport, Inc. v. Warnaco Swimwear, Inc., 709 F. Supp. 2d 821, 2010 U.S. Dist. LEXIS 47582 (C.D. Cal., May 3, 2010)*

Prior History: *TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120, 2009 U.S. Dist. LEXIS 66118 (C.D. Cal., May 27, 2009)*

Core Terms

swimmers, Swimming, wear, Team, disparagement, suits, summary judgment, antitrust, competitors, promotion, endorsement, switched, Lanham Act, coercion, antitrust violation, trade association, genuine issue, consumers, induce, elite, contractual relationship, nonmoving party, anti trust law, material fact, collaboration, comments, swimsuit, argues, coerce, faster

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)(2)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

HN2[] **Summary Judgment, Evidentiary Considerations**

Upon summary judgment, the burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. If the nonmoving party meets this burden, then the motion will be denied.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] **Burdens of Proof, Absence of Essential Element**

Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] **Summary Judgment, Opposing Materials**

A fact issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. To demonstrate a genuine issue, the opposing party must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > Inferences & Presumptions > Inferences

HN5[] **Summary Judgment, Evidentiary Considerations**

In deciding a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

There can be no restraint of trade without a restraint. Promotion and persuasion are not actionable as antitrust violations, even where the speaker holds extraordinary prestige and influence. Such speech is just part of the warfare of competition.

Business & Corporate Law > Joint Ventures > General Overview

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

HN7[] **Business & Corporate Law, Joint Ventures**

A joint research venture alone does not violate the antitrust laws.

Business & Corporate Law > Joint Ventures > General Overview

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

HN8[] **Business & Corporate Law, Joint Ventures**

See *15 U.S.C.S. § 4302*.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9[] **Regulated Practices, Trade Practices & Unfair Competition**

The antitrust laws do not require an ostensibly neutral party to praise competitors equally or to refrain from disparaging a competitor.

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

HN10[] **Burdens of Proof, Movant Persuasion & Proof**

If a moving party fails to carry its initial burden of production upon summary judgment, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial.

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

HN11[] **Reviewability of Lower Court Decisions, Preservation for Review**

There are cases where the United States Court of Appeals for the Ninth Circuit has found no waiver if the issue was at least minimally raised in the pleadings and developed at oral argument.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] **Sherman Act, Claims**

Under the Sherman Act *§ 1*, *15 U.S.C.S. § 1*, an antitrust disparagement claim in the Ninth Circuit does not depend on actual coercion or restraints on consumers. It stems from the recognition that false statements about rivals can obstruct competition and possess no off-setting redeeming virtues, even if consumers are not actually constrained in their purchasing decisions.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

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

HN13[] Sherman Act, Claims

Under a claim for antitrust disparagement under the Sherman Act *§ 1*, *15 U.S.C.S. § 1*, the relevant geographic market is the area of effective competition where buyers can turn for alternate sources of supply. It can be demonstrated by the existence of certain barriers to entry, or insulation from a larger geographic market, such that supply and demand are inelastic with the larger market. The boundaries of a market can also be shown by such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Market definition is generally a factual determination left to the jury.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN14[] False Advertising, Lanham Act

For a prima facie case under the Lanham Act, *15 U.S.C.S. § 1125(a)*, the plaintiff must demonstrate the following: (1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

Evidence > Inferences & Presumptions > Presumptions

HN15[] Consumer Protection, False Advertising

In the Ninth Circuit, publication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance. The presumption, however, is of deception and reliance, i.e., causation, not injury. The presumption is rebuttable.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

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

HN16[] Summary Judgment, Evidentiary Considerations

To avoid summary judgment, the plaintiff must do more than establish a prima facie case and deny the credibility of the defendant's witnesses. She must produce specific, substantial evidence rebutting defendant's evidence.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN17[] **Consumer Protection, False Advertising**

To constitute commercial advertising, a statement must be: (1) commercial speech; (2) intended to influence consumers to buy defendant's goods or services; and (3) disseminated sufficiently to the relevant purchasing public.

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

HN18[] **Intentional Interference, Elements**

The elements of a tortious interference with contractual relations claim are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN19[] **Consumer Protection, False Advertising**

The case law imposes a high burden before speech in the marketplace becomes actionable antitrust conduct. Such statements must have a significant and enduring adverse impact on competition itself in the relevant markets to rise to the level of an antitrust violation. The Ninth Circuit insists on a preliminary showing of significant and more-than-temporary harmful effects on competition, and not merely upon a competitor or customer.

Counsel: **[**1]** For Tyr Sport Inc, a California corporation, Plaintiff: Christopher W Arledge, LEAD ATTORNEY, One LLP, Costa Mesa, CA; Jennifer Sun, Lawrence J Hilton, William E Halle, LEAD ATTORNEYS, O'Neil LLP, Irvine, CA.

For Warnaco Swimwear Inc, a Delaware corporation, doing business as Speedo USA, Defendant: Stuart M Richter, Zia F Modabber, LEAD ATTORNEYS, Gregory S Korman, Katten Muchin Rosenman, Los Angeles, CA.

For United States Swimming Inc, an Ohio corporation, Mark Schubert, an individual, Defendants: Adam Paul Brezine, Jonathan G Fetterly, LEAD ATTORNEYS, Holme Roberts & Owen LLP, Los Angeles, CA; Jennifer Bielak, Richard R Young, LEAD ATTORNEYS, PRO HAC VICE, Colorado Springs, CO.

For Erik Vendt, an individual, Defendant: Richard J Foster, LEAD ATTORNEY, Law Office of Richard J Foster, Seal Beach, CA.

Judges: JAMES V. SELNA, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES V. SELNA

Opinion

[*805] FINAL ORDER RE MOTIONS FOR SUMMARY JUDGMENT

Defendant Warnaco Swimwear, Inc., dba Speedo USA, ("Speedo") moves for summary judgment under *Federal Rule of Civil Procedure 56* on the remaining claims for relief asserted against it by Plaintiff TYR Sport, Inc. ("TYR"). Defendants United States Swimming, Inc. ("USA Swimming") and Mark Schubert **[**2]** ("Schubert") also move for summary judgment under Rule 56 on TYR's remaining claims. Speedo and USA Swimming and Schubert (collectively, "Defendants") join each others' respective motions. TYR opposes both motions.

I. BACKGROUND

TYR and Speedo both design and manufacture high-end swimwear and accessories sold to competitive swimmers. (Statement of Genuine Issues in Opp'n to USA Swimming ("SGI USA") P 3.) USA Swimming is the national governing body ("NGB") of the sport of swimming in the United States, per the Ted Stevens Amateur Sports Act ("Sports Act"), 36 U.S.C. § 220522. (Id. P 1.) In 2006, USA Swimming hired Schubert to be the National and Olympic Team head coach and general manager, though Schubert was and remained a paid spokesperson for Speedo. (Id. PP 2, 9-10.) Speedo also has a sponsorship agreement directly with USA Swimming, and has been the exclusive swimwear equipment sponsor of USA Swimming since 1984. (Id. PP 6, 115.)

TYR alleges that Speedo, USA Swimming, and Schubert formed a combination **[*806]** to make USA Swimming a de facto sales agent for Speedo. Specifically, TYR contends that Schubert, wielding extraordinary influence in the swimming community as the Olympic and National **[**3]** Team head coach, made false statements in promoting Speedo's products and disparaging TYR's.

Much of the controversy centers on the run-up to the 2008 Olympic Games in Beijing. At the time, high-end swimsuit manufacturers were engaged in something of an arms race. (See id. PP 13-16, 173.) Each was attempting to market suits that could significantly reduce the swimming times of elite swimmers. (See id.; Young Decl., Ex. B PP 6-9.) On February 12, 2008, Speedo released its newest suit, the LZR Racer, an upgrade from its previous suit, the Fast Skin Pro ("FS Pro"). (SGI USA PP 13; Young Decl., Ex. B PP 3-6.) TYR, one of Speedo's primary competitors in the American market, was working to develop its own elite racing suit, the Tracer Rise, in time for the run-up to the Beijing Games. (SGI USA PP 14-15.)

Schubert, a paid spokesman for Speedo and the head coach and general manager of the Olympic and National Swim Teams, touted the advantages of the just-released LZR Racer. Just prior to a swim meet in Manchester, England, Schubert gathered the swimmers on the National Team and encouraged them to wear the LZR Racer, stating that it offered a "2% advantage." (Id. P 17.) Schubert was also quoted **[**4]** in a newspaper and magazine article by a reporter covering the meet that, "[i]f you take [the] best times of world record holders and their new times [in the LZR Racer], the difference is 2 per cent." (Id. PP 22-23; Young Decl., Ex. O.) Schubert was also allegedly quoted as saying that he "would strongly advise [the swimmers] to wear the [Speedo] suit at trials, or they may end up at home watching [the Olympics] on NBC." (Complaint P 16*(l).)* [1]

Erik Vendt ("Vendt"), an American swimmer who signed an endorsement deal with TYR in 2006, got caught up in the arms race. (SGI USA P 215.) In late 2007, as he was training to make the U.S. Olympic Team and potentially win a medal in Beijing, Vendt was dissatisfied with the suit TYR had provided. (Id. P 216.) In fall 2007, he made several calls to Schubert, his coach on the National Team and previously at the University of Southern California, to complain about his TYR suit. (Id. PP 214, 216.) Schubert recalls **[**5]** telling Vendt to talk to his agent and TYR about his concerns. (Schubert Depo. 214:6-7, 215:4-6.)

In December 2007, Vendt and his agent met with TYR. (SGI USA P 220.) TYR invited him to test the yet-to-be-released Tracer Rise. (Id.) He was apparently very happy with it. (Id.) However, two weeks later, he informed TYR that he planned to wear the Speedo FS Pro at a January 2008 meet in Long Beach, California. (Id. P 221.) TYR responded by promptly canceling Vendt's endorsement deal. (Id.)

By the time of the U.S. Olympic Trials, only one of the TYR-sponsored swimmers present at the Manchester meet, Katie Carroll ("Carroll"), had switched from wearing a TYR suit to Speedo. (Statement of Genuine Issues in Opp'n to Speedo (SGI Speedo) P 34.) Several swimmers wore a TYR suit at the Trials and qualified for the Olympic Team. (Id. P 45.) In particular, Matt Grevers won two gold medals, a silver medal, and set a world record in Beijing

[1] Neither party has pointed the Court to evidence that Schubert actually made this statement. However, as the Defendants do not contest the issue, the Court will accept the allegation in the Complaint as true for summary judgment purposes.

while wearing the Tracer Rise. (Id. P 164.) Meanwhile, the Speedo-wearing swimmers experienced unparalleled success at the Olympics. All told, 86% of **[*807]** the swimming medals in Beijing, including 91% of the gold medals, were won by swimmers wearing the LZR Racer. (Id. P 55.)

The **[**6]** arms race continued after the Olympics, with other competitors--including Arena, Jaked, and Blue 70--gaining ground on, and sometimes overtaking, the performance of the suits designed by Speedo and TYR. (Id. P 64.) However, Schubert continued his promotion of the Speedo brand, at one point advising two swimmers on the Junior National Team to wear the LZR Racer because it was "faster" than the TYR and Blue 70 suits they were wearing at the time. (Id. P 155.)

However, everything came to an end in July 2009, when FINA, the sport's international governing body, decided to ban from competitions the high-performance full-body suits, including the LZR Racer and the Tracer Rise, starting on January 1, 2010. (Id. P 67.) USA Swimming, meanwhile, decided to move the deadline for banning the full-body suits in its own competitions up to October 1, 2009. (Id.) This effectively ended the market for the high-performance swimsuits.

At this stage in the litigation, TYR has seven remaining claims against Speedo, USA Swimming, and Schubert. [2] TYR's First and Third claims, asserted against all three Defendants, allege a violation of the Sherman Act § 1, *15 U.S.C. § 1*, and the Cartwright Act, *Cal. Bus. & Prof. Code § 16720 et seq.* **[**7]** The Second claim, against Speedo alone, alleges a violation of *Section 2 of the Sherman Act*. The Fourth claim, against Speedo, alleges false advertising in violation of the Lanham Act, *15 U.S.C. § 1125(a)*. The Sixth, Ninth, and Tenth claims, against all three Defendants, allege tortious interference with contractual relations, violation of the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, and seek injunctive relief.

II. LEGAL STANDARD

HN1[] Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN2***[] The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323*. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. **[**8]** See *id. at 322-23*. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000)*.

HN3[] Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex, 477 U.S. at 322*.

HN4[] A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248*. To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical **[*808]** doubt as to the material facts . . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (internal quotation marks and citations omitted). ***HN5***[] In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences **[**9]** are to be drawn in his favor." *Id. at 255*. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Am. Int'l Group, Inc. v. Am. Int'l Bank, 926 F.2d 829, 837 (9th Cir. 1991)*.

III. DISCUSSION

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[2] The claims are numbered here as they are in the body of the Complaint, rather than on the cover page.

The Court considers two summary judgment motions, one brought by Speedo, the other by USA Swimming and Schubert. Because of significant overlap between the motions, the Court treats them here together. The Court considers the challenged claims in turn.

A. Federal and State Antitrust Claims (First through Third Claims)

TYR alleges a conspiracy among Speedo, USA Swimming, and Schubert to restrain trade such that USA Swimming acted as a de facto sales agent for Speedo, promoting Speedo's products to the detriment of Speedo's competitors.

1. Coercion

In the Court's prior order on the Defendants' motions to dismiss (Docket No. 72), the Court clarified exactly what TYR would have to prove to demonstrate an unlawful conspiracy in violation of the Sherman Act and the Cartwright Act. (See id. at 6-9.) The Defendants had argued that TYR could not maintain a Sherman Act § 1 conspiracy claim where the alleged **[**10]** combination was between a market participant, Speedo, and an ostensibly neutral party, USA Swimming. (Id. at 6.) The Court rejected the challenge, noting that the Supreme Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982)*, had recognized a species of Section 1 conspiracies involving a market participant and an ostensibly neutral party. (Docket No. 72 at 7.)

Hydrolevel involved an antitrust suit by a manufacturer of low-water fuel cutoffs for boilers against a nonprofit trade association which promulgated codes and standards for the industry. *456 U.S. at 558-59*. Although the association's codes and standards were only advisory, many were incorporated into federal regulations, state laws, city ordinances, and the laws of all the Provinces of Canada. *Id. at 559*. "Obviously, if a manufacturer's product [could] not satisfy the applicable [association] code, it [would be] at a great disadvantage in the marketplace." Id. The association, therefore, wielded a "powerful influence" over designers of boiler systems. Id.

An employee of the plaintiff's competitor served on the association committee that prepared the standards for boilers. *Id. at 560*. **[**11]** He conspired with the committee chairman to prepare an "unofficial communication" on association letterhead, suggesting that the plaintiffs's product failed to satisfy the association's code governing low-water fuel cutoffs. *Id. at 560-61*. This interpretation, purportedly made by the association itself, was disseminated to potential customers, thereby discouraging the purchase of the plaintiff's product. *Id. at 562*. The Supreme Court found that the competitor "successfully used its position with [the association] . . . to thwart [the plaintiff's] competitive challenge," **[*809]** and held the association liable under *Section 1 of the Sherman Act*. Id.

On their motions to dismiss in this case, Defendants countered with *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989)*, which held that a trade association's speech critical of a product does not constitute an antitrust violation absent some mechanism to actually enforce a restriction on the availability of the product. *Id. at 399*. In Schachar, a trade association labeled a particular eye surgery procedure performed by the plaintiffs as "experimental." *Id. at 398*. However, as the court noted:

> [The association] did not **[**12]** require its members to desist from performing the operation or associating with those who do. It did not expel or discipline or even scowl at members who performed radial keratotomies. It did not induce hospitals to withhold permission to perform the procedure, or insurers to withhold payment; it has no authority over hospitals, insurers, state medical societies or licensing boards, and other persons who might be able to govern the performance of surgery.

Id. (emphasis added). Because the association did not attempt to use any enforcement mechanisms to prevent consumers from getting the surgery, i.e., did not restrict the supply, there was no antitrust violation, only speech. *Id. at 399*.

The distinction between Hydrolevel and Schachar is whether the association or neutral party actually attempts to enforce some standard--whether it punishes or threatens to punish a market actor for deviating from the standard. This distinction has been recognized by numerous other circuits in similar cases. See, e.g., *Santana Prods., Inc. v.*

Bobrick Washroom Equip., Inc., 401 F.3d 123, 132-33 (3d Cir. 2005) (finding no antitrust violation where trade association criticized plaintiff's products, but did **[**13]** not coerce or restrain market actors); Int'l Healthcare Mgmt. v. Haw. Coal. For Health, 332 F.3d 600, 606 (9th Cir. 2003) (finding no antitrust violation from comments made by professional association where it did not act to constrain anyone to follow its advice); Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 373-74 (6th Cir. 2003) (finding that a professional association did not violate antitrust laws under Hydrolevel because, like Schachar, it lacked a mechanism to enforce standards); Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 296 (5th Cir. 1988) (finding no antitrust violation where an influential trade association delayed certification of the plaintiff's product because association did not coerce customers). It is not enough to simply point out that an association has influence over the purchasing decisions of consumers: "An organization's towering reputation does not reduce its freedom to speak out." Schachar, 870 F.2d at 399; accord Consolidated Metal, 846 F.2d at 296 ("Even if user reliance gives [the trade association] significant influence over the market, that influence may enhance, not **[**14]** reduce, competition and consumer welfare ."). Such influence does not prevent an association from promoting a particular product, or disparaging another. Schachar, 870 F.2d at 400.

TYR attempts to distinguish Schachar and other trade association cases because USA Swimming, as an NGB, exercises "monolithic control" over its sport, see JES Props., Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1231-31 (11th Cir. 2006), unlike trade associations, which often lack comparable control over the respective trade. However, the distinction between Hydrolevel and Schachar was not the ability to restrain trade; it was that the defendant in Hydrolevel actually used its de facto force of law to do so.

[*810] TYR also argues that Schachar is inapplicable because it did not involve the "dual role" present here and in Hydrolevel, where an employee of a competitor also served as member or officer within the neutral NGB or trade association. The Court does not find this distinction relevant. See Santana, 401 F.3d at 132 (analogizing to Schachar where plaintiff had alleged a dual role). At most, it goes to motive, but TYR must show that Defendants actually restrained trade, not just that it wanted to. [3]

In short, TYR must prove actual coercion--that USA Swimming and Schubert set a standard with the threat of punishing market participants for deviating from that standard. ***HN6***[] "There can be no restraint of trade without a restraint." Schachar, 870 F.2d at 397. Promotion and persuasion are not actionable as antitrust violations, even where the speaker holds extraordinary prestige and influence. Such speech is just part of the "[w]arfare" of competition. Id. at 399.

With these principles in mind, the Court turns to TYR's evidence that Speedo, USA Swimming, and Schubert coerced elite swimmers to wear Speedo suits as opposed to those of competitors.

i. The Beijing Olympics Comment

On the motion to dismiss, the Court identified a single allegation that potentially presented the necessary coercive conduct. Schubert was quoted as saying, "I would strongly advise [the swimmers] to wear the [Speedo] suit at trials, **[**16]** or they may end up at home watching [the Olympics] on NBC." (Complaint P 16(/).) The Court, at that time, recognized that this statement could be interpreted in two ways: (1) a swimmer wearing a non-Speedo suit would be at a competitive disadvantage, thereby risking a loss at the Trials, or (2) Schubert would exclude a swimmer from the Olympic Team if the swimmer chose to wear a non-Speedo suit. (Docket No. 72 at 8-9.) At the pleading stage, the Court was required to accept TYR's interpretation--that the statement was a threat intended to coerce swimmers into wearing Speedo gear.

Now, on summary judgment, the Defendants have presented evidence that Schubert's statement could not possibly be interpreted as a threat because Schubert lacked the authority to exclude swimmers from the Olympic Team.

[3] The Court **[**15]** also notes that the plaintiffs in Schachar did allege a dual role: "Plaintiffs say that the Academy is in the grip of professors and practitioners who favor conservative treatment, forever calling for more research (the better to justify the academics' request for grants)." 870 F.2d at 399.

First, the Defendants note that USA Swimming's Olympic International Operations Procedures Manual specifically allows swimmers to freely choose the own equipment: "Swimsuit Policy: Athletes may wear the competitive swimsuit of his/her choice." (Young Decl., Ex. D at 16.) This is consistent with the guidelines adopted by the United States Olympic Committee ("USOC"), applicable to all NGBs: "An **[**17]** Athlete shall have the exclusive right to select his or her Specialized Equipment for use in all Protected Competition." [4] (Id., Ex. E.) Thus, at least under USA Swimming and USOC rules, Schubert lacks the authority to mandate that a particular suit be worn by swimmers. TYR concedes as much. (Opp'n to USA Swimming 5.)

Furthermore, under the official selection procedures for the 2008 Olympic Team, Schubert had no discretion with respect to who made the Team. The only criterion for **[*811]** selection is the athlete's swim time at the Olympic Trials--"the wall" decides who goes to the Olympics, not the coach. (See Young Decl., Ex. I.) Under the selection procedures, Schubert could not exclude a TYR-sponsored swimmer whose time was fast enough to qualify, even if he wanted to. Indeed, several TYR-sponsored swimmers qualified at the Trials and swam at the Beijing Olympics. (Zimmer 9/30/09 Depo. at 113:16-25.)

Every witness deposed in this case on this issue has acknowledged that swimmers were free to wear the suit of their choice at the Olympic Trials and **[**18]** that Schubert had no say on who made the pool swimming team. (See, e.g., Descenza Depo. at 48:14-49:7; Furniss Depo. at 148:7-13, 149:15-150:10; Van Wie Depo. at 53:24-54-4; Zimmer 9/30/09 Depo. at 204:18-205:1.) In fact, Mary Descenza ("Descenza"), a TYR-sponsored swimmer, directly told Schubert that she intended to continue wearing TYR suits, and he did not object or pressure her to change her mind. (Descenza Depo. at 60:6-61:14.)

The Defendants having shown evidence that Schubert lacks any coercive power--any means to punish non-Speedo swimmers--with respect to the composition of the Olympic Team for pool swimming, the burden falls to TYR to produce evidence rebutting the Defendants' showing. TYR concedes that it cannot make this showing, at least with respect to the pool swimmers. [5] (SGI Speedo P 40.) TYR admits that the pool swimming Olympic Team is determined by who is "first to the wall." [6]

Instead, TYR notes that Schubert has discretion to choose swimmers for the open water swimming Olympic Team, which is not governed by the same "first to the wall" rule. Therefore, TYR argues, Schubert's statement could reasonably be interpreted as a threat to open water swimmers hoping to make the Olympics. Putting aside the fact that Schubert's comment was made within the context of a pool swim meet, the actual selection of the open water team belies TYR's claim of coercion. Schubert and Bill Rose, the TYR-sponsored head coach of the open water team, chose Chloe Sutton to represent the United States in Beijing over Micha Burden. (Rose Decl. P 9.) Both swimmers wore TYR suits. [7] (Id. P 5.) Although Burden bested Sutton at the Trials, Burden failed to qualify for the Olympics at an international qualifying competition, placing 31 st. (Id. PP 4, 8.) Rose, who was the personal coach of both Burden and Sutton, told Schubert that he felt that Sutton had the best chance to succeed in Beijing. (Id. PP 9.) **[**20]** There is no evidence that suit choice played a role, or that either swimmer was pressured or coerced by Schubert to wear Speedo. [8]

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[4] The parties do not dispute that swimsuits are "Specialized Equipment" and that the Olympic Trials and Olympic Games are "Protected Competition."

[5] However, TYR points out that an extra swimmer was added as an alternate, even though she had not qualified based on her time at the Trials. (SGI Speedo P 40.)

[6] TYR offers the argument that Schubert could influence who reached the wall first through psychological means by "planting in swimmers' **[**19]** minds that the [Speedo suit] is superior and that other suits are inferior." (Opp'n to Speedo 7-8.) This supposed psychological trick does not constitute coercion in any sense of the word.

[7] Burden was sponsored by TYR and Sutton was an amateur who chose to wear TYR.

[8] A swimmer for the men's open water team was also sponsored by TYR. (Zimmer Depo. at 113:16-21.)

Considering the above evidence, Schubert's statement that swimmers not wearing the Speedo suit "may end up at home watching [the Olympics] on NBC," cannot be reasonably interpreted as a threat to exclude swimmers who did not wear Speedo. The evidence establishes that Schubert did not have such authority, that the swimmers and other relevant persons understood **[*812]** that Schubert did not have such authority, and that TYR-sponsored swimmers made the U.S. team and competed in Beijing. There is no triable issue of fact as to whether Schubert's statement constituted an unlawful restraint of trade.

ii. Schubert's Attempts to Persuade Elite Swimmers

TYR argues that Schubert restrained trade by attempting to persuade several elite swimmers to wear Speedo suits from his position of "extraordinary influence." However, as discussed above, statements from a position of influence alone do not constitute "restraints." **[**21]** A person or organization having prestige or respect does not lose the right to promote or criticize products in the marketplace. A statement must set some standard backed by a threat to punish to be actionable as an antitrust violation.

TYR points to several instances of Schubert attempting to persuade swimmers to switch to Speedo. At the Junior Pan Pacific meet in January 2009, Schubert approached Patrick Murphy ("Murphy") and Nick D'Innocenzo ("D'Innocenzo"), two swimmers on the Junior National Team who wore non-Speedo suits. [9] (King Depo. at 13:8-12, 16:6-17:1, 18:3-20:21.) Schubert "suggested in a roundabout sort of way that [the LZR Racer] was the best suit to wear, the fastest suit or the faster suit out of the suits that the boys were wearing." (Id. at 18:25-19:2.) Both swimmers subsequently switched to the LZR Racer. (Id. at 23:7-24:2.) However, Murphy immediately switched back to his TYR suit after a single race, as he did not like the feel of the LZR Racer. [10] (Id. at 24:25-25:10. 61:6-23.) TYR emphasizes that Brian King ("King"), Murphy's coach, said that Murphy "said he felt that he had to wear the LZR suit and would do it, but he didn't want to." [11] (Id. at 24:17-19.)

Schubert's statement to Murphy and D'Innocenzo that the Speedo suit was "faster" is not a restraint on trade. Schubert did not threaten to take any action against them if they chose not to wear Speedo and, as far as the record shows, no action was taken when Murphy did not so chose. Murphy continued to wear the TYR suit, after one go with the LZR, without repercussion. That Murphy felt pressured to wear the suit after Schubert's comments does not evidence the impropriety of Schubert's actions. Murphy did not explain why he felt pressured--whether it was pressure to conform, awe of the National Team head coach, or some other pressure--and he clearly felt free to disregard the LZR after one race. Schubert's "faster" comment was simply promotion of Speedo's product, which Schubert is entitled to do regardless of how influential he is within the swimming community.

Later in the meet, Schubert told King that Murphy was not allowed to wear **[**23]** his TYR swim cap at the meet and had to wear the National Team cap, which had a Speedo logo. (Id. at 20:25-22:2.) However, Schubert's objection was due to the fact that Murphy's personal cap had his name on it, which, according to Schubert, was against team rules. (Id. at 53:20-54-24.) This does not establish that Murphy was coerced to wear a Speedo swimsuit. [12]

[*813] TYR also points out efforts by Schubert to convince swimmers sponsored by Nike, including Jason Lezak, Brendan Hansen, Aaron Peirsol, Cullen Jones, and Kaitlin Sandeno to wear Speedo suits at the Beijing Games. (Young Decl., Ex. K P 12-14.) Again, however, TYR fails to point to any threat Schubert made. Without a threat, Schubert's statements constitute mere promotion, not coercion.

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[9] Murphy **[**22]** wore a TYR and D'Innocenzo wore a Blue 70 suit. (King Depo. at 19:3-4.)

[10] The record is silent on whether D'Innocenzo stuck with the Speedo suit.

[11] This testimony presents an obvious hearsay problem and may not be admissible at trial. *Fed. R. Evid. 801(c)*.

[12] In any case, Murphy disobeyed Schubert and wore his personal TYR cap for the remainder for the meet, apparently without punishment. (King Depo. at 55:4-19.)

TYR presents evidence that a Romanian swimmer, Razvan Florea, switched from TYR to a Speedo suit because of Schubert's comments about the LZR Racer's superior performance. (Florea Decl. PP 5-6.) TYR fails to explain how Schubert or USA Swimming could have any enforcement power against a Romanian **[**24]** swimmer.

Finally, TYR points to the Manchester National Team meeting where Schubert touted the advantages of the latest Speedo suit. [13] Descenza, one of the swimmers at the meeting, testified that Schubert "tried to make a very highly persuasive case and influence. He does have a lot of influence over swimmers because he is such a prominent figure in USA swimming." (Descenza Depo. at 19:23-20:1.) Two other swimmers tried the Speedo suit after the meeting. (Marshall Depo. at 56:11-13; Van Wie Depo. at 16:14-15.) Again, Schubert's statements at the meeting do not establish coercion. Schubert tried to be persuasive, tried to convince swimmers to test the suit, but nothing indicates that he ever attempted to constrain their choice. His prominence within the swimming community does not lessen his ability to legally promote Speedo's product.

iii. Athlete Compensation & Non-Olympic Competitions

In their attempt to establish that Schubert could coerce swimmers to wear Speedo, TYR points to all the discretionary power Schubert **[**25]** has to potentially punish swimmers: (1) he has access to a discretionary fund to pay swimmers; (2) he can choose which swimmers compete on the relays in competition; [14] (3) he has discretion to designate certain swim clubs as "Post-Graduate Training Centers," entitling them to funding from USA Swimming and the USOC; and (4) he has the power to choose swimmers for certain non-Olympic Events, such as the "Duel in the Pool."

The problem is that TYR has failed to connect any threat made by Schubert to the hypothetical powers to punish. It is not enough to show that Schubert could restrain trade--TYR must come forward with evidence that he actually did so. The only potential threat Schubert made was regarding a spot on the Olympic Team. However, as discussed above, Schubert lacked the authority to follow through on the supposed threat. All of the other actions identified by TYR constitute mere promotion--statements to swimmers that the Speedo suit was faster or provided an advantage. TYR has failed to identify any evidence demonstrating that Schubert threatened, **[**26]** even implicitly, to use his discretionary powers to punish a swimmer for not wearing Speedo.

iv. Research Collaboration

TYR also argues that Speedo, USA Swimming, and Schubert restrained trade by collaborating to develop faster swimwear, to the exclusion of Speedo's competitors. TYR cites no authority that such collaboration violates antitrust laws. ***HN7***[] A joint research venture alone does not violate the antitrust laws. See *United States v. Line Material Co., 333 U.S. 287, 310, 68* ***[*814]*** *S. Ct. 550, 92 L. Ed. 701 (1948)*;***HN8***[] see also *15 U.S.C. § 4302* ("In any action under the antitrust laws . . . the conduct of any person in making or performing a contract to carry out a joint venture . . . shall not be deemed illegal per se."). This is particularly true where one of the collaborators, USA Swimming, is not even a market participant. TYR has pointed to no anticompetitive effect of the joint research project. Indeed, such joint research is likely to have many procompetitive effects. [15]

Nor does the fact that USA Swimming kept information gleaned from the collaboration secret **[**27]** demonstrate a restraint of trade. Secrecy is a necessary part of the collaboration; if the results were immediately made public, the manufacturer would have no incentive to expend the time and effort to collaborate with an NGB on research, an activity potentially beneficial to competition. Manufacturers are not required to be altruistic when working in a joint venture with a non-profit.

[13] The parties dispute whether Schubert was referring to an advantage the LZR Racer had over the old Speedo suit, the FS Pro, or over all suits currently in the marketplace.

[14] The swimmers sometimes receive bonuses from sponsors for being chosen to the relay team. (See, e.g., TYR Exs. 18 at 18, 19 at Ex. A.)

[15] The combination of resources and expertise of USA Swimming and Speedo is likely to help innovation in swimsuit technology, thereby benefitting the consumer.

v. Schubert's Role as Technical Advisor

Finally, TYR complains of Schubert's role within USA Swimming to disseminate technical information to the public. TYR argues that Schubert, as a "gatekeeper," only disseminated information favorable to Speedo, misstated information, and withheld information unfavorable to Speedo and favorable to Speedo's competitors. These complaints do not make out a claim of coercion. ***HN9***[] The antitrust laws do not require an ostensibly neutral party to praise competitors equally or to refrain from disparaging a competitor, subject to the limits discussed below with regard to TYR's disparagement theory. See *Schachar, 870 F.2d at 399*.

Because TYR has failed to show a genuine issue of fact with regard to coercion, the Defendants are entitled to summary adjudication on that issue. *Fed. R. Civ. P. 56(d)*. **[**28]** While not agreeing with the Court's application of Schachar, TYR conceded at oral argument that the Defendants were entitled to this relief on its compulsion theory.

2. Disparagement

At the hearing, TYR argued that the Defendants had not addressed TYR's disparagement theory of antitrust liability and therefore failed to carry their initial burden under Celotex of demonstrating the absence of a genuine issue of material fact as to an essential element of TYR's claim. *477 U.S. at 323*. This argument was not specifically advanced in either of TYR's opposition briefs. It was, however, alluded to in the opposition to USA Swimming and Schubert's motion. [16]

The Defendants argue that, because they moved for summary judgment on the entire claim, the burden shifted to TYR to raise a genuine issue of material fact; in **[*815]** this case, to raise their alternative theory of antitrust liability. However, TYR was not obligated to produce anything unless and until the Defendants carried their initial Celotex burden.***HN10***[] "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire, 210 F.3d at 1102-03* (emphasis added). By failing to squarely address TYR's disparagement theory, the Defendants have not carried their initial *Celotex* burden. Thus, TYR's burden of production with regard to the disparagement theory was never **[**30]** triggered.

This is not a new theory raised for the first time to prevent or delay summary judgment. TYR's Complaint specifically alleges that the Defendants engaged in a campaign of false disparagement using the prestige and apparent impartiality of USA Swimming and Schubert. (Compl. PP 13-17.) The disparagement theory was also squarely addressed following the motions to dismiss, as evidenced by the Court's discussion of *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal, 108 F.3d 1147 (9th Cir. 1997)*, in denying dismissal of TYR's disparagement claim. (Docket No. 72 at 10.) By completely failing to address a live issue, the Defendants failed to carry their *Celotex* burden.

Nor has TYR waived its argument by saving it for the hearing. Although the Court has discretion to refuse to consider arguments not raised in a timely manner, see, e.g., *Brass v. County of Los Angeles, 328 F.3d 1192, 1197-98 (9th Cir. 2003)*, the Court does not consider the argument waived here, where the disparagement theory is clearly set forth in the pleadings, remained a live issue following the Court's order on the motions to dismiss, and is alluded to--albeit rather obliquely--in TYR's **[**31]** opposition papers. Cf. *United States v. Fay, 545 F. Supp. 2d 1067, 1071 (E.D. Cal. 2008)* ("***HN11***[] [T]here are cases where the Ninth Circuit has found no waiver if the issue was at least minimally raised in the pleadings and developed at oral argument . . . .").

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[16] "USA Swimming and Schubert misread the [Court's order on the motions to dismiss] (and the referenced authorities), and they fundamentally mischaracterize--i.e., narrow the focus--of the allegations and evidence establishing defendants' coordinated anti-competitive conduct. USA Swimming and Schubert try to cast TYR's claims as limited to the 2008 Olympic team and limited to the rules regarding swimwear of choice. However, the anticompetitive conduct shown by TYR is much broader: it predates the Olympics by more than a year and encompasses **[**29]** behavior unrelated to team selection and technical equipment rules. Put in summary judgment parlance, USA Swimming and Schubert fail to meet their burden of negating an essential element of TYR's claims or demonstrating an absence of evidence supporting them because they miscast them in the narrow range they think falls within the 'undisputed evidence.'" (Opp'n to USA Swimming 13.)

The Defendants also argue that the disparagement claim fails because TYR lacks evidence demonstrating that elite swimmers or consumers were ever restrained from purchasing TYR products. However, ***HN12***[] an antitrust disparagement claim in the Ninth Circuit does not depend on actual coercion or restraints on consumers. It stems from the recognition that "[f]alse statements about rivals can obstruct competition and possess no off-setting redeeming virtues," even if consumers are not actually constrained in their purchasing decisions. See *Harcourt Brace, 108 F.3d at 1152* (quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** P 737b at 280-81 (1978)).

Accordingly, the Defendants are not entitled to summary judgment on TYR's antitrust claims to the extent they rely on a disparagement theory.

3. Illegal Agreement

The Defendants contend that TYR's *Sherman Act § 1* and Cartwright Act claims fail because they lack evidence of an illegal agreement. Relying on *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* **[**32]** and Matsushita, the Defendants argue TYR fails to raise a triable issue of fact as to whether the various agreements between Speedo, USA Swimming, and Schubert are illegal, because those agreements are entirely consistent with legal sponsorship agreements.

The Defendants misapply the holdings of Monsanto and Matsushita. These cases stand for the proposition that, in an antitrust conspiracy case, one cannot reasonably infer a combination or conspiracy **[*816]** solely from conduct that is consistent with independent action, without additional evidence of an actual agreement. See *Matsushita, 475 U.S. at 588*; *Monsanto, 465 U.S. at 763-64*. Here, in contrast, there is unquestionably evidence of an agreement between the parties. TYR need not rely on an inference from circumstantial evidence consistent with independent competition.

4. Market Definition

Finally, the Defendants argue that they are entitled to summary judgment because TYR cannot show a genuine issue of fact as to the relevant geographic market. TYR alleges a market for "high-end competitive swimwear and accessories" in the geographic market of "the entire United States and its territories." (Compl. P 9.)

HN13[] The relevant geographic market is the **[**33]** "area of effective competition . . . where buyers can turn for alternate sources of supply." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991)* (citation and quotation marks omitted). It can be demonstrated by the existence of certain barriers to entry, or insulation from a larger geographic market, such that supply and demand are inelastic with the larger market. Id. The boundaries of a market can also be shown by "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1204 (9th Cir. 1997)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Market definition is generally a factual determination left to the jury. *Forsyth v. Humana, Inc., 114 F.3d 1467, 1476 (9th Cir. 1997)*.

TYR has sufficient evidence of the United States as a separate geographic market to overcome summary judgment on the issue. Internal emails and memos at both Speedo and USA Swimming **[**34]** indicate that they consider the United States market as distinct from the international market. (TYR Exs. 37-39.) Steve Furniss ("Furniss"), the Executive Vice President of TYR and who has worked for 34 years in the performance swimwear industry, testified as to numerous barriers to competition: [17] (1) the ability to provide local technical support; (2) on-the-ground customer service networks able to quickly respond to the needs of elite swim teams; (3) relationships with athletes, coaches, and swim directors; (4) cultural differences in suit preferences; (5) differences in the physiology of

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[17] Speedo, citing Morgan, objects to Furniss's declaration on the grounds that it is impermissible lay witness testimony on the technical subject of the relevant geographic market. See *924 F.2d at 1490*. This objection is overruled because Furniss testifies only as to factual characteristics of the geographic market, which is within his competency **[**35]** as an industry veteran. He does not give a conclusory opinion on market definition, unlike the witnesses in Morgan. See id.

swimmers from country to country; (6) differences in sizing and labeling requirements; (7) differences in local regulations regarding consumer protections, packaging, and the environment; and (8) differences in currency and pricing. (Furniss Decl. PP 4-6.)

Accordingly, the Court finds that the Defendants are entitled to summary adjudication on the issue of antitrust coercion, but not on TYR's antitrust theory of antitrust disparagement.

B. False Advertising Claim (Fourth Claim)

Speedo seeks summary judgment on TYR's false advertising claim under the **[*817]** Lanham Act. TYR's false claims are based on two statements made by Schubert: (1) a statement he made to swimmers and a reporter at a swim meet, that the LZR suit offered "a 2% advantage"; and (2) a statement to two youth swimmers that the LZR suit was "faster" than their non-Speedo suits.

HN14[] For a prima facie case under the Lanham Act, the plaintiff must demonstrate the following: "(1) the defendant made a false statement either about the plaintiff's or its own product; (2) the statement was made in commercial advertisement or promotion; (3) the statement actually deceived or had the tendency to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant caused its false statement to enter interstate commerce; and (6) the plaintiff has been **[**36]** or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to the defendant, or by a lessening of goodwill associated with the plaintiff's product." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1052 (9th Cir. 2008)* (quoting *Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829 (9th Cir. 2002))*.

1. Schubert's Statements to Swimmers

Speedo argues that, even assuming that Schubert's statement can be proven false or misleading, TYR cannot demonstrate injury. His statement at the Manchester swim meet was to an audience of 25 swimmers, only one of whom switched from a wearing TYR to a Speedo on a regular basis. [18] (Kerska Decl. PP 1-4; Carroll Decl. PP 4-16.) The one swimmer who switched, Katie Carroll, did so months later at the Olympic Trials after she had swam a poor first race in her TYR Tracer Rise suit. (Carroll Decl. PP 11-15.) She testified that Schubert's 2% comment had nothing to do with her decision. (Id. P 13.)

Schubert's statement to the two youth swimmers, Murphy and D'Innocenzo, similarly failed to **[**37]** result in lost sales to TYR. Murphy tried the LZR Racer for one race and then switched back to the TYR suit, because he did not like the feel of the Speedo suit. (King Decl. at 24:25-25:10. 61:6-23.) D'Innocenzo was not a TYR customer and, instead, wore a Blue 70 suit. (Id. at 19:3.)

TYR contends that it need not prove injury because Schubert's statements were literally false.***HN15***[] In the Ninth Circuit, "[p]ublication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1146 (9th Cir. 1997)* (quoting *U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040-41 (9th Cir. 1986)*. The presumption, however, is of "deception and reliance," i.e., causation, not injury. The presumption does not cure TYR's failure to show evidence of any actual loss of sales.

Moreover, the presumption is rebuttable. See *Jartran, 793 F.2d at 1041*. The only injury fairly traceable to Schubert's comments was Carroll's defection to Speedo several months after the Manchester comments. However, Carroll specifically stated that her choice to switch sponsors had nothing to do with Schubert's comments. TYR has no evidence **[**38]** rebutting this testimony. Cf. *Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996)* ("***HN16***[] To avoid summary judgment, [the plaintiff] must do more than establish a prima facie case and deny the credibility of the **[*818]** [defendant's] witnesses. She must produce specific, substantial evidence [rebutting defendant's evidence].")

[18] At the elite level, most swimmers are sponsored by a swimwear company and do not purchase their own suits.

Finally, any claim for injunctive relief under the Lanham Act is moot, as it is undisputed that there is no market for the high-performance swimsuits among elite swimmers following FINA's ban.

Because TYR cannot demonstrate injury based on Schubert's statement at the Manchester meet and the statements to Murphy and D'Innocenzo, TYR's Lanham Act claim based on those statements fails as a matter of law.

2. Schubert's Statement to Craig Lord

Speedo argues that Schubert's claim of a 2% advantage made to swim reporter Craig Lord ("Lord") cannot constitute a Lanham Act violation because it is not "commercial advertising or promotion." ***HN17***[] To constitute commercial advertising, a statement must be: (1) commercial speech; (2) intended to influence consumers to buy defendant's goods or services; and (3) disseminated sufficiently to the relevant purchasing public. *Boule v. Hutton, 328 F.3d 84 (2d Cir. 2003)*.

Speedo, **[**39]** citing Boule, contends that Schubert's statement to Lord fails the first prong because the statement was made to the press about a matter of public concern. In Boule, the defendants, son and daughter-in-law of the late Russian avant garde painter Lazar Khidekel, made statements to an art reporter questioning the authenticity of the plaintiffs' Khidekel collection. *Id. at 86, 88*. At the time, the defendants were attempting to sell their own collection of Khidekel works. *Id. at 87*. The statements were quoted in the reporter's magazine article about fraudulent artwork. *Id. at 88*.

The Second Circuit found that the statements in the magazine article did not constitute commercial speech:

> We have little hesitation in deciding that as a matter of law the [magazine] article, and the [defendants'] statements quoted in that article, are not commercial speech. The article itself addresses a matter of public concern--fraud in the art market--and is certainly protected. The [defendants'] statements contained in the article are inextricably intertwined with the reporters' coverage of their topic. The statements by the [defendants] in [the magazine] contribute to reporters' discussion of an issue of **[**40]** public importance and occur in a forum that has traditionally been granted full protection under the *First Amendment*. As always with the public expression of opinion, "we have been careful not to permit overextension of the Lanham Act to intrude on *First Amendment* values." Consequently, the defendants were entitled to a grant of summary judgment on that portion of the Lanham Act claim that addressed the statements by the [defendants] in [the magazine].

Id. at 91-92 (footnote and citation omitted).

Likewise, Lord's article in SwimNews.com addressed a matter of public concern; namely, the public debate, "confusion, doubt and denial" about the effect of Speedo's new high-performance suit on the performance of swimmers. (Young Decl., Ex. O.) The article is clearly protected speech. And like the defendants' statements in Boule, Schubert's statement regarding the performance of athletes in the Speedo LZR Racer is "inextricably intertwined with the reporter['s] coverage of [the] topic." See *328 F.3d at 91*. As such, under *Boule*, Schubert's statement to Lord cannot constitute a Lanham Act violation.

In its opposition brief, TYR did not address Boule or the statement to Lord, apparently conceding **[**41]** that it does not constitute commercial speech actionable under the Lanham Act. Accordingly, Speedo is entitled to summary judgment on TYR's fourth claim. [19]

[*819] C. Intentional Interference with Contractual Relations (Sixth Claim)

[19] The Court does not reach the question of whether Schubert's statement can be proven literally false.

TYR's tortious interference with contractual relations claim is predicated on the termination of the endorsement deal between TYR and swimmer Erik Vendt. During his endorsement deal with TYR, Vendt decided to wear a Speedo suit at a swim meet. TYR canceled his endorsement deal in response.

HN18[] The elements of a tortious interference with contractual relations claim are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587 (1990)*.

The Defendants contend that they cannot be liable because (1) TYR, not Vendt, breached the contract, and (2) TYR has not demonstrated **[**42]** an intentional act on the part of any of the Defendants "designed to induce a breach or disruption." The Court need not reach the breach of contract issue, because TYR does not have sufficient evidence to create a triable issue of fact as to whether any of the Defendants intentionally induced Vendt to breach or disrupt his relationship with TYR. [20]

TYR admits that it does not have direct evidence that the Defendants induced Vendt to breach. However, it points to circumstantial evidence that it claims raises a triable issue of fact as to whether Schubert and Stu Isaac ("Isaac"), a Speedo-sponsored swim coach, induced Vendt to terminate his contract with TYR.

Schubert testified that Vendt called him several times in the fall of 2007 to complain about his TYR suits. (Schubert Depo. at 213:9-215:23.) He also testified that he told Vendt to talk to his agent and communicate his dissatisfaction directly to TYR. (Id. at 214:6-7, 215:4-6.) **[**43]** Vendt, however, stated in an interrogatory response that he never discussed his TYR suits with Schubert. (TYR Ex. 47 at 2.) When pressed at a deposition, he stated that he did not recall discussing TYR suits with Schubert in 2007, but that he may have around March 2008. [21] (Vendt Depo. 148:24-149:18.)

TYR contends that a reasonable jury could find that during the calls in fall 2007, Schubert urged Vendt to end his relationship with TYR based on the following facts: (1) Vendt's evasiveness during discovery regarding the calls; (2) Schubert's public comments urging swimmers to use the LZR Racer; (3) that Schubert used money from his discretionary account to pay Vendt after TYR canceled the contract; (4) Schubert's failed negotiations with TYR for an endorsement deal in 2004; and (5) the fact that Vendt claimed to have secured an endorsement deal with Speedo after TYR canceled his deal.

This circumstantial evidence is insufficient to create **[**44]** a triable issue of fact. First, it is undisputed that Vendt initiated the calls to Schubert, not vice versa. This **[*820]** is, of course, not dispositive, but certainly weighs heavily against the notion that Schubert acted to intentionally induce Vendt to switch vendors.

Second, Schubert's public promotion of Speedo products does not establish that he ever urged a swimmer to breach an endorsement deal. It would be unreasonable to infer that Schubert privately urged Vendt to withhold performance of the endorsement deal from his public comments promoting Speedo.

Finally, the remaining evidence is too tenuous to establish a genuine issue of fact. The Court fails to see how Vendt's evasiveness establishes Schubert's intentional tortious conduct, especially given that Schubert himself appears to have been entirely forthcoming about the calls. The actions taken by Schubert and Speedo after the Vendt lost his TYR deal shed little light on their actions before. [22] And Schubert's alleged motive to injure TYR

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[20] It is worth noting that it appears that TYR terminated Vendt--not vice versa. (See TYR Ex. 45.) TYR's action was predicated on Vendt's choice to wear a competitor's suit, but he appears to have had a unilateral contractual right to do so. (Speedo Ex. 283 § 3.5.)

[21] Vendt's testimony is unclear as to whether the March 2008 calls were with TYR or Schubert; Vendt appears to have been confused by the question. (See Vendt Depo. at 149:2-12.). However, the Court accepts TYR's interpretation for summary judgment purposes.

because of the failure to secure a TYR endorsement deal in 2004 is far too tenuous to provide any significant probative value.

TYR also points to a meeting Vendt allegedly had with Isaac, his Speedo-sponsored coach at Club Wolverine. Vendt testified that he had visited Isaac's home several times, but only when Isaac was not there--Vendt's girlfriend at the time was good friends with Isaac's wife. (Vendt Depo. at 96:7-12.) TYR contends that this is inconsistent with Isaac's testimony that Vendt and his girlfriend once came over to cook a turkey for Thanksgiving. (Isaac Depo. at 227:1-11.) However, Isaac's testimony does not, in fact, establish that he was there or met with Vendt at that time. [23] In any case, nothing indicates that swimsuits were ever discussed.

To overcome summary judgment, TYR needs to show more than a scintilla of evidence. But that is all they have here; disconnected bits of circumstantial evidence. Even if those bits are summed, no reasonable jury could find by a preponderance of the evidence that Schubert or Isaac intentionally induced Vendt to breach his contractual relationship with TYR. Therefore, the defendants are entitled to summary judgment on TYR's Sixth claim.

D. Remaining State Law Claims (Ninth and Tenth Claims)

The Defendants argue that TYR's UCL claim fails because it is predicated on the TYR's other causes of action. However, because TYR's antitrust disparagement claim survives, TYR can base its UCL claim on the Defendants' alleged "unlawful" business practices constituting violating the Sherman Act and the Cartwright Act, and "unfair" business practices that "threaten[] an incipient violation of an ***antitrust law***, or violate[] the policy or spirit of one of those laws because its **[**47]** effects are comparable to or the same as a violation of the law, or otherwise significantly threatens **[*821]** or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*.

TYR's tenth claim seeks only injunctive relief and does not state an independent cause of action. However, because TYR's antitrust claims and UCL claim survive summary judgment, TYR's claim for injunctive relief remains as well.

IV. CONCLUSION

For the foregoing reasons, the motions for summary judgment are GRANTED in part and DENIED in part. Speedo is entitled to summary judgment with respect to TYR's Fourth and Sixth Claims, and USA Swimming and Schubert are entitled to summary judgment on TYR's Sixth Claim. Speedo, USA Swimming, and Schubert are entitled to summary adjudication on the remaining claims to the extent they rely on a coercion theory of antitrust liability.

As noted above, the Court concludes that the Defendants failed to carry their initial *Celotex* burden with respect to TYR's theory of antitrust liability for disparagement. However, ***HN19***[] the case law imposes a high burden before speech in the marketplace becomes actionable antitrust conduct. Such statements "must have a significant **[**48]** and enduring adverse impact on competition itself in the relevant markets to rise to the level of an antitrust violation." *Harcourt Brace, 108 F.3d at 1152*. In fact, the Ninth Circuit "insist[s] on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer)." *Id. at 1151* (internal quotation marks omitted).

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[22] This is especially true given that Schubert did not use his discretionary **[**45]** fund to pay Vendt until April 2008, roughly three months after TYR canceled his endorsement deal. (Schubert Depo. at 218:22-219:3.) And although Vendt claimed to have a Speedo deal in March 2008, (Vendt Depo., Ex. 295), Speedo did not propose a sponsorship deal until May 2008, four months after the end of his TYR deal, and, because of this lawsuit, no deal was ever reached. (Supp. Isaac Decl. PP 4-6.)

[23] "I do believe that one time over a Thanksgiving [Vendt and his girlfriend, Kim] . . . wanted to try to roast a turkey for the first time in their lives, **[**46]** and they brought a turkey over. And my wife helped them, and even went back to their apartment to help them finish off cooking the turkey. I was not involved in that process, thank goodness." (Issac Depo. 227:4-11 (emphasis added).)

The Court believes that the issue of the requisite preliminary showing should be tested before the matter proceeds to trial. To that end, the Court is willing to entertain a further summary judgment motion, even if that requires a slightly collapsed motions schedule [24] or a brief delay in the trial. The Court schedules a telephonic status conference for March 8, 2010 at 11:00 a.m. to discuss the issue.

IT IS SO ORDERED.

DATED: March 16, 2010

/s/ James V. Selna

JAMES V. SELNA

UNITED STATES DISTRICT JUDGE

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[24] The combination of *Rule 56(c) of the Federal Rules of Civil Procedure* and the Local Rules results in a minimum 49-day motions cycle.

LexisNexis

Flores v. EI Maint. Co.

United States District Court for the Northern District of California

March 18, 2010, Decided; March 18, 2010, Filed

No. C 09-3613 CW

Reporter
2010 U.S. Dist. LEXIS 25583 *; 2010 WL 1010013

MANUEL FLORES and ALEJANDRO SICAJAU, Plaintiffs, v. EI MAINTENANCE COMPANY and KEN IRWIN, Defendants.

Subsequent History: Amended by, On reconsideration by *Flores v. EI Maint. Co., 2010 U.S. Dist. LEXIS 30086 (N.D. Cal., Mar. 29, 2010)*

Core Terms

allegations, overtime, minimum wage, meal, failure to pay

LexisNexis® Headnotes

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

HN1[] **Complaints, Requirements for Complaint**

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)*.

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

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

Dismissal under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. However, this principle is inapplicable to legal conclusions; threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, are not taken as true.

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

HN3[] **Remedies, Private Suits**

In actions to enforce Fair Labor Standards Act provisions, no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. *29 U.S.C.S. § 216(b)*.

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

HN4[] **Deceptive & Unfair Trade Practices, State Regulation**

California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, prohibits any unlawful, unfair or fraudulent business act or practice. *Cal. Bus. & Prof. Code § 17200*. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. Violation of almost any federal, state or local law may serve as the basis for a UCL claim.

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

HN5[] **Deceptive & Unfair Trade Practices, State Regulation**

Claims under California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, do not require allegations of anticompetitive conduct; the UCL borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.

Counsel: [*1] For Manuel Flores, Alejandro Sicajau, Plaintiffs: Adam Lee Pedersen, Adam Wang, Law Office of Adam Wang, San Jose, CA.

For EI Maintenance Company, also known as E.I.M Demolition, Ken Irwin, Defendants: James Louis Kohl, LEAD ATTORNEY, Law Offices of James Louis Kohl, Walnut Creek, CA.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND ALTERNATIVE MOTION TO STRIKE

(Docket No. 18)

Defendants EI Maintenance Company and Ken Irwin move to dismiss or, in the alternative, to strike claims asserted by Plaintiffs Manuel Flores and Alejandro Sicajau. Defendants also move for a more definite statement. Plaintiffs oppose the motion. The motion was taken under submission on the papers. Having considered all the papers submitted by the parties, the Court GRANTS in part Defendants' motion to dismiss and alternative motion to strike, and DENIES them in part. The Court stays all proceedings as to Defendant Ken Irwin because of his ongoing bankruptcy case.

BACKGROUND

Plaintiffs allege that, for some period of time over the past four years, they worked for Defendant EI Maintenance Company, a "construction clean-up company" **[*2]** based in Foster City, California. First Am. Compl. (FAC) P 7. They claim that they worked regularly in excess of eight hours per day and forty hours per week. Plaintiffs allege that they were not compensated for their overtime hours, as required by California and federal law. They aver that they did not perform duties that would have exempted Defendants from compensating them for overtime.

Plaintiffs assert the following claims against Defendants: (1) failure to pay overtime, in violation of *California Labor Code section 510*; (2) failure to pay overtime, in violation of the Fair Labor Standards Act (FLSA); (3) failure to pay wages due, in violation of *California Labor Code section 201*; (4) violation of *California Business and Professions Code section 17200*; and (5) providing inadequate pay statements, in violation of *California Labor Code section 226*.

Defendant Ken Irwin, who allegedly had control over Plaintiffs' working conditions, has filed a notice stating that he has a pending bankruptcy petition in the United States Bankruptcy Court. Mr. Irwin asserts that, under *11 U.S.C. § 362(a)(1)*, he is entitled to an automatic stay of Plaintiffs' proceedings.

LEGAL STANDARD

HN1[] A complaint must **[*3]** contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. ***HN2***[] Dismissal under *Rule 12(b)(6)* for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*. However, this principle is inapplicable to legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. *Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 555*).

DISCUSSION

In their opening brief, Defendants argue, among other things, that typographical errors in Plaintiffs' original complaint rendered some claims vague, warranting their dismissal. To address these issues, Plaintiffs filed a FAC to address the errors complained of by Defendants. In **[*4]** their reply, Defendants state that the FAC corrects the purported pleading deficiencies based on the typographical errors. Defendants maintain that, despite these corrections, Plaintiffs' complaint remains susceptible to dismissal.

I. Plaintiffs' Failure to Consent

Defendants argue that Plaintiffs' action must be dismissed for failure to state a claim and for lack of subject matter jurisdiction because Plaintiffs have not consented to participate in this suit. ***HN3***[] In actions to enforce FLSA provisions, no "employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *29 U.S.C. § 216(b)*.

Plaintiffs have not consented in writing to be parties in this action. Neither their FAC nor any other written declaration provides their consent. As a result, they have not met the requirements to bring suit under the FLSA. [1] To proceed on their claims, Plaintiffs must file, in writing, statements indicating their consent.

II. Sufficiency of Plaintiffs' Claims under *California Business and Professions Code Section 17200*

Plaintiffs claim that Defendants' failure to abide by state and federal wage-and-hour laws constitutes a violation of *California Business and Professions Code section 17200*, which is also known as California's Unfair Competition Law (UCL). ***HN4***[] The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048*

[1] Plaintiffs' FAC asserts that this Court's jurisdiction, pursuant to *28 U.S.C. § 1331*, rests on their FLSA claims. If Plaintiffs fail to state such claims, the **[*5]** Court would lack federal-question subject matter jurisdiction over their action.

(9th Cir. 2000). Violation of almost any federal, state or local law may serve as the basis for a UCL claim. *Saunders v. Superior Ct., 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*.

Defendants maintain that Plaintiffs' UCL claims must be dismissed because Plaintiffs do not allege any facts that tend to show monopolistic or anti-competitive practices. They cite two cases, both of which address antitrust claims. *See* *Gonzales v. Proctor and Gamble Company, 247 F.R.D. 616 (C.D. Cal. 2007)*; **[*6]** *Breakdown Services, Ltd. v. Now Casting, Inc., 550 F. Supp. 2d 1123 (C.D. Cal. 2007)*. However, Plaintiffs do not assert that Defendants violated state or federal ***antitrust law***; they allege that Defendants committed wage-and-hour violations. ***HN5***[] UCL claims do not require allegations of anti-competitive conduct; the UCL "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Blanks v. Shaw, 171 Cal. App. 4th 336, 363-64, 89 Cal. Rptr. 3d 710 (2009)* (citation and internal quotation marks omitted).

Plaintiffs aver that Defendants violated *section 17200* by failing to compensate them for overtime pursuant to state and federal law. This allegation sufficiently supports Plaintiffs' claims under *section 17200*.

III. Allegations Concerning Deprivation of the Minimum Wage and Meal Premiums

In connection with their UCL claims, Plaintiffs assert that they have "been illegally deprived of the minimum wage, overtime pay and missed meal premiums to which they were legally entitled . . . ." FAC P 42. Defendants assert that Plaintiffs do not allege facts to support the allegations concerning the failure to pay a minimum wage or meal premiums and, as **[*7]** a result, these allegations should be stricken. [2] Plaintiffs acknowledge that they are not bringing claims concerning the minimum wage or meal periods. Accordingly, because the allegations concerning the minimum wage and meal periods are immaterial to Plaintiffs' claims for overtime pay, the Court strikes them from the FAC. *See* *Fed. R. Civ. P. 12(f)*.

CONCLUSION

For the foregoing reasons, the Court GRANTS in part Defendants' motion to dismiss and alternative motion to strike, and DENIES them in part. Within three days of the date of this Order, Plaintiffs shall file declarations that formally state their consent to sue. Their failure to do so will result in the dismissal of their FLSA claims. If Plaintiffs file consents, Defendant EI Maintenance Company shall file its answer within twenty-one days of the date of their filing. In addition, the Court **[*8]** strikes the allegations contained in paragraph forty-two of Plaintiffs' FAC concerning Defendants' failure to pay the minimum wage and missed meal premiums.

The Court stays all proceedings as to Defendant Ken Irwin because he has an ongoing bankruptcy case.

A case management conference is scheduled for May 4, 2010 at 2:00 p.m.

IT IS SO ORDERED.

Dated: March 18, 2010

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

End of Document

[2] Defendants also argue that, because Plaintiffs do not plead facts to support the allegations concerning Defendants' failure to pay a minimum wage or meal premiums, Plaintiffs' UCL claim must be dismissed. However, as noted above, Plaintiffs state a UCL claim based on their allegations that Defendants failed to compensate them for overtime.

Grant v. Adventist Health Sys. Sunbelt Health Care Corp.

United States District Court for the Western District of North Carolina, Asheville Division

March 25, 2010, Decided; March 25, 2010, Filed

CIVIL CASE NO. 1:09cv79

Reporter
2010 U.S. Dist. LEXIS 29241 *; 2010-2 Trade Cas. (CCH) P77,203

GREGORY GRANT, M.D., BENJAMIN FANN, M.D., and DAVID HAYES, M.D., Plaintiffs, vs. ADVENTIST HEALTH SYSTEM SUNBELT HEALTH CARE CORPORATION d/b/a Park Ridge Hospital a/k/a Fletcher Hospital, Incorporated, PARK RIDGE MEDICAL ASSOCIATES, and DOE PHYSICIANS 1 through 30, Defendants.

Prior History: *Grant v. Adventist Health Sys. Sunbelt Health Care Corp., 2009 U.S. Dist. LEXIS 126766 (W.D.N.C., July 27, 2009)*

Core Terms

Recommendation, motion to dismiss, state law claim, magistrate judge, Memorandum, Sherman Act, district court, portions, allegations, privileges, grounds, novo

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

HN1[] **Magistrates, Pretrial Referrals**

With regard to a magistrate judge's report and recommendation, a district court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. *28 U.S.C.S. § 636(b)(1)(C)*. The district judge may accept, reject, or modify the findings or recommendations and may, but is not required to, receive further evidence.

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

HN2[] **Magistrates, Pretrial Referrals**

A party objecting to a magistrate judge's memorandum and recommendation must specifically identify the portions of the memorandum and recommendation to which objections are made and the basis for such objections. Frivolous, conclusive or general objections need not be considered by the district court.

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

HN3[] **Magistrates, Pretrial Referrals**

With regard to a magistrate judge's report and recommendation, a general objection, or one that merely restates the arguments previously presented is not sufficient to alert the court to alleged errors on the part of the magistrate judge. An "objection" that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an "objection" as that term is used in this context.

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

HN4[] **Magistrates, Pretrial Referrals**

With regard to a magistrate judge's report and recommendation, to the extent that a party asserts claims in the objections which were not asserted in support of or in opposition to the motion, de novo review is not warranted. Claims cannot be raised for the first time in objections to a memorandum and recommendation.

Civil Procedure > Judicial Officers > Magistrates > Pretrial Referrals

HN5[] **Magistrates, Pretrial Referrals**

With regard to a magistrate judge's report and recommendation, where no objection has been raised, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. *Fed. R. Civ. P. 72*.

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

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

HN6[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Antitrust & Trade Law > Sherman Act > Claims

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

HN7[] **Sherman Act, Claims**

At least for the purposes of adequate pleading in antitrust cases, the United States Supreme Court has specifically abrogated the usual "notice pleading" rule, found in *Fed. R. Civ. P. 8(a)(2)* and Conley v. Gibson, which requires only a short and plain statement of the claim showing that the pleader is entitled to relief, to give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

HN8[] Motions to Dismiss, Failure to State Claim

To survive a *Fed. R. Civ. P. 12(b)(6)* motion, factual allegations must be strong enough to raise a right to relief above the speculative level and have enough facts to state a claim to relief that is plausible on its face. The court need not accept the plaintiff's legal conclusions drawn from the facts, nor need it accept as true unwarranted inferences, unreasonable conclusions, or arguments.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] Sherman Act, Claims

Proof of concerted action requires evidence of a relationship between at least two legally distinct persons or entities. Thus, it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Moreover, *§ 1* is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. For similar reasons, the coordinated activity of a parent and its wholly-owned subsidiary are legally incapable of conspiracy with each other for purposes of *§ 1* of the Sherman Act.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN10[] Subject Matter Jurisdiction, Supplemental Jurisdiction

By statute, a district court may decline to exercise supplemental jurisdiction over state law claims when all claims over which it has original jurisdiction are dismissed. *28 U.S.C.S. § 1367(c)(3)*.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN11[] Subject Matter Jurisdiction, Supplemental Jurisdiction

Trial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished. Among the factors that inform this discretionary determination are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN12[] Subject Matter Jurisdiction, Supplemental Jurisdiction

When the only federal claims are dismissed early in the litigation, a federal court has a powerful reason to choose not to continue to exercise jurisdiction.

Counsel: **[*1]** For Gregory Grant, MD, Benjamin Fann, MD, David Hayes, MD, Plaintiffs: C. William Hinnant , Jr., LEAD ATTORNEY, PRO HAC VICE, Medicolegal Consultants, LLC, Anderson, SC; Joel B. Stevenson, LEAD ATTORNEY, Swain, Stevenson & Moore, Asheville, NC.

For Fletcher Hospital, Incorporated, Defendant: Jacqueline D. Grant, LEAD ATTORNEY, Roberts & Stevens, P.A., Asheville, NC; James Larry Jones , W. Davis Frye , LEAD ATTORNEYS, PRO HAC VICE, Baker Donelson Bearman Caldwell & Berkowitz, Jackson, MS.

For Park Ridge Medical Associates, Defendant: Jacqueline D. Grant, LEAD ATTORNEY, Roberts & Stevens, P.A., Asheville, NC.

Judges: Martin Reidinger, United States District Judge.

Opinion by: Martin Reidinger

Opinion

MEMORANDUM OF DECISION AND ORDER

THIS MATTER is before the Court on the Defendant Fletcher Hospital Incorporated's Motion to Dismiss [Doc. 11] and the Amended Motion to Dismiss [Doc. 17] of the Defendant Fletcher Hospital Incorporated (Fletcher).

Pursuant to *28 U.S.C. § 636(b)* and the Standing Orders of Designation of this Court, United States Magistrate Judge Dennis L. Howell was designated to consider the motion and to submit recommendations for its disposition. [1] On July 28, 2009, the Magistrate Judge filed an Amended **[*2]** Memorandum and Recommendation in which he recommended that the motion to dismiss be granted. [Doc. 28]. The Plaintiff filed timely objections to portions of that recommendation. [Doc. 29].

PROCEDURAL HISTORY

On February 24, 2009, the Plaintiffs initiated this action alleging that the Defendant Fletcher was engaged in antitrust activities in violation of the Sherman Act, *15 U.S.C. §§ 1, et. seq.*, was involved in a federal civil rights conspiracy and had committed various state law torts. [Doc. 1]. The Plaintiffs, who are practicing physicians, claim that they were subjected to bad faith professional peer reviews by Fletcher resulting in the revocation and/or restriction of their hospital privileges. [2] [Id.]. According to the Complaint, the motive for the revocation and/or restriction of privileges was to allow physicians employed by a wholly-owned subsidiary of the hospital to take over the Plaintiff's patient base and ultimately, to allow Fletcher to monopolize the field of obstetrical medicine in the **[*3]** Hendersonville area. [Id., at 5-7].

Fletcher moved to dismiss for failure to state claims upon which relief may be granted pursuant to *Federal Rule of Civil Procedure 12(b)(6)* (*Rule 12(b)(6)*). [Doc. 17]. In response to that motion, the Plaintiffs admitted that four claims should be dismissed: (1) the claim pursuant to *42 U.S.C. § 1981*; (2) the claim pursuant to *42 U.S.C. § 1985*; (3) the state law claim for tortious inteference with present and future contractual advantages and relationships; and (4) the common law claim for conversion. [Doc. 22, at 1].

The Magistrate Judge recommended the following:

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[1] Although both an original and amended motion were filed, the parties and the Magistrate Judge treated the amended motion as superseding the original motion. [Doc. 22; Doc. 28; Doc. 29].

[2] Plaintiff Fann sought administrative review but neither of the other two plaintiffs did so. [Doc. 1, at 5].

1. that Fletcher be substituted as the real party defendant for Adventist Health System Sunbelt Health Care Corporation d/b/a Park Ridge Hospital a/k/a Fletcher Hospital, Incorporated and Park Ridge Medical Associates;

2. that the Doe Physicians 1 through 30 be dismissed from this action for lack of service or proof of service within the time provided by *Federal Rule of Civil Procedure 4(m)*;

3. that the Amended Motion to Dismiss [Doc. 17] be granted as to the federal claims which should **[*4]** be dismissed pursuant to *Rule 12(b)(6)*; and

4. that the Amended Motion to Dismiss [Doc. 17] be granted as to the remaining supplemental state law claims which should be dismissed without prejudice pursuant to *28 U.S.C. § 1367(c)*; [3] and, in the alternative, that the state law claims be dismissed pursuant to *Rule 12(b)(6)*.

[Doc. 28].

The Plaintiffs have objected to discrete portions of the Memorandum and Recommendation. They first argue that the Magistrate Judge applied the incorrect standard to a motion to dismiss pursuant to *Rule 12(b)(6)*. They urge this Court to allow them to dismiss this lawsuit without prejudice to allow re-filing in state court. In the alternative, the Plaintiffs ask that the remaining supplemental state law claims be dismissed without prejudice so that they may pursue relief in state court.

The Defendant did not file any objections to the Memorandum and Recommendation. [Doc. 30]. It does, however, urge the Court to dismiss the supplemental **[*5]** state law claims with prejudice. [Id.].

STANDARD OF REVIEW

HN1[] The District Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *28 U.S.C. § 636(b)(1)(C)*. The district judge may accept, reject, or modify the findings or recommendations and may, but is not required to, receive further evidence. [4] Id.

HN2[] A party objecting to a Magistrate Judge's Memorandum and Recommendation "must specifically identify the portions of the [Memorandum] and Recommendation to which objections are made and the basis for such objections." *Thomas v. Westinghouse Savannah River Co., 21 F.Supp.2d 551, 560 (D.S.C. 1997)*. "Frivolous, conclusive or general objections need not be considered by the district court." *Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir.1987)*, *overruled on other grounds* *Douglass v. United Ervs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996)*.

> ***HN3***[] A general **[*6]** objection, or one that merely restates the arguments previously presented is not sufficient to alert the court to alleged errors on the part of the magistrate judge. An "objection" that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an "objection" as that term is used in this context.

Suntrust Mortgage, Inc. v. Busby, 651 F.Supp.2d 472, 476 (W.D.N.C. 2009), *quoting* *Aldrich v. Bock, 327 F.Supp.2d 743, 747 (E.D.Mich. 2004)*.

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[3] That statute provides that "district courts may decline to exercise supplemental jurisdiction over [state law] claim[s] … if … the district court has dismissed all claims over which it has original jurisdiction[.]" *28 U.S.C. § 1367(c)(3)*.

[4] Since this matter is before the Court on a motion pursuant to *Rule 12(b)(6)*, which only pertains to the sufficiency of pleadings, there is no evidentiary issue before the Court, and thus no further evidence was or could have been presented.

HN4[] To the extent that a party asserts claims in the objections which were not asserted in support of or in opposition to the motion, *de novo* review is not warranted. *Price v. Dixon, 961 F.Supp. 894 (E.D.N.C. 1997)*(claims cannot be raised for the first time in objections to a memorandum and recommendation); *Wells v. Shriners Hospital, 109 F.3d 198, 200 (4th Cir. 1997)*(boilerplate objections will not avoid the consequences of failing to object altogether). This Court therefore does not conduct a *de novo* review of those portions of the Memorandum and Recommendation to which non-specific objections have been filed. Nor will it conduct a *de novo* review of issues which were not **[*7]** raised before the Magistrate Judge.

HN5[] Where no objection has been raised, the Court need "'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005)*, *certiorari denied 546 U.S. 1091, 126 S. Ct. 1033, 163 L. Ed. 2d 855 (2006)*, *quoting* *Fed.R.Civ.P. 72*, Advisory Committee note.

DISCUSSION

Those portions of the Memorandum and Recommendation to which no objections were made.

As noted, the Plaintiffs did not oppose the Defendant's motion to dismiss the claims pursuant to *42 U.S.C. §§ 1981* & *1985*, the state law claim for tortious interference with present and future contractual advantages and relationships, and the common law claim for conversion. As a result, those claims are dismissed with prejudice.

The parties also did not object to the Magistrate Judge's conclusion that the real party defendant is Fletcher and that the Doe Physicians should be dismissed from the action. Having satisfied itself that "there is no clear error on the face of the record," the Court accepts those recommendations. *Diamond, 416 F.3d at 315*. Fletcher is substituted as the real party **[*8]** Defendant and the Doe Physicians 1 through 30 are dismissed from the action.

Concerning the Sherman Act claims, the Plaintiffs' objection is limited to the Magistrate Judge's discussion of the Section 1 claim for conspiracy in restraint of trade. [Doc. 29, at 3-6]. They do not object to the recommendation that the Section 2 claim for monopolization be dismissed. Again, the Court has satisfied itself that there is no clear error on the record and this recommendation is accepted.

The Magistrate Judge's Application of the *Rule 12(b)(6)* Standard

The Plaintiffs assign error to the Magistrate Judge's citation to the recent Supreme Court decision in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)*, because that was "a case decided at the summary judgment stage after extensive discovery." [Doc. 29, at 2]. They also note that although "Twombly has changed the landscape, it would be more appropriate to analyze Defendant's *Rule 12(b)(6)* motion according to principles derived from cases which shared the same procedural posture (pleadings) as that now under consideration." [Id.]. The case suggested is *Wuchenich v. Shenandoah Memorial Hospital, 215 F.3d 1324 (4th Cir. 2000)*, **[*9]** an unpublished case decided prior to Twombly.

The Court first notes that the Plaintiffs cited Twombly as the correct standard in their response to the motion to dismiss. [Doc. 22, at 2]. As a result, this is technically an issue raised for the first time in the objections and *de novo* review is not required. *Price v. Dixon, 961 F.Supp. 894*.

Plaintiffs are nonetheless incorrect in their assertion that Twombly was decided at the summary judgment stage. In Twombly, the district court, in ruling on a motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)*, dismissed the complaint alleging Sherman Act violations because "the allegations of … the defendants' actions, taken by themselves, are not sufficiently probative, *on a motion to dismiss,* of conspiratorial intentions that would support a finding of ***antitrust-law*** violations." *Twombly v. Bell Atlantic Corp., 425 F.3d 99, 104 (2nd Cir. 2005)*, *discussing* *Twombly, 313 F.Supp.2d 174, 179-82, 184, 189 (S.D.N.Y. 2003)* (emphasis provided; history omitted).

On appeal, the Second Circuit reversed the District Court because it had "appl[ied] this Circuit's case law with respect to Sherman Act claims at the summary judgment stage" and **[*10]** by so doing, had increased the burden of pleading beyond that specified in *Fed.R.Civ.P. 8* which requires only a "short and plain statement of the claim." *Twombly, 425 F.3d at 104-05*. The Supreme Court reversed the Second Circuit and reinstated the standard adopted by the District Court; thus, changing the "landscape" as applied to *Rule 12(b)(6)* motions. This Court therefore rejects the Plaintiffs' contention that Twombly should not apply because it was not in the same procedural posture as this case. As noted in Twombly,

> [t]his case presents the … question of *what a plaintiff must plead in order to state a claim* under *§ 1 of the Sherman Act*. ***HN6***[] *Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause action will not **[*11]** do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). In applying these general standards to a § 1 claim, [the Supreme Court] h[e]ld that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. … [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.

Twombly, 550 U.S. at 555-56 (citations omitted). Thus,

> ***HN7***[] [a]t least for the purposes of adequate pleading in antitrust cases, the [Supreme] Court specifically abrogated the usual "notice pleading" rule, found in *Federal Rule of Civil Procedure 8(a)(2)* and *Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)*, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," to "give the defendant fair notice **[*12]** of what the … claim is and the grounds upon which it rests."

Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 n.5 (9th Cir. 2008).

The Fourth Circuit has embraced the Twombly standard and announced, in a case brought by a physician against a hospital challenging the suspension of his privileges, that in order

> ***HN8***[] [t]o survive a *Rule 12(b)(6)* motion, "[f]actual allegations must be strong enough to raise a right to relief above the speculative level" and have "enough facts to state a claim to relief that is plausible on its face." [T]he court "need not accept the [plaintiff's] legal conclusions drawn from the facts," nor need it "accept as true unwarranted inferences, unreasonable conclusions, or arguments."

Philips v. Pitt County Memorial Hospital, 572 F.3d 176, 180 (4th Cir. 2009), *quoting* *Twombly, 550 U.S. at 570* (other citations omitted).

Despite the clear language of these cases, the Plaintiffs' argue that the "any set of facts" standard is appropriate in this case and conclude that "the court should be governed by *Rule 8(a)(2) of the Federal Rules of Civil Procedure*, which requires that the complaint need only contain a 'short and plain statement of the claim showing that the pleader is **[*13]** entitled to relief.'" [Doc. 29, at 3]. The Court finds that it would be clear error to adopt the standard of review urged by the Plaintiffs and dismisses this objection.

The Plaintiffs have not made an objection to the recommended dismissal of the Section 1 Sherman Act claim. [Doc. 29, at 2] (noting specific objections). They did make an ambiguous statement that because the Magistrate Judge adopted the wrong standard, his recommendation that the restraint of trade claim be dismissed is wrong. As noted, the correct standard was applied by the Magistrate Judge.

Although the Plaintiffs failed to object to the recommendation that this claim be dismissed, the Court concludes that the Magistrate Judge correctly concluded that the Complaint failed to allege concerted action between two distinct persons that imposed an unreasonable restraint on trade. The Plaintiffs stated that the individual physicians employed by Fletcher's wholly-owned subsidiary had independent and competing interests which rendered them distinct from Fletcher. [Doc. 29, at 5]. The Fourth Circuit, however, has rejected this argument.

> ***HN9***[] "Proof of concerted action requires evidence of a relationship between at least two legally **[*14]** distinct persons or entities." Thus, it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that *§ 1 [of the Sherman Act]* was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Moreover, "*§ 1* is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions." "For similar reasons, the coordinated activity of a parent and its wholly-owned subsidiary are legally "incapable of conspiracy with each other for purposes of *§ 1 of the Sherman Act*."

American Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 223 (4th Cir. 2004), *certiorari denied 543 U.S. 979, 125 S. Ct. 479, 160 L. Ed. 2d 356 (2004)*, *citing* *Okasanen v. Page Memorial Hospital, 945 F.2d 696 (4th Cir. 1991)*, *certiorari denied 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992)* (other citations omitted). To the extent the Plaintiffs claim the physician employees of the subsidiary had an independent financial stake **[*15]** in depriving the Plaintiffs of their hospital privileges, they have not alleged that those physicians had any control over the hospital's decisions concerning privileges. *Id., at 224-25*.

In fact, the Plaintiffs concede defeat as to the Sherman Act claims by acknowledging in the objections that they "have not sought to amend their complaint to salvage any of their federal claims (which they readily recognize as an option, but do not intend to pursue)[.]" [Doc. 29, at 6]. The Court therefore finds that the Plaintiffs failed to raise any objection to the recommended dismissal of either of the Sherman Act claims. The Court concludes that dismissal should be granted.

The Magistrate Judge's Alternative Recommendation Regarding Dismissal of the State Law Claims for Failure to State a Claim

The Magistrate Judge recommended that supplemental jurisdiction be declined and the state law claims be dismissed without prejudice. ***HN10***[] By statute, a district court may decline to exercise supplemental jurisdiction over state law claims when all claims over which it has original jurisdiction are dismissed. *28 U.S.C. § 1367(c)(3)*. Neither party has objected to this recommendation and the Court finds that it should **[*16]** be accepted.

> ***HN11***[] [T]rial courts enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished. Among the factors that inform this discretionary determination are convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy.

Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995) (citations omitted). This case is in its earliest stages; no answer has been filed and discovery has not commenced. ***HN12***[] When the only federal claims are dismissed early in the litigation, a federal court has a "powerful reason to choose not to continue to exercise jurisdiction." *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)*. Continuing the case here is no more convenient or fair to the parties than allowing a state court action to go forward. *Daly v. Zobel, 311 Fed.Appx. 565 (4th Cir. 2008)*. From the standpoint of federal judicial economy, however, allowing state law claims to proceed in state court is more economical. *Cohill, 484 U.S. at 351-52*. The Court will therefore dismiss the state law claims without prejudice to **[*17]** refiling in state court. See, *28 U.S.C. § 1367(d)*.

ORDER

IT IS, THEREFORE, ORDERED that Fletcher Hospital, Incorporated is hereby **SUBSTITUTED** as the real party defendant for Adventist Health System Sunbelt Health Care Corporation d/b/a Park Ridge Hospital a/k/a Fletcher Hospital, Incorporated and Park Ridge Medical Associates.

IT IS FURTHER ORDERED that the Defendants Doe Physicians 1 through 30 are hereby **DISMISSED** for lack of service or proof of service within the time provided by *Federal Rule of Civil Procedure 4(m)*.

IT IS FURTHER ORDERED that the Defendant Fletcher Hospital Incorporated's Motion to Dismiss [Doc. 11] and the Amended Motion to Dismiss [Doc. 17] of the Defendant Fletcher Hospital Incorporated (Fletcher) is hereby **GRANTED** in part and **DENIED** in part as follows:

1. The Plaintiffs' claims pursuant to *42 U.S.C. §§ 1981* &*1985* are hereby **DISMISSED** with prejudice;

2. The Plaintiffs' state law claims for tortious interference with present and future contractual advantages and relationships and conversion are hereby **DISMISSED** with prejudice;

3. The Plaintiffs' claims based on the Sherman Act, *15 U.S.C. §§ 1, et. seq.* are hereby **DISMISSED** with prejudice; and

4. The Plaintiffs' remaining **[*18]** state law claims are hereby **DISMISSED** without prejudice.

Signed: March 25, 2010

/s/ Martin Reidinger

Martin Reidinger

United States District Judge

Shipp v. Donaher

United States District Court for the Eastern District of Pennsylvania

March 25, 2010, Decided; March 25, 2010, Filed

CIVIL ACTION No. 09-2475

Reporter
2010 U.S. Dist. LEXIS 28409 *; 2010 WL 1257972

WILLIAM and STACY SHIPP, Plaintiffs, v. DONNA DONAHER, et al., Defendants.

Subsequent History: As Amended April 1, 2010.

Vacated by, in part, Reconsideration granted by, in part, Reconsideration denied by, in part Shipp v. Donaher, 2010 U.S. Dist. LEXIS 59202 (E.D. Pa., June 11, 2010)

Core Terms

confession of judgment, plaintiffs', antitrust, allegations, notice, state court, Counts, defendants', state actor, properties, deprivation, harms, collection, provisions, loans, private right of action, federal claim, meanwhile, motions, rights, complaint alleges, motion to dismiss, state action, partnership, proceedings, violations, intervene, injuries, merits, dismissal with prejudice

Counsel: [*1] For WILLIAM SHIPP, STACY SHIPP, INDIVIDUALLY, PROFESSIONALLY, AND AS EXCLUSIVE RESIDUAL CO-OWNERS OF ALL RIGHTS PREVIOUSLY HELD BY THE 560 COATES STREET PARTNERSHIP BETWEEN WILLIAM SHIPP AND JASON FYK, Plaintiffs: NORMAN SHAPERO, LEAD ATTORNEY, WEST CHESTER, PA.

For DONNA DONAHER, INDIVIDUALLY, PROFESSIONALLY, AND AS A REPRESENTATIVE MEMBER OF CLASS A, TUCKER ARENSBERG, PC, Defendants: WILLIAM F. MCDEVITT, CHRISTIE PABARUE MORTENSEN $ YOUNG, PHILADELPHIA, PA.

For JOHN ROACH, INDIVIDUALLY, PROFESSIONALLY, AND AS A REPRESENTATIVE MEMBER OF CLASS B, PNC BANK, NATIONAL ASSOCIATION, Defendants: DANIEL B. HUYETT, LEAD ATTORNEY, STEVENS & LEE, READING, PA.

JASON FYK, AS AGENT FOR PNC BANK, NATIONAL ASSOCIATION AND THE PNC/TA CLAN, Defendant, Pro se, COCHRANVILLE, PA.

FOR YOUR KIDS, INC., Defendant, Pro se, COCHRANVILLE, PA.

Judges: Louis H. Pollak, United States District Judge.

Opinion by: Louis H. Pollak

Opinion

Pollak, J.

OPINION

Plaintiffs William and Stacy Shipp have sued (1) PNC Bank, N.A. ("PNC"), (2) Tucker Arensberg, PC ("Tucker"), (3) PNC's Chief Executive Officer, James Rohr, [1] (4) Donna Donaher, an attorney at Tucker, (5) Jason Fyk, (6) For Your Kids, Inc., [2] a company owned by Fyk, (7) an association identified in **[*2]** the complaint as "the PNC/[Tucker] Clan," and (8) Doe defendants, alleging that defendants' actions in connection with two confessed judgments in the Pennsylvania state courts violated various laws and constitutional provisions. Plaintiffs' complaint includes seventy-six counts in all, [3] including (1) violations of the federal constitution and *42 U.S.C. § 1983*, (2) violations of various federal statutes, including (a) the Sherman Antitrust Act ("Sherman Act"), *15 U.S.C. § 1 et seq.*, (b) the Bank Holding Company Act ("BHCA"), *12 U.S.C. § 1841 et seq.*, (c) the Fair Debt Collection Practices Act ("FDCPA"), *15 U.S.C. § 1692 et seq.*, (d) the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.*, and (e) numerous criminal provisions of Title 18 of the U.S. Code, (3) state constitutional violations, and (4) state tort claims. Defendants PNC and Rohr and, in a separate motion, Donaher and Tucker, now move to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. [4]

I.

Although the complaint in this case is lengthy and convoluted, the history of plaintiffs' dispute with the moving defendants [5] may be concisely stated. Plaintiff William Shipp and defendant Jason Fyk purchased a property on Coates Street in Coatesville, Pennsylvania in December 2003. Compl. P 72. They took out a mortgage on that property from the National Bank of Malvern, at which Shipp is an employee. *See id*. P 75. The title to the property and the mortgage were both listed "in Shipp's and Fyk's individual names." *Id*. P 76. Fyk subsequently purchased another property in Coatesville, this one on Jane Street. *Id*. P 84.

In April 2005, Fyk incorporated defendant For Your Kids, *id*. P 88, and later that month, For Your Kids received Small Business Administration ("SBA") loans from **[*5]** defendant PNC, *id*. P 89. Fyk "executed [a] personal surety agreement[] in favor of PNC on" those loans. *Id*. P 90. The relationship between Fyk and Shipp subsequently soured, *see id*. PP 117-33, and, at some point, Fyk "defaulted against another creditor," *id*. P 105, leading PNC to seek confessed judgments, apparently against the Coates Street and Jane Street properties, *see id*. PP 26, 213, 217. Donaher, on behalf of Tucker, represented PNC in those proceedings. *See id*. P 26.

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[1] Rohr is identified in the complaint as "John Roach," but both parties refer to him as James Rohr in **[*3]** their memoranda of law.

[2] The parties divergently spell the name of this corporate entity as "For Your Kids, Inc." and "Four Your Kids, Inc." I adhere to the former, which is the spelling in the official caption of this case and in the answer filed by Fyk.

[3] The complaint, which runs to 143 pages, is of a kind that should be firmly discouraged. Among other things, the complaint (1) is filled with needless repetition and irrelevancies, (2) alleges violations of multiple nonexistent statutes, (3) pleads the existence of diversity jurisdiction even though it lists both plaintiffs and numerous defendants as Pennsylvania residents, and (4) is larded with footnotes to legal authorities better found in a memorandum of law. While none of these infirmities bears on the merits of the arguments made in defendants' motions to dismiss, both this court and all parties to this litigation would have been better served by a shorter, plainer statement of plaintiffs' claims. *See* *Fed. R. Civ. P. 8(a)*.

[4] Fyk has filed a *pro se* answer, which he seeks to submit on behalf of both himself and For Your Kids. See Docket No. 11. Normally, this court would strike the answer insofar as it purports to be submitted by **[*4]** a *pro se* litigant on behalf of a corporation. *See, e.g.,* *Penn Graphics Equip. Co. v. Globaltec Innovations, Corp., No. 06-cv-3247, 2006 U.S. Dist. LEXIS 79149, 2006 WL 3144398, at *1 (E.D. Pa. Oct. 30, 2006)* (striking all filings made on behalf of a corporation by a non-lawyer). Because of the view I take of this case, however, the propriety of Fyk's answer is moot.

[5] For convenience, I will use "defendants" to refer to the moving defendants.

Shipp, who also brought a state-court contract action against Fyk, *see id*. P 19, sought to intervene in the confessed judgment proceedings, *see id*. P 20. PNC "moved to dismiss Shipp's intervention petition," and that motion was granted. *Id*. P 21. Shipp appealed, but "the Superior Court quashed [the] appeal," *id*. P 22, and the Pennsylvania Supreme Court "denied Shipp's allocatur petition as moot," *id*. P 23, after PNC issued what plaintiffs call "partial and conditional release documents" on both properties, *id*. PP 213, 217. The Shipps then filed the complaint in this action on June 1, 2009. The complaint alleges that defendants' actions in seeking the confessed judgment, as well as their actions more generally with **[*6]** regard to Pennsylvania's confessed judgment procedures and SBA loans, deprived William Shipp of numerous constitutional and statutory rights. [6]

II.

In order to survive a motion to dismiss for failure to state a claim, a complaint need only include "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. While a complaint "requires more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action," "detailed factual allegations" are unnecessary. *Twombly, 550 U.S. at 555*. Rather, plaintiffs must simply include enough facts to "state a claim to relief that is plausible on its face." *Id. at 570*.

In reviewing a 12(b)(6) motion, "the facts alleged [in the complaint] must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff **[*7]** can prove those facts or will ultimately prevail on the merits." *Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008)*. "[R]easonable inferences" are also drawn in favor of the plaintiff, *id*., but this court need not "'accept as true a legal conclusion couched as a factual allegation,'" *Twombly, 550 U.S. at 555*.

III.

As a threshold matter, Tucker and Donaher argue that the *Rooker-Feldman* doctrine deprives this court of jurisdiction to hear plaintiffs' claims. *See* Tucker Mem. at 37-38. The *Rooker-Feldman* doctrine, under which federal district courts and courts of appeals "lack subject matter jurisdiction to review, directly or indirectly, state court adjudications," *In re Diet Drugs, 282 F.3d 220, 240 (3d Cir. 2002)*, "'precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling,'" *Whiteford v. Reed, 155 F.3d 671, 674 (3d Cir. 1998)* (quoting *FOCUS v. Allegheny Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996))*. It thus "applies to cases 'brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district **[*8]** court review and rejection of those judgments.'" *Stoss v. Singer Fin. Corp., No. 08-cv-5968, 2010 U.S. Dist. LEXIS 16514, 2010 WL 678115, at *3 (E.D. Pa. Feb. 24, 2010)* (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005))*.

In particular, the *Rooker-Feldman* doctrine bars review by this court of "'claims that have been previously adjudicated in state court or that are inextricably intertwined with a state adjudication.'" *Whiteford, 155 F.3d at 674* (quoting *Gulla v. N. Strabane Twp., 146 F.3d 168, 170 (3d Cir. 1998))*. "The actually litigated prong is principally useful where the claims before the state and federal courts are in all respects identical." *ITT Corp. v. Intelnet. Int'l, 366 F.3d 205, 211 (3d Cir. 2004)*. "State and federal claims are inextricably intertwined," meanwhile, "'(1) when in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered [or] (2) when the federal court must . . . take action that would render [the state court's] judgment ineffectual.'" *ITT Corp., 366 F.3d at 211* (quoting *Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 421 (3d Cir. 2003))* (internal quotation marks **[*9]** omitted).

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[6] Plaintiff Stacy Shipp is mentioned primarily with reference to both of the loss of consortium claims in the complaint. See Compl. PP 695, 697.

The doctrine is thus "narrow [in] scope," *Turner v. Crawford Square Apartments III, L.P., 449 F.3d 542, 547 (3d Cir. 2006)*: "[W]here a state action does not reach the merits of a plaintiff's claims, . . . *Rooker-Feldman* does not deprive the federal court of jurisdiction." *Whiteford, 155 F.3d at 674*; *accord, e.g., ITT Corp., 366 F.3d at 211*. More specifically, when a denial of intervention is not effectively a decision on the merits, the denial of intervention does not trigger the application of *Rooker-Feldman. See FOCUS, 75 F.3d at 841*.

Tucker and Donaher contend that plaintiffs' claims reduce to the proposition that "the trial court, the Superior Court and the Pennsylvania Supreme Court improperly denied [plaintiffs'] right to intervene in the" confessed judgment proceedings "based upon the alleged acts of the defendants." Tucker Mem. at 38. This argument, however, slightly misunderstands what I take to be the nub of plaintiffs' grievances. Although plaintiffs clearly disagree with the state courts' ruling, the complaint's primary focus is on the alleged actions of the various defendants in instantiating and carrying out the confessed judgment action -- which is to say that **[*10]** the complaint attempts to put before this court the merits of issues that the state courts declined to consider. This fact alone is a sufficient basis to conclude that the state courts did not "previously adjudicate" plaintiffs' claims.

The question of whether plaintiffs' claims are inextricably intertwined with the state courts' ruling is slightly more complex. The state courts' opinions denying intervention -- which have been provided by plaintiffs as exhibits to the complaint [7] -- go beyond merely "asserting that [the state courts] lacked jurisdiction" to entertain the intervention. *FOCUS, 75 F.3d at 841*. Rather, the Court of Common Pleas' October 1, 2007 order addresses two additional issues -- (1) whether or not a partnership of Shipp and Fyk owned the properties at issue, and (2) whether "PNC . . . made false averments to the Court and otherwise committed 'obstructionist malfeasance.'" Compl. Ex. 4, at 2-3. The Superior Court memorandum affirming the denial of intervention, while focused on jurisdictional issues, expresses the view that PNC did not have actual notice that the properties were owned by a partnership at the time it instituted the confessed judgment actions. *See id*. **[*11]** Ex. 8, at 9. This aspect of the Superior Court's decision was based on the conclusions that (1) "[t]he deed to the property does not indicate the property is owned by a partnership," *id*. at 8, and (2) "[u]nder the circumstances of the present case . . . the court would be limited to the four corners of the deed in determining whether the property was really partnership property," to the exclusion of parol evidence, *id*. at 9 (internal quotation marks omitted).

The claims in the complaint are, however, largely independent of the Pennsylvania courts' decisions that (1) a partnership did not own the properties, titled as they were in the individual names of Shipp and Fyk, (2) PNC's conduct in the Court of Common Pleas was unimpeachable, and (3) Shipp was not entitled to intervene. Count 1 of the complaint provides a convenient illustration. That count, pled as a violation of **[*12]** the *Privileges and Immunities Clause of the Fourteenth Amendment*, alleges variously that (1) "[d]efendants seized [one of the properties] . . . without bringing charges against Shipp or the [alleged] Partnership," (2) "[d]efendants . . . forc[ed plaintiffs] to continue in a hostile and dangerous business relationship with Fyk", in part by "fr[eezing Shipp] out of the courts," (3) "[d]efendants knowingly took and retained Shipp's property by *ex parte* action," and (4) "[t]here can be no greater abridgement of rights and immunities than being told that your legal interests were subordinated to the one who illegally subordinated your interest in *ex parte* proceedings." Compl. PP 339-41, 344. Whatever the merits of this claim, it is not one that was ever decided by the state courts, and ruling on its merits would not entail a decision that the state courts were incorrect to deny intervention or that the expressed grounds for the denial were incorrect. [8] Moreover, insofar as plaintiffs' allegations *do* "den[y] a legal conclusion that a state court has reached," the result is simply that "there **[*13]** is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Exxon Mobil, 544 U.S. at 293*.

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[7] Plaintiffs failed to attach the exhibits to the originally-filed version of the complaint. Plaintiffs did, however, petition to supplement the complaint with exhibits a week thereafter, and no defendant has objected to that request. The petition will therefore be granted as uncontested pursuant to *Local Rule 7.1(c)*.

[8] Given that the complaint alleges that PNC subsequently released the properties, there is no way that this court could, at present, render the state courts' judgment on intervention "ineffectual."

Accordingly, I conclude that the *Rooker-Feldman* doctrine does not deprive this court of jurisdiction over plaintiffs' claims, and I turn to the question of whether the complaint states one or more claims on which relief may be granted.

IV.

Counts 1-12 of the complaint allege federal constitutional violations, and Count 22 alleges an additional claim pursuant to *42 U.S.C. § 1983*. All of plaintiffs' federal constitutional claims must, of course, be brought under *§ 1983*, *e.g., Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001)*, which "provides redress for certain violations of rights arising under the federal constitution or laws of the United States which are caused by persons acting under color of state law," *Mosley v. Yaletsko, 275 F. Supp. 2d 608, 612 (E.D. Pa. 2003)*. Thus, "[t]o establish a valid claim under *§ 1983*, a claimant must **[*14]** show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Robb v. City of Phila., 733 F.2d 286, 290-91 (3d Cir. 1984)*.

Here, the defendants are private parties. Thus, plaintiffs must satisfy "a two-part inquiry" in order to maintain claims against the defendants under *§ 1983*. *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1265 (3d Cir. 1994)*. "'First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.'" *Id.* (quoting *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982))*. "'Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" *Id.* (quoting *Lugar, 457 U.S. at 937*). A state actor is one who is "'a state official,'" or who "'has acted together with or has obtained significant aid from state officials,'" or whose "'conduct is otherwise chargeable to the State.'" *Id.* (quoting *Lugar, 457 U.S. at 937*).

Defendants **[*15]** do not argue that the first prong of this test is not met, and it is. Plaintiffs' claims are largely based upon a confessed judgment action in the state courts, and "[t]he power to confess judgment depends on a state statute and the procedure for doing so depends on state procedural rules of general application." *Jordan, 20 F.3d at 1265*. A "right or privilege created by the State" is thus at issue.

The pertinent question is therefore whether or not defendants may fairly be said to be state actors. They are not state officials, so defendants are state actors only if the "state [has] significantly contribute[d] to the [alleged] constitutional deprivation," by, for instance, "authorizing its own officers to invoke the force of law in aid of the private persons' request." *Id. at 1266*. Both plaintiff and defendants rely on the Third Circuit's decision in *Jordan* for support on this score. In *Jordan*, the Court of Appeals held that "a state procedure permitting private parties to file a complaint and confess judgment essentially involves acquiescence by the state, not compulsion," and that "[i]n such circumstances, private conduct is not attributable to the state." *Id*. (internal quotation marks **[*16]** omitted). Nor does a "confession of judgment itself . . . so intimately involve [landlords] and their Attorneys in state action that they could be treated as acting under color of law." *Id*. The Third Circuit's holding was grounded in the fact that while "entry of the [confessed] judgment" has "consequences," "[i]t involves no immediate seizure or deprivation of property under force of law." *Id. at 1266 n.17*.

By contrast, the Court of Appeals held that "a judgment creditor who uses Pennsylvania's procedure for executing on a confessed judgment acts under color of law and becomes a state actor." *Id.* The relevant distinction between the institution of a confessed judgment action and the issuance of writs of execution is, the Third Circuit held, that "writs of execution and attachment involve actions by state officials that plainly involve or threaten the use of legal force." *Id. at 1267*. Thus, under *Jordan,* otherwise-private parties who merely seek and receive confessed judgments are not state actors, while those who execute on confessed judgments are state actors.

Under the facts alleged in plaintiffs' complaint, PNC, via its attorneys at Tucker, filed a confessed judgment action against **[*17]** two properties -- presumably the Coates and Jane Street properties, at least one of which was titled in the names of Shipp and Fyk. Compl. PP 18, 76. An "execution notice[]" was then sent to Fyk as to each property.

Id. P 31; *see also id*. P 28. The complaint does not, however, allege that PNC ever sought to execute on the confessed judgment; rather, it reveals that PNC "issued . . . purported releases of [the properties]" in 2008. *Id*. P 58.

Under *Jordan*, defendants' action of filing for confessed judgments is an insufficient basis for the conclusion that defendants acted as state actors. [9] The complaint, meanwhile, fails to allege that defendants took the step -- execution of a confessed judgment -- that *Jordan* held was sufficient to transform judgment creditors into state actors. Thus, if defendants were state actors, it was because "execution notices" were sent to Fyk.

The sending of such notices was not considered in *Jordan*, and this issue is left somewhat murky by the complaint, which -- despite purporting to include the relevant notices as attachments, *see* Compl. P 31 -- neither attaches nor describes the notices. Plaintiffs do, however, include numerous allegations concerning Pennsylvania's confessed judgment procedure, *see, e.g., id*. PP 274-96. This court will therefore take judicial notice of the relevant state Rules of Civil Procedure. *See, e.g., Pennsylvania v. Lockheed Martin Corp., No. 09-cv-0821, 684 F. Supp. 2d 564, 2010 U.S. Dist. LEXIS 8052, 2010 WL 456810, at *1 n.2 (M.D. Pa. Feb. 1, 2010)* (noting that "the court may take judicial notice of public records"). [10] Pursuant to those rules, notice **[*19]** of the confessed judgment action may be served either prior to or contemporaneously with a writ of possession -- which writ is the instrument by which a confessed judgment is executed. *See Pa. R. Civ. P. 2973.1-.3*. Because the complaint alleges that notice was served but *not* that a writ of possession was served, plaintiffs' allegations only support the inference that PNC served Fyk with a pre-writ notice pursuant to *Pennsylvania Rule of Civil Procedure 2973.2* -- or some other kind of notice unaccompanied by an actual execution.

Like the entry of a confessed judgment itself, the sending of pre-execution notice does not "involve[] [the] immediate seizure or deprivation of property under force of law." *Jordan, 20 F.3d at 1266 n.17*. Such notice essentially gives the confessed judgment defendant time in which to "petition for relief from a confessed judgment," Note to *Pa. R. Civ. P. 2973.2(a)*, and therefore **[*20]** is not a means of state compulsion; it merely is notice that such compulsion may follow. Accordingly, under *Jordan*, the mailing of notice does not so entangle the state in the enforcement of private claims to property as to transform the otherwise private actions of the confessed judgment plaintiff or its attorneys into state action. Nor can I conclude that the fact that Shipp, not Fyk, brings this suit makes any difference as to the existence *vel non* of state action: Although Shipp was denied leave to intervene in the confessed judgment action, any injuries inflicted on Shipp as co-owner of Coates Street by the confessed judgment actions were, at worst, identical to Fyk's as co-owner of the properties in question. Nothing in the confessed judgment procedure invoked by defendants, in other words, supports a finding of state action in this case.

Nor does anything else in the prodigiously prolix complaint form a sufficient basis for determining that the moving defendants were state actors. The only actions allegedly taken by the state courts, for instance, involve the denial of Shipp's motion to intervene in the confessed judgment action itself. The complaint further alleges that there **[*21]** were "radical changes to [Pennsylvania's] confessed judgment lien law" "[i]n 1996 and 2003," Compl. P 279, but there is no indication of how these changes render defendants state actors with regard to their actions concerning the properties at issue -- especially given that plaintiffs believe that the moving defendants were not aided by state officials but rather "collaborated and conspired to defraud the Civil Procedures Rules Committee," *id*. P 295. (The Court of Common Pleas is also referred to as "an unknowing target of deception." *Id*. P 321.) Nor do

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[9] *Jordan* differs factually from this case in certain ways -- it (1) concerned personal and not real property, *see 20 F.3d at 1258*, (2) occurred before certain changes were made to Pennsylvania's confessed judgment procedures, *see* Compl. PP 274-96, and (3) did not concern a third party to the confessed judgment action. **[*18]** But the rules for confessed judgments of real property concern the same two steps described in *Jordan*, the rules changes described in the complaint are not relevant to the core procedures held by *Jordan* to be pertinent to defendants' status as private or state actors, and while plaintiffs' interest in the proceedings may differ from the interests of a judgment debtor, that distinction is irrelevant to the degree of state involvement in the alleged constitutional deprivations.

[10] This court may take judicial notice of appropriate items without converting defendants' motions into motions for summary judgment. *See, e.g., Lord v. Erie County, No. 08-cv-213, 2010 U.S. Dist. LEXIS 308, 2010 WL 56095, at *6 n.10 (W.D. Pa. Jan. 5, 2010)* (quoting *Pryor v. NCAA, 288 F.3d 548, 560 (3d Cir. 2002))*.

plaintiffs' repeated assertions that defendants were, in fact, "state actor[s]" or "[s]tate [p]rosecutor[s]" suffice to demonstrate that those labels are correct. *E.g.*, Compl. PP 162-68, 170, 175, 178, 180, 182-83, 225, 388-90.

Accordingly, defendants' motions will be granted as to Counts 1-12 and 22 of the complaint.

V.

The federal statutory causes of action in plaintiffs' complaint invoke (1) the Sherman Act, (2) the BHCA, (3) the FDCPA, (4) RICO, and (5) various criminal provisions in Title 18. I consider these claims in turn.

A.

Count 13 of the complaint alleges a violation of the Sherman Act. It is unclear whether plaintiffs intend **[*22]** to plead a violation of *§ 1* or *§ 2* of the Act; the complaint lists *§ 2* as the relevant statute but speaks in terms of restraint of trade, which is governed by *§ 1*. Whether plaintiffs intend to proceed under *§ 1* or *§ 2*, however, they must show that they have standing to bring an antitrust claim. In the Third Circuit, five factors are used to determine whether or not a plaintiff has antitrust standing:

> "(1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages."

Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 320 (3d Cir. 2007) (applying these factors in the context of *§ 2*) (quoting *Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997))*; **[*23]** *see also* *City of Pittsburgh v. W. Penn Power Corp., 147 F.3d 256, 264 (3d Cir. 1998)* (applying the same factors in the context of a § 1 claim). Antitrust standing is thus "'essentially a balancing test comprised of many constant and variable factors.'" *W. Penn Power Corp., 147 F.3d at 265* (quoting *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964-65 (3d Cir. 1983))*. Nevertheless, the Third Circuit has instructed that a district court "should first address the issue of whether the plaintiff suffered an antitrust injury," and if no such injury "is . . . found, further inquiry is unnecessary." *Id.*; *see also, e.g., id*. ("[A] showing of antitrust injury is a necessary but insufficient condition of antitrust standing.") (internal quotation marks omitted).

An antitrust injury is one "'of the type the antitrust laws were intended to prevent.'" *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)* (quoting *Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours & Co., 826 F.2d 1235, 1240 (3d Cir. 1987))*. Specifically, "'[a]n antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services,' not just his own welfare," *id.* (quoting **[*24]** *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991))*, because "'***antitrust law*** aims to protect competition, not competitors,'" *id*. (quoting *Alberta Gas Chems., 826 F.2d at 1241*). The injury must be the "direct effect of" "the antitrust violation," which requires more than "a mere causal link," and "whether the plaintiff has experienced an antitrust injury depends in part on its source -- did the injury flow from that which makes the defined acts unlawful." *W. Penn Power Corp., 147 F.3d at 265, 268*. Thus, as a general matter -- though not, perhaps, as a hard and fast rule -- "only competitors and consumers will suffer antitrust injury." *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 77 (3d Cir. 2000)*.

It is somewhat difficult to garner from the complaint what, precisely, plaintiffs claim amounts to an antitrust violation. Whatever plaintiffs' intent, however, nothing in Count 13 alleges an antitrust injury. The only claimed harms to plaintiffs are that defendants (1) "assert[ed] priority over superior prior contract rights," Compl. P 431 -- presumably rights allegedly held by plaintiffs -- and (2) "maligned [William] Shipp's title, reputation, and **[*25]** control of his property and finances," increasing the risk he faced "while claiming no effect," *id*. P 432. These are injuries only to plaintiffs' "own welfare," not "the prices, quantity or quality of goods and services," *Mathews, 87 F.3d at 641*, and are therefore not the type of injuries the antitrust laws are meant to prevent.

Further, any injury suffered by plaintiffs is necessarily an indirect, not a direct, result of defendants' actions. The allegations in the complaint most plausibly tied to an antitrust theory imply that defendants control the market for SBA loans. Plaintiffs are neither competitors of defendants nor, as far as the complaint discloses, consumer-debtors of SBA loans. Indeed, William Shipp's only relationship to the defendants is as (1) the co-owner of a property subjected to a confessed judgment under the terms of the other co-owner's loan, and (2) a failed state-court intervenor. Plaintiffs therefore cannot have been directly harmed by any actions defendants took in the SBA loan market. It is the debtor -- which is to say Fyk, not the Shipps -- who would feel the direct effects of those actions. Plaintiffs, in other words, have not alleged either an antitrust **[*26]** injury or a sufficient causal link. In light of these shortcomings, I need not consider the other factors in the antitrust standing analysis. [11] *See* *W. Penn Power Co., 147 F.3d at 269* (affirming the dismissal of antitrust claims after determining that plaintiffs had not satisfied these two prongs of the analysis).

Because plaintiffs lack standing to maintain Count 13, defendants' motions will accordingly be granted as to that count.

B.

Count 14 seeks to allege a violation of the anti-tying provisions of the BHCA, *12 U.S.C. § 1972*. Pursuant to *12 U.S.C. § 1975*, "[a]ny person who is injured in his business or property by reason of anything forbidden in *section 1972* . . . may sue therefor in [the] district court[s]." *See also, e.g., Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1345-46 (11th Cir. 1997)* (noting that in 1970, "Congress enacted *§ 1975* of the BHCA, creating a private right of action in favor of individuals **[*27]** harmed by virtue of violations of the anti-tying provisions of the BHCA"). Thus, in order to have standing to sue under the BHCA, a plaintiff must at least allege an injury that is caused by the allegedly unlawful tie. *See, e.g., Baggett v. Fist Nat'l Bank of Gainesville, 117 F.3d 1342, 1346 (11th Cir. 1997)*; *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n, 840 F.2d 653, 660 (9th Cir. 1988)*; *Sterling Coal Co. v. United Am. Bank of Knoxville, 470 F. Supp. 964, 965 (E.D. Tenn. 1979)*; *see also* *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chi., 693 F. Supp. 666, 669 (N.D. Ill. 1988)* (limiting standing to those who allege "direct" injuries). Further, pursuant to the language of the statute, the injury must be one to "business or property."

Defendants correctly argue that plaintiffs have not alleged an injury caused by the tie. *See* PNC Mem. at 25-26. Plaintiffs' BHCA allegations are limited to the allegations that (1) "[d]efendants illegally require that its SBA borrowers provide vigilante bailout services upon PNC's decision to confess judgment, whereby the debtor is made the collections enforcer against third parties who are unprepared and unprotected from such attack," **[*28]** and (2) "PNC does not properly screen these debt collection recruits nor train them adequately, leaving defaulting debtors free to wreak havoc on the marketplace." Compl. PP 438-39. These allegations are bereft of any suggestion that the alleged tie between SBA loans and "vigilante bailout services" harmed plaintiffs.

Moreover, even reading the phrase "injured in his business or property" broadly to include *any* injury to business or property, none of the other allegations in the complaint are sufficient to confer *§ 1975* standing on plaintiffs. Plaintiffs do allege that (1) Fyk threatened them, *see id*. P 144, (2) he did so at the behest of the other defendants, *see id*. PP 392-93, 400, 649, (3) plaintiffs suffered "financial exposure" as a result, *id*. P 399, (4) "[i]n response to Fyk's threats, [William] Shipp recused himself from [the] Board of Directors decisions" at the bank for which Shipp works, *id*. P 230, and (5) Fyk was used by the defendants "to extort funds from unsuspecting members of the general public," *id*. P 495, *see also id*. P 499. But the only harms to plaintiffs -- as opposed to the general public -- actually alleged in these portions of the complaint are (1) the presumably **[*29]** personal psychic harm from financial exposure and (2) the need to recuse. These are not harms to business or property. Any other harms alleged in the complaint, meanwhile, are not tied to anything that can be construed as "vigilante bailout services" provided by Fyk. Accordingly, nothing in the complaint establishes plaintiffs' standing to sue for a BHCA violation, and defendants' motions will be granted as to Count 14.

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[11] I also note that Fyk and other debtors, as the direct victims of any anticompetitive activity, would be better suited to challenge any antitrust violations by the defendants. The fourth factor of the standing test thus also weighs against plaintiffs in this case.

C.

Count 15 of the complaint alleges that the defendants violated the FDCPA, *15 U.S.C. § 1692 et seq.* This count must be dismissed as to PNC and Rohr, because "the FDCPA's provisions generally apply only to 'debt collectors,'" not creditors. *Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 403 (3d Cir. 2000)*. Thus, "[c]reditors who collect in their own name and whose principal business is not debt collection . . . are not subject to the Act." *Id.* (quoting *Aubert v. Am. Gen. Fin., Inc., 137 F.3d 976, 978 (7th Cir. 1998))*. The act also exempts "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." *15 U.S.C. § 1692a(6)(A)*. Here, the complaint reveals that PNC originated the loan to For Your Kids on which it later **[*30]** tried to collect. *See* Compl. P 89 ("PNC granted two SBA guaranteed loans to For Your Kinds totaling $ 85,000"); PP 109-10 (speaking of "the time that PNC issued SBA loans to Fyk"), P 162(b) (noting the "PNC-Fyk *lien-generating* contract") (emphasis supplied), P 303 (alleging that PNC was aware of various pieces of information "prior to Fyk loan issuance"), P 304(f)(vi) (discussing "PNC's assessment of Fyk's character prior to loan origination"), P 372 (noting "PNC's private contract with Fyk"), P 383 (alleging that "Fyk conveyed contingent property interests to PNC in December 2006"), P 466 (alleging that "Fyk was insolvent at loan origination, and PNC could have identified this risk at time of loan origination"). The FDCPA claim may therefore not be asserted against PNC. Rohr, meanwhile, is an officer of PNC, and there are no allegations in the complaint to suggest that he attempted to collect any debts for any other institution or for PNC under a different name. The claim is thus also precluded as to Rohr.

Tucker and Donaher, meanwhile, argue that plaintiffs "do[] not allege that [Tucker or Donaher] attempted to collect *any* debt from [them]." Tucker Mem. at 28. This argument is well-taken. **[*31]** Plaintiffs' FDCPA claims arise under *15 U.S.C. § 1692d*, e, f, and g, *see* Compl. PP 444-47, 449, and each of these sections applies only if statements or communications are made "in connection with the collection of any debt," *15 U.S.C. §§ 1692d*, *1692e*, *1692g(a)*, or "to collect or attempt to collect any debt," *id*. *§ 1692f*. *See also* *Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 232 (3d Cir. 2005)* (noting this feature with regard to *§§ 1692e* and *1692g*). Nothing in the complaint alleges that any communications between Donaher and Shipp were related to the collection of a debt.

In fact, all of the facts and factual allegations currently before this court are to the contrary: According to the complaint, the attorney defendants (1) sent William Shipp a letter rejecting a check sent by Shipp to PNC, (2) conversed with Shipp before oral argument in the Superior Court, and (3) filed documents in opposition to Shipp's petition to intervene in the state court proceedings. *See* Compl. PP 189-90. But (1) the letter merely returns the check and refuses to disclose information in discovery, *see* Compl. Ex. 5A, (2) the conversation consisted only of "Donaher's rejection of Shipp's offer to discuss **[*32]** lien resolution," *id*. P 190, and (3) Tucker's judicially-noticed filings in the Superior Court do not attempt to collect a debt from plaintiffs. [12] Thus, as the plaintiffs have "allege[d] no facts to support the contention that" communications they received from Donaher and Shipp "constituted a collection or attempt to collect" the debt, the allegations that the attorney defendants violated the FDCPA will be dismissed.

D.

Count 23 of the complaint alleges that the defendants violated *18 U.S.C. § 1962(c)*, the portion of RICO that makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." The same count alleges that defendants violated *18 U.S.C. § 1962(d)*, which outlaws conspiracies to violate the other provisions of *§ 1962*.

RICO provides a private right **[*33]** of action to "[a]ny person injured in his business or property by reason of a violation of *section 1962*." *18 U.S.C. § 1964(c)*. The Third Circuit has interpreted this language "as requiring a RICO plaintiff to make two related but analytically distinct threshold showings relevant in this appeal: (1) that the plaintiff suffered an injury to business or property; and (2) that the plaintiff's injury was proximately caused by the

[12] Further, the Court of Common Pleas, in an opinion attached to the complaint, held that Tucker's filings in that court contained no "false averments." Compl. Ex. 4, at 2.

defendant's violation of *18 U.S.C. § 1962*." *Maio v. Aetna, Inc., 221 F.3d 472, 483 (3d Cir. 2000)*. Moreover, "'a showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest.'" *Id.* (quoting *Steele v. Hosp. Corp. of Am., 36 F.3d 69, 70 (9th Cir. 1994))*. This requirement "can be satisfied by allegations and proof of actual monetary loss," *id*., or by a "fail[ure] to perform under the parties' contractual arrangement," *id. at 490*.

Nowhere in the extraordinarily lengthy complaint do plaintiffs allege that they suffered any such concrete harms. The RICO count, in fact, does not allege *any* harm to the plaintiffs. *See* Compl. PP 492-96. Elsewhere, plaintiffs claim that they suffered injuries such as (1) "a cloud **[*34]** over every personal decision that [they] have to make in every facet of their lives," *id*. P 140-41; *see also id*. PP 145-46, (2) "threats against Shipp's person, employment, [b]usiness relationships, reputation, and health," *id*. P 144, (3) recusals from decisions made by the bank of which William Shipp is a director and the need to "subordinate [Shipp's] own . . . claims" against Fyk to those held by Shipp's bank, *id*. PP 230-31, *see also id*. P 673, (4) "premature" concerns about the plaintiffs' "ability to endure market pressures" and ability to "care for their children," *id*. PP 543-44, (5) "the indignity of being toyed with before the courts," *id*. P 546, and (6) being "frozen out of the legal process," P 176. None of these injuries is concrete and financial. [13]

Plaintiffs also allege that defendants' "activities unreasonably caused injury, harm, damage, inconvenience, annoyance, and **[*35]** discomfort to [William] Shipp's reasonable enjoyment and use of his reasonable rights in" the property at issue. *Id*. P 628. This statement never specifies *what* damage plaintiffs suffered, and therefore does not allege a concrete financial injury. Paragraph 628 is also nothing more than a legal conclusion, which is insufficient to overcome defendants' motions to dismiss. *See* *Weiss v. First Unum Life Ins., No. 02-cv-4249, 2003 U.S. Dist. LEXIS 27863, 2003 WL 25713970, at *5 (D.N.J. Aug. 27, 2003)* ("Plaintiff's vague and conclusory assertion that he was damaged because he deferred purchases and lost medical benefits are wholly insufficient to establish a compensable injury to business or property."); *Heimbecker v. 555 Assocs., No. 01-cv-6140, 2003 U.S. Dist. LEXIS 6636, 2003 WL 21652182, at *14 (E.D. Pa. Mar. 26, 2003)* (dismissing a RICO count where the allegations of injury amounted to "bald assertions, subjective characterizations, and legal conclusions"). Finally, the allegations that "Fyk breached contractual obligations to Shipp," *id*. P 643, and that "[d]efendants and[/]or their agents irreparably harmed the Plaintiffs in their businesses," *id*. P 647, are equally conclusory and therefore insufficient to state an injury that is cognizable **[*36]** under RICO. [14]

Accordingly, I find that plaintiffs have not established standing to sue under RICO, and defendants' motions will be granted as to Count 23.

E.

Counts 16-21 and 24-29 of the complaint allege that the defendants violated various federal criminal statutes contained in Title 18 of the United States Code. As a general matter, "Title 18 is a federal criminal statute which does not create civil liability or a private right of action." *U.S. ex rel. Stafford v. Luongo, No. 85-cv-1642, 1989 U.S. Dist. LEXIS 4733, 1989 WL 45910, at *2 (E.D. Pa. Apr. 19, 1989)*. Thus, private parties may not maintain suit under most provisions of Title 18.

This general rule applies to almost all of the remaining statutes invoked in the complaint. Count **[*37]** 17, for instance, alleges that the defendants acted as accessories after the fact in violation of *18 U.S.C. § 3*. That statute,

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[13] Plaintiffs do *not* allege that they suffered financial harm because William Shipp subordinated his claims against Fyk to those against NBM. Even if the complaint included such allegations, however, it would be unclear how that particular harm was proximately caused by defendants' alleged RICO activities.

[14] The complaint veers toward attempting to state claims on behalf of Shipp's bank in several places. The bank, however, is not a plaintiff in this action, and "[t]hat an individual shareholder or employee may sustain harm incidental to the injury to [a] corporation does not confer [RICO] standing upon him." *Jordan v. Berman, 792 F. Supp. 380, 386 n.11 (E.D. Pa. 1992)*, *vac'd in part on other grounds sub nom.* *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994)*.

however, "do[es] not provide a private right of action." Keyter v. Bush, No. 08-cv-97, 2008 U.S. Dist. LEXIS 17045, 2008 WL 613129, at *2 (D. Del. Mar. 5, 2008); *accord, e.g.,* Thomas v. Bryant, No. 09-cv-5189, 2009 U.S. Dist. LEXIS 77031, 2009 WL 2473662, at *2 (W.D. Wash. Aug. 7, 2009). Neither does (1) the bankruptcy fraud statute, 18 U.S.C. § 157, *see Carpenter v. Young*, No. 04-cv-927, 2005 WL 1364787, at *4 (E.D. Pa. June 1, 2005); (2) 18 U.S.C. §§ 286 and 371, which criminalize conspiracies against the United States, *see, e.g.,* Jones v. Lockett, No. 08-cv-16, 2009 U.S. Dist. LEXIS 63381, 2009 WL 2232812, at *8 (W.D. Pa. July 23, 2009) (§ 371); Dugar v. Coughlin, 613 F. Supp. 849, 852 n.1 (S.D.N.Y. 1985) (§ 286); (3) the mail, wire, and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, & 1344, [15] *see, e.g.,* Jones, 2009 U.S. Dist. LEXIS 63381, 2009 WL 2232812, at *8 (§ 1341); Beale v. Rubin & Rothman, LLC, No. 08-cv-4279, 2009 U.S. Dist. LEXIS 55384, 2009 WL 1916322, at *5 (D.N.J. June 29, 2009) (§§ 1341 and 1344); Kovalev v. City of Phila., No. 07-cv-4875, 2008 U.S. Dist. LEXIS 103552, 2008 WL 5377625, at *7 (E.D. Pa. Dec. 23, 2008) (§§ 1341 and 1343); Fleishman v. Scilley, No. 03-cv-4639, 2004 U.S. Dist. LEXIS 20066, 2004 WL 2203746, at *1 (E.D. Pa. Sept. 30, 2004) **[*38]** (same); (4) 18 U.S.C. § 876, which concerns mailing threatening communications, [16] *see, e.g.,* Weiss v. Sawyer, 28 F. Supp. 2d 1221, 1227 (W.D. Okla. 1997); Bryant v. Yellow Freight Sys., 989 F. Supp. 966, 968 (N.D. Ill. 1997); (5) 18 U.S.C. § 880, which concerns the proceeds of extortion, *see* Giron v. Abascal, No. 07-cv-110, 2007 U.S. Dist. LEXIS 38582, 2007 WL 1722404, at *1, *4 (D.N.M. May 3, 2007), or (6) the attempt and conspiracy statute, 18 U.S.C. § 1349, *see* Rogerson v. United States, No. 08-cv-5060, 2009 U.S. Dist. LEXIS 40339, 2009 WL 1361875, at *1, *5 (D.S.D. May 13, 2009). Defendants' motions will therefore be granted as to counts 17-20 and 24-29.

Further, although it appears that no federal court has yet addressed the question of whether or not 18 U.S.C. § 893, which criminalizes the willful lending of "money or property . . . for the purpose of making extortionate extensions of credit," contains a private right of action, this court concludes that it does not. There is no such right in the language of the statute, and § 893 is once again a "criminal statute [that] do[es] not support civil causes of action." *Carpenter*, 2005 WL 1364787, at *4. For this reason, the motions will also be granted as to Count 21.

Finally, while 18 U.S.C. § 1031 [17] "does permit a private cause of action, [that] private cause of action is limited to employee whistle blowers." Jones, 2009 U.S. Dist. LEXIS 63381, 2009 WL 2232812, at *9; *see also* 18 U.S.C. § 1031(h)(1) (providing a cause of action for individuals who are "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee"). Plaintiffs do not allege **[*40]** that they are or ever were employees of the moving defendants, and defendants' motions will therefore also be granted as to Count 16 of the complaint.

VI.

The preceding sections conclude that all of the federal claims against PNC, Rohr, Tucker, and Donaher must be dismissed. [18] As noted above, Fyk and For Your Kids have filed an answer to the complaint, and the alleged "PNC/[Tucker] Clan" and the as-yet unidentified defendants have filed no response to the complaint. Nevertheless, the federal counts will be dismissed as to all defendants. Plaintiffs' claims under the federal constitution, the

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[15] Count 25 of the complaint, which alleges a wire fraud violation, is pled as a violation of 18 U.S.C. § 1342, not 18 U.S.C. § 1343. Because § 1342 concerns sending and receiving mail under fictitious names, I assume that plaintiffs intended to list § 1343 as the relevant statute. In any case, § 1342 also lacks a private right of action. *See, e.g.,* Weiss v. Sawyer, 28 F. Supp. 2d 1221, 1227 (W.D. Okla. 1997); Drance v. Simpson Thacher & Bartlett, No. 96-cv-5729, 1997 U.S. Dist. LEXIS 11361, 1997 WL 442071, at *5 (S.D.N.Y. Aug. 5, 1997).

[16] Count 27 of the complaint actually refers to 18 U.S.C. § 876, which does not **[*39]** exist. Because that count deals with the mailing of threatening communications, I assume that plaintiffs meant to plead a violation of § 876.

[17] On its face, Count 16 attempts to plead a violation of 18 U.S.C. § 1931, which does not exist. Both that count and 18 U.S.C. § 1031 are, however, captioned "major fraud against the United States," so I construe that count as attempting to state a violation of § 1031.

[18] Because I reach this conclusion for the reasons given above, I will not address the numerous additional arguments presented in defendants' motions.

Sherman Act, the BHCA, RICO, and Title 18 cannot proceed against the non-moving defendants for precisely the reasons enunciated in Sections III, IV.A-B, and IV.D-E above. The FDCPA count, meanwhile, is subject to dismissal because the nonmoving defendants, like Tucker and Donaher, are not alleged to have attempted to collect a debt **[*41]** from the Shipps. [19] Because it therefore appears that all federal claims against all defendants are precluded for reasons substantially identical to reasons raised in the moving defendants' memoranda of law, to which plaintiffs have had an opportunity to respond, this court will *sua sponte* dismiss the federal claims against the non-moving defendants. *See* *Grine v. Colburn's Air Conditioning & Refrigeration, No. 09-cv-11, 2009 U.S. Dist. LEXIS 75344, 2009 WL 2634179, at *1 (W.D. Pa. Aug. 25, 2009)*; *Freedom Med. Inc. v. Gillespie, 634 F. Supp. 2d 490, 507 n.6 (E.D. Pa. 2007)*; *see also, e.g.,* *Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3d Cir. 1980)* (noting that this court "may on its own initiative enter an order dismissing the action provided that the complaint affords a sufficient basis for the court's action").

With no federal claims remaining in this case, the pendent state claims will be dismissed without prejudice pursuant to *28 U.S.C. § 1367(c)(3)*. In deciding whether to retain jurisdiction over state claims once all of the federal claims in a case have been dismissed, this court considers "judicial economy, convenience, fairness, and comity." *Annulli v. Panikkar, 200 F.3d 189, 202 (3d Cir. 1999)*, **[*43]** *abrogated on other grounds by* *Rotella v. Wood, 528 U.S. 549, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)*. Because this court is dismissing the complaint before discovery, judicial economy strongly weighs in favor of dismissal of the remaining claims. Comity, meanwhile, counsels allowing the Pennsylvania state courts to determine these issues, and I can perceive no unfairness or inconvenience to plaintiff if these claims are litigated in the appropriate state forum. [20]

VII.

Finally, I consider whether dismissal of plaintiffs' federal claims should be with or without prejudice to amendment of the complaint. Amendment of Counts 16-21 and 24-29 would be futile, because the statutes involved in those counts either contain no private right of action at all or no private right of action that encompasses plaintiffs. Those counts will accordingly be dismissed with prejudice. Similarly, because I can not imagine any set of facts broadly consistent with the current complaint that could sufficiently allege state action on the part of the defendants, Counts **[*44]** 1-12 and 22 will also be dismissed with prejudice. *See, e.g.,* *Thompson v. Eva's Village & Sheltering Program, No. 09-cv-1510, 2009 U.S. Dist. LEXIS 100504, 2009 WL 3486050, at *7 (D.N.J. Oct. 28, 2009)*. Count 13 will be dismissed with prejudice because plaintiffs would be unable to state an antitrust injury in an amended complaint, and Count 15 must be dismissed with prejudice as pled against PNC and Rohr, given that those defendants may not be considered debt collectors with regard to the SBA loan. By contrast, Counts 14 and 23, and Count 15 insofar as it applies to the remaining defendants, are being dismissed for pleading deficiencies that may potentially be remedied by amendment of the complaint; those counts will accordingly be dismissed without prejudice. Plaintiffs will be afforded thirty (30) days in which to file an amended complaint, with the proviso that the complaint must, this time, strictly comply with *Rule 8(a)(2)*'s mandate that it include "a short and plain statement of the claim showing that the pleader is entitled to relief."

An appropriate order accompanies this opinion.

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[19] Plaintiffs repeatedly assert that the other defendants used Fyk "to enforce collections." Compl. P 304(e); *see also, e.g., id*. P 313. The complaint does not allege, however, that Fyk ever attempted to collect a debt from Shipp, and the communications **[*42]** from Fyk to Shipp attached as exhibits also give no hint that Fyk was attempting to do so. *See id*. Exs. 1, 2, 7. A letter from Fyk to Shipp's counsel that is attached to the complaint is a settlement offer that asks, *inter alia*, that Shipp pay him "$ 967 for materials and work to the property." *Id*. Ex. 11. The courts in this circuit that have considered this question have determined that communications to a debtor's attorney do not fall within the ambit of the FDCPA. *See, e.g.,* *Wright v. Phelan, Hallinan & Schmieg, LLP, No. 09-cv-3538, 2010 U.S. Dist. LEXIS 21977, 2010 WL 786536, at *4-*6 (E.D. Pa. Mar. 8, 2010)* (citing further cases). Further, the letter to Shipp's counsel is manifestly *not* an attempt to collect any debt for the other defendants, and it is PNC's alleged collection attempts -- directly and via Tucker and Fyk -- that underpin plaintiffs' FDCPA claim.

[20] In this regard, I note that plaintiff has not alleged that defendants have complete control over the state courts -- only that Pennsylvania's confessed judgment procedure is tainted.

ORDER

AND NOW, this 25th day of March, 2010, for the reasons stated in the foregoing opinion, it is hereby **ORDERED** as follows:

(1) Plaintiffs' **[*45]** Petition to Supplement the Complaint with Exhibits (Docket No. 2) is **GRANTED**;

(2) Plaintiffs' request for judicial notice (contained in Docket No. 20) is **GRANTED**;

(3) Plaintiffs' Requests for Document Production (contained in Docket Nos. 16 and 20) are **DISMISSED AS MOOT**;

(4) The motion to dismiss filed by defendants PNC Bank, N.A. and James Rohr (Docket No. 14) is **GRANTED**;

(5) The motion to dismiss filed by defendants Donna Donaher and Tucker Arensberg, P.C. (Docket No. 15) is **GRANTED**; and

(6) (a) Counts 1-13, 16-22, and 24-29 of the Complaint, and Count 15 insofar as it applies to defendants PNC Bank, N.A. and James Rohr are **DISMISSED WITH PREJUDICE**; (b) Counts 14 and 23, and Count 15 insofar as it applies to the remaining defendants, are **DISMISSED WITHOUT PREJUDICE** to refiling an amended complaint within thirty (30) days of the date of this Order; and (c) Counts 30-76 are **DISMISSED WITHOUT PREJUDICE** to inclusion in an amended complaint or refiling in the appropriate state court.

BY THE COURT:

/s/ Louis H. Pollak

Pollak, J.

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Kroger Co. v. Sanofi-Aventis

United States District Court for the Southern District of Ohio, Western Division

March 26, 2010, Filed

Case No. 1:06-CV-163; Case No. 1:06-CV-202; Case No. 1:06-CV-427

Reporter

701 F. Supp. 2d 938 *; 2010 U.S. Dist. LEXIS 45101 **; 2011-1 Trade Cas. (CCH) P77,361

THE KROGER CO., et al., Plaintiffs, v. SANOFI-AVENTIS, et al., Defendants. IN RE: PLAVIX DIRECT PURCHASER ANTITRUST LITIGATION; This Document Relates to: All Actions; CVS PHARMACY, INC., et al., Plaintiffs, v. SANOFI-AVENTIS, et al., Defendants.

Subsequent History: Reconsideration denied by *Kroger Co. v. Sanofi-Aventis, 2010 U.S. Dist. LEXIS 164380 (S.D. Ohio, Nov. 23, 2010)*

Related proceeding at *In re Plavix Indirect Purchaser Antitrust Litig., 2011 U.S. Dist. LEXIS 8940 (S.D. Ohio, Jan. 31, 2011)*

Core Terms

patent, generic, antitrust, purchasers, Plaintiffs', manufacturer, anticompetitive, antitrust violation, infringement, speculative, anti trust law, Sherman Act, Defendants', procompetitive, damages, flows, cases, district court, pharmaceutical, complaints, injunction, launch, competitors, consumers, alleged injury, allegations, indirect, patent infringement, predicate, invalid

LexisNexis® Headnotes

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

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

Although typically courts are limited to the pleadings when faced with a motion under *Fed. R. Civ. P. 12(b)(6)*, a court may take judicial notice of other court proceedings without converting the motion into one for summary judgment.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

HN2[] Standing, Requirements

In order to survive a motion to dismiss for failure to allege antitrust injury, a plaintiff must allege either (1) that the antitrust violation was a necessary predicate to their injury; or (2) that the defendants could injure plaintiffs only by engaging in the antitrust violation.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

A claim survives a motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* if it contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. A complaint's factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true.

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

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

HN4[] Regulated Practices, Private Actions

A court must construe a complaint in the light most favorable to the plaintiff. In doing so, however, plaintiff must provide more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Particularly in the antitrust context, a district court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed. A naked assertion gets a complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility. Something beyond the mere possibility of relief must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] Sherman Act, Claims

Section 1 of the Sherman Act states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal. *15 U.S.C.S. § 1*. Although *Section 1* read literally prohibits every agreement in restraint of trade, it is well settled that the statute was intended to outlaw only "unreasonable" restraints. Thus in order to establish a violation of *§ 1* of the Sherman Act, the plaintiffs must allege that the defendants entered into an agreement to unreasonably restrain trade.

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

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN6[] **Private Actions, Standing**

To establish any antitrust claim, a plaintiff must have standing under the antitrust laws. Antitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement courts must dismiss it as a matter of law.

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

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN7[] **Private Actions, Standing**

In the traditional sense, standing is a U.S. Const. art. III requirement needing injury-in-fact, a casual connection between the injury and the conduct complained of, and the redressability of that injury by a favorable decision. Antitrust standing and Article III standing are not one and the same, and courts not only may--but must--reject claims under *Fed. R. Civ. P. 12(b)(6)* when antitrust standing is missing.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN8[] **Standing, Requirements**

There are certain factors to be analyzed in determining whether a plaintiff has established antitrust standing. These factors include: (1) the casual connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation. The five factors are to be balanced, with no one factor being determinative.

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

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

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN9[] Private Actions, Standing

As antitrust standing is a threshold, pleading-stage inquiry, when a complaint by its terms fails to establish this requirement courts must dismiss it as a matter of law--lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

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

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN10[] Standing, Requirements

An antitrust claimant must prove antitrust injury, which is to say (1) injury of the type that the antitrust laws were intended to prevent and (2) injury that flows from that which makes the defendants' acts unlawful. A naked assertion of antitrust injury is not enough and an antitrust claimant must put forth factual allegations plausibly suggesting, not merely consistent with, antitrust injury. A claimant must allege more than that an injury is causally related to an antitrust violation; an injury will not qualify as antitrust injury unless it is attributable to an anticompetitive aspect of the practice under scrutiny. The antitrust injury doctrine bars recovery where the asserted injury, although linked to an alleged violation of antitrust laws, flows directly from conduct that is not itself an antitrust violation.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN11[] Justiciability, Standing

The constitutional minimum for general standing consists of (1) an injury-in-fact which is concrete and particularized, and actual or imminent not conjectural or hypothetical, (2) a casual connection between the injury and the conduct complained of, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. A complainant must allege an injury to himself that is distinct and palpable not merely abstract and the alleged harm must be actual and imminent not hypothetical. Plaintiffs are denied standing where they rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief. To satisfy U.S. Const. art. Ill's standing requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; the injury must be fairly traceable to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN12[] **Standing, Injury in Fact**

For standing, although a plaintiff need not show that the defendant's wrongful actions were the sole proximate cause of his injuries, the causal link must be provided as a matter of fact and with a fair degree of certainty.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN13[] **Per Se Rule & Rule of Reason, Per Se Violations**

The per se rule is a method of determining whether § 1 of the Sherman Act, 15 U.S.C.S. § 1, has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN14[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act states that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce shall be deemed guilty of a felony. 15 U.S.C.S. § 2. To establish a § 2 violation, plaintiffs must demonstrate (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN15[] **Defenses, Fraudulent Procurement of Patent**

Walker Process claims are based on a fraudulently obtained patent. In Walker Process, the U.S. Supreme Court held that although a patent is an exception to the general rule against monopolies and to the right to access a free and open market and is generally immune from a suit for antitrust liability, the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act, 15 U.S.C.S. § 2. Typically, Walker Process claims are brought as counterclaims in patent infringement lawsuits; for instance, a plaintiff claims the defendant is infringing his patent and the defendant counterclaims that the patent was obtained fraudulently and is invalid. Walker Process claims are based on a fraudulently obtained patent, and are typically brought as counterclaims in patent infringement suits: the plaintiff claims the defendant infringed his patent, and the defendant responds that the patent was invalid as fraudulently obtained, and that the plaintiff's enforcement efforts violate Walker Process.

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN16[] Justiciability, Standing

Outside the context of an infringement suit counterclaim, a patent's validity can be challenged only by a party (1) producing or preparing to produce the patented product, and (2) being threatened or reasonably likely to be threatened with an infringement suit.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN17[] Defenses, Fraudulent Procurement of Patent

The U.S. District Court for the Southern District of Ohio finds the reasoning of In re Remeron and In re Ciprofloxacin more persuasive than the holding of Molecular Diagnostics. Significantly, the balance of the courts interpreting standing of consumers in Walker Process claims deny such parties standing.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN18[] Defenses, Fraudulent Procurement of Patent

There is no case in which a federal court has concluded that purchasers of a patented product have standing to assert a Walker Process claim against a patent holder where the underlying patent has been upheld as valid and enforced against an infringer. In such circumstance, the infringer itself would be unable to substantiate a Walker Process claim.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

Patent Law > ... > Defenses > Patent Invalidity > General Overview

HN19[] Defenses, Fraudulent Procurement of Patent

If a patent is valid, a Walker Process claim cannot stand.

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

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

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN20[] **Bad Faith, Fraud & Nonuse, Bad Faith**

Under Professional Real Estate Investors, Inc. v. Columbia Pictures a sham suit must be both subjectively brought in bad faith and based on a theory of either infringement or validity that is objectively baseless. Accordingly, if a suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial. In contrast with a Walker Process claim, a patentee's activities in procuring the patent are not necessarily at issue. It is the bringing of the lawsuit that is subjectively and objectively baseless that must be proved. If an objective litigant could conclude that a suit is reasonably calculated to elicit a favorable outcome, the suit is immunized from antitrust liability, and an antitrust claim premised on the sham exception must fail. A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham.

Counsel: **[**1]** For Kroger Co, Plaintiff: Wilbert Benjamin Markovits, LEAD ATTORNEY, Waite, Schneider, Bayless & Chesley, Cincinnati, OH; William Henry Blessing, LEAD ATTORNEY, Cincinnati, OH; Gregory Alan Harrison, Dinsmore & Shohl -1, Cincinnati, OH; Jean M Geoppinger, Waite Schneider Bayless & Chesley Co LPA, Cincinnati, OH; Richard Alan Arnold, Scott E Perwin, Kenny Nachwalter, P.A., Miami, FL.

For Sanofi-Aventis, Defendant: Joseph P Thomas, LEAD ATTORNEY, Ulmer & Berne - 1, Cincinnati, OH; Richard J. Stark, LEAD ATTORNEY, Cravath, Swaine & Moore LLP, New York City, NY; Alan R Dial, Kevin R Sullivan, Peter M Todaro, King & Spalding LLP, Washington, DC; David Greenwald, Evan R. Chesler, Cravath, Swaine & Moore LLP, New York, NY; Jeffrey Francis Peck, Ulmer & Berne LLP - 1, Cincinnati, OH.

For Bristol-Myers Squibb Co, Defendant: Gregory Alan Harrison, LEAD ATTORNEY, Dinsmore & Shohl -1, Cincinnati, OH; Richard J. Stark, LEAD ATTORNEY, Cravath, Swaine & Moore LLP, New York City, NY; Alan R Dial, Kevin R Sullivan, Peter M Todaro, King & Spalding LLP, Washington, DC; David Greenwald, Evan R. Chesler, Cravath, Swaine & Moore LLP, New York, NY.

For Apotex Corporation, Defendant: Robert Alan Klingler, LEAD **[**2]** ATTORNEY, Cincinnati, OH; Gregory Alan Harrison, Dinsmore & Shohl -1, Cincinnati, OH; Howard Langer, PRO HAC VICE, Langer & Grogan, P.C., Philadelphia, PA; John James Grogan, Langer & Grogan, P.C., Philadelphia, PA; Kathleen Mary Brinkman, Cincinnati, OH; Robert S Silver, Caesar, Rivise, Bernstein, Cohen & Pokotilow, Ltd., Philadelphia, PA.

For Sanofi-Synthelabo, Inc., Sanofi-Aventis U.S. L.L.C., Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership, Defendants: Joseph P Thomas, LEAD ATTORNEY, Ulmer & Berne - 1, Cincinnati, OH; Gregory Alan Harrison, Dinsmore & Shohl -1, Cincinnati, OH; Jeffrey Francis Peck, Ulmer & Berne LLP - 1, Cincinnati, OH.

Judges: Michael H. Watson, UNITED STATES DISTRICT JUDGE.

Opinion by: Michael H. Watson

Opinion

[*940] **OPINION AND ORDER**

I. INTRODUCTION

This matter arises from actions against Defendant pharmaceutical manufacturers, Sanofi Aventis and Sanofi-Synthelabo, Inc. ("Sanofi Aventis") and Bristol-Myers Squibb Company and Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership ("BMS") (collectively "Sanofi") and Apotex Corporation ("Apotex") (collectively

"Defendants"). These cases involve Plavix, a pioneer clopidogrel bisulfate drug used to treat patients at risk for heart **[**3]** attacks and strokes. Sanofi manufacturers Plavix. Apotex was the first generic applicant to seek Federal Drug Administration ("FDA") approval to market a generic version of Plavix in the United States.

Plaintiffs have brought antitrust claims for alleged violations under §§ 1 and 2 [1] of the Sherman Act, *15 U.S.C. §§ 1* and *2*. Plaintiffs claim that they have suffered antitrust injuries as a result of Defendants' alleged illegal agreements. Plaintiffs assert the alleged illegal agreements prevented Defendants from entering into a legal competitive agreement which would have permitted the generic version of Plavix to enter the market at an earlier date thus allowing Plaintiffs to purchase the drug for a lower price.

The Court has subject matter jurisdiction pursuant to *28 U.S.C. §§ 1331* and *1337(a)*. Venue is proper in this Court pursuant to *15 U.S.C. § 22* because each Defendant transacts business here.

Defendants Sanofi and Apotex have moved the Court to dismiss Plaintiffs' claims, pursuant to *Fed. R. Civ. P. 12(b)(6)*. Plaintiffs have responded to the motions, **[**4]** and Defendants have replied. For the reasons that appear below, the Court **GRANTS** Defendants' motions to dismiss (Case No. 1:06-CV-163 Docs. 67 & 68; Case No. 1:06-CV-202 Docs. 97 & 98; Case No. 1:06-CV-427 Docs. 60 & 61).

II. BACKGROUND

A. The Parties

1. Defendants

(a) The Sanofi Defendants

Defendant Sanofi-Aventis is a French corporation engaging in the development, **[*941]** manufacture, and sales of brand-name pharmaceutical drugs throughout the United States. Defendant Sanofi-Synthelabo is a Delaware corporation and an affiliate of Sanofi-Aventis. Defendant Sanofi-Synthelabo is the holder of the U.S. patent 4,847,265 ("the '265 patent") for Plavix, the pharmaceutical drug at issue in this litigation.

Defendant Bristol-Myers Squibb is a Delaware corporation engaging in the development, manufacturing, and selling of brand-name pharmaceutical drugs throughout the United States. Defendant Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership is a partnership registered in the state of Delaware. Under this business arrangement with Sanofi-Aventis, Bristol-Myers Squibb and Bristol-Myers Squibb Sanofi Pharmaceuticals Holding Partnership engage in the marketing and selling of Plavix throughout **[**5]** the United States.

(b) The Apotex Defendant

Defendant Apotex is a Delaware corporation and is a wholly-owned subsidiary of Apotex, Inc., Canada's largest generic drug manufacturer. Apotex was the first generic applicant to seek FDA approval to sell generic Plavix.

2. Plaintiffs

(a) Direct Purchasers

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[1] Section 2 claims are not brought against Defendant Apotex. *See, e.g.*, Second Am. Compl. at P 132 (Case No. 1:06-cv-163, Doc. 62).

The Direct Purchasers consist of the Kroger Plaintiffs, [2] The Direct Purchaser Class Plaintiffs, [3] and the CVS Plaintiffs. [4] The Direct Purchasers purchase pharmaceutical products for distribution and sale throughout several states. The Direct Purchasers own and operate retail stores with pharmacies throughout several states [5] and these pharmacies dispense pharmaceutical drugs, including Plavix, to the public. [6]

(b) Indirect Purchasers

The Indirect Purchasers [7] consist of end-payors who seek to represent in this class action "[a]ll persons and entities throughout the United States and its territories who purchased Plavix for themselves, their families, or their members, employees, insureds, participants, or beneficiaries" during the relevant time period. End-Payor Pls.' First Am. Consol. Class Action Compl. P 148 (Case No. 1:06-cv-226, Doc. **[*942]** 81). The Indirect Purchasers consist of individual consumers, health and benefit funds, and private insurance companies that are third-party payors. Such third-party payors pay some or all of the cost of prescription drugs, specifically Plavix, purchased for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries.

B. Regulatory System Governing the Drug Approval Process

Before a drug can be sold in the United States, the FDA must approve the drug. *21 U.S.C. § 355(a)*. A pioneer drug manufacturer files a new drug application ("NDA") with the FDA as part of the process of proving the drug is safe and effective, and to obtain premarket approval. The NDA must reference those patents that claim the new drug and for which a claim of patent infringement could reasonably be asserted against an unauthorized manufacturer or seller. After the **[**8]** FDA approves the NDA, the NDA and its related patents are listed in the Approved Drug Products With Therapeutic Equivalence Evaluations publication, also known as the "Orange Book."

The Hatch-Waxman Act of 1984 ("Hatch-Waxman Act") regulates the approval of generic pharmaceutical drugs through an expedited FDA approval process. *21 U.S.C. § 355*). This expedited process allows generic versions of brand-name drugs previously approved by the FDA to reach market more quickly by allowing the generic manufacturer to forego clinical trials in reliance on the test results of the brand name manufacturer.

A generic drug company files an Abbreviated New Drug Application ("ANDA") if it seeks to utilize the expedited approval process. The ANDA Application must include a statement certifying that the generic drug will not infringe on the brand name manufacturer's drug. [8] *See* *21 U.S.C. § 355(j)(2)(A)(vii)(I-IV)*. A Paragraph IV certification

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[2] The Kroger Plaintiffs: The Kroger Co., Walgreen Co., Eckerd Corporation, Maxi Drug, Inc. d/b/a Brooks Pharmacy, Albertson's, Inc., Safeway, Inc., Hy-Vee, Inc. and American Sales Company, Inc.

[3] The Direct Purchaser Class Plaintiffs: Meijer, Inc., Meijer Distribution, Inc., Rochester Drug Cooperative, Inc., SAJ Distributors, Inc., Stephen L. LaFrance Holdings, Inc. on behalf of themselves and a proposed class of direct purchasers of Plavix

[4] CVS Pharmacy, Inc., et al.: CVS Pharmacy, Inc., **[**6]** Rite Aid Corporation, and Rite Aid Hdqrts. Corp.

[5] Except for American Sales Company, Inc. American Sales Company, Inc. purchases pharmaceutical goods and distributes such goods to retail stores owned by affiliated companies.

[6] The Direct Purchasers have each filed a separate complaint. The Direct Purchasers have collectively responded to Defendants' motion to dismiss.

[7] Indirect Purchasers: American **[**7]** Federation of State, County and Municipal Employees District Council 47 Health and Welfare Fund, Kenneth A. Franklin, International Association of Fire Fighters Local 22 Health and Welfare Fund, International Brotherhood of Electrical Workers Local 98 Health & Welfare Plan, Painters District Council No. 30 Health and Welfare Fund, Richard Parker, Plumbers and Pipefitters Local Union 630 Welfare Fund, Joel Scheckner, United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund, United Food and Commercial Workers Union Local 1776 and Participating Employers Health and Welfare Fund, Vista Healthplan, Inc., Charles S. Watson, and Antonette Williams.

[8] Four types of certifications exist:

triggers a 45-day time frame in which the NDA holder can file an action against the generic manufacturer for infringement of the patent which is the subject of the certification. 21 U.S.C. § 355(j)(5)(B)(iii). Pursuant to statute, upon filing such a suit, the FDA's **[**9]** approval of the ANDA is automatically stayed for up to 30 months, until the expiration of the pioneer patent, or until judicial resolution of the patent litigation. 21 U.S.C. § 355(j)(5)(B)(iii)(I-III).

The FDA grants the first generic manufacturer to file a Paragraph IV certification with an ANDA for a specific drug an 180-day exclusivity period to sell its version of the generic drug without other generic competitors entering the market. The 180-day exclusivity period begins to run from (1) the day the court determines the pioneer drug's patent is invalid, or (2) the day the initial holder of the ANDA application first markets the generic. 21 U.S.C. § 355(j)(5)(B)(iv)(I), (II). During the 180-day exclusivity period other generic manufacturers are prevented from receiving ANDA approval.

Much controversy **[**10]** surrounds the potential for companies to collude to subvert the Hatch-Waxman Act during this 180-day exclusivity period. If a brand name manufacturer pays a generic manufacturer to stay off the market, the 180-day period is **[*943]** not triggered and thus the time never begins to run. Therefore, neither the generic manufacturer paid by the patent holder nor other generic manufacturers waiting in line for the 180-day period to run can enter the market. Such so-called "reverse payment" agreements have been heavily scrutinized for being anti-competitive. Furthermore, when settlement agreements end the patent litigation initiated by the filing of the ANDA with Paragraph IV certification, the patent's validity is never litigated. *See, e.g*., Alan Devlin, *Exclusionary Strategies in the Hatch-Waxman Context*, 2007 MICH. ST. L. REV. 631 (2007); James C. Burling, *Hatch-Waxman Settlements: The Battle for a Benchmark*, 20-SPG ANTITRUST 41 (2006); Herbert Hovenkamp, Mark Janis & Mark A. Lemiey, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 MINN. L. REV. 1719(2003).

C. Sanofi's Patents and Product

Sanofi is the patent assignee of several patents, including: U.S. patent 4,529,596 issued July **[**11]** 16, 1985, and U.S. patent 4,847,265 ("the '265 patent") issued July 11, 1989, and Canadian patent 1,194,875 issued on or about October 15, 1985. Sanofi submitted the NDA for Plavix on April 28, 1997, and it was approved by the FDA on November 17, 1997. Plavix is listed in the Orange Book as covered by the '265 patent, U.S. Patent 5,576,328 ("the '328 patent"), U.S. Patent 6,429,210 ("the '210 patent"), and U.S. Patent 6,504,030 ("the '030 patent"). Sanofi and BMS under a business partnership jointly market the pharmaceutical drug Plavix in the United States.

Plaintiffs' complaints allege the '265 patent is invalid because of misrepresentations and omissions made to the Patent and Trademark Office ("PTO") as part of the patent application, resulting in inequitable conduct by Sanofi, thereby rendering the '265 patent unenforceable. The Court takes judicial notice of United States District Judge Sidney Stein's decision, *Sanofi-Synthelabo v. Apotex Inc., 492 F. Supp. 2d 353, 397 (S.D.N.Y. 2007)*, *aff'd*, *550 F.3d 1075 (Fed. Cir. 2008)*, *cert denied*, *130 S. Ct. 493, 175 L. Ed. 2d 346 (2009)*, finding no clear and convincing evidence that Sanofi engaged in inequitable conduct before the PTO regarding the '265 patent **[**12]** valid, finding the '265 patent valid and enforceable, and issuing a permanent injunction barring Apotex from engaging in any activity that infringes the '265 patent. *See* *Buck v. Thomas M. Cooley Law Sch., 597 F.3d 812, 2010 WL 935364, *3 (6th Cir. 2010)* (***HN1***[] "Although typically courts are limited to the pleadings when faced with a motion under *Rule 12(b)(6)*, a court may take judicial notice of other court proceedings without converting the motion into one for summary judgment." (citing *Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565, 576 (6th Cir. 2008)))*.

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(1) "Paragraph I" certification: no patent information has been filed with the FDA;

(2) "Paragraph II" certification: the patent has expired;

(3) "Paragraph III" certification: the date the patent will expire in the future, or;

(4) "Paragraph IV" certification: the patent is invalid or not infringed by the generic product,

See 21 U.S.C. § 355(j)(2)(A)(vii)(I-IV).

D. Apotex's ANDA and the Patent Litigation

On November 16, 2001, Apotex became the first manufacturer to seek FDA approval to market a generic version of Plavix in the United States. Apotex filed an ANDA with a Paragraph IV certification to sell a generic version of Plavix and gave notice to Sanofi of such Paragraph IV certification. Apotex claimed that each patent listed in the Orange Book that related to Plavix was unenforceable, invalid, and would not be infringed by Apotex's generic drug. Pursuant to the Hatch-Waxman Act, Apotex, as the first generic manufacturer to file an ANDA with Paragraph IV certification, was entitled **[**13]** to the 180-day exclusivity period once it began marketing its generic version of Plavix.

Following this ANDA filing by Apotex, Sanofi filed a lawsuit on March 21, 2002, in the United States District Court for the **[*944]** Southern District of New York asserting Apotex had infringed on two of the patents covering Plavix, the "265 patent and the '328 patent, pursuant to *35 U.S.C. § 271(e)(2)(A)*. [9] Thus the lawsuit triggered a 30-month delay during which the FDA could not approve Apotex's ANDA. Subsequently, Sanofi dismissed with prejudice its claims based on the '328 patent; therefore only the claims for infringement of the '265 patent remained.

In addition to its suit against Apotex, Sanofi also filed suit against Dr. Reddy's Laboratory, Ltd., Dr. Reddy's Laboratories, Inc., and Teva Pharmaceutical Industries, Ltd., for alleged infringement of the '265 patent through their potential **[**14]** selling of generic Plavix.

E. Agreements between Sanofi and Apotex

Apotex received final FDA approval for its generic version of Plavix on January 20, 2006; the automatic 30-month stay expired in May 2005. The patent trial was scheduled for April 2006. Because of the gap in time until trial, Apotex was faced with launching its generic drug "at-risk" (i.e., without resolution of the patent's validity). A launch at-risk exposed Apotex to the danger that Sanofi would file for a preliminary injunction enjoining Apotex from selling generic Plavix while the lucrative 180-day exclusivity period continued to run, and subjected Apotex to possible infringement damages if the patent was upheld.

Apotex began planning for a launch at-risk. It entered into purchase contracts for raw materials in anticipation of the launch of generic Plavix and also began obtaining pre-release orders from customers, including many Plaintiffs in this case. Apotex offered to indemnify its customers from any potential liability they might face as a result of selling generic Plavix. Apotex's Chief Executive Officer, Dr. Bernard Sherman, also issued a press release after Apotex received final FDA approval of its generic **[**15]** Plavix stating that Apotex was confident the '265 patent would be held invalid.

Outside the two companies, independent professionals in the patent field also believed the validity of the '265 patent was questionable. For instance, when Aventis was subject to a hostile bid from Sanofi, Aventis hired Jeffrey Lewis, a patent attorney from Patterson, Belknap, Webb & Tyler LLP, in New York, to review the information surrounding the '265 patent litigation and to advise Aventis shareholders on the risk of the Plavix litigation. In March 2004, Mr. Lewis represented to shareholders and analysts that he believed the challenge to the '265 patent to be very valid. *See* Second Am. Compl. (Case No. 1:06-cv-163, Doc. 62) at P 75.

In addition to the risk of the invalidity of the '265 patent, Plaintiffs in this case allege Sanofi was concerned that even if Sanofi ultimately did prevail on the patent suit, Sanofi risked billions of dollars in lost profits, long term damage to their business prospects, and lowering of their stock price, compounded by the danger that Apotex might not have the resources to pay substantial infringement damages. Thus, Plaintiffs maintain both Sanofi and Apotex were

[9] In this case, Plaintiffs assert that because of its alleged omission and misrepresentations to the PTO, Sanofi had reason to believe that the '265 patent was invalid as anticipated by prior art under *35 U.S.C. § 102*, for obviousness under *35 U.S.C. § 103*, and under the doctrine of obviousness-type double patenting.

motivated **[**16]** to enter into a settlement agreement by risk and uncertainty. Prior to any negotiation of an agreement, Apotex and Sanofi agreed that Sanofi would not seek a temporary restraining order or a preliminary injunction **[*945]** and Apotex would be protected in selling its generic Plavix for at least 75 days before any patent trial.

1. The March Agreement

Sanofi and Apotex began to negotiate a settlement agreement between the parties. On March 21, 2006, Sanofi and Apotex announced a tentative agreement ("the March Agreement") which required approval by the Federal Trade Commission ("FTC") and a consortium of state attorneys general. The alleged terms of the agreement were: (1) Sanofi would not launch an authorized generic of its own during the 180-day exclusivity period; (2) Sanofi would pay Apotex for the cost of its generic Plavix inventory, up to $ 40 million; (3) Sanofi would pay Apotex $ 60 million if the FTC and the state attorneys general did not approve the agreement on or before June 30, 2006; if the agreement was approved by that date, Sanofi had the option of paying Apotex $ 20 million, $ 30 million, or $ 40 million per month (depending on the month) through December 31, 2006; (4) Sanofi **[**17]** would make similar payments to Apotex in the event that Sanofi was unable to negotiate an agreement with Dr. Reddy's by the time regulatory approval was obtained; and (5) Sanofi would compensate Apotex in the event that Plavix sales fell below certain specified amounts once Apotex entered the market with its generic version. [10]

The March Agreement was submitted to the FTC and the state attorneys general on March 30, 2006. Sanofi and Apotex issued press releases regarding the March Agreement to settle the '265 litigation, but noted a significant risk existed that the settlement would not be approved by the FTC and the state attorneys general and thus would not be finalized.

On May 5, 2006, the state attorneys general notified Sanofi and Apotex that the March Agreement failed to obtain approval.

2. The May Agreement

Sanofi and Apotex submitted a second agreement ("the May Agreement") to the FTC and state attorneys general on May 26, 2006. The May Agreement also required approval by the Federal Trade Commission and a consortium of state attorneys general. The May Agreement contained the following modifications **[**18]** to the March Agreement: (1) the effective date of Apotex's license was moved forward to June 1, 2011 from September 17, 2011; (2) if the patent litigation resulted in a judgment that the "265 patent was valid, damages borne by Apotex would be capped at 50% of its net sales (the March Agreement had capped the damages at 70% of sales) and Sanofi would not be entitled to seek attorneys' fees; and (3) Sanofi would not be prohibited from launching its own authorized generic during Apotex's 180-day exclusivity period. On July 28, 2006, the state attorneys general notified Sanofi and Apotex that the May Agreement would not be approved.

Plaintiffs in this case allege the existence of additional verbal side agreements to the May Agreement that were not disclosed to the FTC or the state attorneys general. On July 27, 2006, one day prior to the announcement that the May Agreement was not approved, the Antitrust Division of the Department of Justice launched a criminal probe into the proposed settlement. The offices of BMS' (former) Chief Executive Officer and the Senior Vice President for Strategy and External Affairs were searched by the Federal Bureau of Investigation. On June 11, 2007, BMS **[**19]** entered a plea agreement wherein it pleaded guilty to two counts of making false **[*946]** statements to government officials in connection with the proposed settlement.

3. The Generic Launch by Apotex

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[10] The facts of the March Agreement are alleged in each of Plaintiffs' complaints,

On August 8, 2006, Apotex initiated a launch at-risk of its generic version of Plavix. Five days later Sanofi filed a motion for preliminary injunction which was granted on August 31, 2006. Apotex halted sales on its generic 23 days after it launched.

F. Plaintiffs' Allegations in the Antitrust Litigation

Plaintiffs filed various amended complaints against Defendants alleging violations of antitrust laws. The Direct Purchaser Plaintiffs assert two causes of action, violations of §§ 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1* and *2*.

The thrust of Plaintiffs' allegations is that but for Defendants entering into the March and May Agreements described above, Defendants would have instead entered into an agreement with more favorable terms than the March and May Agreements. Plaintiffs claim Defendants would have either (1) entered into a licensing agreement granting Apotex a license to market its generic version of Plavix for a continuous and sustained period before the 2011 patent expiration date; or, alternatively **[**20]** (2) Sanofi would have given up some of its patent life in exchange for delayed entry of Apotex's generic after Apotex received FDA approval. Plaintiffs allege this alternative, allegedly procompetitive agreement would have avoided the '265 patent trial and would have allowed Plaintiffs to receive the benefits of generic competition through cost savings.

G. *Cardizem*

The seminal case in the Sixth Circuit involving reverse payment agreements between a brand manufacturer and a pharmaceutical generic is the *Cardizem* case. *In re: Cardizem CD Antitrust Litig., 332 F.3d 896, 906 (6th Cir. 2003)*. In *Cardizem*, direct and indirect purchasers of diltiazem hydrochloride, a heart medication commonly referred to as Cardizem CD, sued the manufacturer of the drug and the potential manufacturer of the generic version of the drug for an alleged antitrust violation arising from an agreement entered into by the defendants. Essentially, the agreement provided that the brand name manufacturer, Hoescht Marion Roussell, Inc., would pay Andrx, the generic manufacturer, quarterly payments of $ 10 million in return for Andrx not marketing its FDA-approved generic. The Sixth Circuit held that such a settlement agreement **[**21]** was *per se* illegal. *Id*.

The *Caridzem* case occurred under the statutory framework established by the Hatch-Waxman Act. Hoescht held a patent for a time-released version of Cardizem CD that was listed in the Orange Book. Andrx filed an ANDA with a Paragraph IV certification asserting its generic did not infringe on any of Hoescht's patents. Because Andrx was the first to file an ANDA, upon FDA approval it was entitled to the 180-day exclusivity period. In January 1996, Hoescht immediately filed a lawsuit asserting that the generic version infringed its patent, thus triggering the 30-month stay of approval.

Over a year later on September 15, 1997, Andrx obtained tentative approval of its ANDA, and asserted that it would market its generic as soon as either the 30-month stay expired in July 1998 or the court in the patent infringement suit determined Hoescht's patent was not infringed.

Soon thereafter on September 24, 1997, however, and prior to the possible entry date for the generic, Hoescht and Andrx entered into an agreement. The interim settlement agreement provided that Andrx would not market its generic version of the **[*947]** drug until the patent litigation was decided and would not relinquish **[**22]** its 180-day period of exclusivity. In return, Hoescht would make payments of $ 40 million per year beginning on the date Andrx received final FDA approval. Essentially, in return for Andrx parking its 180-day period of exclusivity and thereby preventing competition to Hoescht by other generics, Hoescht would make substantial reverse payments to Andrx. Significantly, the agreement extended to other drugs not included in the patent litigation.

The 30-month statutory stay expired on July 8, 1998; pursuant to the agreement, Andrx did not bring its generic drug to market and Hoescht began making $ 10 million quarterly payments.

The plaintiffs in *Cardizem* filed claims under *Section 1* of the Sherman Act seeking treble damages under *Section 4* of the Clayton Act. Specifically, the plaintiffs alleged that the agreement and payments caused Andrx not to bring its generic to market and that competition was not introduced to Hoescht's brand name drug thereby keeping the price for *Cardizem* elevated. The plaintiffs asserted the agreement precluded other generics from entering the market because Andrx parked its 180-day exclusivity period.

In several motions to dismiss, the defendants argued, *inter alia*, **[**23]** that the plaintiffs had failed to allege a cognizable antitrust injury. The district court denied each motion to dismiss, concluding the plaintiffs had adequately asserted an "antitrust injury."

Subsequently, the plaintiffs moved for partial summary judgment on the grounds that the agreement was a *per se* illegal restraint of trade. The district court granted the plaintiffs' motion, holding that the agreement, and specifically the payments not to enter the market, was a naked, horizontal restraint of trade and thus was per se illegal.

On interlocutory appeal, the district court certified two questions for the Sixth Circuit Court of Appeals:

> (1)… In determining whether Plaintiffs have properly pled antitrust injury, does the language of the Sixth Circuit's decisions in *Valley Products Co. v. Landmark, 128 F.3d 398, 404 (6th Cir. 1997)* and *Hodges v. WSM, Inc., 26 F.3d 36, 39 (6th Cir. 1994)* require dismissal of Plaintiffs' antitrust claims at the pleading stage if Plaintiffs cannot allege facts showing that Defendants' alleged anticompetitive conduct was a "necessary predicate" to their antitrust injury; i.e., that dismissal is required unless Plaintiffs plead facts showing that the alleged **[**24]** antitrust injury could not possibly have occurred absent Defendants' alleged anticompetitive conduct?
>
> (2). . . In determining whether Plaintiffs' motions for partial judgment were properly granted, whether the Defendants' September 24, 1997 Agreement constitutes a restraint of trade that is illegal *per se* under section 1 of the Sherman Antitrust Act, *15 U.S.C. § 1*, and under the corresponding state antitrust laws at issue in this litigation.

Cardizem, 332 F.3d at 900.

The Sixth Circuit initially addressed the second question and held the agreement was a *per se* illegal restraint of trade in violation of *Section 1* of the Sherman Act. The court stated the agreement guaranteeing Andrx money in return for abstaining from marketing their generic and preventing other generics from entering the market through misuse of the 180-day exclusivity period was, "at its core, a horizontal agreement to eliminate competition in the market for Cardizem CD throughout the entire United States, a classic example of a *per se* illegal restraint of trade." *Cardizem, 332 F.3d at 908*. The court rejected the defendants' characterization of the **[*948]** agreement as merely an attempt to enforce patent rights, stating that **[**25]** the payments and the parked 180-day exclusivity arrangement were tantamount to bolstering the patent's effectiveness. Furthermore, the court rejected as irrelevant the defendants' characterizations of the agreement as having procompetitive benefits. Citing *Arizona v. Maricopa County Medical Society*, the court reiterated that the *per se* rule allows courts to presume certain behaviors are *per se* anticompetitive without needing to evaluate any proposed procompetitive justifications. *Arizona v. Maricopa Cty. Medical Soc, 457 U.S. 332, 351, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. "Thus, the law is clear that once it is decided that a restraint is subject to *per se* analysis, the claimed lack of any actual anticompetitive effects or presence of procompetitive effects is irrelevant." *Cardizem, 332 F.3d at 909*.

In turning to the question of antitrust injury, the court applied the *Brunswick* test. The *Brunswick* test establishes a two part test to determine antitrust injury. Antitrust injury is (1) "injury of the type that the antitrust laws were intended to prevent" and (2) injury "that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

The court found **[**26]** prong one easily fulfilled by the plaintiffs' allegations that as consumers of the drug Cardizem, they were deprived of an alternative, less expensive generic and thus were forced to purchase the higher priced brand name. The court opined that "[p]reventing that kind of injury was undoubtedly a *raison d'etre* of the Sherman Act." *Cardizem, 332 F.3d at 909* (citations omitted). Yet whether the injury "flows" from that which makes defendants' acts unlawful" required more discussion.

The defendants, relying on *Hodges v. WSM, Inc., 26 F.3d 36, 39 (6th Cir. 1994)*, [11] argued that in order to adequately allege an antitrust injury, a plaintiff must allege that the *only* way the defendant could have caused the plaintiffs injury was by engaging in the antitrust activity. *Cardizem, 332 F.3d at 912*. As applied to the *Cardizem* case facts, the defendants maintained Andrx *could* have unilaterally and legally decided on its own not to market its generic and thus plaintiffs had not suffered an antitrust injury.

The Sixth Circuit disagreed with this argument and clarified *Hodges*, holding that ***HN2***[] "in order to survive a motion to dismiss for failure to allege antitrust injury, a plaintiff must allege *either*. (1) that the antitrust violation was 'a necessary predicate' to their injury; *or* (2) that the defendants could injure plaintiffs only by engaging in the antitrust violation." *Cardizem, 332 F.3d at 913* (citing *Hodges, 26 F.3d at 39*) (emphasis added by *Cardizem* court). Thus, despite the defendants' allegations of an alternative legal reason for Andrx's decision not to market its generic, the complaint could survive a motion to dismiss because it asserted a viable antitrust injury that flowed from the *per se* illegal agreement. *Id*.

III. STANDARD ON MOTION TO DISMISS

HN3[] A claim survives a motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* **[*949]** if it "contain[s] sufficient factual matter, accepted as **[**28]** true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a 'probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. A complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all of the complaint's allegations are true." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations omitted).

HN4[] A court must also "construe the complaint in the light most favorable to the plaintiff." *Inge v. Rock Fin. Corp., 281 F.3d 613, 619 (6th Cir. 2002)*. In doing so, however, plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555*; *see also* *Iqbal, 129 S. Ct. at 1949* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007)*. Particularly in the antitrust context, the Supreme Court cautions that "a district **[**29]** court must retain the power to insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Mich. Division-Monument Builders of N. Am. v. Mich. Cemetery Ass'n, 524 F.3d 726, 731-32 (6th Cir. 2008)* (quoting *Twombly, 550 U.S. at 558*). The Supreme Court reminded courts that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Twombly, 550 U.S. at 558* (internal citations omitted). "[A] naked assertion . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility. . . ." *Id*. Thus, "something beyond the mere possibility of [relief] must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value." *Id*. (internal citations omitted); *see also* *NicSand, Inc. v. 3M Co., 507 F.3d 442, 450 (6th Cir. 2007)* (en banc).

IV. DISCUSSION

Defendants Sanofi and Apotex seek dismissal of Plaintiffs' **[**30]** Sherman Act Section 1 Claim. Defendants Sanofi and Apotex argue Plaintiffs' *Section 1* restraint-of-trade theory is flawed because Plaintiffs fail to allege an antitrust

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[11] In *Hodges*, the Sixth Circuit Court affirmed the district court's dismissal for failure to allege an antitrust injury and stated: "[b]ecause plaintiffs did not allege, nor could they, that the illegal **[**27]** antitrust conduct was a necessary predicate to their antitrust injury *or* that defendants could exclude plaintiffs only by engaging in the antitrust violation, it was appropriate to dismiss the case pursuant to *Federal Rule of Civil Procedure 12(b)(6)*." *Hodges, 26 F.3d at 39* (emphasis added).

violation and lack standing to bring an antitrust claim for failure to allege an antitrust injury flowing from the alleged anticompetitive behavior.

Defendant Sanofi seeks dismissal of Plaintiffs' Sherman Act Section 2 Claim based on a *Walker Process* theory of monopolization through the "enforcement of a patent procured by fraud" on the PTO. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* ("enforcement of a patent procured by fraud on the Patent Office may be violative of *[section] 2* of the Sherman Act provided the other elements necessary to a *[section] 2* case are present"). Defendant Sanofi argues Plaintiffs as consumers fail to establish their standing, as *Walker Process* claims are typically permitted by courts only for actual or would-be patent infringers.

Plaintiffs oppose dismissal of any of their claims arguing they pleaded each claim sufficiently to withstand a motion to dismiss.

[*950] A. Section 1 Claims

In their motions to dismiss, Defendants argue Plaintiffs fail to adequately plead **[**31]** a Section 1 claim. Specifically, they assert that Plaintiffs fail to plead a violation of antitrust laws, fail to plead a cognizable antitrust injury, and the attempt to connect their alleged injury to the settlement agreements is hypothetical and speculative.

Plaintiffs assert the agreements are *per se* illegal agreements in violation of antitrust laws and assert an antitrust injury of "overcharges on their purchases of Plavix" flowing from such. Joint Resp. in Opp'n to Mot. to Dismiss (1:06-cv-163, Doc. 74) at 46. Plaintiffs claim that Defendants violated *Section 1* of the Sherman Act by entering into unlawful anticompetitive agreements which prevented Defendants from entering into a legal procompetitive agreement. *See* *15 U.S.C. § 1*. Plaintiffs allege this legal procompetitive agreement would have resulted in an earlier and sustained entry of generic Plavix into the market place. Plaintiffs allege by entering into these unlawful anticompetitive agreements Defendants sought to restrain trade by keeping generic Plavix out of the market. *Id*.

HN5[] *Section 1* of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or **[**32]** commerce … is declared to be illegal." *15 U.S.C. § 1*. Although *Section 1* read literally "prohibits every agreement in restraint of trade", *Maricopa Cty., 457 U.S. at 342*, it is well settled that the statute was intended to outlaw only "unreasonable" restraints. *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Thus in order to establish a violation of *Section 1* of the Sherman Act, Plaintiffs must allege that Defendants entered into an agreement to unreasonably restrain trade. *Id.; Cardizem, 332 F.3d at 906*.

HN6[] To establish any antitrust claim, however, a plaintiff must have standing under the antitrust laws. *See* *NicSand, 507 F.3d at 450* ("[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law.").

1. Standing

Defendants assert Plaintiffs' complaints fail to establish they have antitrust standing because the complaints fail to assert an antitrust injury that flows from the allegedly anticompetitive agreements. *See, e.g., Valley Prods. Co., Inc. v. Landmark, A Div. of Hospitality Franchise Sys., Inc., 128 F.3d 398, 402 (6th Cir. 1997)* (quoting *Brunswick, 429 U.S. at 489*). Specifically, **[**33]** Defendants argue Plaintiffs' alleged injury is not of the type antitrust laws were intended to prevent, does not flow from the alleged violation, and the injury is speculative. Defendants assert the complaints fail to allege an antitrust injury because the agreements on which Plaintiffs hinge their injury never took effect, as evidenced by the fact that the agreements required government approval, never were approved, and Apotex launched at-risk. Instead, Defendants claim Plaintiff's current inability to purchase a generic version of Plavix if it constitutes any type of injury, does not flow from that which supposedly violated the antitrust laws--namely the alleged anticompetitive agreements--but results from the permanent injunction issued after a bench trial in which the court ruled that Sanofi's patent was valid and enforceable. *Sanofi-Synthelabo v. Apotex Inc., 492 F.*

Supp. 2d 353 (S.D.N.Y. 2007), *aff'd*, 550 F.3d 1075 (Fed. Cir. 2008), *cert denied*, *130 S. Ct. 493, 175 L. Ed. 2d 346* ***[*951]*** *(2009)*. As such, Defendants argue Plaintiffs' theory--that in the absence of the actual proposed settlement agreements the Defendants would have reached a "procompetitive agreement" resulting in the sustained presence **[**34]** of generic Plavix on the market--is entirely speculative and conjectural.

Plaintiffs contend they have adequately pleaded an antitrust injury and a valid injury exists and flows from Defendants' agreements. Plaintiffs argue their alleged injury is not speculative. Plaintiffs assert their injury is paying heightened prices for Plavix and this is precisely the type of injury the antitrust laws were designed to prevent.

(a) Requirements for Antitrust Standing

HN7[] In the traditional sense, standing is an Article III requirement needing injury-in-fact, a casual connection between the injury and the conduct complained of, and the redressability of that injury by a favorable decision. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351*; *Fednay, Ltd. v. Chester, 547 F.3d 607, 614 (6th Cir. 2008)*. "Yet antitrust standing and Article III standing are not one and the same, and we not only may--but we must--reject claims under *Rule 12(b)(6)* when antitrust standing is missing." *NicSand, 507 F.3d at 449*.

HN8[] "The Supreme Court has articulated certain factors to be analyzed in determining whether a plaintiff has established antitrust standing." *Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 976 (6th Cir. 2000)* **[**35]** (citing *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 537-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. These factors include:

> (1) the casual connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
> (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;
>
> (4) the potential for duplicative recovery or complex apportionment of damages; and
>
> (5) the existence of more direct victims of the alleged antitrust violation.

Indeck, 250 F.3d at 976. The five factors are to be balanced, however, "with no one factor being determinative." *Id*. (citing *Peck v. Gen. Motors Corp., 894 F.2d 844, 846 (6th Cir. 1990))*.

HN9[] As "antitrust standing is a threshold, pleading-stage inquiry, … when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law--lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be." *NicSand, 507 F.3d at 450*. **[**36]** As the Sixth Circuit noted in *NicSand*,

> [l]t should come as no surprise that, in the seminal antitrust standing case, the Supreme Court dismissed the claim under *Rule 12(b)(6)*. *See* *Associated Gen. Contractors, 459 U.S. at 545-46,103 S.Ct. 897*. And our court has dismissed numerous lawsuits for lack of antitrust standing under *Rule 12(b)(6)*. *See* *Indeck Energy Servs. v. Consumers Energy Co., 250 F.3d 972, 977 (6th Cir. 2000)*; *Valley Prods., 128 F.3d at 407*; *Hodges v. WSM, Inc., 26 F.3d 36, 39 (6th Cir.1994)*; *Peck v. Gen. Motors Corp., 894 F.2d 844, 848 (6th Cir. 1990)*; *Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1351-52 (6th Cir.1989)*; *Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 90 (6th Cir.1989)*; *Axis, S.p.A. v. Micafil, Inc., 870 F.2d 1105, 1111 (6th* ***[*952]*** *Cir. 1989)*; *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079, 1088 (6th Cir.1983)*; *see also* *N.W.S. Mich., Inc. v. Gen. Wine & Liquor Co., 58 Fed. Appx. 127, 129-30 (6th Cir. Feb. 6, 2003)*; *Park Ave. Radiology Assocs., P.C. v. Methodist Health Sys., 198 F.3d 246, 1999 WL 1045098, at *7 (6th Cir. 1999)*; *Dry v. Methodist Med. Ctr. of Oak Ridge, Inc., 893 F.2d 1334, 1990 WL 3489, at *5 (6th Cir.1990)*.

Id. As the Supreme Court **[**37]** pointed out, it "is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Assoc. Gen. Contractors of Cal., Inc., 459 U.S. 535* (citation omitted).

(b) Existence of Antitrust Injury

Antitrust injury is the most hotly disputed element of antitrust standing in this case.

HN10[] An antitrust claimant must prove antitrust injury, which is to say (1) "injury of the type that the antitrust laws were intended to prevent" and (2) injury "that flows from that which makes the defendants' acts unlawful." *Brunswick, 429 U.S. at 489*; *see also NicSand, 507 F.3d at 450*. A "naked assertion" of antitrust injury is not enough and "an antitrust claimant must put forth factual 'allegations plausibly suggesting (not merely consistent with)' antitrust injury." *NicSand, 507 F.3d at 451* (quoting *Twombly, 550 U.S. at 553-54*). A claimant must allege more than that an injury is "causally related to an antitrust violation[;]" an injury "will not qualify as antitrust injury unless it is attributable to an anti-competitive aspect of the practice under scrutiny. . **[**38]** . ." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (internal citations omitted); *see also NicSand, 507 F.3d at 451*. "The Sixth Circuit. . . has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of antitrust laws, flows directly from conduct that is not itself an antitrust violation." *Indeck, 250 F.3d at 976* (quoting *Valley Prods., 128 F.3d at 403*.)

Defendants rely upon the Sixth Circuit's decisions in the *Axis* trilogy of cases for the proposition that Plaintiffs failed to plead an injury that flows from the alleged violations but instead pleaded an injury that flows from the patent as a valid legal barrier. *Axis, 870 F.2d at 1105*; *Hodges, 26 F.3d at 36*; *Valley Prods. Co., 128 F.3d at 398*. In *Axis*, the Sixth Circuit found that Axis' alleged injury--lost sales and profits resulting from its exclusion from the U.S. market--did not result from the corporate acquisition the plaintiff challenged on antitrust grounds, but rather from the defendant's patents to which the plaintiff was not licensed. *870 F.2d 1105*. For its analysis, the court assumed that the acquisitions violated **[**39]** the antitrust laws. The Sixth Circuit held that even if the defendant's acquisition violated *Section 1* of the Sherman Act by reducing competition, the plaintiff did not suffer an antitrust injury because its exclusion from the United States market was not caused by the acquisition, but rather resulted from the enforcement of the patents and the patent controller's refusal to license Axis. Thus even if the violation had not occurred, the plaintiff would have suffered the same injury because the defendant's patents "were an impenetrable barrier" to the plaintiffs entry to the U.S. market. *Id*. The "claims of injury by reason of antitrust violations are compensable only when the injury flows *directly* from the unlawful act." *Id. at 1109* (emphasis added). Thus, the court held the plaintiff was **[*953]** not entitled to damages or injunctive relief absent a showing of antitrust injury. Accordingly, the Sixth Circuit affirmed the district court's dismissal.

Similarly, in *Hodges*, the Sixth Circuit held plaintiff's alleged injury, which stemmed from defendant's agreement to refuse certain shuttle services entry to Opryland theme park, was not caused by a violation of antitrust laws, but instead by a legal **[**40]** right to refuse entry onto private property. *26 F.3d at 36*. Thus even if the agreement was anticompetitive and in violation of *Section 1*, *id. at 38*, the court reasoned the illegal antitrust conduct was not the "necessary predicate" of the plaintiff's injury as the defendant exercised a lawful property right to exclude the plaintiff. Accordingly, the Sixth Circuit affirmed the district court's dismissal of the action for failure to state a claim.

And in the final case in this trilogy, *Valley Products*, a case about soap embossed with hotel logos, a manufacturer alleged an antitrust action against a hotel franchiser for terminating the manufacturer's license to produce products and for deciding to choose other manufacturers as its preferred vendors. *128 F.3d 398*. The Sixth Circuit held the alleged antitrust violation was not a "necessary predicate" to the plaintiffs injury as the alleged injury would have been suffered whether or not the defendants entered an anticompetitive agreement because of plaintiff's loss of its vendor agreement. Thus, the plaintiff had not suffered an antitrust injury. *Id. at 404*.

The Sixth Circuit further illuminated this line of cases in *Cardizem* when it explained **[**41]** that the *Axis* plaintiffs'

> complaints were dismissed for failure to allege antitrust injury because each of the Defendants had taken an action that it was lawfully entitled to take, independent of the alleged antitrust violation, which was the actual, indisputable, and sole cause, of the plaintiff's injury. In *Axis*, the antitrust injury was not the "necessary predicate" because the plaintiff's alleged injury--its exclusion from competing in the armature winding machine market--admittedly flowed not from the anticompetitive effects of the allegedly illegal purchase, but from its lack of access to the "impenetrable" patents.
> * * *
> Thus, in reality, we have only dismissed a case for failure to allege that an antitrust violation is the "necessary predicate" for the plaintiff's injury where it has been apparent from the face of the complaint that actual and unequivocally legal action by the defendant would have caused plaintiffs injury, even if there had been no antitrust violation.

Cardizem, 332 F.3d at 914.

In *Cardizem*, however, the court distinguished the *Axis* trilogy, finding that the complaint alleged that the *per se* illegal agreement with its payment to the generic manufacturer, rather **[**42]** than the patent, constituted the "necessary predicate" for the generic manufacturer's decision to keep generic product off the market. *Cardizem, 332 F.3d at 914-15*. The *Cardizem* court held that the fact that the generic could have unilaterally, and legally, decided not to bring its generic product to a manifestly profitable market had no relevance in assessing whether the plaintiffs adequately alleged that the antitrust violation was the necessary predicate for their injury. *Id*.

In distinguishing the *Axis* trilogy of cases, the *Cardizem* court clarified that in "none of [the Axis trilogy of] cases was a complaint dismissed for failure to allege antitrust injury based on a defendant's claim that it *could* have caused the same injury without committing the alleged violation." *Cardizem, 332 F.3d at 914* (emphasis **[*954]** in original). Instead, the *Cardizem* court found that the *Axis* trilogy's complaints were dismissed for failure to allege antitrust injury because each of the "defendants *had taken* an action that it was lawfully entitled to take, independent of the alleged antitrust violation, which was the actual, indisputable, and sole cause of the plaintiffs injury." *Id*. (emphasis added). The *Cardizem* **[**43]** court reasoned that unlike the *Axis'* defendants, the *Cardizem* defendants failed to "identify a lawful right that they had and exercised and that indisputably caused plaintiffs' injury." *Id. at 914-15*.

Plaintiffs would have the Court find this case analogous to *Cardizem*. The Court, however, finds the instant case analogous to the *Axis* trilogy of cases because Plaintiffs' allegations, taken as true and construed in their favor, preclude the possibility that their injury flowed from the anticompetitive effects of the agreements "which make [D]efendants' acts unlawful." *Brunswick, 429 U.S. at 489*. While the instant case is somewhat factually similar to *Cardizem* in that it involves a reverse payment agreement, in *Cardizem*, the agreements and reverse payments kept the generic from entering the market. Not so in this case. The complaints establish Apotex's launch at-risk flooded the clopidogrel bisulfate market with generic product and the dissemination of this generic drug was stopped by the preliminary and permanent injunctions obtained by Sanofi against Apotex. The complaints themselves state that the alleged anticompetitive agreements neither precluded Apotex from selling clopidogrel bisulfate **[**44]** nor prevented these Plaintiffs from buying it. The complaints claim that the injunction stopped Apotex from putting anymore generic Plavix on the market.

Defendants identify a lawful right that they had and exercised--litigation of the '265 patent to determine its validity resulting in a preliminary and permanent injunction--independent of the alleged antitrust violation, which was the "actual, indisputable, and sole cause of Plaintiffs' injury." *Id*. (emphasis added). Had the New York district court not issued the injunctions, Plaintiffs would still have access to generic clopidogrel bisulfate and would have no injury. Thus, Plaintiffs' injury of being "overcharge[d] on their purchases of Plavix" resulted when the generic was pulled from the market as a result of the injunction, notwithstanding the allegedly anticompetitive agreements. The injunctions barring infringement of the '265 patent and the '265 patent itself are impenetrable legal impediments to the sale of generic Plavix, resulting in Plaintiffs' inability to "purchase Plavix and its generic equivalents for a sustained and continuous period of time." Direct. Puch. Compl. P 162(b). Such alleged "injury, although causally related **[**45]** to an antitrust violation, nevertheless will not qualify as 'antitrust injury,'" *Atl. Richfield, 495 U.S. at*

333 (citations omitted), since it "flows directly from conduct that is not itself an antitrust violation." *See* Indeck, 250 F.3d at 976.

Since antitrust injury is a necessary component of antitrust standing, dismissal is appropriate.

(c) Injury is Speculative

As addressed above, the Supreme Court instructs in *Twombly* that a naked assertion of antitrust injury is not enough and an antitrust claimant must put forth factual allegations plausibly suggesting (not merely consistent with) antitrust injury. *Twombly, 550 U.S. at 555-56*.

Defendants argue Plaintiffs' "but for" theory attempts to fill in missing links between the alleged anticompetitive agreements and the injury of being "overcharge[d] on their purchases of Plavix" **[*955]** and that such missing links are fatal to Plaintiffs' case. Defendants state that Plaintiffs' theory that but for the alleged anticompetitive March and May agreements, Defendants would have reached a procompetitive agreement allowing early entry of the generic onto the market obviating the need for a patent trial is pure speculation. Defendants argue conjectural and **[**46]** hypothetical injuries such as this are insufficient to establish the injury-in-fact required to establish the constitutional minimum for standing.

Plaintiffs contend the Court must accept as true the allegation that "were it not for the unlawful agreements, . . . given the pressure and incentive to settle faced by all of the Defendants, the Defendants would have reached a procompetitive agreement." Joint Resp. in Opp'n to Mot. to Dismiss (Case No. 1:06-cv-163, Doc. 74) at 47. Plaintiffs allege the illegal agreements prevented Defendants from entering into a different agreement which Plaintiffs aver would have been more procompetitive than the negotiated agreements. Plaintiffs argue the lack of agreement compelled the generic to enter the market, forcing the subsequent injunction, and instigating the eventual finding of the validity of the challenged patent. Plaintiffs argue that the anticompetitive agreements injured them by preventing a true, procompetitive agreement from being reached between Sanofi and Apotex. Plaintiffs state this procompetitive agreement would have allowed the entry of generic clopidigrel bisulfate "well before 2011 [the patent's expiration]… at a price materially **[**47]** below the branded version." Third Consol. Am. Compl. (Case No. 1:06-cv-202, Doc. 92) at P 136. Plaintiffs claim the procompetitive agreement would have "permitted Apotex to enter the market immediately … in return for royalty payments from Apotex reflecting the parties' contemporaneous valuation of Sanofi's patent rights," or it would have permitted "early-entry settlement in which Sanofi would have given up some portion of its patent life in exchange for Apotex agreeing to delay its entry for some period of time. . . ." *Id. at P 137*.

In *Associated General Contractors, 459 U.S. at 519*, the Supreme Court dismissed a Section 1 claim for lack of standing where the claimant's injury and the alleged restraint in the market contained several "somewhat vaguely defined links" and was "highly speculative." The "tenuous and speculative character of the relationship between the alleged antitrust violation" and the injury claim weighed "heavily against judicial enforcement of the [claimant's] antitrust claim." *Id. at 542-43, 545-46*. "The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within **[**48]** judicially manageable limits." *Id. at 542-44*. *See also* Lujan, 504 U.S. at 560-61 (finding that ***HN11***[] the constitutional minimum for general standing consists of (1) an injury-in-fact which is concrete and particularized, and actual or imminent not conjectural or hypothetical, (2) a casual connection between the injury and the conduct complained of, and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision (internal citations omitted)); *Whitmore v. Arkansas, 495 U.S. 149, 156, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)* (A complainant must allege an injury to himself that is distinct and palpable not merely abstract and the alleged harm must be actual and imminent not hypothetical); *Warth v. Seldin, 422 U.S. 490, 507, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)* (the plaintiffs denied standing where they "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted **[*956]** otherwise, and might improve were the court to afford relief); *Coyne v. Am. Tobacco, 183 F.3d 488, 494 (6th Cir. 1999)* ("To satisfy Article Ill's standing requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged **[**49]** illegal conduct of the defendant; the injury must be 'fairly traceable' to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury.").

Defendants argue Plaintiffs cannot satisfy standing requirements by merely asserting that but for a challenged action, Defendants would have proceeded in a way that benefitted Plaintiffs. Defendants rely on *American Federation of Government Employees v. Clinton, 180 F.3d 727 (6th Cir. 1999)*, *cert. denied*, *529 U.S. 1018, 120 S. Ct. 1417, 146 L. Ed. 2d 310 (2000)*. In that case, the plaintiffs challenged an administrative determination which allowed only private contractors to bid on work at Air Force bases. The plaintiffs alleged that if work at the Air Force bases were bid on by other military bases and not just private contractors, those other military bases would have won the bids and plaintiffs would have better employment opportunities. *Id*. The Sixth Circuit affirmed the district court's dismissal of plaintiffs' claims for lack of standing, finding the asserted "injuries too speculative, and insufficiently concrete and particularized, to establish Article III standing." *Id. at 731*. The court indicated **[**50]** the injuries alleged tended to "involve a potential loss of job benefits, not an actual one. . . . [and] any benefit loss results most clearly from the unchallengeable and unchallenged decision to close bases", not the decision to limit bidding to private contractors. *Id. at 732*.

The Court finds *American Federation* analogous to the current Plaintiffs' "but for" world. ***HN12***[] Although a plaintiff "need not show that the defendant's wrongful actions were the sole proximate cause of his injuries, the causal link must be provided as a matter of fact and with a fair degree of certainty." *Ezzo's Inv., Inc. v. Royal Beauty Supply, Inc., 243 F.3d 980, 990 (6th Cir. 2001)* (citations omitted). Here, the causal link is strewn far: but for the alleged anticompetitive agreements, Sanofi not only would have entered into a different settlement agreement with Apotex but one with more procompetitive terms than the March and May agreements actually negotiated between Sanofi and Apotex which allowed early entry of Apotex's generic onto the market; the hypothetical agreement would receive regulatory clearance; and such events would have prevented the preliminary injunction, prevented the determination of the **[**51]** validity of the patent by the patent court, and prevented the permanent injunction which prevented Apotex from selling generic Plavix before the expiration of the patent.

In order to connect the alleged injury--lack of access to generic Plavix--to the anticompetitive agreements, and to circumvent the launch at-risk and subsequent injunctions, Plaintiffs weave a circuitous "but for" scenario which would have resulted in sustained early entrance of generic Plavix thus preventing their alleged injury. This indirect causal link between Defendants' alleged wrongful actions--the March and May anticompetitive agreement--and Plaintiffs' injuries is not a matter of fact [12] and rests on a purely hypothetical early-entrance agreement that would provide Plaintiffs the benefit of earlier access to generic Plavix. Plaintiffs **[*957]** cannot satisfy standing requirements by merely asserting that but for a challenged action, Defendants would have proceeded in a way that benefitted Plaintiffs. *See* *Warth, 422 U.S. at 507*. The Court finds the claim for an injury deriving from the failure to reach a hypothetical procompetitive agreement is "nothing but speculation." *Assoc. Gen. Contactors, 459 U.S. at 542-43, 545-46*; **[**52]** *Indeck, 250 F. 3d at 977* (affirming the district court's dismissal of the Section 1 claim because the claimed injury and the antitrust damages alleged by plaintiff from defendant's acts were, among other things, too indirect and speculative).

Furthermore, the difficulty in determining damages for speculative claims supports a finding that such claims cannot meet the requirements of antitrust standing. *Assoc. Gen. Contractors, 459 U.S. at 542-44* ("Partly because [the injury] is indirect, and partly because the alleged effects on the [claimant] may have been produced by independent factors, the [claimant]'s damages claim is also highly speculative"). In remarking on the difficulty of ascertaining damages of such a speculative injury, the Supreme Court noted that "any attempt to ascertain damages with such precision 'would often require additional long and complicated proceedings involving massive evidence and complicated theories.'" *Id. at 544* (citations omitted).

The Court notes that if the injury began to **[**53]** accrue at the time the agreements were made, or at the time an alternative procompetive agreement would have been reached, the alleged injury would still be occurring notwithstanding Sanofi's valid patent and the permanent injunction preventing entry of Apotex's generic onto the market. Essentially, the injury would only end when the patent expired and Plaintiffs gained access to the generic

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[12] *See, e.g.*, Merriam-Webster Online Dictionary, 2009 (defining fact as "a thing done"; "the quality of being actual"; "something that has actual existence"; or "an actual occurrence").

Plavix. It seems illogical to suggest that a patent-holder must pay consumers for being injured by not having access to a generic when the patent holder possesses a valid patent preventing entrance of such a generic onto the market. The relief requested by Plaintiffs would not redress or prevent Plaintiffs' alleged injury. Furthermore the damages theory relies on speculation as to what might have been negotiated in a hypothetical agreement and such damages would be impossible to define. Such difficulty in ascertaining damages of such a speculative injury is outside Congress's intent for enacting the Sherman Act. *See* Axis, 870 F.2d at 1107 (citing Hawaii v. Standard Oil, 405 U.S. 251, 263, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972) ("Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might **[**54]** conceivably be traced to an antitrust violation")).

Instead, reading the complaint in the light most favorable to Plaintiffs, the injuries alleged tend to involve a loss of potential access to generic Plavix if a hypothetical procompetitive agreement were reached, not an actual one, and any benefit lost results from the preliminary and permanent injunctions. *Id. at 731*. Plaintiffs' complaint hinges on a purely conjectural theory of antitrust injury. The Court finds such injury is speculative and insufficiently concrete and particularized to establish standing.

Plaintiffs, however, rely on the New Jersey district court decision in *In re K-Dur* for their "but for" proposition. *In re K-Dur, 338 F. Supp. 2d 517 (D.N.J. 2004)*. In *K-Dur*, the state of Pennsylvania and various direct and indirect purchasers of K-Dur, a pioneer potassium chloride supplement used to treat patients with depleted potassium levels, sued the manufacturer and generic manufacturers alleging the defendants entered into an unlawful agreement **[*958]** in restraint of trade in violation of *Sections 1* and *2* of the Sherman Act. The district court found that "a reasonable trier of fact could conclude that but for the allegedly anti-competitive **[**55]** agreements, generic drugs may have entered the market sooner." *Id. at 532, 535*. Accordingly, the district court found the plaintiffs pleaded "sufficiently the anti-competitive behavior (an agreement in restraint of trade) and injury (higher prices) required to state a Sherman Act violation." *Id*.

The Court is unpersuaded by the reasoning in *K-Dur. K-Dur* is distinguishable because, that case, like *Cardizem*, involved actual reverse payments. Neither involved a generic manufacturer prevented by injunctions from continuing to provide generic product to the market. Here, in contrast, the Court has already held that these Plaintiffs have neither pled a cognizable injury nor a direct relation between Plaintiffs' alleged injury and Defendants' alleged misconduct. In this case, the "but for" theory is an attempt by Plaintiff to circumvent the reality of the permanent injunction that removed the generic from the market and produced the level of competition--or more aptly lack of competition--as it currently exists. Lastly, *K-Dur* was decided under the older Con/ey-standard which was heightened by the Supreme Court's rulings in *Twombly* and *Iqbal*.

In this case, Plaintiffs do not allege their injury--lack **[**56]** of access to generic Plavix--derives directly from the alleged anticompetitive agreements. On the face of the complaint, Plaintiffs assert their injury hinges on the *failure* to enter a hypothetical agreement. In an attempt to skirt the injunctions as the source of its injury, Plaintiffs allege a speculative link of acrimony that flowed from the anticompetitive agreements which in turn prevented entrance into a procompetitive agreement. Plaintiffs cloud the issue through discussion of Sanofi's criminal sanctions in support of the alleged "acrimony."

Plaintiffs' complaints state the agreements were *per se* illegal, but the alleged competition-destroying conduct did not destroy competition, as evidenced by Plaintiffs' allegations that Apotex went to market notwithstanding the agreement. *See* *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251* (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"). Indeed, Plaintiffs cannot satisfy their pleading burden by ignoring the course of action that did occur--i.e. a launch at-risk followed by an injunction and a subsequent trial--and **[**57]** in a conclusory fashion asserting Defendants would have procompetitively settled instead of proceeding to trial. Plaintiffs' asserted "but for" scenario presupposing arrangements is not fact and the Court will not accept unwarranted inferences of fact cast in the form of factual allegations. *See* *Blackburn v. Fisk Univ., 443 F.2d 121, 124 (6th Cir. 1971)*; *see also* *Twombly, 550 U.S. at 555-56*.

Plaintiffs point to an FTC study and law review articles saying many similar type disputes are settled, however, conduct of others does not bespeak conduct by these Defendants. *See* Joint Resp. in Opp'n to Defs.' Mot. to Dismiss (Case No. 1:06-cv-163, Doc. 74) at 59-60 and Ex. E. An allegation of anticompetitive agreements and a naked assertion of the mere possibility of injury tied to these agreements is not adequate. Conclusory allegations will not suffice, absent "further factual enhancement," to propel Plaintiffs' complaints across the "line between possibility and plausibility of entitlement to relief." *Twombly, 550 U.S. at 557*. Instead the complaints make a series of speculative links of what could, would, or **[*959]** should have happened that would allow Plaintiffs to currently have access to a generic **[**58]** version of the patented Plavix drug. The antitrust laws are not designed to ensure the most productive competition or the most procompetitive agreement that could be reached, they are designed to ensure a market free from inappropriate restraints on competition. And the Supreme Court requires more than "naked assertion[s]" of antitrust injury to establish antitrust standing. *See* *NicSand, 507 F.3d at 451* (quoting *Twombly, 550 U.S. at 557*).

(d) Conclusion

The Court finds Plaintiffs lack antitrust standing to bring a Section 1 claim against Defendants because Plaintiffs fail to demonstrate that the alleged antitrust violation was a necessary predicate of Plaintiffs' injury and the asserted injury is speculative. In balancing these factors,

> (1) the casual connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused;
> (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market;
> (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative;

Indeck, 250 F.3d at 976, each factor supports dismissal of Plaintiffs' Section 1 **[**59]** claim for failing to allege an antitrust injury that flows from the pleaded anticompetitive behavior.

2. Violation of Antitrust Laws / *Per se* Violation of Antitrust Laws

Although the parties dispute whether Plaintiffs have adequately alleged a violation of the antitrust laws, the Court need not reach this argument as Plaintiffs' failure to allege an antitrust injury and their lack of antitrust standing disposes of Plaintiffs' Section 1 claim. A conclusion that the March or May Agreement was a "*per se* illegal restraint of trade does not obviate the need to decide whether the plaintiffs adequately alleged antitrust injury." *Cardizem, 332 F.3d at 909 FN15* (citing *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 341-42, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (***HN13***[]) "The *per se* rule is a method of determining whether *§ 1* of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury. . . .")).

Accordingly, since antitrust injury was insufficiently pleaded, the Court declines to analyze whether Plaintiffs adequately pleaded that the March and May settlement agreements violated the antitrust laws.

B. Section 2 Claims

Defendant Sanofi argues it is entitled to have the Sherman **[**60]** Act Section 2 claims, *15 U.S.C. § 2*, against it dismissed because Plaintiffs lack standing to pursue the Section 2 claims. Specifically, Sanofi asserts that Plaintiffs' *Walker Process* claims, claims based on a fraudulently obtained patent, must fail as Plaintiffs cannot challenge the patent directly and therefore should not be able to challenge the patent's validity under *Walker Process. Walker Process, 382 U.S. at 174, 177* ("enforcement of a patent procured by fraud on the Patent Office may be violative of *[Section] 2* of the Sherman Act."). Sanofi argues that the *Walker Process* decision did not contemplate direct consumers as suitable plaintiffs in this type of action. Rather, it contends, the only entity with standing to bring a *Walker Process* claim is an entity against whom a fraudulently obtained patent is, or could be, enforced.

Plaintiffs maintain that Sanofi unlawfully monopolized the clopidogrel bisulfate **[*960]** market by enforcing the '265 patent, a patent procured by fraud, in violation of *Section 2* of the Sherman Act. Specifically, Plaintiffs allege Sanofi violated Section 2 of the Sherman Act by committing fraud on the PTO, listing the fraudulently obtained patent in the FDA's **[**61]** Orange Book, filing and prosecuting patent infringement actions against Apotex and other prospective generic competitors, and entering into the illegal agreements with Apotex described above. Because Plaintiffs are direct purchasers of Plavix, Plaintiffs assert that they have standing to prosecute a *Walker Process* claim as an injured party under the antitrust laws.

HN14[] Section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony …" *15 U.S.C. § 2*. To establish a *Section 2* violation, plaintiffs must demonstrate "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd of Podiatric Surgery, Inc., 185 F.3d 606, 622 (6th Cir. 1999)*.

1. [62] *Walker Process* Claim**

HN15[] *Walker Process* claims are based on a fraudulently obtained patent. In *Walker Process*, the Supreme Court held that although a "patent… is an exception to the general rule against monopolies and to the right to access a free and open market" and is generally immune from a suit for antitrust liability, the "enforcement of a patent procured by fraud on the Patent Office may be violative of *[Section] 2* of the Sherman Act." *Walker Process, 382 U.S. at 174, 177*. Typically, *Walker Process* claims are brought as counterclaims in patent infringement lawsuits; for instance, a plaintiff claims the defendant is infringing his patent and the defendant counterclaims that the patent was obtained fraudulently and is invalid. *See* *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1067 (Fed. Cir. 1998)* ("an antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement suit); *see also* *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 689-90 (2d Cir. 2009)* *("Walker Process* claims are based on a fraudulently obtained patent, and are typically brought as counterclaims **[**63]** in patent infringement suits: the plaintiff claims the defendant infringed his patent, and the defendant responds that the patent was invalid as fraudulently obtained, and that the plaintiff's enforcement efforts violate *Walker Process*.").

HN16[] Outside the context of an infringement suit counterclaim, a patent's validity can be challenged only by a party (1) producing or preparing to produce the patented product, and (2) being threatened or reasonably likely to be threatened with an infringement suit. *In re DDAVP, 585 F.3d at 690* (citing *Cordis Corp. v. Medtronic, Inc., 835 F.2d 859, 862 (Fed. Cir. 1987))*. As purchasers of Plavix, the plaintiffs do not satisfy these requirements and cannot directly challenge the '265 patent's validity.

Whether a direct purchaser that cannot directly challenge a patent's validity can instead allege a *Walker Process* claim or if such *Walker Process* claim is **[*961]** available only to actual or would-be infringers is not as clear, as cases litigating the issue show. For example, Sanofi points to *In re Remeron Antitrust Litigation, 335 F. Supp. 2d 522 (D.N.J. 2004)*, among others, for the proposition that district courts have dismissed *Walker Process* claims brought by direct **[**64]** purchasers, finding that direct purchasers lack standing to pursue *Walker Process* claims challenging a patent. In *In re Remeron*, the district court dismissed the *Walker Process* claim brought by the direct purchasers of mirtazapine against the drug's manufacturer. The district court reasoned that "*Walker Process* and its progeny involve antitrust counterclaimants who were potential or actual competitors in patent infringement suits." *Id. at 529*. As the direct purchasers "neither produced mirtazapine nor would have done so . . . [and] Plaintiffs were not party to the initial patent infringement suits," the court concluded the direct purchasers lacked standing to pursue a *Walker Process* claim. *Id. See also* *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514 (E.D.N.Y. 2005)* (recognizing a "serious question [as to] whether indirect plaintiffs have standing to assert a *Walker Process* claim"); *Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)* (J. Posner sitting by designation) (the fraud at issue in a *Walker Process* claim is directed at a patentee's competitors and therefore suppliers of inactive pharmaceutical ingredients for those competitors **[**65]** lacked standing). *Cf.* *Associated Gen.*

Contractors of Cal., 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (not every and any party connected with an antitrust violation has standing to bring an antitrust claim).

Conversely, Plaintiffs point the Court to Molecular Diagnostics Labs v. Hoffmann-La Roche Inc., 402 F. Supp. 2d 276 (D.D.C. 2005). In *Molecular Diagnostics*, the district court specifically disagreed with the *In re Remeron* court, and instead found that direct purchasers have standing under *Walker Process* despite the direct purchasers lack of status as a competitor or party to an infringement suit. *Id*. The court reasoned that because the harm in a *Walker Process* claim is the antitrust violation through the fraudulently procured patent, and not the fraud itself, a direct purchaser who can meet the traditional antitrust standing requirements satisfies standing in a *Walker Process* claim. Accordingly, the *Molecular Diagnostics* district court proceeded to analyze the direct purchasers' standing under the "standing requirements in more conventional antitrust actions." Id. at 281. *See also* In re Netflix Antitrust Litig., 506 F. Supp. 2d 308, 316 [N.D.Cal. 2007] (finding *Molecular Diagnostics* persuasive for the proposition **[**66]** that "even though *Walker Process* claims are predicated on enforcement of a fraudulently-obtained patent, the harm still accrues directly to consumers").

Further convoluting standing in a *Walker Process* context is a recent decision from the Second Circuit, In re DDAVP Direct Purchaser Antitrust Litigation. 585 F.3d 677 (2d Cir. 2009). In *In re DDAVP*, the Second Circuit reversed the district court's ruling that direct purchasers lack standing to pursue *Walker Process* claims against a drug manufacturer. *Id*. The district court relied primarily on *In re Remeron* and *In re Ciprofloxacin. Id*. In addressing "a question of first impression" of "whether the plaintiffs have standing to bring their *Walker Process* claim, when a court has yet to find [a] patent fraudulently obtained," the Second Circuit fashioned a narrow ruling. Based on the fact the purchaser plaintiffs were challenging an "already tarnished patent," the Second Circuit stated "[w]e therefore hold only that purchaser plaintiffs have standing to raise *Walker Process* claims for patents that are already unenforceable due to inequitable conduct." Id. at 690-91 (emphasis **[*962]** added). The Second Circuit specifically declined to decide "whether **[**67]** purchaser plaintiffs per se have standing to raise *Walker Process* claims." Id. at 691-92. Notably, the Second Circuit addressed that "[i]f a patent is valid, a *Walker Process* claim cannot stand." Id. at 690. In styling their limited ruling, the court recognized the defendants' argument that:

> giving *Walker Process* standing to the plaintiffs, who cannot directly challenge the '398 patent's validity, could result in an avalanche of patent challenges, because direct purchasers otherwise unable to challenge a patent's validity could do so simply by dressing their patent challenge with a *Walker Process* claim. It would be relatively easy, the defendants argue, for these purchasers to allege an antitrust injury, as patent protection inherently leads to supra-competitive prices. ... Given that *Walker Process* fraud converts this fundamental feature of the patent system into a potential antitrust violation, the defendants contend that finding purchaser standing could significantly increase the costs of defending and enforcing patents by greatly expanding the universe of potential challenges.

Id. at 690. The court balanced the defendants' argument against its concern that antitrust violations would **[**68]** go unremedied if

> direct purchasers would be able to recover antitrust damages from a fraudulent patentee only after that patentee first loses on a fraudulent procurement claim. This asks too much of the generic competitors and other potential patent challengers, who may not have the strategic interest or the resources to start or win such a battle, or who may be presented with strong incentives to settle their challenge by patent holders seeking not only to preserve their patent's enforceability, but also to avoid potential *Walker Process* liability.

Id. at 691. Accordingly, as to "not pass lightly over the defendants' objections to expanding the universe of patent challengers [and without] disturbing the incentives for innovation," the Second Circuit "tread carefully" by holding "only that purchaser plaintiffs have standing to raise *Walker Process* claims for patents that are already unenforceable due to inequitable conduct." Id. at 691-92.

None of the above discussed cases are binding precedent on this Court, however, each is persuasive. In comparing the case *subjudice* and taking all the facts in a light most favorable to Plaintiffs, **HN17**[] the Court finds the reasoning of In re Remeron and In **[**69]** re Ciprofloxacin more persuasive than the holding of Molecular

Diagnostics. Significantly, the balance of the courts interpreting standing of consumers in *Walker Process* claims deny such parties standing.

Sanofi points out, and the Court agrees, that ***HN18***[] there is "no case in which a federal court has concluded that purchasers of a patented product have standing to assert a *Walker Process* claim against a patent holder where the underlying patent has been upheld as valid and enforced against an infringer." Def. Sanofi's Memo. in Supp. of Mot. to Dismiss (Case No. 2:06-cv-163, Doc. 68-2) at 38. In such circumstance, the infringer itself, in this case Apotex, would be unable to substantiate a *Walker Process* claim. E.g., *Kemin Foods, L.C. v. Pigmentos Vegetates del Cento S.A. de C.V., 384 F. Supp. 2d 1334, 1353 (S.D. Iowa 2005)* (finding of patent validity necessitates dismissal of defendant's *Walker Process* counterclaim as unsupportable as a matter of law because it is premised on a finding that the patents-in-suit are invalid and unenforceable).

In this case, Apotex litigated the validity and enforceability of the '265 patent through the Federal Circuit; the Federal **[*963]** Circuit affirmed the district **[**70]** court's ruling that Sanofi's '265 patent was valid and enforceable. *See Sanofi-Synthelabo v. Apotex Inc., 492 F. Supp. 2d 353, 397 (S.D.N.Y. 2007)*, *aff'd*, *550 F.3d 1075 (Fed. Cir. 2008)*, *cert denied*, *130 S. Ct. 493, 175 L. Ed. 2d 346 (2009)*. Apotex failed to establish by clear and convincing evidence that Sanofi engaged in inequitable conduct when prosecuting the drug patent before the PTO. *Id*. Those counterclaims by Apotex are almost identical to the claims brought in this case by the direct purchasers. Subsequent to the Federal Circuit's ruling upholding the validity and enforceability of the '265 patent, the other cases brought by Sanofi against potential generic manufacturers Dr. Reddy's and Teva resulted in a stipulated judgment of the parties that the '265 patent was valid and enforceable. *See* Consent J. and Order at 1-2, *Sanofi-Synthelabo v. Dr. Reddy's Labs*, Case No. 1:02-cv-03672 (S.D.N.Y June 30, 2009) (J. Stein); Stipulation of Order of Dismissal, *Sanofi-Aventis v. Teva Pharmaceuticals USA, Inc*., Case No. 1:04-cv-07548 (S.D.N.Y. Jan. 15, 2005) (J. Stein).

Given the facts of this case, the Court declines Plaintiffs' invitation to stray beyond the realm of *Walker Process* cases denying direct **[**71]** purchasers standing. *In re Remeron, 335 F. Supp. 2d at 522*; *In re Ciprofloxacin, 363 F. Supp. 2d at 514*. Persuasively, the policy concerns noted by the Second Circuit for its narrow holding, such as fear a claim would go unlitigated by an alleged infringer, do not exist in this case. As eloquently stated in *In re Ciprofloxacin*:

> Given that consumers are often subjected to monopoly prices for invalid patents, it is tempting to suggest that, as a policy matter, a rule should be fashioned giving consumers of drugs--and perhaps patented goods generally--the right to challenge the validity of patents. ... Under the proposed rule, the consumers would have to show by clear and convincing evidence--as accused infringers must--that the subject patent was invalid. This proposal would have the effect of allowing non-infringing consumers of a patented product to seek to invalidate the patent in order to allow price-reducing competitors to enter the market. The desirability of such a change is a complex issue which . . . should be made by Congress, and not by the courts.

In re Ciprofloxacin, 363 F. Supp. 2d at 542.

The Court is loathe to grant such an expansion of potential patent challengers by conferring **[**72]** standing to direct purchasers of a drug for which the patent has been judicially determined to be valid and enforceable. *Cf. In re DDAVP, 585 F.3d at 690* (***HN19***[] "If a patent is valid, a *Walker Process* claim cannot stand."). While the Court recognizes Plaintiffs were not parties to the original challenge to the '265 patent, the Court in this case does not find reason to disrupt the delicate balance between patent law and ***antitrust law*** that *Walker Process* delineated. The Second Circuit's decision specifically crafted a narrow holding so to not disturb this balance, and such narrowing is telling of the Second Circuit's hesitation to expand standing in *Walker Process* cases to all direct purchasers. *Id. at 691-92* (Second Circuit specifically declined to decide "whether purchaser plaintiffs per se have standing to raise *Walker Process* claims."). This Court too will tread carefully so as not to open the door to all direct purchasers otherwise unable to challenge a patent's validity being able to do so by dressing their patent challenge with a *Walker Process* claim. Accordingly, the Court finds Plaintiffs lack standing to pursue their *Walker Process* claims.

2. Other Section 2 claims

In addition to **[**73]** its Walker Process claim, Plaintiffs assert Defendants violated *Section 2* **[*964]** by "enforcing the fraudulently procured '265 patent by submitting it to the FDA for listing in the FDA's Orange Book and by filing and prosecuting patent infringement actions against Apotex and other prospective generic competitors." Second Am. Compl. (Case No. 1:06-cv-163, Doc. 62) at P 135. Plaintiffs argue that Sanofi conducted sham litigation by the filing of the infringement actions against Apotex, Teva, and other prospective generic competitors, and by listing the patent in the Orange Book of patents which Plaintiffs argue was done for delay.

> ***HN20***[] "[Under *Professional Real Estate Investors, Inc. v. Columbia Pictures]* a sham suit must be both subjectively brought in bad faith and based on a theory of either infringement or validity that is objectively baseless. Accordingly, if a suit is not objectively baseless, an antitrust defendant's subjective motivation is immaterial. Id. In contrast with a Walker Process claim, a patentee's activities in procuring the patent are not necessarily at issue. It is the bringing of the lawsuit that is subjectively and objectively baseless that must be proved."

Nobelpharma, 141 F.3d at 1072 **[**74]** (citing *Prof'l Real Estate Investors v. Columbia Pictures, 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993))*.

"If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized [from antitrust liability], and an antitrust claim premised on the sham exception must fail." *Prof'l Real Estate Investors, 508 U.S. at 60*. The Supreme Court then noted that a "winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id. at 60 n.5*.

In construing the complaints in the light most favorable to the Plaintiffs, it does not follow that Sanofi's lawsuit against Apotex was subjectively and objectively baseless. Sanofi successfully won the lawsuit and thus exerted reasonable effort to petition for redress. *Prof'l Real Estate Investors, 508 U.S. at 60 n.5*. Likewise, it follows that Sanofi's listing of the '265 patent in the Orange Book was not in bad faith, merely a standard action under the Hatch-Waxman Act.

In regard to the argument by Plaintiffs that Defendants conspired to restrain trade through the March and May agreements, this argument fails for the reasons stated above for failure to plead an antitrust injury **[**75]** that flows from that which makes Defendants' acts unlawful.

3. Conclusion

The Court finds Plaintiffs lack standing to pursue their *Walker Process* claim. The Court also finds Plaintiffs fail to state a Section 2 claim for submission of the '265 patent for listing in the FDA's Orange Book and for filing and prosecuting patent infringement actions against Apotex and other prospective generic competitors.

V. DISPOSITION

The Court finds Plaintiffs lack antitrust standing to bring a Section 1 claim against Defendants as Plaintiffs fail to allege that the asserted antitrust violation was a necessary predicate of Plaintiffs' injury and any injury alleged is speculative. The Court further finds that Direct Purchaser Plaintiffs do not have standing to bring *Section 2* *Walker Process* claims against Sanofi.

Accordingly, the Court **GRANTS** Defendants' Motions to Dismiss (Case No. 1:06-CV-163, Docs. 67 & 68; Case No. 1:06-CV-202, Docs. 97 & 98; Case No. 1:06-CV-427, Docs. 60 & 61). The Clerk of Court is **DIRECTED** to enter final judgment with prejudice against Plaintiffs in **[*965]** the following cases and to close these cases: Case Nos. 1:06-CV-163, 1:06-CV-202, and 1:06-CV-427. The Clerk of Court is **DIRECTED** to **[**76]** enter final judgment with prejudice against the plaintiffs in the following consolidated cases and to close these cases: Case Nos. 1:06-cv-224; 1:06-cv-518; 1:06-cv-533; 1:06-cv-545; and 1:06-cv-550. The Clerk is further instructed to remove all the aforementioned cases from this Court's Civil Justice Reform Act Report.

IT IS SO ORDERED.

/s/ Michael H. Watson

MICHAEL H. WATSON, JUDGE

UNITED STATES DISTRICT COURT

In re TFT-LCD Antitrust Litig.

United States District Court for the Northern District of California

March 28, 2010, Decided; March 28, 2010, Filed

No. M 07-1827 SI; MDL. No. 1827

Reporter

267 F.R.D. 583 *; 2010 U.S. Dist. LEXIS 85000 **

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION;This Order Relates to: ALL CASES

Subsequent History: Motion granted by *Tracfone Wireless, Inc. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 270 F.R.D. 535, 2010 U.S. Dist. LEXIS 120298 (N.D. Cal., Nov. 2, 2010)*

Prior History: *In re TFT-LCD (Flat Panel) Antitrust Litig., 2010 U.S. Dist. LEXIS 38111 (N.D. Cal., Mar. 28, 2010)*

Core Terms

panels, purchaser, assigned, indirect, products, prices, conspiracy, antitrust, defendants', plaintiffs', entities, Display, televisions, monitors, manufacturers, co-conspirators, indirectly, resale, own use, employees, residents, local government entity, legal representative, immediate family, judicial officer, pass-through, affiliates, heirs, juror, staff

Counsel: **[**1]** For Fern M Smith, Special Master: Fern M. Smith, JAMS, San Francisco, CA.

Martin Quinn, Special Master, Pro se, San Francisco, CA.

For Martin Quinn, Special Master: Martin Quinn, JAMS, San Francisco, CA.

For ATS Claim, LLC, 09-1115, Plaintiff: David Paul Germaine, LEAD ATTORNEY, Chicago, IL; David Paul Germaine, LEAD ATTORNEY, PRO HAC VICE, Chicago, IL; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA.

For Direct Purchaser Plaintiffs, Plaintiff: Daniel L. Warshaw, LEAD ATTORNEY, Pearson, Simon, Warshaw & Penny LLP, Sherman Oaks, CA; Eric B. Fastiff, LEAD ATTORNEY, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Hilary Kathleen Ratway, LEAD ATTORNEY, Hausfeld, LLP, Washington, DC; Andrew Scirica Kingsdale, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Brendan Patrick Glackin, Lieff, Cabraser, Heimann & Bernstein LLP, San Francisco, CA; Bruce Lee Simon, Jessica L. Grant, Pearson, Simon, Warshaw & Penny, LLP, San Francisco, CA.

For BellSouth Telecommunications, Inc., 09-4997, Pacific Bell Telephone Company, 09-4997, Southwestern Bell Telephone Company, 09-4997, Plaintiffs: Christopher T. Leonardo, Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, **[**2]** DC; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Liaison Counsel for Direct Aciton Plaintiffs, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Joshua C. Stokes, Crowell & Moring LLP.

For Nokia Corporation, 09-5609, Nokia Inc., 09-5609, Plaintiffs: Brian Parker Miller, Donald MacKaye Houser, Joann Elizabeth Johnston, Peter Konito, Alston & Bird LLP, Atlanta, GA; Lisa Kathleen Bojko, Alston & Bird, Atlanta, GA; Randall Lee Allen, Alston and Bird, Menlo Park, CA; Richard W. Stimson, Alston & Bird LLP, Dallas, TX; Valarie Cecile Williams, PRO HAC VICE, Alston & Bird LLP, Atlanta, GA; Donald M. Houser, Alston Bird LLP.

For AT & T Corp., 09-4997, AT & T Datacomm, Inc., 09-4997, AT & T Mobility LLC, 09-4997, AT & T Operations, Inc., 09-4997, AT & T Services, Inc., 09-4997, Plaintiffs: Christopher T. Leonardo, Christopher H. Wood, Kenneth L. Adams, R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC; Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell **[**3]** & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; Joshua C. Stokes, Crowell & Moring LLP.

For Motorola, Inc., 09-5840, Plaintiff: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Jeffrey H. Howard, PRO HAC VICE, Crowell & Moring LLP, Washington, DC; Jerome A. Murphy, Crowell & Moring LLP, Washington, DC; Joshua Courtney Stokes, Crowell & Moring, Los Angeles, CA; R. Bruce Holcomb, Adams Holcomb LLP, Washington, DC.

For Electrograph Systems, Inc., 10-117, Electrograph Technologies, Corp., 10-117, Plaintiffs: Jason C. Murray, Crowell & Moring LLP, Los Angeles, CA; Philip J. Iovieno, Boies, Schiller & Flexner LLP, Albany, NY; William A. Isaacson.

For Dell Inc., 10-1064, Dell Products, L.P., 10-1064, Plaintiffs: Debra Dawn Bernstein, Elizabeth Helmer Jordan, Michael P. Kenny, Rodney J Ganske, Alston & Bird LLP, Atlanta, GA; Matthew David Kent, Alston + Bird LLP, Atlanta, GA; Steven Daniel Hemminger, Alston & Bird LLP, Menlo Park, CA.

For Indirect Purchaser Plaintiffs, Plaintiff: Joseph M. Alioto, Sr., LEAD ATTORNEY; Stephen Gerard Larson, Girardi & Keese, Los Angeles, CA; Gregory W. Landry, LaMarca & **[**4]** Landry, P.C.; Marvin A. Miller, Miller Law LLC.

For Direct Purchaser Plaintiffs, Plaintiff: Andrew Scirica Kingsdale; Eric B. Fastiff; Jessica L. Grant.

For Tracfone Wireless, Inc., 10-3205, Plaintiff: David Bedford Esau, West Palm Beach, FL; James Blaker Baldinger, Carlton Fields PA, West Palm Beach, FL; Robert L. Ciotti, Carlton Fields, Tampa, FL.

For LG Display Co., Ltd., (D, I, 09-1115), formerly known as, LG Philips LCD Co., LTD., Defendant: Jerome Cary Roth, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC; Jeremy James Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Samsung Electronics Co. Ltd., (D, I, 09-1115), Defendant: Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, Robert D. Wick, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Timothy C. Hester, Covington & Burling, San Francisco, CA.

For Sharp Corporation, (D, I, 09-1115), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, Ryan Takemoto, **[**5]** Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Alex Santana, Pillsbury Winthrop Shaw & Pittman, San Francisco, CA; Anne Benton Kaldor, Bingham McCutchen, San Francisco, CA; Colin C. West, McCutchen, Doyle, Brown & Enersen, LLP, San Francisco, CA; Erin Alysa Smart, Bingham McCutchen LLP, San Francisco, CA; John M. Grenfell, Pillsbury Winthrop Shaw PittmanLLP, San Francisco, CA; Kenneth I. Schacter, Bingham McCutchen LLP, New York, NY; Richard S. Taffet, Bingham McCutchen, New York, NY; Jon R. Roellke, Bingham McCutchen.

For Sharp Electronics Corporation, (D, I, 09-1115), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, August Orval Stofferahn, Ryan Takemoto, Susan Greenberg, Tara Michele Desautels, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Alex Santana, Pillsbury Winthrop Shaw & Pittman, San Francisco, CA; Anne Benton Kaldor, Bingham McCutchen, San Francisco, CA; Colin C. West, McCutchen, Doyle, Brown & Enersen, LLP, San Francisco, CA; Erin Alysa Smart, Bingham McCutchen LLP, San Francisco, CA; Fusae Nara, Pillsbury Winthrop LLP, San Francisco, CA; John M. Grenfell, Pillsbury Winthrop Shaw PittmanLLP, San Francisco, CA; Kenneth I. Schacter, Bingham McCutchen LLP, New **[**6]** York, NY; Richard S. Taffet, Bingham McCutchen, New York, NY; Jon R. Roellke, Bingham McCutchen.

For Toshiba Corporation, (D, I, 09-1115), Toshiba America Information Systems, Inc., (D, I, 09-1115), Defendants: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; John H. Chung, LEAD ATTORNEY, Wayne A. Cross, White & Case LLP, New York, NY.

For Toshiba Matsushita Display Technology Co., Ltd., (D, I, 09-1115), Defendant: John H. Chung, LEAD ATTORNEY, Wayne A. Cross, White & Case LLP, New York, NY.

For Hitachi Ltd., (D, I, 09-1115), Hitachi Displays, Ltd., (D, I, 09-1115), Defendants: Courtney Lynn Landis, Morgan, Lewis & Bockius, San Francisco, CA; Kent Michael Roger, Michelle Minju Kim-Szrom, Morgan, Lewis & Bockius LLP, San Francisco, CA.

For Hitachi America Ltd., (I), Defendant: Candice Simone Petty, Kent Michael Roger, William James Taylor, LEAD ATTORNEYS, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Hitachi Electronic Devices (USA), Inc., (D, I, 09-1115), Defendant: Candice Simone Petty, Kent Michael Roger, William James Taylor, LEAD ATTORNEYS, Michelle Minju Kim-Szrom, Morgan, Lewis & Bockius LLP, San Francisco, CA; Courtney Lynn Landis, Morgan, Lewis & Bockius, **[**7]** San Francisco, CA.

For NEC LCD Technologies, Ltd., (D, I), Defendant: Stephen Holbrook Sutro, Duane Morris LLP, San Francisco, CA.

For NEC Electronics America, Inc., (D, I), Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA; Edward G. Biester, III, Duane Morris LLP, Philadelphia, PA.

For AU Optronics Corporation, (D, I, 09-1115), Defendant: Christopher Alan Nedeau, LEAD ATTORNEY, Allison Marie Dibley, Esq., Bryan B. Barnhart, Carl Lawrence Blumenstein, Nossman LLP, San Francisco, CA.

For AU Optronics Corporation America, (D, I, 09-1115), Defendant: John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Sedgwick Detert Moran & Arnold, LLP, San Francisco, CA; Allison Marie Dibley, Esq., Carl Lawrence Blumenstein, Christopher Alan Nedeau, Nossaman LLP, San Francisco, CA; Bryan B. Barnhart, Nossman LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Michael F. Healy, Esq., Sedwick Detert Moran & Arnold LLP, San Francisco, CA.

For Chi Mei Optoelectronics, Chi Mei Optoelectronics Corporation, (D, I, 09-1115), Defendants: Gordon Pearson, Wilmer Cutler Pickering **[**8]** Hale and Dorr LLP, Washington, DC.

For Chi Mei Optoelectronics USA, Inc., (D, I, 09-1115), Defendant: Nathan Loy Walker, LEAD ATTORNEY, WilmerHale, Palo Alto, CA; Brent J. Gurney, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Gordon Pearson, Cristina Carlucci Ashworth, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Therese Lee, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chunghwa Picture Tubes Ltd., (D, I, 09-1115), Defendant: Joel Steven Sanders, Joshua David Hess, Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Hannstar Display Corporation, (D, I, 09-1115), Defendant: Christoher M. Wyant, LEAD ATTORNEY, Hugh F. Bangasser, K&L Gates LLP, Seattle, WA; Hugh Frederick Bangasser, Julie Anne Halter, Ramona M. Emerson, K&L GATES, Seattle, WA; Jeffrey L. Bornstein, K&L Gates LLP, San Francisco, CA.

For Samsung Semiconductor, Inc., (D, I, 09-1115), Defendant: Gary L. Halling, LEAD ATTORNEY, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, **[**9]** San Francisco, CA; Daniel M Suleiman, Robert D. Wick, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Timothy C. Hester, Covington & Burling, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For Epson Imaging Devices Corporation, (D), terminated on 1/15/08, Defendant: Stephen P. Freccero, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA.

For CMO Japan Co., Ltd., (D, I, 09-1115), Chi Mei Corporation, (D, I, 09-1115), Nexgen Mediatech, Inc. ("Nexgen"), (D, 09-1115), Chimei Innolux Corp., Defendants: Gordon Pearson, Cristina Carlucci Ashworth, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For NEC Electronic America, Inc., Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, Duane Morris LLP, San Francisco, CA.

For Nexgen Mediatech USA Inc, (D, 09-1115), Defendant: Caren K. Khoo, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr, New York, NY; Brent J. Gurney, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Gordon Pearson, Cristina Carlucci Ashworth, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Therese Lee, Wilmer Cutler Pickering Hale & Dorr LLP, **[**10]** Washington, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For LG Electronics Inc., (D), Defendant: Samuel R. Miller, LEAD ATTORNEY, Robert Brooks Martin, III, Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA.

For Royal Phillips Electronics NV, Defendant: Garrard R. Beeney, LEAD ATTORNEY, Sullivan & Cromwell, New York, NY.

For NEC Display Solutions of America, Inc., Defendant: Stephen Holbrook Sutro, LEAD ATTORNEY, George Dominic Niespolo, Duane Morris LLP, San Francisco, CA.

For Samsung Electronics America, Inc., (D, I, 09-1115), Defendant: Gary L. Halling, LEAD ATTORNEY, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Simon J. Frankel, LEAD ATTORNEY, Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA; Daniel M Suleiman, Robert D. Wick, Covington & Burling LLP, Washington, DC; Derek Ludwin, Washington, DC; Timothy C. Hester, Covington & Burling, San Francisco, CA.

For Phillips Consumer Electronics North America, Defendant: R. Dale Grimes, LEAD ATTORNEY, Joshua Ray Denton, Bass, Berry & Sims, PLC, Nashville, TN; Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For LG Electronics U.S.A., Inc., (D), Defendant: A. Scott **[**11]** Ross, LEAD ATTORNEY, Neal & Harwell, Nashville, TN; Samuel R. Miller, LEAD ATTORNEY, Robert Brooks Martin, III, Ryan M. Sandrock, Sidley Austin, LLP, San Francisco, CA.

For IPS Alpha Technology, LTD., IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendants: Kent Michael Roger, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Chungwa Picture Tubes Ltd. ("CPT"), Defendant: Patrick J. Ahern, Baker & McKenzie, Chicago, IL.

For Mitsubishi Electric & Electronics USA, Inc., Defendant: Donald R. Harris, Terrence Joseph Truax, Jenner & Block LLC, Chicago, IL; Kenneth E. Keller, Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA; Michael T. Brody, Robert J. Blazejowski, Jenner & Block, LLP, Chicago, IL; Michael David Lisi, Krieg Keller Sloan Reilley & Roman, San Francisco, CA.

For Samsung Electronics Company, Ltd., Defendant: Gary L. Halling, LEAD ATTORNEY, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Jeffrey Michael Davidson, Covington & Burling LLP, San Francisco, CA.

For Seiko Epson Corporation, Defendant: Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA.

For Epson Electronics America, Inc., (D, 09-1115), **[**12]** Dismissed as a indirect purchaser defendant on 4/1/08, Defendant: Kevin C. McCann, LEAD ATTORNEY, Chad A. Westfall, Sean David Unger, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA; Derek Francis Foran, Stephen P. Freccero, Morrison & Foerster LLP, San Francisco, CA; Melvin R. Goldman, Morrison & Foerster, San Francisco, CA; David Lawrence Meyer, Morrison & Foerster, Washington, DC.

For Syntax-Brillian Corp., Defendant: Herman Samuel Palarz, LEAD ATTORNEY, Tyre Kamins Katz & Granof, Los Angeles, CA.

For Toshiba America, Inc., Toshiba Corp., doing business as, Defendants: Wayne A. Cross, White & Case LLP, New York, NY.

For Tatung Company of America, Inc. ("Tatung America"), (D, 09-1115), Defendant: Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA; Nancy Chung Allred, Robert Walter Tarun, Baker & McKenzie LLP, San Francisco, CA; Patrick J. Ahern, PRO HAC VICE, Baker & McKenzie, Chicago, IL; Roxane C. Busey, PRO HAC VICE, BAker & McKenzie LLP, Chicago, IL.

For Koninklijke Philips Electronics N.V. ("Philips"), (D), Defendant: Bradley P. Smith, Garrard R. Beeney, Theodore Edelman, LEAD ATTORNEYS, Sullivan & Cromwell LLP, New York, NY; Brendan P. Cullen, Sullivan **[**13]** & Cromwell, Palo Alto, CA.

For Toshiba America Electronics Components, Inc., (D, I, 09-1115), Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; John H. Chung, Wayne A. Cross, LEAD ATTORNEYS, White & Case LLP, New York, NY; Kristen J. McAhren, LEAD ATTORNEY, White & Case LLP, Washington, DC.

For LG Display America, Inc., (D, I, 09-1115), formerly known as LG Philips LCD America, Inc., Defendant: Jerome Cary Roth, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; Michael Robert Lazerwitz, LEAD ATTORNEY, Jeremy James Calsyn, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; Katerina S Colitti, PRO HAC VICE, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC.

For Toshiba Mobile Display Co., Ltd., Defendant: Christopher M. Curran, LEAD ATTORNEY, White & Case, Washington, DC; Wayne A. Cross, LEAD ATTORNEY, White & Case LLP, New York, NY.

For Au Optronics Corporation America, Inc, 09-4997, Defendant: Allison Marie Dibley, Esq., Nossaman LLP, San Francisco, CA.

For Mitsui & Co. (Taiwan), Limited, (D), Defendant: Lisa Cox Ghannoum, Baker Hostetler, Cleveland, OH; Peter Wethrell James, Baker Hostetler, Los Angeles, CA; Ernest E. Vargo, Baker & Hostetler **[**14]** LLC, Tracy Lynn Cole, Baker & Hostetler LLP.

For Sanyo Consumer Electronics Co., Ltd., (D), Defendant: Allison Ann Davis, LEAD ATTORNEY, Sam N. Dawood, Davis Wright Tremaine LLP, San Francisco, CA; Nick Steven Verwolf, Davis Wright Tremaine LLP, Bellevue, WA.

For Samsung SDI America, Inc., Samsung SDI Co., Ltd., Defendants: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Philips Electronics North America Corporation, Defendant: Brendan P. Cullen, Sullivan & Cromwell, Palo Alto, CA.

For Tatung Company, Defendant: Patrick J. Ahern, LEAD ATTORNEY, Baker & McKenzie, Chicago, IL.

For Apple Inc., Interested Party: Caroline Nason Mitchell, LEAD ATTORNEY, Jones Day, San Francisco, CA.

For Hewlett-Packard Company, Interested Party: Beatrice B. Nguyen, Gregory D. Call, Esq., LEAD ATTORNEYS, Crowell & Moring LLP, San Francisco, CA.

For State of California, Amicus: Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

For United States Antitrust Division, Department of Justice, Intervenor: Peter K. Huston, LEAD ATTORNEY, Department of Justice, Antitrust Division, San Francisco, CA; Alexandra Jill Shepard, David J. Ward, Niall Edmund Lynch, **[**15]** Heather S. Tewksbury, United States Department of Justice, Antritrust Divsion, San Francisco, CA; U.S. Department of Justice, Antritrust Divsion, San Francisco Field Office, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA; U.S. Department of Justice, Antitrust Division, San Francisco, CA.

For State of Illinois, Intervenor: Blake Lee Harrop, LEAD ATTORNEY, Office of the Attorney General, Antitrust Bureau, Chicago, IL.

For State of Washington, Intervenor: Brady R. Johnson, LEAD ATTORNEY, Attorney General of Washington, Seattle, WA.

For State of Oregon, Intervenor: Michael E. Haglund, Michael K. Kelley, Haglund Kelley Horngren Jones & Wilder, LLP, Portland, OR.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

[*587] ORDER GRANTING INDIRECT PURCHASER PLAINTIFFS' MOTION for CLASS CERTIFICATION; DENYING DEFENDANTS' MOTION TO STRIKE MODIFIED CLASS DEFINITIONS; GRANTING MOTIONS TO STRIKE UNTIMELY DECLARATIONS

Now before the Court is the indirect purchaser plaintiffs' motion for class certification, defendants' motion to strike the modified class definitions and declarations filed with the reply brief, and plaintiffs' objections to the declaration of Shane Gregorczyk. **[**16]** For the reasons set forth below, the Court GRANTS the indirect purchaser plaintiffs' motion for class certification, DENIES defendants' motion to strike the modified class definition, GRANTS defendants' motion to strike the declarations of Chien-Ming Kuan, Yin-Hua Hsu, and Fu-Chia Hsu as untimely, and GRANTS plaintiffs' motion to strike the Gregorczyk declaration as untimely.

BACKGROUND

I. The TFT-LCD market

This multidistrict litigation stems from allegations of a global price-fixing conspiracy in the market for Thin Film Transistor Liquid Crystal Display ("TFT-LCD") panels. TFT-LCD panels are used in a number of products, including but not limited to computer monitors, notebook computers, and televisions. TFT-LCD panels are made by sandwiching liquid crystal compound between two pieces of glass called substrates. The resulting screen contains hundreds of thousands of electrically charged dots, called pixels, which form an image. The panel is then combined with a backlight unit, a driver, and other equipment to create a "module" allowing the panel to operate and be integrated into a television, computer monitor, or other product.

TFT-LCD panels are sold in a variety of sizes, and vary **[**17]** across a number of technical dimensions. For example, larger panels used for televisions require high contrast ratios for vibrant colors and wider viewing angles, while smaller panels used in mobile phones require small size and low weight. TFT-LCD panels have no independent utility, but have value only as components of other products. When a TFT-LCD panel is incorporated into a finished product, the panel is not modified, and remains a discrete, physical object within the finished product. TFT-LCD panels are purchased by many different types and sizes of customers through different manufacturing and distribution channels. The parties dispute the complexity of the distribution chain, with defendants contending that it is multi-layered, complex, and heterogeneous, and plaintiffs asserting that the distribution chain is relatively simple and not materially different **[*588]** from the distribution chains in other high-tech industries.

Between 1996 and 2006, defendants collectively dominated the market for TFT-LCD panels and products, and the top six companies (Samsung, LG, Chi Mei, AU Optronics, Sharp, and Chunghwa) currently control in excess of 80% of the TFT-LCD panel market. Indirect Purchaser **[**18]** Plaintiffs' Second Amended Consol. Compl. ¶ 116. During this period, the TFT-LCD industry experienced significant consolidation, including the creation of defendant AU Optronics in 2001 through the merger of Acer Display and Unipac Electronics; the creation of defendant Toshiba Matsushita in 2002; Fujitsu Ltd.'s transfer of its TFT-LCD business to defendant Sharp in 2005; and the joint venture for the production of TFT-LCD panels for televisions by Hitachi, Toshiba, and Matsushita in 2004. *Id*. ¶ 117. The TFT-LCD industry is also marked by a number of cross-licensing agreements, joint ventures, and other cooperative arrangements which plaintiffs allege facilitate collusion. *Id*. ¶¶ 111-14.

Although panel prices vary according to the finished product, the panel is usually a significant cost component in finished TFT-LCD products. Plaintiffs have submitted evidence showing that a panel can constitute 50%-80% of the price of computer monitors, 33%-70% of the price of televisions (and more for televisions exceeding 40"), and 10%-25% of the cost of a notebook computer. Necessarily, however, the price-component of a panel in a finished product varies both by product and manufacturer. Defendants **[**19]** cite different estimates, asserting that TFT-LCD panels reflect approximately 35 to 40% of the finished television price, and 10 to 15% of the price for notebook computers. The complaint alleges that computer monitors now comprise approximately 50% of revenues for the "large LCD products market," with TVs and notebook computers accounting for approximately 27% and 21% of revenues, respectively. *Id*. ¶ 101.

Plaintiffs allege that during the class period, defendants formed a cartel to interfere with the normal cycle of supply and demand for TFT-LCD panels. According to plaintiffs, defendants agreed on prices, agreed to limit production, and agreed to manipulate the supply of TFT-LCD panels and products so that prices remained artificially high. Plaintiffs allege that defendants executed their price-fixing scheme by participating in surreptitious group and bilateral meetings, as well as communicating with each other by telephone and e-mail. *Id*. ¶¶ 130-48.

Plaintiffs allege that some group meetings were formalized and known as "Crystal Meetings." *Id*. ¶¶ 133-35. These meetings were attended by employees at three levels of defendants' corporations, including "CEO" or "top" meetings, attended **[**20]** by Chief Executive Officers and/or Presidents; "commercial" or "operation" meetings, attended by management-level personnel; and working group meetings attended by lower-level sales and marketing personnel. *Id*. ¶¶ 133-41. Plaintiffs allege that at these "Crystal Meetings," as well as in other communications, participants discussed supply and demand and general market conditions for TFT-LCD products; exchanged fabrication plant and production capacity information; reached agreements on target prices, floor prices, and price ranges for TFT-LCD panels and products; planning consistent public statements on anticipated supply and demand; and disciplined new market entrants and pressured them to abide by agreed-upon pricing and production. Plaintiffs have submitted considerable evidence in the form of detailed meeting reports, e-mails and memoranda documenting numerous meetings between various defendants at which defendants shared price information and agreed on pricing and production levels. *See e.g*., Zahid Decl. Ex. 95-103; *see also* Netz Errata Decl. Ex. 23 (listing meetings in which defendants met to share plans for future prices and supply, and to agree on prices). [1]

[*589] II. The Department of Justice Investigation

In about 2006, the Antitrust Division of the Department of Justice began investigating a number of the defendants' alleged participation in a global conspiracy to fix prices of TFT-LCD panels. The investigation is ongoing. To date, seven corporate defendants in this action have pled guilty to Sherman Act violations relating to suppressing and eliminating competition by fixing the prices of TFT-LCD panels. Those defendants are Sharp Corporation (CR 08-802 SI); LG Display Co. Ltd. and LG Display America, Inc. (CR 08-803 SI), Chunghwa Picture Tubes, Ltd. (CR 08-804 SI); Hitachi Displays Ltd. (CR 09-247 SI); Epson Imaging Devices Corporation (CR 09-854 SI) [2] ; and Chi Mei Optoelectronics Corporation (CR 09-1166 SI). [3] The DOJ has also confirmed that it has signed a conditional **[**22]** leniency agreement with a company in the TFT-LCD industry; price-fixing cartel participants may qualify for amnesty under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, P.L. 108-237 ("ACPERA") by providing concrete evidence of a price-fixing agreement. *See* Lynch Decl. ¶ 6 (Docket No. 966).

No defendant has, as part of its criminal plea, made or promised any restitutionary payments to entities or individuals injured by the wrongful acts.

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[1] Plaintiffs have **[**21]** submitted extensive evidence in support of their allegations that defendants engaged in a price-fixing conspiracy. This evidence has all been submitted under seal, and is found at the following: Zahid Decl. 95-103; Supp. Zahid Decl. Ex. 8-15. This list is not intended to be exhaustive, as plaintiffs have submitted well over 100 exhibits, all under seal, in support of their motion.

[2] Epson Imaging Devices Corporation is not named as a defendant in the Indirect-Purchaser Plaintiffs' Second Consolidated Amended Complaint. This entity is named as a defendant in the Third Amended Direct Purchaser Plaintiffs' Consolidated Complaint. Docket No. 1416 ¶ 21.

[3] In addition, several individual executives from LG Phillips and Chunghwa Pictures Tubes, Ltd., have pled guilty to criminal violations of the Sherman Act. *See* CR 09-44 SI, CR 09-45 SI and CR 09-437 SI.

Four of the defendants (LG Display Co., Ltd., LG Display America, Inc., Chunghwa Picture Tubes, Ltd., and Chi Mei Optoelectronics Corporation) pled guilty to participating in a conspiracy from 2001 to 2006 among "major TFT-LCD producers, the primary purpose of which was **[**23]** to fix the price of certain TFT-LCD sold in the United States and elsewhere." Three of the defendants (Sharp Corporation, Hitachi Displays Ltd., and Epson Imaging Devices Corporation) pled guilty to participating in price-fixing conspiracies with "major TFT-LCD producers" with regard to sales of specific types of products to specific entities. For example, Sharp pled guilty to participating in a conspiracy to fix prices of TFT-LCD panels sold to Dell, Inc. for use in computer monitors and laptops from April 2001 to December 1, 2006; participating in a conspiracy to fix prices of TFT-LCD sold to Apple Computer Inc. for use in iPod portable music players from September 2005 to December 2006; and for participating in a conspiracy to fix prices of TFT-LCD sold to Motorola Inc. for use in Razr mobile phones from the fall of 2005 to the middle of 2006. *See* CR 08-802 SI.

III. This litigation

The indirect purchaser plaintiffs filed this multidistrict antitrust class action on behalf of all persons and entities who indirectly purchased TFT-LCD panels (contained in TFT-LCD products) manufactured, marketed, sold and/or distributed by one or more of the defendants, for the indirect purchasers' end **[**24]** use and not for resale. Second Amended Consol. Compl. ¶ 16. The indirect purchaser plaintiffs bought TFT-LCD products containing TFT-LCD panels either from (1) TFT-LCD panel direct purchasers, such as Dell, Hewlett-Packard, and Apple, that incorporate TFT-LCD panels into final, branded TFT-LCD products and sell directly to the public, or (2) retailers, such as Best Buy, Wal-Mart, or Target, that acquire the TFT-LCD products from TFT-LCD panel direct purchasers or distributors. Defendants argue that there can be many intermediaries between defendants and the final indirect purchasers, including *inter alia*, Original Equipment Manufacturers ("OEMs"), Original Design Manufacturers ("ODMs"), system integrators, contract manufacturers, electronic parts distributors, resellers, and retailers. Defendants argue that each intermediary may add value by, among other things, combining a TFT-LCD panel with other components to make a finished product.

[*590] The indirect purchaser plaintiffs allege a "long-running conspiracy extending from at least January 1, 1996 through at least December 11, 2006, at a minimum, among defendants and their co-conspirators, the purpose and effect of which was to fix, raise, **[**25]** stabilize, and maintain prices for LCD panels sold indirectly to Plaintiffs and the members of the other indirect-purchaser classes defined below." *Id*. ¶ 1. The indirect purchaser plaintiffs seek equitable relief under Section 16 of the Clayton Act, *15 U.S.C. § 26*, based on alleged violations of Section 1 of the Sherman Act, *15 U.S.C. § 1*, as well as restitution, disgorgement, and damages under the antitrust, consumer protection, and unfair competition laws of 23 states. [4]

The indirect purchaser plaintiffs seek certification of the following classes:

(1) A nationwide class for injunctive relief under *Rule 23(b)(2)*:

> All persons and entities residing in the United States as of the date notice is first published, who indirectly purchased in the United States between January 1, 1999 and the present, LCD panels incorporated in televisions, monitors and/or laptop computers, from one of more **[**26]** of the named Defendants, for their own use and not for resale. Specifically excluded from this Class are the named Defendants; the officers, directors, or employees of any defendant; any entity in which any defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any defendant. Also excluded are any federal, state or local governmental entities, any judicial officers presiding over this action and members of their immediate families and judicial staffs, and any juror assigned to this action.

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[4] The "indirect purchaser states" are Arizona, California, the District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin.

(2) Separate indirect-purchaser state-wide classes for equitable relief (restitution and disgorgement) under *Rule 23(b)(2)* and damages under *Rule 23(b)(3)*, in accordance with the laws of 23 states, with the following definitions:

> All persons and entities in [Indirect Purchaser State] who, from January 1, 1999 to December 31, 2006, as residents of [Indirect Purchaser State], purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in [Indirect Purchaser State] indirectly from one or more of the named Defendants for their own use and not for resale. Specifically excluded from this Class are the named Defendants; the officers, directors, **[**27]** or employees of any defendant; any entity in which any defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any defendant. Also excluded are any federal, state or local governmental entities, any judicial officers presiding over this action and members of their immediate families and judicial staffs, and any juror assigned to this action.

In the course of briefing the class certification motion, the indirect plaintiffs modified the class definition in two ways to address standing objections raised by defendants: (1) the end of the class period was extended from December 11, 2006 to December 31, 2006 to account for two indirect purchaser plaintiffs who purchased TFT-LCD products between December 12, 2006 and December 31, 2006, and (2) the class definition was modified from "all entities and persons residing in [the indirect purchaser state] as of the date notice is published . . ." to "all entities and persons who, [during class period], as residents of [indirect purchaser state], purchased . . ." to account for plaintiffs who purchased LCD products in an indirect purchaser state during the class period but who have since moved out of the indirect **[**28]** purchaser state.

Defendants have moved to strike the proposed modifications to the class definitions on the ground that plaintiffs should be required to seek leave of Court and/or the consent of defendants in order to modify the class definition. Defendants rely on this Court's decision in *Jordan v. Paul Financial LLC, No. C 09-4496 SI, 2009 U.S. Dist. LEXIS 7592, 2009 WL 192888* ***[*591]*** *(N.D. Cal. Jan. 27, 2009)*, in which the Court denied the plaintiff's request, made at the class certification hearing, to withdraw the pending class certification motion in order to substantively redefine the class and conduct additional discovery. However, *Jordan* is distinguishable in that there the proposed redefinition of the class was significant, and would have required additional discovery. Here, the proposed modifications are minor, require no additional discovery, and cause no prejudice to defendants. The Court DENIES defendants' motion to strike the modified class definitions.

LEGAL STANDARD

Plaintiffs bear the burden of showing that each of the four requirements of *Rule 23(a)* and at least one requirement of *Rule 23(b)* have been met. *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186*, *amended*, *273 F.3d 1266 (9th Cir. 2001)*. **[**29]** A district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*. The court must also find that one of the requirements of *Rule 23(b)* has been satisfied. Plaintiffs contend the class should be certified pursuant to *Rule 23(b)(3)*, which requires the court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*.

The Ninth Circuit has recently reaffirmed the principle that "'[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of *Rule 23* are met' and 'nothing in either the language **[**30]** or history of *Rule 23* . . . gives the court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. ConocoPhilips Co., 593 F.3d 802, 808 (9th Cir. 2010)* (quoting *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-79, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974))*; *see also Staton v. Boeing Co., 327 F.3d 938, 954 (9th Cir. 2003)*. "Although certification inquiries such as commonality, typicality, and predominance might properly call for some substantive inquiry, the court may not go so far as to judge the validity of these claims." *United Steel, 593 F.3d at 808* (internal quotations omitted); *see also* *Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975)*. However, although the Court may not require preliminary proof of the claim, it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements. Courts may also consider the legal and factual issues presented by plaintiff's complaint." 2 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, 7.26 (4th ed. 2005). Sufficient information must be provided to form a **[**31]** reasonable and informed judgment on each of the requirements of *Rule 23*. *See* *Blackie, 524 F.2d at 901 n.17*. In order to safeguard due process interests and the judicial process, the Court conducts an analysis that is as rigorous as necessary to determine whether class certification is appropriate. *See* *Chamberlan v. Ford Motor Co., 402 F.3d 952, 961 (9th Cir. 2005)*; *see also* *Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*.

The Supreme Court has long recognized that class actions play an important role in antitrust enforcement. *See* *Reiter v. Sonotone Corp., 442 U.S. 330, 344, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*; *Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262, 266, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*. "Accordingly, when courts are in doubt as to whether certification is warranted, courts tend to favor class certification." *In re Static Random Access (SRAM) Antitrust Litig., C 07-1819 CW, 2008 U.S. Dist. LEXIS 107523, 2008 WL 4447592, at *2 (Sept. 29, 2008)* ("*SRAM*") (citing *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 258 (D.D.C. 2002)*, and *In re Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 238 (E.D.N.Y. 1998))*. **[*592]** "Courts have stressed that price-fixing cases are appropriate for class certification because a class-action lawsuit is the most fair and **[**32]** efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers." *In re Rubber Chem. Antitrust Litig., 232 F.R.D. 346, 350 (N.D. Cal. 2005)* (internal quotations and citation omitted).

DISCUSSION

I. *Rule 23(a)*

A. Ascertainability

Defendants contend that the proposed classes are not ascertainable because the classes include indirect purchasers who bought TFT-LCD products incorporating panels manufactured by "one or more of the named Defendants." Defendants assert that in most instances, the parties will not be able to determine whether a particular TFT-LCD product contains a panel manufactured by a defendant, as opposed to a third-party manufacturer. Defendants argue that "there is no way to determine who manufactured the panel contained in a finished product by looking at the product, and defendants are not aware of any sources of information available to end users that consistently identify the manufacturer of the LCD panel contained in a finished product." Opposition at 51:17-52:2.

A class definition is sufficient if the description of the class is "definite enough so that it is administratively feasible **[**33]** for the court to ascertain whether an individual is a member." *O'Connor v. Boeing North American Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998)*. "The identity of class members must be ascertainable by reference to objective criteria." 5 James W. Moore, *Moore's Federal Practice, § 23.21[1]*.

The Court finds that the class definition is objective and ascertainable. Class members must live in one of the listed states, must have made a purchase during the class period, the purchase must have been for the class member's own use and not resale, and the product must contain a TFT-LCD panel made by one of the defendants. These are objective criteria. Whether a class member purchased a product containing an TFT-LCD panel made by a defendant can be determined by the model number or serial number of the product. Plaintiffs have submitted evidence showing that typically this determination can be made based on the model number alone because most models contain panels made by a single manufacturer. For those few models using different panels from different manufacturers, the model number will determine class membership unless the model used panels made by defendants and non-defendants. Plaintiffs have **[**34]** submitted evidence showing that during the class period, defendants made 89.7% to 96.3% of the panels used in televisions, computer monitors, and notebook computers, *see* Netz Rebuttal Report at 88 n. 356, and thus the universe of products containing non-defendant panels is very small. Further, plaintiffs state that they will obtain information from the OEMs identifying models using LCD panels made by non-defendants and the serial numbers of units with panels made by non-defendants for the rare models that used panels from both defendants and non-defendants.

The fact that class members will be required to submit some information in order to determine whether they are members of the class does not render the class definition unascertainable. Courts have rejected arguments similar to those advanced by defendants. *See* *In re Static Random Access Memory (SRAM) Antitrust Litig., 264 F.R.D. 603, 2009 WL 4263524, at *4 (N.D. Cal. Nov. 25, 2009)* ("*SRAM*") ("Plaintiffs will be able to identify all products that contain Defendants' SRAM by analyzing Defendants' documents, testimony from Defendants' personnel, third party transactional data, third party discovery responses that state whether their **[**35]** products contain SRAM, [Bill of Materials] from OEMs and contract manufacturers, and publicly available information."); *Dunnigan v. Metropolitan Life Ins. Co., 214 F.R.D. 125, 136 (S.D.N.Y. 2003)* (fact that class membership could be determined through "slow and burdensome" manual review of files did not defeat ascertainability); *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 506 (S.D.N.Y. 1996)* (certifying antitrust **[*593]** class of "investors who transacted through non-Defendant owned brokers where those brokers did not function as a distinct economic entity in the chain of purchase or sale" and stating that this determination would require evidentiary submissions).

B. Numerosity

Rule 23(a)(1) requires the proposed class to be "so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*. Plaintiffs assert there are thousands of class members in each of the state-wide classes and hundreds of thousands of nationwide class members who purchased TFT-LCD products during the class period. Given the nature of the TFT-LCD market and the international scope of the alleged conspiracy, common sense dictates that joinder would be impracticable. Defendants do not contest **[**36]** numerosity, and the Court finds that this requirement is met.

C. Commonality

For a proposed class to be certified, *Rule 23(a)(2)* requires that there be "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)* "Where an antitrust conspiracy has been alleged, courts have consistently held that 'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006)* ("*DRAM*") (citing *In re Rubber Chem. Antitrust Litig., 232 F.R.D. at 351*). Plaintiffs assert that questions of law and fact common to the class include (1) whether defendants shared confidential pricing and production information regarding TFT-LCD panels; (2) whether defendants through meetings and communications reached agreements on pricing and production of TFT-LCD panels; (3) whether defendants developed and implemented measures to monitor each member's compliance with their unlawful agreements; (4) whether defendants' agreements resulted in an unlawful overcharge on the price of TFT-LCD panels; (5) whether the unlawful overcharge on the price of TFT-LCD panels **[**37]** was passed-through to the indirect purchasers of TFT-LCD products; (6) whether the overcharge to indirect purchasers can be calculated using a common, formulaic method; and (7) whether there is an ongoing threat of injury to the members of the class as a result of defendants' unlawful conduct. Defendants do not dispute that there are some common issues of law and fact, and instead contend that plaintiffs cannot demonstrate the *Rule 23(b)(3)* requirement that common issues predominate over individualized questions. The Court finds that plaintiffs have established commonality, and addresses the issue of predominance *infra*.

D. Typicality

The typicality requirement of *Rule 23(a)(3)* is fulfilled when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. Generally, the class representatives "must be part of the class and possess the same interest and suffer the same injury as the class members." *Falcon, 457 U.S. at 156*. Questions of class typicality focus on "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other **[**38]** class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)* (quoting *Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985))*. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998)*.

"The typicality requirement does not mandate that the products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members." *In re Vitamins Antitrust Litig., 209 F.R.D. 251, 261 (D.D.C. 2002)*. Instead, "[t]he overarching scheme is the linchpin of plaintiffs'. . . complaint, regardless of the product purchased, the market involved or the price ultimately paid. Furthermore, the various products purchased and the different amount of damage **[*594]** sustained by individual plaintiffs do not negate a finding of typicality, provided the cause of those injuries arises from a common wrong." *In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 480 (W.D. Pa. 1999)*.

Defendants challenge the typicality **[**39]** of named plaintiffs Kou Srimoungchanh, William Fisher, Judy Griffith, Chad Hansen, Gladys Baker, Ling-Hung Jou, and Jai Paguirigan. To the extent defendants contend that certain plaintiffs (Judy Griffith and Chad Hansen) lack typicality because their purchases occurred between December 12, 2006 and December 31, 2006, or that other plaintiffs (Gladys Baker, Ling-Hung Jou, and Jai Paguirigan) do not fulfill the residency requirement of the class definition, those arguments have been addressed *supra* in connection with the modified class definition. [5]

Defendants challenge Mr. Srimoungchanh on the ground that he did not personally purchase the product on which he bases his claim, but rather the product was purchased by First Secure Data, which defendants assert is a limited liability corporation owned by Mr. Srimoungchanh. However, plaintiffs have **[**40]** submitted the deposition testimony of Mr. Srimoungchanh, in which he states that First Secure Data is a sole proprietorship, and thus he owns the TFT-LCD products purchased by First Secure Data. *See* Srimoungchanh Depo. at 74:20-25 (Supp. Zahid Decl., Ex. 53). Accordingly, defendants' objection to Mr. Srimoungchanh's standing lacks merit.

Defendants contend that Gladys Baker is not typical because she purchased a Dell monitor containing a panel manufactured by Quanta Display, a non-defendant. Quanta was an independent company until defendant AU Optronics acquired it in late 2006. Plaintiffs contend that Quanta Display is a co-conspirator, and they cite to documents showing that Quanta attended multiple group and bilateral meetings with defendants. Although plaintiffs are correct that case law holds that a conspirator is jointly liable for everything done during the period of the conspiracy's existence, the proposed class definition does not encompass purchases from co-conspirators, named or unnamed. Plaintiffs request permission to revise the class definition to include "LCD panels incorporated in televisions, monitors, and/or notebook computers, from one or more named Defendants and **[**41]** Quanta Display, Inc." Plaintiffs also argue that Ms. Baker's purchase is a qualifying purchase because as the surviving company, AU Optronics assumed all rights and obligations of Quanta, including Quanta's liability for illegal overcharges. The Court finds that Ms. Baker's purchase does not render her atypical in light of the allegations that Quanta participated the alleged price-fixing conspiracy and AU Optronics' acquisition of Quanta. The Court also finds it appropriate to amend the class definition as proposed by plaintiffs.

E. Adequacy

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[5] Plaintiffs concede that Mr. Fisher lacks standing because his February 10, 2007 purchase is outside the redefined class period. Mr. Fisher is a resident of North Carolina. Second Amd. Consol. Compl. ¶ 45. There is an additional named plaintiff from North Carolina, Donna Jeanne Flanagan, whose adequacy and typicality defendants do not challenge.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon, 150 F.3d at 1020*. The Ninth Circuit "does not favor denial of class certification on the basis of speculative conflicts." *Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003)*.

Defendants do not challenge the qualifications of plaintiffs' **[**42]** counsel, and the Court finds that the plaintiffs' counsel is qualified and able to litigate this case.

Defendants challenge the adequacy of plaintiffs Christopher Murphy, Martha Mulvey, Ben Northway, and Robert Watson on the ground that these plaintiffs' business and family relationships with counsel compromise their ability to represent the class. Mr. Murphy and Ms. Mulvey are represented **[*595]** by family members, Mr. Northway is employed by his counsel, and Mr. Watson's counsel is a customer of Mr. Watson's landscaping business. However, "[a]s the courts routinely observe, a named plaintiff will not be disqualified simply because of a close or familial relationship with one of the attorneys representing the class." *In re Cardizem CD Antitrust Litig., 200 F.R.D. 326, 337 (E.D. Mich. 2001)*; *see also* *Lewis v. Goldsmith, 95 F.R.D. 15, 20 (D.N.J. 1982)* (observing that "it would seem a bit anomalous that an individual whose uncle has developed a reputation as a competent securities lawyer should be prohibited from turning to his uncle for assistance if he has a legitimate claim"). "Rather, there must be some evidence that the relationship at issue is likely to create a conflict of interest or **[**43]** otherwise compromise the ability to vigorously prosecute the action on behalf of the class. The concern is that the financial interests of the class representative may conflict with those of the class; *e.g.*, he may seek a settlement that is not good for the class as a whole." *In re Cardizem CD Antitrust Litig., 200 F.R.D. at 337*.

Here, defendants have not shown how any of these relationships have created a conflict. Plaintiffs assert that none of these plaintiffs or their counsel have any strategic or settlement authority, as none of the four challenged class representatives have any relationship with lead counsel in this case. The mere fact of the plaintiffs' familial and business relationships does not create a *per se* presumption of impropriety or conflict. In addition, there are over 30 other named plaintiffs, each represented by their own individual counsel. On this record, the Court finds that the named plaintiffs are adequate representatives, and the asserted conflicts are merely speculative.

Finally, defendants challenge certain plaintiffs' level of participation and knowledge about this litigation. For example, defendants state that Ms. Baker and Mr. Paguirigan could not recall **[**44]** whether they had read the initial complaints before they were filed, and they argue that Ms. Mulvey is inadequate because she could not define terms such as "class action," "class representative," or "overcharge." "While class representatives must be familiar with the basics of, and understand the gravamen of, their claims, it is not necessary that they be intimately familiar with every factual and legal issue in the case." *SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *6* (internal quotations and citation omitted). Here, the plaintiffs have searched for products and documents, provided answers to written discovery, given deposition testimony, and followed the progress of this litigation through communication with counsel, and have demonstrated their ability to serve as class representatives. *See* Supp. Zahid Decl. Ex. 55-58. The Court is satisfied that these plaintiffs can serve as adequate class representatives.

II. *Rule 23(b)(2)*

A. Nationwide injunctive relief class

Plaintiffs seek certification of the following nationwide class for injunctive relief under *Rule 23(b)(2)*:

> All persons and entities residing in the United States as of the date notice is first published, who indirectly purchased in the United **[**45]** States between January 1, 1999 and the present, LCD panels incorporated in televisions, monitors and/or laptop computers, from one of more of the named Defendants, for their own use and not for resale. Specifically excluded from this Class are the named Defendants; the officers, directors, or

> employees of any defendant; any entity in which any defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any defendant. Also excluded are any federal, state or local governmental entities, any judicial officers presiding over this action and members of their immediate families and judicial staffs, and any juror assigned to this action.

Plaintiffs "seek to enjoin Defendants' collusive practices and policies that violate Section 1 of the Sherman Act (*15 U.S.C. § 1*), and operate to artificially inflate LCD panel prices in the U.S." Motion at 13:14-17. "[I]ndirect purchasers are not barred from bringing an antitrust claim for injunctive relief against manufacturers." *Lucas Auto.* **[*596]** *Eng'g Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1235 (9th Cir. 1998)*.

Rule 23(b)(2) provides for certification where "the party opposing the class has acted or refused to **[**46]** act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief if appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. Plaintiffs argue that certification of a nationwide class under *Rule 23(b)(2)* is appropriate because defendants' collusive conduct was market-wide and not specific to individual customers. "It is possible to certify the injunctive aspects of the suit under *Rule 23(b)(2)* and the damages aspects under *Rule 23(b)(3)*, achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected person to exercise control over the damages aspects." *Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898 (7th Cir. 1999)*; *see also* *SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *6-7* (certifying nationwide injunctive relief class under *Rule 23(b)(2)* and *27* statewide classes for monetary relief, including disgorgement, under *Rule 23(b)(3)*).

Defendants contend that plaintiffs lack standing to obtain injunctive relief because they do not, and cannot, allege a threat of future injury from the alleged conspiracy. Defendants argue that plaintiffs have not shown an "imminent threat of irreparable injury" because **[**47]** the "plaintiffs, their expert, and the government agree that there has been no anticompetitive conduct since 2006." Opposition at 55:2-3. Defendants note that the complaint does not contain substantive allegations of anticompetitive conduct after December 2006, and that plaintiff's expert, Dr. Netz uses the time period of 2007 to the present as a "competitive period" for the purpose of her "before and after" price regression. Defendants also emphasize that none of the criminal plea agreements on which plaintiffs rely mentions anticompetitive conduct occurring after 2006. Finally, defendants argue that it is particularly improbable that any anticompetitive conduct continued after the government's antitrust investigation became public in December 2006.

The Court finds that at this stage of the litigation, the indirect purchaser plaintiffs have alleged facts sufficient to establish standing to seek injunctive relief. Contrary to defendants' assertions, plaintiffs need not show an "imminent threat of irreparable injury," to be entitled to injunctive relief under the Sherman Act. Section 16 of the Clayton Act provides, "Any person . . . shall be entitled to sue for and have injunctive relief **[**48]** . . . against threatened loss or damage by a violation of the antitrust laws . . . under the same conditions and principles . . . [usually employed by] courts of equity." *15 U.S.C. § 26*; *see also* *Lucas Auto. Eng'g, 140 F.3d at 1235* ("[A]n antitrust plaintiff seeking injunctive relief need only show a threatened injury, not an actual one.").

Plaintiffs have alleged a multi-company cartel that operates in a market with high barriers to entry, and that engaged in frequent clandestine meetings and employed sophisticated monitoring devices to ensure compliance. The complaint alleges that beginning in 1996 and continuing through the filing of the second amended complaint, defendants and their co-conspirators entered into a "continuing agreement, understanding and conspiracy in restraint of trade artificially to fix, raise, stability and peg prices for LCD panels and LCD products in the United States, in violation of Section 1 of the Sherman Act (*15 U.S.C. § 1*)." Second Amended Consol. Compl. ¶ 251. Plaintiffs assert that they will be able to show at trial that defendants could very quickly resume their unlawful pricing activities, even on short notice.

Courts have found similar allegations **[**49]** sufficient to establish standing for a nationwide class seeking injunctive relief. In *SRAM*, the plaintiffs sought to certify a nationwide injunctive class from November 1, 1996 through December 31, 2006. The defendants contended that the plaintiffs had impliedly alleged that the conspiracy ended in 2006, and thus that the plaintiffs lacked standing to seek injunctive relief. Judge Wilken rejected that argument and certified a nationwide injunctive class:

> IP Plaintiffs allege that the same market conditions that facilitated the conspiracy from 1996 to 2006 continue today. They allege that Defendants' price-fixing resulted from a systematic, repeated pattern of **[*597]** sharing sensitive competitive information which was greatly facilitated by the cross-competitor business relationships that still exist. Thus, there is alleged a significant risk that the conspiracy will persist or reform in the future.

*SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *7*; *cf.* *In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 14 (1st Cir. 2008)* (class did not have standing for injunctive relief where the record showed that the "'perfect storm' that allegedly precipitated massive arbitrage opportunities for selling **[**50]** Canadian cars in the United States ceased long ago.").

Neither the fact that plaintiffs' expert assumed that the conspiracy ended in 2006 for the purpose of her regression analysis, nor the fact that the time periods covered by the criminal pleas do not extend past 2006 means that plaintiffs do not have standing to seek injunctive relief. As plaintiffs' expert explained in her report, she chose 2007 to the present as the "after" period for her "before and after" analysis on the assumption that defendants' price-fixing ended after the DOJ announced its criminal investigation. She did not determine the "after" period based on any affirmative evidence of the absence of a price-fixing conspiracy during that time period. Similarly, the fact that various defendants have pled guilty to Sherman Act violations into 2006 does not obviate the threat that a conspiracy will persist or resume in the future.

Accordingly, the Court certifies a nationwide injunctive class under *Rule 23(b)(2)*.

B. Statewide classes for equitable restitutionary claims

Plaintiffs also seek certification under *Rule 23(b)(2)* of 23 statewide classes for equitable relief, namely disgorgement and restitution under state law. Plaintiffs **[**51]** assert, without citation to authority, that because these remedies are equitable, certification is appropriate under *Rule 23(b)(2)*. "The distinction made in *Rule 23(b)(2)*, however, is not one between equitable remedies and compensatory damages; rather, it is between "final injunctive relief or corresponding declaratory relief with respect to the class as a whole" and all other forms of relief. Therefore, Plaintiffs' claim for restitution must be merely incidental to the claim for injunctive or declaratory relief." *In re Paxil Litig., 218 F.R.D. 242, 247 (C.D. Cal. 2003)* (denying certification under *Rule 23(b)(2)* where restitution was predominant relief sought) (internal citation omitted); *see also* *In re School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986)* (upholding district court denial of certification under *Rule 23(b)(2)* when class sought restitution).

Here, the *Rule 23(b)(2)* statewide classes would be seeking solely disgorgement and restitution, and not injunctive or declaratory relief. Thus, certification under *Rule 23(b)(2)* is inappropriate. Rather, plaintiffs' claims for disgorgement and restitution are properly considered claims for monetary relief, and thus the Court will **[**52]** consider certification of these claims under *Rule 23(b)(3)*.

III. *Rule 23(b)(3)*

Plaintiffs seek certification of 23 statewide classes for money damages pursuant to *Rule 23(b)(3)*. "To qualify for certification under *Rule 23(b)(3)*, a class must meet two requirements beyond the *Rule 23(a)* prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (quoting *Fed. R. Civ. P. 23(b)(3)*). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon, 150 F.3d at 1022* (internal quotations omitted).

Defendants contend that plaintiffs cannot show that "questions of law or fact common to class members predominate over any questions affecting only individual members," as required by *Rule 23(b)(3)*. Specifically, defendants contend that individual issues predominate because (1) some **[**53]** if not all class members are subject to a jurisdictional defense under the Foreign Trade Antitrust Improvements **[*598]** Act; (2) plaintiffs cannot show antitrust impact on a class-wide basis due to complex distribution channels, wide variations in purchasers' market power and negotiation abilities, changes in the TFT-LCD market over time, variation in panel specifications, and the value added to TFT-LCD products as they move through the supply chain; and (3) the evidence and criminal pleas show that there were multiple separate conspiracies, not a single overarching conspiracy.

A. Subject matter jurisdiction/FTAIA

Defendants contend that the Court lacks subject matter jurisdiction over most, if not all, of the indirect purchaser plaintiffs' claims because the alleged anticompetitive conduct occurred overseas. The Foreign Trade Antitrust Improvements Act, *15 U.S.C. § 6a* ("FTAIA"), amends the Sherman Act and "excludes from [its] reach much anti-competitive conduct that causes only foreign injury." *F. Hoffman-LaRoche, Ltd. v. Empagran (Empagran I), 542 U.S. 155, 158, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*. The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than **[**54]** import trade or import commerce) with foreign nations." *15 U.S.C. § 6a*. The FTAIA then "provides an exception to this general rule, making the Sherman Act applicable if foreign conduct '(1) has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (2) such effect gives rise to a [Sherman Act] claim.'" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 985 (9th Cir. 2008)* (quoting *Empagran I* and *15 U.S.C. § 6a*). This exception is known as the "domestic injury exception" of the FTAIA. *Id*. The Supreme Court has explained that the FTAIA,

> initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e*., it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e*., the "effect" must "giv[e] rise to a [Sherman Act] claim."

Empagran I, 542 U.S. at 162 (quoting *15 U.S.C. § 6a*, emphasis in original).

Defendants **[**55]** argue that the indirect purchaser plaintiffs fall into two groups, those who allegedly bought (1) foreign-panel products (finished products incorporating panels where the panels were initially sold by defendants overseas); and (2) domestic-panel products (finished products incorporating panels where the panels were initially sold directly into the United States). Defendants argue that those who purchased "foreign-panel products" account for the vast majority of the indirect purchaser class, and that those class members' claims are barred by the FTAIA because the alleged antitrust injury occurred overseas and is too attenuated from the ultimate sale in the United States to have a "direct, substantial and reasonably foreseeable effect" on American commerce. In contrast, defendants argue, the FTAIA would not apply to claims based on domestic-panel products because there the defendant's conduct involved import commerce, *i.e*., a defendant shipped the panel directly into the United States from abroad, or domestic commerce, *i.e*., a defendant's U.S. subsidiary shipped the panel to a U.S. customer. Defendants argue that individual issues of fact and law predominate over common ones with respect **[**56]** to the applicability of the FTAIA because plaintiffs have not offered a class-wide means for sorting the purported class members into foreign-panel product purchasers and domestic-panel product purchasers.

Plaintiffs respond that the applicability, if any, of the FTAIA will be resolved with common evidence of defendants' conduct, and that defendants never explain *why* application of the FTAIA to the claims of the indirect purchaser class would involve individualized questions of fact or law. Plaintiffs note that defendants' own chart purportedly listing the percentage of panels sold from 2001-2006 shows that almost all of the class members' purchases of LCD products would be subject to the threatened FTAIA defense. **[*599]** Thus, plaintiffs argue, even accepting defendants' argument that the FTAIA bars claims by purchasers of foreign-panel products, the applicability of the FTAIA can be decided for all such class members. *See* *Kruman v. Christie's Int'l, 284 F.3d 384, 398 (2d Cir. 2002)*, *abrogated on other grounds by* *Empagran I, 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226*, (the FTAIA "clearly reveals that its focus is not on the plaintiff's injury but on the defendant's conduct"). Plaintiffs also argue that defendants' FTAIA **[**57]** defense lacks merit. Plaintiffs argue that the plain language of the FTAIA states that the

Sherman Act does not apply to "conduct involving trade or commerce *(other than import trade or import commerce)* with foreign nations . . . .", and that here all of the defendants shipped some panels directly to the United States. Further, plaintiffs argue that even if the claims in the indirect purchaser classes were found to be subject to the FTAIA's "domestic effects" test, this case would meet that standard.

The Court concludes that the FTAIA defense can be resolved on a class basis, and thus the possibility of this defense does not provide a basis for denying certification. Courts have emphasized that the FTAIA analysis focuses on the defendants' conduct. *See* *Kruman, 284 F.3d at 398*; *see also* *Carpet Group Int'l Oriental Rug Importers Ass'n Inc., 227 F.3d 62, 71 (3d Cir. 2000)*. The Court will be required to determine whether defendants import goods, whether defendants' conduct is "foreign" **[**58]** and outside the scope of the Sherman Act, and, if foreign conduct is involved, whether that foreign conduct sufficiently affects domestic commerce: these questions that can be decided on a class-wide basis.

The cases cited by defendants do not address the FTAIA in the context of class certification, and are also factually distinguishable. For example, in *United Phosphorus Ltd. v. Angus Chemical Company, 131 F. Supp. 2d 1003, 1013 (N.D. Ill. 2001)*, the court dismissed an action brought by foreign plaintiffs for lack of subject matter jurisdiction. The foreign plaintiffs were prospective manufacturers of a drug (AB) used in the manufacture of tuberculosis medication (ethambutol), and they alleged Sherman Act monopolization claims against an American company that had brought a trade secret action in state court against the foreign plaintiffs to prevent its employee from disclosing technology needed to manufacture AB. After reviewing an extensive factual record, the court dismissed the antitrust claims, finding that the foreign plaintiffs had no intent or ability to sell AB in the United States. *Id. at 1013*. The court also held that the foreign plaintiffs could not claim domestic injury **[**59]** by supposing that their exclusion from the foreign AB market had an effect on domestic sales of ethambutol because there was no evidence of a link between alleged misconduct in the foreign AB market and the supply or price of ethambutol in the United States. *Id*. There was also no evidence that the foreign plaintiffs intended to make ethambutol, or that they were prevented from making a single sale of ethambutol. *Id*. *United Phosphorus* is distinguishable in that it was decided upon a full factual record, did not involve imports, and the court found no effect in the domestic market. Here, merits discovery is underway, imports are at issue, and plaintiffs have alleged an anticompetitive effect in the United States.

The other cases cited by defendants are similarly inapposite. *See In re DRAM, 546 F.3d at 988-89* (affirming dismissal of complaint by foreign consumer that made its purchases entirely outside of the United States and that alleged that super-competitive prices in the United States may have affected prices in foreign markets where plaintiff purchased); *In re Intel Corp. Microprocessor Antitrust Litig., 452 F. Supp. 2d 555, 559 (D. Del. 2006)* (dismissing AMD's claims based on AMD's **[**60]** lost sales of German-made microprocessors to foreign customers); *In re Intel Corp. Microprocessor Antitrust Litig., 476 F. Supp. 2d 452, 456-57 (D. Del. 2007)* (dismissing class plaintiffs' claims to the extent they were derivative of AMD's dismissed foreign-based claims); *Papst Motoren GMbH v. Kanematsu-Goshu (U.S.A.), Inc., 629 F. Supp. 864, 869 (S.D.N.Y. 1986)* (dismissing Section 2 claim by Japanese corporation **[*600]** where all lost sales occurred in Japan). [6]

B. Antitrust impact

To determine whether the predominance requirement is satisfied, the Court must identify the issues involved in the case, and determine which are subject to common proof and which are subject to individualized proof. "Liability in an antitrust case is based on: (1) whether there was a conspiracy to fix prices in violation of the antitrust laws; (2) whether the plaintiffs sustained an antitrust injury, or the 'impact' **[**61]** of the defendants' unlawful activity; and (3) the amount of damages sustained as the result of the antitrust violations." *SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *7*. Defendants primarily challenge the second element of plaintiffs' antitrust claim, and they contend that plaintiffs have failed to demonstrate that common proof can be used to establish class-wide impact.

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[6] The parties also dispute whether the FTAIA must be interpreted consistently with state law such that state law could not reach conduct that is barred by the FTAIA. These legal questions can be decided after, or in conjunction with, determinations about the applicability of the FTAIA to plaintiffs' claims.

As the *DRAM* court stated,

> [D]uring the class certification stage, the court must simply determine whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate. The court cannot weigh in on the merits of plaintiffs' substantive arguments, and must avoid engaging in a battle of expert testimony. Plaintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis.

*DRAM, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, at *9*; *see also* *SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *8*; *In re Bulk (Extruded) Graphite Products Antitrust Litig., No. Civ. 02-6030 (WHW), 2006 U.S. Dist. LEXIS 16619, 2006 WL 891362, at *14 (D.N.J. Apr. 4, 2006)*; *In re Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 384 (S.D.N.Y. 1996)*. **[**62]** The Ninth Circuit recently emphasized that "[a]lthough certification inquiries such as commonality, typicality and predominance might properly call for some substantive inquiry, the court may not go so far . . . as to judge the validity of these claims." *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO v. ConocoPhilips Co., 593 F.3d 802, 808 (9th Cir. 2010)* (holding district court abused discretion in denying certification based on court's assessment of validity of plaintiffs' claims).

Plaintiffs argue that they are entitled to a presumption of class-wide antitrust impact with regard to three of the proposed state classes: California, Minnesota and Florida. As a threshold matter, the parties dispute whether the inference of impact is procedural or substantive. "Rules governing presumptions and burdens of proof are generally regarded as substantive for purposes of *Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)*." *Johnston v. Pierce Packing Co., 550 F.2d 474, 476 n.1 (9th Cir. 1977)*. Defendants do not cite any authority holding that the existence of a presumption of antitrust impact is a matter of procedural **[**63]** law, and indeed a number of courts have held that such a presumption is substantive. *See* *SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *9 n.5*.; *In re New Motor Vehicles Canadian Export Antitrust Litig., 235 F.R.D. 127, 133 (D. Me. 2006)*, *rev'd on other grounds*, *522 F.3d 6 (1st Cir. 2008)*; *see also* *Computer Econ., Inc. v. Gartner Group, Inc., 50 F. Supp. 2d 980, 990 (S.D. Cal. 1999)* ("State rules that define the elements of a cause of action, affirmative defenses, presumptions, burdens of proof, and rules that create or preclude liability are so obviously substantive that their application in diversity actions is required.").

"California courts routinely recognize a presumption of class-wide impact for indirect purchaser antitrust price-fixing claims." *SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *8*. "[W]hen a conspiracy to fix prices has been proven and plaintiffs have established they purchased the price-fixed goods or services, the jury can infer plaintiffs were damaged." *B.W.I. Custom Kitchen v. Owens-Illinois **[*601]** Inc., 191 Cal. App. 3d 1341, 1351, 235 Cal. Rptr. 228 (1987)*; *see also* *In re Cipro Cases I and II, 121 Cal. App. 4th 402, 413, 17 Cal. Rptr. 3d 1 (2004)* ("Petitioners assert that the trial court erred in finding that injury to the class may be assumed **[**64]** when a horizontal market-wide restraint of trade is alleged. However, this is ordinarily a permissible assumption in cases where consumers have purchased products in an anticompetitive market, even if some consumers did not actually have to pay the overcharge because of their individual circumstances.").

However, regardless of whether certain state laws permit an inference of antitrust impact, plaintiffs still have the burden of demonstrating that "there is a reasonable method for determining on a class-wide basis whether and to what extent that overcharge was passed on to each of the [indirect purchasers] at all levels of the distribution chain." *In re Methionine Antitrust Litig., 204 F.R.D. 161, 164 (N.D. Cal. 2001)* ("*Methionine I*").

In support of their argument that antitrust impact can be proven on a class-wide basis, plaintiffs have submitted the expert report of economist Dr. Janet S. Netz. Dr. Netz has examined the TFT-LCD industry and market to determine if the indirect purchaser plaintiffs would have suffered impact as a result of the alleged price-fixing conspiracy. Dr. Netz assumes that there was a conspiracy among TFT-LCD manufacturers as plaintiffs have alleged, and her **[**65]** report asserts that there are a number of characteristics that make the TFT-LCD industry highly susceptible to cartelization and price-fixing, including (1) the lack of an alternative source of supply of TFT-LCD panels and the lack of an alternative technology; (2) the existence of barriers to entry; (3) regular meetings and interactions that allowed defendants to exchange information, come to agreements, and police cheating; and (4) difficulty in cheating due to the use of most-favored customer clauses. Netz Errata Decl. at 3. Dr. Netz's report examines the price targets set by the cartel and actual market prices, and finds that these prices match well. Based on these analyses, Dr. Netz concludes that the cartel was successful in increasing prices. *Id*. at 33-60.

Next, Dr. Netz considered the commonality of the impact on direct purchasers. *Id*. at 61-70. Dr. Netz examined the pricing strategies used by defendants, including the use of most-favored customer clauses, the centralization of pricing decisions, and price negotiations starting from a common basis. Dr. Netz also analyzed the prices for TFT-LCD panels to determine whether the prices are related by market forces, and concludes **[**66]** that there is a common pricing structure for TFT-LCD panel prices. *Id*. at 67-71. In reaching this conclusion, she examined the correlation between panel prices, and found that 76% of panel price correlations (approximately 50,000 of 66,000 correlations) are positive and statistically significant. *Id*. at 70 & Ex. 32, 33. Dr. Netz then used regression analysis to examine the determinants of panel prices, and found that 77% of price variation is determined by five variables that describe the panel characteristics (panel size, resolution, volume, application, and time-period). *Id*. at 68 & Ex. 30; Netz Rebuttal Decl. at 31-35. Based on these analyses, Dr. Netz concludes that most of the variation in transaction prices is driven by common factors rather than individual ones, and that these common influences on price are susceptible to being estimated using a formula.

Finally, Dr. Netz considered whether the higher price imposed on direct purchasers translates into higher prices - the pass-through - to indirect purchasers. Dr. Netz discusses the economic theory of pass-through, and states that it is the shape of the demand curve and the degree of competition that determines the pass-through **[**67]** rate. When an industry is perfectly competitive, [7] the pass-through rate of an industry-wide cost is positive, and when the industry also displays constant costs, [8] the pass-through **[*602]** rate is 100%. Netz Errata Decl. at 73. Dr. Netz states that even with imperfect competition, the pass-through rate is positive, and "it may be less than 100%, 100%, or greater than 100% depending on the shape of the demand curve." *Id*. at 74. The more competitive the industry, the closer the pass-through rate is to 100%. *Id*. at 74-75.

Dr. Netz evaluated documentary evidence and industry information, and concludes that the pass-through can be calculated through the multiple levels of the TFT-LCD distribution channel. "The more competitive each of these **[**68]** levels is, the closer the pass-through rate at each level is 100%, and thus the more likely the channel-length pass-through rate is 100%. Each of the distribution levels for monitors, notebooks and TVs - panel distributors, product manufacturers, product distributors, and retailers - is highly competitive." *Id*. at 76-77; *see id*. at 77-80 (discussing competitive features of TFT-LCD distribution channel). [9]

Dr. Netz proposes three types of regression models that will establish that antitrust impact to direct purchasers can be shown on a class-wide basis using common proof: the before-and-after approach, the structural model of supply approach, and the conjectural variations approach. *Id*. at 91-102. **[**69]** [10] The before-and-after method involves identifying two similar periods in which the only significant difference in factors affecting supply and demand is the alleged collusive activity, and comparing the two periods to determine the "but-for" price. *Id*. at 91-95 (describing before-and-after approach). Dr. Netz describes the structural model as follows:

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[7] According to Dr. Netz, a perfectly competitive market "is one in which there are many buyers and sellers, such that no individual buyer or seller can affect prices in any significant manner; there is a homogenous good; there is perfect information; and there is free entry and exit." Netz Errata Decl. at 73 n.210.

[8] Dr. Netz states that "constant costs" means that the industry can grow to any size without driving up the costs of inputs. Netz Errata Decl. at 73.

[9] Dr. Netz also states, "That the LCD product manufacturing industry is highly competitive is not inconsistent with Plaintiffs' claims that Defendants fixed the price of LCD panels and LCD products. By fixing the price of panels, the Defendants in effect are fixing the price of products because product prices are a function of panel prices; an increase in the price of LCD panels leads to an increase in the price of LCD products, as discussed in Section VI.D [of the Errata Declaration]." *Id*. at 77 n.224.

[10] In a separate order, the Court has certified a class of direct purchaser plaintiffs, and found that the direct purchaser plaintiffs have demonstrated, through their expert, plausible methodologies for proving antitrust impact on the direct purchaser class.

> The first step is to determine the oligopoly model that reasonably approximates the characteristics of the LCD industry. The model is then used to derive the supply equations that describe the firms' conduct when competing independently, rather than colluding. I can then use data from the actual world - the world in which there was an LCD cartel - to calculate the response of demand to changes in price, and derive the parameters of a demand function for the products at issue. These parameters can be used in conjunction with the structural model to calculate the but-for price; the but-for price is a result of the interaction implied by the model of demand and supply. The but-for price is then compared to the actual price in order to calculate overcharges.

Id. at 95; *see id*. at 95-100 (describing structural model). The third method, the **[**70]** conjectural variations approach, "estimate[s] firm conduct and use[s] these estimates to model what prices would be if firms set prices and quantities independently, rather than collusively." *Id*. at 100; *see id*. at 100-01 (describing conjectural variations approach).

Dr. Netz then describes the common method that can be used to measure the pass-through of the overcharges to indirect purchasers. *Id*. at 102-07. "In order to estimate the pass-through rate, I regress the price of the product at the bottom of the channel (the amount the end customer pays) on its cost at the top of the distribution channel (the amount Defendants charge direct customers)." *Id*. at 102. Dr. Netz proposes two different regression approaches to measuring pass-through over the entire distribution channel, the "top and bottom" approach and the "top to bottom" approach. *Id*. at 108-12. The choice of approach depends on the data available. *Id*.

Dr. Netz conducted **[**71]** 53 pass-through studies: 5 complete pass-through studies that measure pass-through from defendants down the distribution channels to the end user, and **[*603]** 48 partial pass-through studies that measure pass-through in different segments of the distribution channel. Rebuttal Netz. Decl. at 70-86. Dr. Netz ran separate regression analyses for each of the three TFT-LCD products at issue, which took into account panel size, panel manufacturer and resolution, when that data was available. Errata Decl. at 102-114. To conduct these analyses, Dr. Netz used transaction data produced by some defendants, as well as (separately) price data from DisplaySearch, a third-party market research firm.

Defendants raise a number of challenges to Dr. Netz's analyses and conclusions, and have submitted the expert report of Dr. Edward Snyder. Dr. Snyder is the dean and a professor of economics at the University of Chicago Booth School of Business. Defendants contend that the complexity and heterogeneity of the TFT-LCD market makes common proof of impact impossible. Dr. Snyder states that determining impact involves an individualized analysis because the alleged overcharges paid by direct purchasers are not common **[**72]** due to a number of factors, including the industry growth during the class period, the customized nature of some TFT-LCD panels, the significant competition with non-LCD technologies in particular applications, and the recent history of major entry and substantial shifts in shares among manufacturers. *See* Snyder Decl. ¶ 25. Dr. Snyder also states that pass-through decisions differ by customer, model, stage of distribution, and over time, and he emphasizes that "[t]he distribution chains that move LCD panels from the defendant manufacturers to products that are purchased by individual end users are extraordinarily complex and varied. While some simple distribution chains may involve only one pass-on decision, more complex chains . . . may involve six-pass on decisions by intermediaries." *Id*. ¶ 28. Dr. Snyder critiques Dr. Netz's economic analyses, and performs his own regression analyses, reaching conclusions diametrically opposed to those of Dr. Netz.

Numerous courts have held that variations in products and complexities in a distribution chain do not preclude an estimation of whether an overcharge impacted end purchasers. In *SRAM*, the indirect purchaser plaintiffs alleged a ten year **[**73]** price-fixing conspiracy in the market for Static Random Access Memory, a type of memory device. Similar to the industry here, there are multiple types of SRAM, and SRAM is used in a variety of product markets, including the communications market in cell phones and Voice Over Internet Protocol technology, the computer market in, *inter alia*, servers, mainframes, and high-end computer workstations, and the networking communications market in, *inter alia*, routers, modems and firewalls. *SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *1* (listing additional SRAM products). Also similar to this case, the defendants in *SRAM* sold to various customers, large and small, through a variety of distribution paths. "SRAM manufactured by Defendants can be purchased by an SRAM distributor and resold to an original equipment manufacturer (OEM) or purchased by a contract manufacturer. Contract manufacturers create individual SRAM components and finished products containing SRAM for OEMs. Thus, OEMs purchase SRAM directly from SRAM manufacturers, distributors and contract manufacturers. OEMs then sell SRAM directly to consumers or to consumers through a reseller, distributor or retailer." *Id*. The *SRAM* defendants argued that **[**74]** the distribution chain was too complex to discern evidence of pass-through. The court rejected that argument, finding that the "divergent pricing and sales practices are not necessarily an impediment to measuring pass-through" and that "many other markets have the same features as the markets at issue here, and those markets are routinely tested for relationships among variables of interest." *264 F.R.D. 603, Id. at *11*.

Also instructive are the numerous antitrust cases filed against Microsoft in which Microsoft argued that injury could not be proven on a class-wide basis due to the complexity and changing nature of the software industry and the multi-layered and variable distribution chain. For example, in opposing certification of two California classes of indirect purchasers, Microsoft argued "Because the software represents only a small percentage of the cost of the computer, and because there are many other factors which may **[*604]** inhibit passing on price changes . . . whether, and the extent to which, any given OEM passed on the excess will differ from case to case. The amount passed through by distributors or retailers purchasing from the OEMs, or purchasing directly from Microsoft, may also vary, **[**75]** so the fact, much less the amount, of any overcharge reaching a consumer will be a function of so many variables . . . that the impact of any violation cannot possibly considered collectively." *Microsoft I-V Cases*, 2002-2 Trade Cas. (CCH) ¶ 73,013 at 88,561 (Cal. Sup. Ct. Aug. 29, 2000) (Docket No. 1024-10, Ex. 9). Judge Pollak rejected that argument, finding that the plaintiffs' expert described one method for estimating the "but for" price to direct purchasers, and two methods for measuring pass-through to indirect purchasers. *Id*. at 88,562. Judge Pollak recognized the complexities posed by multiple products, multiple distribution channels, and the "extraordinary rate at which changes ha[d] occurred in the relevant markets over the six year class period," but held that "the court is not persuaded that a comprehensive analysis of the issues cannot be made within the context of properly managed trial proceedings." *Id*. at 88,563; *see also In re Florida Microsoft Antitrust Litig*., No. 99-27340, 2002 WL 31423620, at *13-15 (Fla. Cir. Ct. Aug. 26, 2002); *Gordon v. Microsoft Corp., No. MC 00-5594, 2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *12 (Minn. Dist. Ct. Mar. 30, 2001)*; *see also* *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. at 499, 523* **[**76]** (certifying a direct purchaser class where plaintiffs accused 33 defendants of conspiring through Nasdaq market-makers, making markets in 5,393 stocks with "11 market-makers for each Nasdaq stock" because "neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . . the price range was affected generally.").

The Court is satisfied that, for class certification purposes, plaintiffs have put forth a feasible methodology to show that the channel-length pass-through rate can be measured, regardless of the path or the number of steps the panel went through from defendants to class members. As other courts have recognized, "the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of [impact] through generalized proof." *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 100 (D. Conn. 2009)*. Plaintiffs are not required to "prove the merits of their case-in-chief at the class certification stage. They need not demonstrate that **[**77]** their multiple regression analysis captures all the proper variables and thus reaches the 'right' answer, as the defendants would require them to. . . . It is unnecessary to delve further into the merits by going point-by-point through each expert's theory to decide who has designed the 'better' multiple regression equation." *Id. at 101*.

The cases relied on by defendants are distinguishable. In *Somers v. Apple, Inc., 258 F.R.D. 354 (N.D. Cal. 2009)*, the plaintiffs' expert "ha[d] not yet developed a model or worked with any data in the context of this case," and had presented "nothing more than a vague five-paragraph long collection of proposals for accomplishing what the Court sees as a daunting task." *Id. at 360*. *Methionine I* involved a proposed class "that includes all methionine indirect purchasers in Wisconsin at all levels of the distribution chain. The class includes those indirect purchasers who purchased methionine from a direct purchaser in the same form as the direct purchaser bought the methionine from a defendant; those who purchased methionine from another indirect purchaser who in turn may have purchased the methionine from a direct or indirect purchaser; and those who **[**78]** purchased from a direct or indirect purchaser any one or more of dozens of different products that contain methionine and are ultimately incorporated into feed for a variety of livestock and pets. The class also includes indirect purchasers who are resellers at various levels in the distribution chain and indirect purchasers who are ultimate consumers." *Methionine I, 204 F.R.D. at 162*. The court denied certification, finding that the plaintiffs' expert did not point to any evidence in the record to support his proposed formula for measuring pass-through, and that the **[*605]** expert had not advanced any methodology for determining how resellers (who were included in the class) were injured. Id. at 165. The court subsequently certified a much narrower class of indirect purchasers. In *Methionine II*, the court decertified that class because the plaintiffs' expert's methodology, which had changed, no longer took into account any of the complexity of the market at issue. In re Methionine Antitrust Litig., No. 00-1311 CRB, 2003 U.S. Dist. LEXIS 14828, 2003 WL 22048232, at *5 (N.D. Cal. Aug. 23, 2006).

In re Graphics Processing Units (GPUs) Antitrust Litigation, 253 F.R.D. 478 (N.D. Cal. 2008), is also distinguishable. In that **[**79]** case, "[h]undreds if not thousands of GPU products were sold during the limitations period [and] each graphics product varied not only as to performance level but also as to its ultimate application. Many of the graphics products sold were particularly customized to the needs of a specific purchaser, meaning they could not be interchanged with any other GPU product sold by defendants. . . . In short, these products were *not* fungible commodities." GPU, 253 F.R.D. at 491 (emphasis in original). Here, plaintiffs have submitted considerable evidence - disputed by defendants - that TFT-LCD panels are fungible, interchangeable, and largely homogenous. The *GPU* court also distinguished the Microsoft cases, noting that while in Microsoft, the prior government litigation against Microsoft consisted "extrinsic evidence of harm," in *GPU* the DOJ had ended its criminal investigation without returning any indictments. Id. at 500. Here, seven defendants have pled guilty to Sherman Act violations, there is an amnesty applicant, and the DOJ's investigation is ongoing.

Defendants also criticize Dr. Netz for using average prices and third party data from a market research company in her analyses, rather **[**80]** than disaggregated "more precise" transactional data. Defendants argue that such data masks relevant differences in the individual transaction data. As an initial matter, however, defendants' arguments are undercut by the fact that Dr. Snyder uses average data in his own analyses. More importantly, a number of courts have held that averaged and aggregated data may be used to demonstrate pass-through. In *Gordon v. Microsoft Corporation*, a Minnesota court certified two classes of indirect purchasers in an antitrust suit against Microsoft. The court denied Microsoft's motion to decertify the classes, and rejected Microsoft's arguments, similar to those made by defendants here, about the use of average and aggregate data:

> The damages question for trial is presumably not about whether a specific Microsoft price increase found its way through the distribution chain and resulted in an increase in the price paid by a specific class member. Rather, the question is how a series of Microsoft price increases, and/or a series of Microsoft failures to reduce prices, impacted the price each consumer paid. The question of what would have happened but for Microsoft's monopoly overcharge is a hypothetical, **[**81]** and a hypothetical question generally cannot be answered by historical data about what actually happened, but must often be answered by general principles about what generally tends to happen. Thus, average pass through rates appear reasonable and even necessary to prove damages here.

Gordon, 2003 WL 23105550, at *3; *see also* SRAM, 264 F.R.D. 603, 2009 WL 4263524, at *11 (rejecting the defendants' criticism that the indirect purchaser plaintiffs' use of average and aggregated data in their structural model could yield "false-positive pass-through"); In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. at 523; In re Commercial Tissue Products, 183 F.R.D. 589, 595 (N.D. Fla. 1998) ("[E]ven if there is considerable individual variety in pricing because of individual price negotiations, class plaintiffs may succeed in proving class-wide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent) by the collusive actions of defendants."). [11]

[*606] Defendants also challenge Dr. Netz's use of competitive benchmarks in the "before and after" method. Defendants argue that Dr. Netz's selection of 1996-1998 and 2007 to the present as competitive benchmarks is inconsistent with the allegations of the second amended complaint and undercuts the reliability of her regression

[11] With regard to the use of third party data from DisplaySearch, plaintiffs have submitted evidence that defendants regularly rely on DisplaySearch **[**82]** data in the normal course of business. In addition, plaintiffs state that Dr. Netz used DisplaySearch data in large part because of defendants' failure to provide plaintiffs with timely answers to data interpretation questions.

analyses. Plaintiffs respond that Dr. Netz's selection of these periods as "competitive" is empirically sound because the evidence indicates that defendants' price-fixing agreement may not have begun to affect prices until 1999, and the DOJ's investigation into LCD price-fixing became public at the end of 2006, which should have had a chilling affect on defendants' illegal activities. In addition, Dr. Netz states that to the extent that either of these possible benchmarks was not competitive, this would mean that the prices in those periods were actually higher than competitive prices would have been, and thus Dr. Netz's overcharge estimates **[**83]** would understate (to defendants' benefit) the overcharges that actually occurred. The Court agrees that there is nothing improper or necessarily inconsistent about Dr. Netz's use of the post-2006 time period as a competitive benchmark.

In sum, the Court concludes that plaintiffs have presented plausible methodologies for demonstrating class-wide impact. Dr. Netz's report is supported by defendants' transactional data as well as industry data, and courts have accepted multiple regression analyses as means of proving antitrust injury and damages on a class-wide basis. Defendants' challenges to plaintiffs' evidence and Dr. Netz's analyses go to the merits of plaintiffs' claims, and will be resolved by the trier of fact.

C. Damages

In price-fixing cases, "[p]laintiffs are not required to supply a precise damage formula at the certification stage." *SRAM, 2008 U.S. Dist. LEXIS 107523, 2008 WL 4447592, at *6*. Plaintiffs need only demonstrate a proposed method for determining damages that is "not so insubstantial as to amount to no method at all." *DRAM, 2006 U.S. Dist. LEXIS 39841, 2006 WL 1530166, *10*; *see also Yokoyama v. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1094 (9th Cir. 2010)* ("[D]amage calculations alone cannot defeat certification. '[T]he **[**84]** amount of damages is invariably an individual question and does not defeat class action treatment.'") (quoting *Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975))*; *see also In re Rubber Chem. Antitrust Litig., 232 F.R.D. at 351*.

Dr. Netz states that damages can be determined by multiplying the relevant revenues by the overcharge rate. The overcharge rate, in turn, is determined by the regression analyses discussed *supra*. To a large degree, defendants' arguments on this point are largely similar to those discussed *supra*, with defendants contending that the variability and heterogeneity in the TFT-LCD market prevents any calculation of pass-through and damages. Defendants also contend that plaintiffs' damages methodology is unworkable because it amounts to a fluid recovery model because it does not provide any way to calculate actual damages to the members of each subgroup. However, Dr. Netz states that the overcharge amount would be calculated for the different panel types, which would also have different revenue rates, and thus differentiated damages figures could be calculated for class members. Rebuttal Netz Decl. at 87.

Defendants have not shown that the methods are "so insubstantial **[**85]** as to amount to no method at all." *In re Potash Antitrust Litig., 159 F.R.D. 682, 697 (D. Minn. 1995)*. The validity of plaintiffs' methods "will be adjudicated at trial based upon economic theory, data sources, and statistical techniques that are entirely common to the class." *In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. at 521*. The Court finds that plaintiffs have met their burden to show that damages can be established using common proof.

D. Single conspiracy vs. many separate conspiracies

Defendants also argue that individual issues predominate because "plaintiffs present no evidence that shows the existence of a single conspiracy involving all defendants." **[*607]** Opposition at 45:16. Defendants argue that while plaintiffs' complaint contains "conclusory" allegations of a single, overarching conspiracy, plaintiffs' more specific allegations, certain defendants' guilty pleas, statements by the government, and the nature and history of the LCD panel industry all contradict the notion of a single overarching conspiracy. For example, defendants emphasize that Chunghwa's and LG Display's plea agreements cover panels sold in the United States and elsewhere from September 2001 to June **[**86]** 2006 and December 2006, respectively, while Sharp's plea covers specific products sold only to Dell, Motorola and Apple during segmented times. Defendants also place great weight on the government's statements that its investigation has revealed that certain defendants (such as Hitachi and Sharp) were involved in a "separate" conspiracy that was "related" to, but distinct from, the "larger" conspiracy to fix prices in the LCD market. Relying on Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978), defendants argue that to the extent plaintiffs may have been harmed by different, unconnected alleged agreements, common issues of fact regarding liability do not predominate. In *Blue Bird*, the Fifth Circuit reversed the certification of a single nationwide class where it "appear[ed] from the limited record before us that the plaintiffs plan to proceed state by state and prove by varying evidence fifty different price-fixing conspiracies." Id. at 323.

Plaintiffs respond that, unlike the plaintiffs in *Blue Bird*, here there is considerable evidence of a single conspiracy in which defendants and their co-conspirators formed an international illegal cartel to restrict competition and fix **[**87]** prices in the LCD market. Further, plaintiffs argue that proof of an antitrust price-fixing conspiracy is a class-wide issue because it is defendants' conduct that defines the alleged conspiracy. *See, e.g.,* In re Corrugated Container Antitrust Litig., 80 F.R.D. 244, 250 (S.D. Tex. 1978) ("Whether the proof ultimately adduced will establish the existence of a national conspiracy among the defendants is not in issue here; it is not the court's function to weigh this evidence for its truth but merely to ascertain whether it is of a type suitable for class-wide use. The court is persuaded that the conspiracy issue . . . is susceptible of generalized proof, since it deals primarily with what the defendants themselves did and said."); *see also* SRAM, 2008 U.S. Dist. LEXIS 107523, 2008 WL 4447592, at *5 ("[W]hether a conspiracy exists is a common question that predominates over other issues in this case and has the effect of satisfying the first prerequisite of FRCP 23(b)(3).").

Plaintiffs also argue that defendants have not provided any evidence that is inconsistent with, or that forecloses the possibility of, a single conspiracy, and that the Court should reject defendants' attempt to divide the alleged conspiracy into **[**88]** smaller pieces. With regard to the criminal pleas, plaintiffs emphasize that several defendants have made binding admissions before this Court that, at least since 2001, they violated United States antitrust laws by fixing LCD panel prices. Plaintiffs also argue that the specific details of the criminal convictions cannot be used to defeat or narrow civil liability. *See* In re Vitamins Antitrust Litig., No. Misc. 99-197, 2000 U.S. Dist. LEXIS 7397, 2000 WL 1475707, at *18 (D.D.C. May 9, 2000) ("the criminal guilty pleas do not establish boundaries for this civil litigation").

The Court rejects defendants' attempts to recharacterize plaintiffs' allegations, as well as defendants' attempts to limit the alleged conspiracy by reference to the criminal guilty pleas and DOJ's statements. The Court agrees with plaintiffs that defendants may not recast plaintiffs' allegations, and plaintiffs have consistently alleged a single, overriding conspiracy spanning the entire class period. As plaintiffs note, the Supreme Court has held that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962). **[**89]** In addition, the scope and nature of the criminal guilty pleas are not determinative of the plaintiffs' potential claims in a civil antitrust suit. Indeed, "[Sherman Act] civil actions may be brought in cases in which criminal prosecution would not have been justified . . . . Thus, a civil action may succeed ... [even] if the government [does] not show that **[*608]** the violation constituted a criminal act." Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 501 n.51 (2d Cir. 1984), *rev'd on other grounds*, Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

E. Superiority

Rule 23(b)(3) also requires that a class action be superior to other methods of adjudication. "[I]f common questions are found to predominate in an antitrust action, . . . courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied." Wright, Miller & Kane, *Federal Practice and Procedure: Civil Procedure* § 1781, at 254-55 (3d ed. 2004). The *SRAM* court's analysis of this issue applies here: "In antitrust cases such as this, . . . damages . . . are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress." SRAM, 2008 U.S. Dist. LEXIS 107523, 2008 WL 4447592, at *7. **[**90]** The Court finds that a class action is superior to other available methods of adjudication.

IV. Objections

Defendants object to the declarations of Chien-Ming Kuan, Yin-Hua Hsu and Fu-Chia Hsu on numerous grounds, including the fact that these declarations were filed in connection with plaintiffs' reply and that defendants have not had the opportunity to depose the declarants. Conversely, five months after the close of briefing on the class certification motion, defendants filed the declaration of Shane Gregorczyk, a Dell employee. Plaintiffs object to Mr. Gregorczyk's declaration on numerous grounds, including the fact that plaintiffs have not had the opportunity to depose Mr. Gregorczyk.

The Court finds that all four of the declarations are untimely, and STRIKES them on that ground.

CONCLUSION

For the foregoing reasons, the Court GRANTS plaintiffs' motion for class certification. (Docket No. 1023). The Court DENIES defendants' motion to strike the modified class definition, and GRANTS defendants' motion to strike the declarations of Chien-Ming Kuan, Yin-Hua Hsu and Fu-Chia Hsu. (Docket No. 1326). The Court also GRANTS plaintiffs' motion to strike the Gregorczyk declaration. (Docket No. **[**91]** 1583). The Court ORDERS as follows:

1. The following nationwide class is hereby certified pursuant to *Federal Rule of Civil Procedure 23(a)* and *23(b)(2)* for injunctive and declaratory relief:

> All persons and entities residing in the United States as of the date notice is first published, who indirectly purchased in the United States between January 1, 1999 and the present TFT-LCD panels incorporated in televisions, monitors, and/or notebook computers, from one or more of the named defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

2. In addition, the following state classes are hereby certified for damages pursuant to *Federal Rule of Civil Procedure 23(a)* and *23(b)(3)*:

ARIZONA:

> All **[**92]** persons and entities in Arizona who, from January 1, 1999 to December 31, 2006, as residents of Arizona, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Arizona indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives **[*609]** and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

CALIFORNIA:

> All persons and entities in California who, from January 1, 1999 to December 31, 2006, as residents of California, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in California indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; **[**93]** the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

DISTRICT OF COLUMBIA:

All persons and entities in the District of Columbia who, from January 1, 1999 to December 31, 2006, as residents of the District of Columbia, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in the District of Columbia indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding **[**94]** over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

FLORIDA:

All persons and entities in Florida who, from January 1, 1999 to December 31, 2006, as residents of Florida, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Florida indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

HAWAII:

All persons and entities in Hawaii who, from January 1, 1999 to December 31, 2006, as residents of Hawaii, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Hawaii indirectly from one or more of the named Defendants **[**95]** or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

IOWA:

All persons and entities in Iowa who, from January 1, 1999 to December 31, 2006, as residents of Iowa, purchased LCD panels incorporated in televisions, **[*610]** monitors, and/or laptop computers in Iowa indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental **[**96]** entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

KANSAS:

All persons and entities in Kansas who, from January 1, 1999 to December 31, 2006, as residents of Kansas, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Kansas indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

MAINE:

All persons and entities in Maine who, from January 1, 1999 to December 31, 2006, as residents of Maine, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Maine indirectly from one **[**97]** or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

MASSACHUSETTS:

All persons and entities in Massachusetts who, from January 1, 1999 to December 31, 2006, as residents of Massachusetts, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Massachusetts indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. **[**98]** Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

MICHIGAN:

All persons and entities in Michigan who, from January 1, 1999 to December 31, 2006, as residents of Michigan, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Michigan indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding **[*611]** over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

MINNESOTA:

All persons and entities in Minnesota who, from January 1, 1999 to December 31, 2006, as residents of Minnesota, purchased LCD panels incorporated **[**99]** in televisions, monitors, and/or laptop computers in Minnesota indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

MISSISSIPPI:

All persons and entities in Mississippi who, from January 1, 1999 to December 31, 2006, as residents of Mississippi, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Mississippi indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives **[**100]** and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

NEVADA:

All persons and entities in Nevada who, from January 1, 1999 to December 31, 2006, as residents of Nevada, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Nevada indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

NEW MEXICO:

All persons and entities in New Mexico who, from January 1, 1999 to **[**101]** December 31, 2006, as residents of New Mexico, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in New Mexico indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

NEW YORK:

All persons and entities in New York who, from January 1, 1999 to December 31, 2006, as residents of New York, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in New York indirectly from one or more of the named Defendants or Quanta **[*612]** Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent **[**102]** companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

NORTH CAROLINA:

All persons and entities in North Carolina who, from January 1, 1999 to December 31, 2006, as residents of North Carolina, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in North Carolina indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror **[**103]** assigned to this action.

NORTH DAKOTA:

All persons and entities in North Dakota who, from January 1, 1999 to December 31, 2006, as residents of North Dakota, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in North Dakota indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

RHODE ISLAND:

All persons and entities in Rhode Island who, from January 1, 1999 to December 31, 2006, as residents of Rhode Island, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Rhode Island indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for **[**104]** resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

SOUTH DAKOTA:

All persons and entities in South Dakota who, from January 1, 1999 to December 31, 2006, as residents of South Dakota, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in South Dakota indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial **[**105]** officer presiding over this action and the members of **[*613]** his/her immediate family and judicial staff, and any juror assigned to this action.

TENNESSEE:

All persons and entities in Tennessee who, from January 1, 1999 to December 31, 2006, as residents of Tennessee, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Tennessee indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

VERMONT:

All persons and entities in Vermont who, from January 1, 1999 to December 31, 2006, as residents of Vermont, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Vermont indirectly from one or **[**106]** more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

WEST VIRGINIA:

All persons and entities in West Virginia who, from January 1, 1999 to December 31, 2006, as residents of West Virginia, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in West Virginia indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. **[**107]** Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

WISCONSIN:

All persons and entities in Wisconsin who, from January 1, 1999 to December 31, 2006, as residents of Wisconsin, purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in Wisconsin indirectly from one or more of the named Defendants or Quanta Display Inc., for their own use and not for resale. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

The following individuals and entities are hereby named as class representatives:

State	Plaintiff
Arizona	Allan Rotman
California	Frederick Rozo, Steven Martel, Robert Kerson, Byron Ho, Joe Solo, Lisa Blackwell
D.C.	David Walker
Florida	Robert Feins, Scott Eisler
Hawaii	John Okita
Iowa	Ben Northway
Kansas	Rex Getz, Kou Srimoungchanh
Maine	Patricia Giles
Massachusetts	Christopher Murphy
Michigan	Gladys Baker, Judy Griffith, Ling-Hung Jou
Minnesota	Martha Mulvey
Mississippi	Cynthia Saia
Nevada	Allen Kelley
New Mexico	Thomas Clark, Marcia Weingarten
New York	Tom DiMatteo, Chris Ferencsik
North Carolina	Donna Jeanne Flanagan
North Dakota	Bob George
Rhode Island	Dr. Robert Mastronardi
South Dakota	Christopher Bessette, Chad Hansen
Tennessee	Dena Williams, Scott Beall
Vermont	Robert Watson
West Virginia	John Matrich
Wisconsin	Joe Kovacevich, Jai Paguirigan

[*614]

3. **[**108]** The following law firms are designated and appointed as Class Counsel for the indirect purchaser plaintiffs: Zelle Hoffman Voelbel & Mason LLP, and The Alioto Law Firm.
4. As soon as practicable after the entry of this Order, all parties shall meet and confer to develop a plan for dissemination of notice to the Class.

IT IS SO ORDERED.

Dated: March 28, 2010

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

End of Document

Davis v. Four Seasons Hotel Ltd.

Supreme Court of Hawai'i

March 29, 2010, Decided

NO. 29862

Reporter

122 Haw. 423 *; 228 P.3d 303 **; 2010 Haw. LEXIS 63 ***

DARYL DEAN DAVIS, MARK APANA, ELIZABETH VALDEZ KYNE, EARL TANAKA, THOMAS PERRYMAN, and DEBORAH SCARFONE, on behalf of themselves and all others similarly situated, Plaintiffs/Appellants, vs. FOUR SEASONS HOTEL LIMITED, dba FOUR SEASONS RESORT, MAUI and FOUR SEASONS RESORT, HUALALAI, and MSD CAPITAL, INC., Defendants/Appellees.

Subsequent History: Motion granted by *Davis v. Four Seasons Hotel, Ltd., 2010 U.S. Dist. LEXIS 90877 (D. Haw., Aug. 31, 2010)*

Prior History: [*1]** CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAI'I. Case 1:08-cv-00525-HG-LEK.

Davis v. Four Seasons Hotel Ltd., 2009 U.S. Dist. LEXIS 47519 (D. Haw., June 2, 2009)

Core Terms

employees, unfair methods of competition, unfair, service charge, deceptive act, practices, consumers, antitrust, amended complaint, public interest, anticompetitive, legislative history, allegations, customers, hotel, competitors, tips, per se violation, distribute, violations, deeming, consumer protection, anti trust law, damages, commerce, bring an action, oppression, beverage, plain language, majority opinion

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Labor & Employment Law > Wage & Hour Laws > Wage Payments

HN1[] **Wage & Hour Laws, Wage Payments**

See *Haw. Rev. Stat. § 481B-14* (2008).

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

HN2[] **Appellate Jurisdiction, Certified Questions**

See *Haw. R. App. P. 13(a)*.

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

HN3[] State Regulation, Claims

See Haw. Rev. Stat. § 480-2 (2008).

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

HN4[] State Regulation, Claims

See Haw. Rev. Stat. § 481B-4 (2008).

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

HN5[] State Regulation, Claims

See Haw. Rev. Stat. § 480-13 (2008).

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN6[] State Regulation, Claims

Pursuant to Haw. Rev. Stat. § 481B-4 (2008), any person who violates Haw. Rev. Stat. ch. 481B, including Haw. Rev. Stat. § 481B-14 (2008), shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of Haw. Rev. Stat. § 480-2 (2008). Haw. Rev. Stat. § 480-2(a), which is virtually identical to Section 5(a)(1) of the Federal Trade Commission Act (FTCA), 15 U.S.C.S. § 45(a)(1), declares that any unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN7[] State Regulation, Claims

Only consumers, the attorney general, or the director of the office of consumer protection are authorized to bring an action based on unfair or deceptive acts or practices. Haw. Rev. Stat. § 480-2(d) (2008). Actions based on unfair methods of competition, on the other hand, are not so limited. Instead, Haw. Rev. Stat. § 480-2(e) (2008) provides that any person may bring an action based on unfair methods of competition declared unlawful by this section. Furthermore, Haw. Rev. Stat. § 480-13(a) (2008), which is similar to Section 4 of the Clayton Act, 15 U.S.C.S. § 15(a), provides that any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by Haw. Rev. Stat. ch. 480 may sue for damages and may bring proceedings to enjoin the unlawful practices.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **State Regulation, Claims**

Haw. Rev. Stat. § 480-2(e) (2008) provides that any person can sue for unfair methods of competition, while *Haw. Rev. Stat. § 480-1* (2008) defines "person" to include individuals, corporations, firms, trusts, partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies, and incorporated or unincorporated associations. Therefore, under the plain language of *Haw. Rev. Stat. §§ 480-1* and *480-2(e)*, employees constitute "any person" within the meaning of *Haw. Rev. Stat. § 480-1* because they are "individuals." Since the language of *Haw. Rev. Stat. §§ 480-1* and *480-2(e)* is plain, clear, and unambiguous, the statute should be applied as written.

Antitrust & Trade Law > Clayton Act > Scope

HN9[] **Antitrust & Trade Law, Clayton Act**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] **State Regulation, Claims**

Employees are "individuals" within the meaning of *Haw. Rev. Stat. § 480-1* (2008) and therefore qualify as "persons" under *Haw. Rev. Stat. §§ 480-2(e)* and *480-13(a)* (2008). Therefore, employees have standing to sue under *Haw. Rev. Stat. §§ 480-2(e)* and *480-13(a)* if they meet the additional requirements.

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

HN11[] **State Regulation, Claims**

In order to state a cause of action pursuant to *Haw. Rev. Stat. § 480-2(e)* (2008) and recover money damages, a plaintiff must first satisfy the requirements of *Haw. Rev. Stat. § 480-13* (2008). *Haw. Rev. Stat. § 480-13(a)* provides that, with limited exceptions, any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by Haw. Rev. Stat. ch. 480 may sue for damages and may bring proceedings to enjoin the unlawful practices.

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

HN12[] **Motions to Dismiss, Failure to State Claim**

When analyzing whether a plaintiff has sufficiently alleged an injury, the court views the complaint in a light most favorable to plaintiff in order to determine whether the allegations contained therein could warrant relief. *Haw. R. Civ. P. 12(b)(6)*.

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

HN13[] **State Regulation, Claims**

While the phrase "injury to business or property" found in *Haw. Rev. Stat. § 480-13(a)* (2008) is not defined in that section or elsewhere in the chapter, the requirement is satisfied, for example, if plaintiffs allege that injury occurred to personal property through a payment of money wrongfully induced or through the diminishment of financial resources as a result of a defendant's unfair methods of competition or unfair or deceptive acts or practices.

Antitrust & Trade Law > Clayton Act > Claims

HN14[] **Clayton Act, Claims**

Federal case law has interpreted the "injury to business or property" language of Section 4 of the Clayton Act, *15 U.S.C.S. § 15(a)*, as a causation requirement, requiring a showing of antitrust injury. Plaintiffs must prove an injury of the type the antitrust laws were intended to prevent, one that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause. Also known as the fact of damage requirement, the antitrust plaintiff need not prove with particularity the full scope of profits that might have been earned. Instead, it requires a showing, with some particularity, of actual damage caused by anticompetitive conduct that the antitrust laws were intended to prevent.

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

HN15[] **State Regulation, Claims**

Haw. Rev. Stat. § 481B-4 (2008) declares that any person who violates Haw. Rev. Stat. ch. 481B shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of *Haw. Rev. Stat. § 480-2* (2008). However, although the deeming language of *Haw. Rev. Stat. § 481B-4* eliminates the requirement that a plaintiff prove that a defendant's conduct that violates Haw. Rev. Stat. ch. 481B (including *Haw. Rev. Stat. § 481B-14*) constitutes an unfair method of competition, it does not purport to modify the causation requirement of *Haw. Rev. Stat. § 480-13* (2008).

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

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN16[] **State Regulation, Claims**

Haw. Rev. Stat. § 480-2(b) (2008) declares that, in construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission (FTC) and the federal courts interpreting Section 5(a)(1) of the Federal Trace Commission Act (FTCA), *15 U.S.C.S.*

§ 45(a)(1). However, Haw. Rev. Stat. § 480-2 differs from Section 5 of the FTCA in one essential aspect: enforcement. Section 5 of the FTCA contains no private remedy; rather enforcement of its provisions is vested in the FTC.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN17[] Clayton Act, Claims

Haw. Rev. Stat. § 480-13(a) (2008) tracks the language of Section 4 of the Clayton Act, 15 U.S.C.S. § 15(a), which provides in part that any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney fees. 15 U.S.C.S. § 15(a).

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

Governments > Legislation > Interpretation

HN18[] State Regulation, Claims

Haw. Rev. Stat. § 480-3 provides that Haw. Rev. Stat. ch. 480 shall be construed in accordance with judicial interpretations of similar federal antitrust statutes. Pursuant to this instruction, it is appropriate to look to the guidance of similar federal antitrust statutes as permitted in Haw. Rev. Stat. § 480-3.

Antitrust & Trade Law > Clayton Act > Claims

HN19[] Clayton Act, Claims

In order to recover treble damages under section 4 of the Clayton Act, 15 U.S.C.S. § 15(a), based on Section 7 violations, a plaintiff must prove antitrust injury, which should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. Additionally, where a plaintiff alleges a per se violation of the antitrust laws, the plaintiff must still allege and prove antitrust injury by alleging the nature of the competition in order to ensure that the injury results from a competition-reducing aspect of the defendant's behavior.

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

HN20[] State Regulation, Claims

Hawaii's requirement that a plaintiff allege the nature of the competition in his or her complaint in order to maintain an action for unfair methods of competition pursuant to Haw. Rev. Stat. § 480-2(e) (2008), is consistent with the federal requirement that a plaintiff allege that his or her injury reflects the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation, in order to have standing pursuant to Section 4 of the Clayton Act, 15 U.S.C.S. § 15(a). Furthermore, this requirement reflects the underlying purpose of both the federal and Hawai'i antitrust laws, which is to preserve unrestrained competition.

Counsel: Ashley K. Ikeda (Weinberg, Roger & Rosenfeld); Harold L. Lichten and Shannon Liss-Riordan, pro hac vice (Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan) for plaintiffs-appellants.

Wayne S. Yoshigai and Nathan B. Hong (Torkildson, Katz, Moore, Hetherington & Harris); Paul E. Wagner, pro hac vice (Shea Stokes Roberts & Wagner) for defendants-appellees.

Judges: MOON, C.J., NAKAYAMA, DUFFY, AND RECKTENWALD, JJ.; WITH ACOBA, J., DISSENTING.

Opinion by: RECKTENWALD

Opinion

[304] [*424]** OPINION BY RECKTENWALD, J.

Plaintiffs-Appellants (collectively "Employees") have been or currently are employed as banquet servers at the Defendants-Appellees Four Seasons Resort, Maui or Four Seasons Resort, Hualalai on the island of Hawai'i. Employees filed a class action complaint against Defendants-Appellees [1] (hereinafter collectively referred to as "Four Seasons") in the United States District Court for the District of Hawai'i (district court), and subsequently filed an Amended Complaint. Employees claimed, inter alia, that Four Seasons violated *Hawai'i Revised Statutes (HRS) § 481B-14* [2] by retaining a portion of a mandatory "service charge" **[***2]** collected at banquets and other events and by failing to notify customers that it was doing so.

Four Seasons moved to dismiss the Amended Complaint, arguing, inter alia, that Employees do not have standing to assert their claims for monetary damages under *HRS §§ 480-2(e)* and *480-13*, quoted infra, because they are not businesses, competitors, or consumers, and because they failed to adequately plead the effect of Four Seasons' alleged actions on competition and therefore did not sufficiently allege antitrust injury.

On June 2, 2009, the district court [3] certified the following question pursuant to *Hawai'i Rules of Appellate Procedure (HRAP) Rule 13* **[***3]** [4] :

> **[**305] [*425]** Where plaintiff banquet server employees allege that their employer violated the notice provision of *H.R.S. § 481B-14* by not clearly disclosing to purchasers that a portion of a service charge was used to pay expenses other than wages and tips of employees, and where the plaintiff banquet server employees do not plead the existence of competition or an effect thereon, do the plaintiff banquet server employees have standing under *H.R.S. § 480-2(e)* to bring a claim for damages against their employer?

This court entered an order accepting this certified question on June 12, 2009.

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[1] Defendant-Appellee Four Seasons Resorts Limited operates the Four Seasons Resort, Maui and Four Seasons Resort, Hualalai, which are both owned by Defendant-Appellee MSD Capital.

[2] *HRS § 481B-14 (2008)* provides:

> ***HN1***[] **Hotel or restaurant service charge; disposition.** Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

[3] The Honorable Helen Gillmor, United States District Judge, presided.

[4] *HRAP Rule 13(a)* states in pertinent part as follows:

> ***HN2***[] When a federal district or appellate court certifies to the Hawai'i Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawai'i that is determinative of the cause and that there is no clear controlling precedent in the Hawai'i judicial decisions, the Hawai'i Supreme Court may answer the certified question by written opinion.

For the reasons set forth herein, we answer the certified question as follows:

Employees are "any persons" within the meaning **[***4]** of *HRS §§ 480-1* and *480-2(e)*, quoted infra, and are within the category of plaintiffs who have standing to bring a claim under *HRS § 480-2(e)* for a violation of *HRS § 481B-14*.

However, based on the allegations contained in Employees' Amended Complaint, Employees have not sufficiently alleged the "nature of the competition" to bring a claim for damages against Four Seasons under *HRS §§ 480-2(e)* and *480-13(a)* for a violation of *HRS § 481B-14*.

I. BACKGROUND

This factual background is based primarily upon the information certified to this court by the district court, as well as the allegations contained within Employees' Amended Complaint. See *TMJ Hawaii, Inc., v. Nippon Trust Bank, 113 Hawai'i 373, 374, 153 P.3d 444, 445 (2007)* (in answering a certified question, this court relied upon the information certified to the court by the district court and the facts set forth in the plaintiff's amended complaint).

Employees have all worked as food and beverage servers for Four Seasons. Daryl Dean Davis, Mark Apana, Elizabeth Valdez Kyne, Earl Tanaka, and Thomas Perryman have worked at the Four Seasons Resort, Maui, and Deborah Scarfone has worked at the Four Seasons Resort, Hualalai on the Big Island.

The **[***5]** Amended Complaint, which sought money damages, alleged in relevant part [5] :

> 4. For banquets, events, meetings and in other instances, the defendants add a preset service charge to customers' bills for food and beverage provided at the hotels.
> 5. However, the defendants do not remit the total proceeds of the service charge as tip income to the employees who serve the food and beverages.
> 6. Instead, the defendants have a policy and practice of retaining for themselves a portion of these service charges (or using it to pay managers or other non-tipped employees who do not serve food and beverages).
> 7. The defendants do not disclose to the hotel's customers that the service charges are not remitted in full to the employees who serve the food and beverages.
>
> 8. For this reason, customers are misled into believing that the entire service charge imposed by the defendants is being distributed to the employees who served them food or beverage when, in fact, a smaller percentage is being remitted to the servers. As a result, customers who would otherwise be inclined to leave an additional gratuity for such servers frequently do not do so because they erroneously believe **[**306]** **[*426]** that the servers are receiving **[***6]** the entire service charge imposed by the defendants.
> . . .
>
> **COUNT I**
>
> **(*Hawaii Revised Statutes, Sections 481B-14*, *481B-4*, and *480-2* [6])**

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[5] Employees' Amended Complaint also included Counts II - V, in which Employees' alleged that Four Seasons' conduct constituted intentional interference with contractual relations and/or advantageous relations, breach of implied contract, unjust enrichment, and unpaid wages pursuant to *HRS §§ 388-6*, *10* and *11*.

[6] *HRS § 480-2 (2008)* provides:

> ***HN3*[]** **Unfair competition, practices, declared unlawful.** (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

> The action of the defendants as set forth above are in violation of *Hawaii Revised Statutes Section 481B-14*. Pursuant to *Section 481B-4*, such violation constitutes an unfair method of competition or unfair and deceptive act or practice within the meaning of *Section 480-2*. *Section 480-2(e)* permits an action based on such unfair methods of competition to be brought in the appropriate court, and a class action for such violation is permitted and authorized by *Section 480-13* [7] and *Rule 23 of the Federal Rules of Civil Procedure*.

On January 30, 2009, Four Seasons moved to dismiss the Amended Complaint, arguing, inter alia, that Employees lacked standing under *HRS § 480-2(e)* to bring a claim for unfair methods of competition because they are not businesses, competitors, or consumers. Four Seasons also asserted that Employees failed to properly plead the nature of the competition.

The district court held a hearing **[***9]** on the motion to dismiss on March 24, 2009. Following oral argument, Judge Gillmor denied Four Seasons' motion to dismiss with leave to renew the motion following receipt of a ruling by this court with respect to the issue of standing of the Employees to bring the action. An order certifying the question was entered on June 2, 2009, and transmitted to this court the next day.

In addition to the briefs of both parties, several amici curiae also filed amicus briefs in this case as follows: (1) Gustavo Rossetto (hereinafter "Amicus Curiae Rossetto"); (2) Fairmont Hotels and Resorts (U.S.), Inc., Oaktree Capital Management, LP, Kuilima Resort Company, Turtle Bay Resort Company, Turtle Bay Resort Hotel, LLC, TBR Property LLC, and Benchmark Hospitality, Inc.; (3) Starwood Hotels & Resorts Worldwide, Inc.; and (4) HTH Corporation, Pacific Beach Hotel, and Pagoda Hotel.

> (b) In construing this section, **[***7]** the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (*15 U.S.C. 45(a)(1)*), as from time to time amended.
>
> (c) No showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.
>
> (d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.
>
> (e) Any person may bring an action based on this section.

HRS § 481B-4 (2008) provides:

> ***HN4***[] **Remedies.** Any person who violates this chapter shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of *section 480-2*.

[7] *HRS § 480-13 (2008)* provides:

> ***HN5*[] Suits by persons injured; amount of recovery, injunctions.** (a) Except as provided in subsections (b) and (c), any person who is injured **[***8]** in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:
>
> (1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $ 1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney's fees together with the costs of suit in actions not brought under section 480-14(c); and
>
> (2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.
>
> . . .

[307] [*427] II. DISCUSSION**

A. Introduction

1. Applicable Statutes

The Amended Complaint alleges that Four Seasons engaged in unfair methods of competition in violation of *HRS § 481B-14* by withholding a portion of the service charge imposed on the sale of food and beverages at Four Seasons' resorts without advising customers that it was doing **[***10]** so. In their Opening Brief, Employees argue that this conduct "leads customers to believe that the waitstaff are receiving a tip of 18-22% of the food and beverage bill and deters customers from leaving any additional gratuity . . . ."

HRS § 481B-14 provides that:

> Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

HN6[] Pursuant to *HRS § 481B-4*, any person who violates chapter 481B, including *§ 481B-14*, "shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of *section 480-2*." *HRS § 480-2(a)*, which is virtually identical to section 5(a)(1) of the Federal Trade Commission Act (FTCA), *15 U.S.C. § 45(a)(1)*, [8] declares that any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."

HN7[] Only consumers, the attorney general, or the director of the office of consumer protection are authorized to bring an action based on unfair or deceptive acts or practices. *HRS § 480-2(d)*. Actions based on unfair methods of competition, on the other hand, are not so limited. Instead, *HRS § 480-2(e)* provides that "[a]ny **[***12]** person may bring an action based on unfair methods of competition declared unlawful by this section." (emphasis added). [9] Furthermore, *HRS § 480-13(a)*, which is similar to section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, [10] provides that

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[8] Section 5(a)(1) of the FTCA provides that "[u]nfair methods **[***11]** of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *15 U.S.C. § 45(a)(1)*. *HRS § 480-2* "differs from section 5 of the FTCA in one essential aspect - enforcement." *Hawai'i Med. Ass'n v. Hawai'i Med. Serv. Ass'n, 113 Hawai'i 77, 109, 148 P.3d 1179, 1211 (2006)*. *HRS § 480-2(e)* provides a private right of action with regard to unfair methods of competition claims, id., while the Federal Trade Commission (FTC) has sole authority to enforce the FTCA, see *Robert's Hawai'i Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 249, 982 P.2d 853, 878 (1999)*, superseded by statute, 2002 Haw. Sess. Laws Act 229, § 2 at 916-17, as recognized in *Hawai'i Med. Ass'n, 113 Hawai'i at 107, 148 P.3d at 1209*; *Star Markets, Ltd. v. Texaco, Inc., 945 F. Supp. 1344, 1346 (D. Hawai'i 1996)*.

[9] The availability of a private right of action for unfair methods of competition in Hawai'i has changed over the last several years. In *Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 612, 607 P.2d 1304, 1308-09 (1980)*, overruled by *Robert's Hawai'i Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 982 P.2d 853 (1999)*, and *Island Tobacco Co., Ltd. v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 300-01, 627 P.2d 260, 268-69 (1981)*, overruled by Robert's Hawai'i, this court held that *HRS § 480-2* afforded plaintiffs a private right of action for unfair methods of competition. In Robert's Hawai'i, this court overruled Ai and Island Tobacco to the extent that they held there existed such a private right and instead **[***13]** held that "there is no private claim for relief under *HRS § 480-13* for unfair methods of competition in violation of *HRS § 480-2*." *91 Hawai'i at 252, 982 P.2d at 881*. Thereafter, in 2002, the legislature amended *HRS § 480-2* to add *subsection (e)* which makes clear there is such a private right. 2002 Haw. Sess. Laws Act 229, § 2 at 916-17. In *Hawai'i Med. Ass'n v. Hawai'i Med. Services Ass'n, 113 Hawai'i 77, 107, 148 P.3d 1179, 1209 (2006)*, this court held that "[w]e do not believe the amendment 'overruled' Robert's Hawai'i . . . but instead simply provided a new right that did not previously exist."

[10] Section 4 of the Clayton Act, *15 U.S.C. § 15(a)*, provides:

"any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by **[**308]** **[*428]** [chapter 480]: (1) [m]ay sue for damages . . . ; and (2) [m]ay bring proceedings to enjoin the unlawful practices[.]"

2. The Parties' Arguments

Employees allege that they have standing based on the plain meaning of the relevant statutes, the legislative history of *HRS §§ 481B-14* and *480-2(e)*, **[***14]** and relevant Hawai'i and federal law. Specifically, Employees argue that the plain meaning of "any person" as found in *HRS § 480-2(e)*, and as defined by *HRS § 480-1*, does not limit standing to businesses, competitors or consumers, and that even if this court determines that the phrase "any person" is ambiguous, the legislative history of *HRS § 480-2(e)* demonstrates that "[e]ach one of the plaintiffs here qualifies as 'any person' under the law." [11] Furthermore, Employees argue that the legislative history of *HRS § 481B-14* "reflects a specific legislative intent to protect plaintiff food and beverage servers." Additionally, Employees argue that based on the plain meaning of *HRS §§ 481B-14* and *481B-4*, "a violation of *§ 481B-14* is 'deemed' by the language of the statute to be an unfair method of competition . . . and no further proof that such a violation is an [unfair method of competition] is required." Finally, Employees argue that "[t]o the extent it is applicable, federal ***antitrust law*** supports the conferral of standing on plaintiffs." [12]

Four Seasons counters that Employees "lack standing to bring their damages claims under *HRS § 481B-14* as that statute is currently written and based on the allegations (or lack thereof) in [their] Amended Complaint." Specifically, Four Seasons argues that the legislative history of *HRS § 481B-14* shows that it is not a wage and hour law intended to protect employees or create a labor standard, [13] but is instead "a consumer protection law designed to prevent businesses from engaging in unfair and/or anticompetitive behavior." Furthermore, Four Seasons argues that the broad "any person" language of *HRS § 480-2(e)* "should **[***16]** not be interpreted literally" and should instead be limited to businesses, competitors, or consumers [14] based on the legislative history of *HRS § 480-2(e)* and this court's holding in *Hawai'i Medical Association v. Hawai'i Medical Service Association, 113 Hawai'i 77, 105,*

> **(a) Amount of recovery; prejudgment interest** Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . , and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

[11] Employees also argue that a limited interpretation of "any person" so as to exclude Employees "risks violation the *equal protection clause of the Hawaii Constitution* (*Article I, Section 5*) **[***15]** because it requires the court to deny the protection of Chapter 480 to employees, who may be [unfair methods of competition] victims similarly situated to other 'persons' receiving protection under the statute, without a reasonable basis." Because we conclude that Employees fall within the definition of "any person," we do not

[12] Employees also contend that Employees can enforce *HRS § 481B-14* through *HRS §§ 388-6*, *10* and *11*. However, this argument will not be addressed because it is beyond the scope of the certified question.

[13] Four Seasons also argues that if *HRS § 481B-14* "was intended to create a wage claim for employees, it is strikingly - if not unconstitutionally - vague. Among other things, it does not specify which employees should be paid the service charge as tip income[,]" and "allows the employer to pick any employee to receive the monies in any amount."

This argument, however, does not relate to the issue of whether or not employees have standing under *HRS § 480-2(e)* to bring a claim for damages for a violation of *HRS § 481B-14*, but instead relates the merits **[***17]** of such a claim. Accordingly, we do not address it here.

[14] At some points in its Answering Brief, Four Seasons also includes *480-2(e)* is limited to businesses, competitors, consumers or "other market participants." At oral argument, counsel for Four Seasons argued that "businesses" may be broadly interpreted under this court's holding in HMA to include groups such as trade associations which are market participants, but did not further explain what other entities may be considered to be "market participants," see MP3: Oral Argument, Hawai'i Supreme Court, at 39:37 - 40:01 (Jan. 21, 2010), available at *http://www.courts.state.hi.us/courts/oral_arguments/archive/oasc29862.html*, other than indicating that employees are not, id. at 57:15 - 57:23.

148 P.3d 1179, 1212 (2006) (hereinafter "HMA"), as well as federal courts' interpretations of section 4 of the Clayton Act. Additionally, Four Seasons argues that both Hawai'i and federal case law require that Employees plead the nature of the competition, and that this requirement **[**309]** **[*429]** must be satisfied even if a plaintiff alleges a per se violation of Hawai'i ***antitrust law***.

As discussed below, Employees clearly qualify as "any person" within the plain meaning of HRS §§ 480-1 and 480-2(e), and the legislative history of HRS § 480-2(e) is consistent with this interpretation. Contrary to Four Seasons' assertions, standing to sue under HRS §§ 480-2(e) and 480-13(a) is not limited so as to preclude Employees from bringing suit. Moreover, both the plain language and legislative history of HRS § 481B-14 support the conclusion **[***18]** that Employees can bring claims for violations of HRS § 481B-14, as long as all other requirements of §§ 480-2(e) and 480-13(a) are met.

Additionally, Employees have sufficiently alleged a direct injury in fact to their "business or property" within the meaning of HRS § 480-13(a). However, Employees have failed to allege the "nature of the competition" in their Amended Complaint, which is required in order to bring a claim for damages based on Four Seasons' alleged unfair methods of competition.

B. Employees are "persons" within the meaning of HRS §§ 480-1 and 480-2(e), and have standing to bring a claim under HRS § 480-2(e) for a violation of HRS § 481B-14

1. Employees are "persons" for purposes of HRS §§ 480-1 and 480-2(e)

HN8[] HRS § 480-2(e) provides that "any person" can sue for unfair methods of competition, while HRS § 480-1 defines "person" to include "individuals, corporations, firms, trusts, partnerships, limited partnerships, limited liability partnerships, limited liability limited partnerships, limited liability companies, and incorporated or unincorporated associations, ..." Therefore, under the plain language of HRS §§ 480-1 and 480-2(e), Employees constitute "any person" **[***19]** within the meaning of § 480-1 because they are "individuals." Since the language of §§ 480-1 and 480-2(e) is plain, clear, and unambiguous, the statute should be applied as written. See, e.g., *State v. Yamada, 99 Haw. 542, 553, 57 P.3d 467, 478 (2002)* ("[i]nasmuch as the statute's language is plain, clear, and unambiguous, our inquiry regarding its interpretation should be at an end"); *Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 67, 905 P.2d 29, 42 (1995)* ("[w]here the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning") (citation omitted).

However, even if the language of HRS §§ 480-2(e) and 480-1 is considered to be unclear or ambiguous and the legislative history of HRS § 480-2(e) is therefore examined, it confirms that "any person" is not limited to consumers, businesses, or competitors, and can in fact extend to Employees. HRS § 480-2(e) was enacted in 2002 in response to *Robert's Hawai'i School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawai'i 224, 252, 982 P.2d 853, 881 (1999)*, superseded by statute, 2002 Haw. Sess. Laws Act 229, § 2 at 916-17, as recognized in *HMA, 113 Hawai'i at 107, 148 P.3d at 1209*, **[***20]** in which this court held that "there is no private claim for relief under HRS § 480-13 for unfair methods of competition in violation of HRS § 480-2." See H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665 (noting that HRS § 480-2 was amended in response to a "1999 Supreme Court interpretation of section 480-2").

The "any person" language initially proposed for HRS § 480-2(e) never changed from the time the bill was first introduced as S.B. 1320 until it was signed into law as Act 229. Compare S.B. 1320, 21st Leg., Reg. Sess. (2002) with 2002 Haw. Sess. Laws Act 229, § 2 at 916-17. Most of the committee reports suggest that the "any person" language is to be construed broadly so as to encompass plaintiffs like Employees who are neither consumers, businesses nor competitors. See S. Stand. Comm. Rep. No. 448, in 2001 Senate Journal, at 1116-17 ("The purpose of [S.B. 1320] is to allow a private citizen to bring an action based on unfair methods of competition.") (emphasis added); S. Stand. Comm. Rep. No. 931, in 2001 Senate Journal, at 1295 ("The purpose of [S.B. 1320] is to amend the antitrust and unfair competition law to allow any person to bring a lawsuit for enforcement **[***21]** . .

.") (emphasis added); H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665 ("The purpose of **[**310]** **[*430]** this bill is to permit private actions for unfair methods of competition.") (emphasis added). This interpretation is also consistent with the Senate floor discussion of S.B. No. 1320. [15]

Four Seasons argues that standing under *HRS § 480-2(e)* is limited to businesses, competitors or consumers, so as not to include Employees, based on this court's statement in HMA that "[b]y its plain terms, *HRS § 480-2(e)* authorizes any person, i.e., businesses and individual consumers, to bring an action grounded upon unfair methods of competition[,]" *113 Hawai'i at 110, 148 P.3d at 1212* **[***22]** (emphasis in original), which is a reference to a report of the House Consumer Protection & Commerce and Judiciary & Hawaiian Affairs committees, indicating that "[t]his bill amends the law to clearly give businesses and consumers the right to enforce the law . . . [,]" H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665 (emphasis added). This argument must be rejected, however, because when viewed in context, the reference to "businesses and individual consumers" in the committee report does not appear to have been an exclusive definition of who may bring suit. [16] Similarly, when viewed in context, the foregoing passage in HMA appears to have been intended to explain that persons or entities in addition to competitors may bring an action under *HRS § 480-2(e)* as long as they meet the additional standing requirements discussed below, in part II.C. See *HMA, 113 Hawai'i at 110, 148 P.3d at 1212* ("To require that the plaintiffs in this case be competitors of HMSA would contravene the plain language of *subsection (e)* and the intent of the legislature in amending the subject statute."). Additionally, a broad interpretation of "any person" is consistent with the principle that, **[***23]** as a remedial statute, chapter 480 must be construed liberally. *Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 68, 905 P.2d 29, 43 (1995)* (HRS chapter 480 is a remedial statute, which is 'to be construed liberally in order to accomplish the purpose for which [it was] enacted . . . .'") (citation omitted).

Four Seasons also argues **[***24]** that federal judicial interpretations of the phrase "any person" in similar federal antitrust statutes also limit standing to businesses, consumers, or competitors. For example, Four Seasons relies on *Vinci v. Waste Management, Inc., 80 F.3d 1372 (1996)*, for the proposition that the Ninth Circuit has limited standing to "only certain plaintiffs[.]" Four Seasons further notes that *HRS § 480-3* states that "[t]his chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes, ..."

A review of federal case law interpreting the phrase "any person" in *section 4* of the Clayton Act, *15 U.S.C. § 15(a)*, which is analogous to *HRS § 480-13(a)*, demonstrates that "any person" is not so limited. Instead, the Supreme Court has observed that ***HN9***[] "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Blue Shield of Virginia v. McCready, **[**311]** **[*431]** 457 U.S. 465, 472-485, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (citation omitted) (plaintiff, who was an individual receiving health care coverage **[***25]** under a health plan purchased by her employer from the defendant (Blue Shield), had antitrust standing to sue under section 4 of the Clayton Act for Blue

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[15] In support of the bill, Senator Matsunaga stated that the bill "amends the antitrust and unfair competition law to allow any person to bring a lawsuit for enforcement." 2002 Senate Journal, at 626 (statement of Sen. Matsunaga) (emphasis added). Senator Hogue, who opposed the bill, expressed similar views about its scope in a subsequent debate: "This bill, if enacted, would open the floodgates and allow anybody to file such a suit, no matter how frivolous." 2002 Senate Journal, at 724 (statement of Sen. Hogue) (emphasis added).

[16] The committee report states that:

> Your Committees find that only the Attorney General may bring an action to enforce the antitrust, or unfair methods of competition law. This restriction was the result of a 1999 Supreme Court interpretation of *section 480-2, Hawaii Revised Statutes.* However, the Attorney General does not have the resources to investigate and litigate all price-fixing claims. This bill amends the law to clearly give businesses and consumers the right to enforce the law if the Attorney General declines to commence an action based on the claim.

H. Stand. Comm. Rep. No. 1118, in 2002 House Journal, at 1665.

Thus, the report was focusing on the question of whether persons other than the Attorney General should be able to bring suit, rather than providing an exclusive list of which persons would be able to bring suit if the statute was amended.

Shield's alleged failure to reimburse her for costs of treatment); see also *Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 311-15 (4th Cir. 2007)* (plaintiff was a software developer and had antitrust standing to sue a defendant manufacturer of computer operating system software even though the plaintiff was not a consumer or competitor and did not operate in the same market as the defendant); *American Ad Mgmt., Inc., v. General Telephone Co. of California, 190 F.3d 1051, 1057 (9th Cir. 1999)* (holding that authorized sellers of advertising space, who purchased advertising space in the defendant's Yellow Pages telephone directory and then sold the space to customers, had antitrust standing even though not consumers or competitors); *Eichorn v. AT&T Corp., 248 F.3d 131, 141-42 (3d Cir. 2001)* (former employees of a subsidiary corporation who challenged a no-hire agreement of the parent corporation, alleging that the agreement was a conspiracy to restrain competition in the relevant labor market, had federal antitrust standing because the **[***26]** agreement precluded them from seeking re-employment from at least three divisions of the parent corporation within the competitive market).

The Ninth Circuit's holding in Vinci is not inconsistent with this analysis. In Vinci, the plaintiff was a former employee of a waste removal corporation who brought an action against his former employer, alleging that he was discharged for refusing to cooperate in the employer's anti-competitive scheme to drive a joint venturer out of business and engage in predatory price-fixing. *80 F.3d at 1373-74*. Four Seasons relies on a passage from the Ninth Circuit's opinion which stated that "[a] plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer 'antitrust injury.'" *Id. at 1376* (citation omitted). However, the court's subsequent discussion indicates that although "antitrust standing is generally limited to customers and competitors," employees can be afforded standing in certain circumstances. Id. (emphasis added).

The court in Vinci focused on the narrow issue of when a terminated employee has antitrust standing to challenge the loss of his or her job as an antitrust violation. For example, the court recognized **[***27]** that former employees who were "essential participants" in an anti-competitive scheme and whose termination is a "necessary means" to accomplish the scheme can obtain antitrust standing. Id. The court held that the plaintiff in Vinci did not fall within this category of former employees because he did not "allege any facts which suggest that he was essential to the alleged antitrust scheme or that his termination was necessary to accomplish the scheme." *Id. at 1376-77*; cf. *Ostrofe v. H.S. Crocker Co., Inc., 740 F.2d 739, 745-46 (9th Cir. 1984)* (former employee who had alleged that he had been discharged after refusing to engage in the employer's scheme to fix prices in violation of federal ***antitrust law*** had antitrust standing because he was "an essential participant in the scheme to eliminate competition" in the industry and "his discharge was a necessary means to achieve the [employer's] illegal end"); *Ashmore v. Northeast Petroleum Div. of Cargill, Inc., 843 F. Supp. 759, 765-72 (D. Me. 1994)* (former employees had federal antitrust standing to sue for alleged price discrimination by their employer since they were integral to the employer's anti-competitive scheme in that they either **[***28]** had to take an active role in implementing the scheme or face discharge).

Vinci, therefore, does not stand for the proposition that the Ninth Circuit has limited antitrust standing to only businesses, competitors, or consumers, to the exclusion of employees or other individuals. *80 F.3d at 1376-77*; see also *American Ad Mgmt., 190 F.3d at 1057* (rejecting the defendant's claim that standing is limited to consumers and competitors, and recognizing that "[t]he Supreme Court has never imposed a 'consumer or competitor' test but has instead held the antitrust laws are not so limited"). Instead, Vinci indicates that antitrust standing may extend beyond businesses, competitors, or consumers and provides a specific framework **[**312]** **[*432]** for analyzing the distinct issue of antitrust standing for a terminated employee.

In sum, based upon the plain language of the statute, ***HN10***[] Employees are "individuals" within the meaning of *HRS § 480-1* and therefore qualify as "persons" under *HRS §§ 480-2(e)* and *480-13(a)*. Additionally, the legislative history of *HRS § 480-2(e)* does not evince a clear intent by the legislature to preclude employees from filing an unfair methods of competition claim, but rather indicates that **[***29]** the language is intended to be interpreted broadly. Finally, the federal case law would not require a contrary result. Therefore, Employees have standing to sue under *HRS §§ 480-2(e)* and *480-13(a)* if they meet the additional requirements discussed below.

2. The plain language and the legislative history of HRS § 481B-14 establish that Employees have standing to bring a claim under HRS § 480-2(e) for a violation of HRS § 481B-14

Four Seasons argues that Employees lack standing to bring an unfair methods of competition claim for violation of HRS § 481B-14 because it "is a consumer protection law designed to prevent businesses from engaging in unfair and/or anticompetitive behavior." In making this argument, Four Seasons relies on the legislative history of HRS § 481B-14. Employees respond that the legislative history demonstrates that "one of the problems the statute is intended to remedy is that 'employees may not be receiving tips or gratuities' that customers intend to be distributed to the employees." Employees further contend that "nothing in the committee reports demonstrates a legislative intent to deny employees the ability to seek redress for violation of § 481B-14."

As a threshold **[***30]** matter, we observe that the plain language of HRS § 481B-14 is inconsistent with Four Seasons' argument that Employees cannot obtain standing to sue for a violation of HRS § 481B-14. HRS § 481B-14 provides that any hotel or restaurant that applies a service charge "shall distribute the service charge directly to its employees" or "clearly disclose to the purchaser" that it is withholding some of the service charge. HRS § 481B-4 provides that "[a]ny person who violates [chapter 481B] shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice . . . ." Nothing in either provision purports to preclude employees from seeking to enforce those provisions pursuant to HRS § 480-2(e). Since we have concluded that employees are "persons" who may bring an action under HRS § 480-2(e), see section II.B.1, supra, the plain language of these provisions is inconsistent with Four Seasons' position. See Cieri, 80 Haw. at 67, 905 P.2d at 42 ("[w]here the language of the statute is plain and unambiguous, our only duty is to give effect to its plain and obvious meaning") (citation omitted). In any event, as we discuss below, the legislative history of HRS § 481B-14 **[***31]** does not reflect an intent to preclude enforcement by employees.

In April of 2000, the legislature passed House Bill No. 2123 (H.B. No. 2123, H.D. 2), which was signed into law as Act 16, and codified within chapter 481B entitled "Unfair and Deceptive Practices" as HRS § 481B-14. Section 1 of Act 16 states that "[t]he legislature finds that Hawaii's hotel and restaurant employees may not be receiving tips or gratuities during the course of their employment from patrons because patrons believe their tips or gratuities are being included in the service charge and being passed on to the employees." 2000 Haw. Sess. Laws Act 16, § 1 at 21-22. It also states that:

> The purpose of this Act is to require hotels and restaurants that apply a service charge for food or beverage services, not distributed to employees as tip income, to advise customers that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

2000 Haw. Sess. Laws Act 16, § 1 at 22.

The legislative history of HRS § 481B-14 includes three forms of the bill (original, House Draft 1 (H.D.1) and House Draft 2 (H.D.2)), three committee reports, and Act 16 as signed into law by the Governor. **[***32]** H.B. 2123, H.D.1, H.D.2, 20th Leg., Reg. Sess. (2000); 2000 Haw. Sess. Laws Act 16, § 1 at 21-22. At all times, including when signed into law as Act 16, the bill was entitled **[**313]** **[*433]** "Relating to Wages and Tips of Employees." [17] Id.

Initially introduced as HB 2123, the bill would have, inter alia, added a definition for "tips" in HRS § 387-1 that would include any service charges imposed by the employer, and amended HRS § 388-6 to prohibit employers from withholding tips from employees. See H.B. 2123, 20th Leg., Reg. **[***33]** Sess. (2000). According to the report of the House Committee on Labor & Public Employment, which was the first committee to consider the bill, it was originally intended to "strengthen Hawaii's wage and hour law to protect employees who receive or may receive tips

[17] Employees argue that "[t]he title to the Act is pivotal in dismantling Defendants' claim that the law was not meant to benefit employees because the Hawaii Constitution provides at Article III, Section 14 that: 'No law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title.'" However, although we believe the title is instructive in that it appears to reflect the legislature's concern that employees may not always be receiving the service charges imposed by their employers, we do not believe it is dispositive of the issue of whether the legislature intended to afford Employees standing to sue for HRS § 481B-14 violations.

or gratuities from having these amounts withheld or credited to their employers." H. Stand. Comm. Rep. No. 479-00, in 2000 House Journal, at 1155.

The Hotel Employees and Restaurant Employees, Local 5, union testified in support of the proposed bill. Id. The Department of Labor and Industrial Relations [DLIR] and the ILWU Local 142, however, expressed concerns. [18] Based on those concerns, the House Committee on Labor and Public Employment "amended the bill by deleting its contents and inserting a new section regarding unfair and deceptive business practices." Id. Thus, H.D.1 reflects the Committee's decision to amend Chapter 481B (Unfair and Deceptive Trade Practices) rather than Chapter 387 (Wage and Hour Law). The new section, which eventually became *§ 481B-14*, would "require[] that any hotel or restaurant applying a service charge to distribute it to the employees or clearly state that the service charge is being used to **[***34]** pay for costs or expenses other than wages for employees." Id.

H.D.1 was then considered by the House Committee on Finance, which made only "technical, nonsubstantive amendments" to the bill, which, as amended, became H.D.2. See H. Stand. Comm. Rep. No. 854-00, in 2000 House Journal, at 1298. The Committee's report, dated March 3, 2000, indicated that the bill's purpose "is to prevent unfair and deceptive business practices." Id.

The bill was subsequently considered by the Senate Committee on Commerce and Consumer Protection, which recommended adoption of the bill without further amendment. **[***35]** The Committee's April 3, 2000 report indicates that "[t]he purpose of this measure is to enhance consumer protection," and further noted that:

> Your Committee finds that it is generally understood that service charges applied to the sale of food and beverages by hotels and restaurants are levied in lieu of a voluntary gratuity, and are distributed to the employees providing the service. Therefore, most consumers do not tip for services over and above the amounts they pay as a service charge.
>
> Your Committee further finds that, contrary to the above understanding, moneys collected as service charges are not always distributed to the employees as gratuities and are sometimes used to pay the employer's administrative costs. Therefore, the employee does not receive the money intended as a gratuity by the customer, and the customer is misled into believing that the employee has been rewarded for providing good service.

[314]** **[*434]** S. Stand. Comm. Rep. No. 3077, in 2000 Senate Journal, at 1286-87 (emphasis added).

The report went on to state that "[t]his measure is intended to prevent consumers from being misled about the application of moneys they pay as service charges . . . ." Id.

In sum, the legislative **[***36]** history of H.B. No. 2123 indicates that the legislature was concerned that when a hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so, both employees and consumers can be negatively impacted. The legislature chose to address that concern by requiring disclosure and by authorizing enforcement of that requirement under HRS chapter 480. There is no clear indication in the legislative history that the legislature intended to limit enforcement to consumers, businesses, or competitors and to preclude enforcement by employees. Therefore, the legislative history of *HRS § 481B-14* is consistent with the conclusion that Employees have standing to sue as "persons" under *HRS § 480-2(e)* for a violation of *HRS § 481B-14* if they meet the additional requirements discussed below.

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[18] Specifically, the Committee Report notes that:

> The [DLIR] expressed concerns that the bill, as drafted, would delete the tip credit in its entirety thereby disallowing employers from taking any offset from the employees' wages. DLIR testified that since the current rules concerning tips and gratuities are in line with federal regulations, changing the definitions would cause a lot of confusion for both employers and employees.

H. Stand. Comm. Rep. No. 479-00, in 2000 House Journal, at 1155. The ILWU Local 142 also expressed concerns that "changing the definition of tips would cause much confusion[.]" Id.

C. Employees have not sufficiently alleged the "nature of the competition," which is required to bring a claim for unfair methods of competition under *HRS §§ 480-2(e)* and *480-13(a)*

HN11[] In order to state a cause of action pursuant to *HRS § 480-2(e)* and recover money damages, Employees must first satisfy the requirements of *HRS § 480-13*. *Flores v. Rawlings Co., LLC, 117 Hawai'i 153, 162, 177 P.3d 341, 350 (2008)* **[***37]** ("In order for [the defendant's] failure to register [as a collection agency as required by *HRS § 443B-3*] to be actionable by private litigants [pursuant to *HRS § 480-2*], the threshold requirements of *HRS § 480-13* must be satisfied."). *HRS § 480-13(a)* provides that, with limited exceptions, "any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by [chapter 480]: (1) [m]ay sue for damages . . . ; and (2) [m]ay bring proceedings to enjoin the unlawful practices[.]"

HN12[] When analyzing whether or not Employees have sufficiently alleged an injury to their "business or property," this court views Employees' Amended Complaint "in a light most favorable to [Employees] in order to determine whether the allegations contained therein could warrant relief . . . ." *In re Estate of Rogers, 103 Hawai'i 275, 280, 81 P.3d 1190, 1195 (2003)*; see *Hawai'i Rules of Civil Procedure Rule 12(b)(6)*.

In HMA, this court considered what a plaintiff must allege in order to bring an action for unfair methods of competition under *HRS § 480-2(e)*. Specifically, this court addressed, inter alia, whether the Hawai'i Medical Association (HMA) sufficiently alleged **[***38]** injury to itself under *HRS § 480-13(a)* as a result of the Hawai'i Medical Services Association's (HMSA) alleged unfair methods of competition. *HMA, 113 Hawai'i at 107-115, 148 P.3d at 1209-1217*. HMA alleged that HMSA deprived over 1,600 HMA physicians of reimbursement for services provided by HMA physicians to HMSA plan members. *Id. at 83-84, 148 P.3d at 1185-86*. These HMA physicians had become "participating physician[s]" in HMSA's network by entering into a "Participating Physician Agreement" (called a "PAR agreement") with HMSA "to provide medically necessary healthcare services to HMSA's plan members in exchange for HMSA's payments at specified rates." *Id. at 81, 148 P.3d at 1183*.

HMA, on its own behalf and on behalf of participating physicians in HMSA's network, brought suit against HMSA for violation of *HRS § 480-2*, and tortious interference with prospective economic advantage. [19] *Id. at 81, 148 P.3d at 1183*. HMA alleged that HMSA engaged in "an unfair and deceptive scheme to avoid making timely and complete payments owed to its physician members" after the HMA physicians had rendered medical care to HMSA members pursuant to their PAR agreements. *Id. at 84, 148 P.3d at 1186*. HMA **[***39]** alleged that this "wrongful conduct **[**315]** **[*435]** (1) constituted unfair methods of competition and (2) delayed, impeded, denied or reduced reimbursement owed to HMA's physician members. HMA further alleged that HMSA's wrongful conduct . . . resulted in direct and substantial harm to HMA and its members." *Id. at 81, 148 P.3d at 1183*.

HMSA filed a motion for judgment on the pleadings, arguing that HMA's claims should be dismissed because HMA, inter alia, lacked standing to bring suit on its own behalf. *Id. at 85, 148 P.3d at 1187*. Moreover, in its reply to HMA's opposition to the motion, HMSA argued that HMA's claim under HRS chapter 480 failed because HMA had not pled any direct injury to its "business or property." *Id. at 86, 148 P.3d at 1188*. The circuit court granted HMSA's motion for judgment on the pleadings and HMA appealed. *Id. at 87, 148 P.3d at 1189*.

On **[***40]** appeal, this court considered whether HMA sufficiently alleged injury to itself with respect to its post-June 28, 2002 [20] unfair methods of competition claims under *HRS § 480-2*. *Id. at 107-15, 148 P.3d at 1209-17*. This court acknowledged the three elements essential to recovery under *HRS § 480-13*: (1) a violation of HRS chapter

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[19] Individual physicians also sued HMSA on similar grounds and the cases were consolidated on appeal. *HMA, 113 Hawai'i at 81, 148 P.3d at 1183*. However, because this court's discussion regarding the requirements to sue under *HRS §§ 480-2* and *480-13* arose in the context of the HMA suit, we focus here solely on the issues pertaining to that suit.

[20] *HRS § 480-2(e)* became effective on June 28, 2002. In HMA, this court held that *§ 2(e)* cannot be applied retroactively because **[***41]** "[n]either the language of the statute itself nor the legislative history of the amendment give any expressed indication that the amendment should be applied retroactively." *HMA, 113 Hawai'i at 107, 148 P.3d at 1209*.

480; (2) which causes an injury to the plaintiff's business or property; and (3) proof of the amount of damages. [21] Id. at 114, 148 P.3d at 1216 (citing Ai, 61 Haw. at 617, 607 P.2d at 1311); see also Robert's Hawai'i School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawai'i 224, 254 n.30, 982 P.2d 853, 883 n.30 (1999), superseded by statute, 2002 Haw. Sess. Laws Act 229, § 2 at 916-17, as recognized in HMA, 113 Hawai'i at 107, 148 P.3d at 1209 ("[W]hile proof of a violation of chapter 480 is an essential element of an action under HRS § 480-13, the mere existence of a violation is not sufficient ipso facto to support the action; forbidden acts cannot be relevant unless they cause [some] private damage.") (citation omitted).

This court, according to the majority opinion, first determined that HMA need not be a "competitor[]" of or "in competition" with HMSA in order to have standing under HRS § 480-13(a). [22] Id. at 110, 148 P.3d at 1212. This court also determined that a plaintiff "may bring claims of unfair methods of competition based on conduct that would also support claims of unfair or deceptive acts or practices." Id. at 111, 148 P.3d at 1213. In doing so, however, "the nature of the competition [must be] sufficiently alleged in the complaint." Id. at 113, 148 P.3d at 1215 (emphasis added). This court recognized that otherwise, "the distinction between claims of unfair **[***42]** or deceptive acts or practices and claims of unfair methods of competition that are based upon such acts or practices would be lost where both claims are based on unfair and deceptive acts or practices." Id. at 111-12, 148 P.3d at 1213-14 (emphasis in original). This court held that HMA sufficiently alleged an unfair methods of competition claim based on conduct that would also **[**316]** **[*436]** support a claim of unfair or deceptive acts or practices [23] because it sufficiently alleged the nature of the competition in its complaint. [24] Id. at 112-13, 148 P.3d at 1214-15.

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[21] A fourth element--"a showing that the action is in the public interest or that the defendant is a merchant"--used to be required, but was eliminated by the 1987 amendment to HRS §§ 480-2 and -13. See HMA, 113 Hawai'i at 114 n.31, 148 P.3d at 1216 n.31 (citing S. Conf. Comm. Rep. No. 105, in 1987 Senate Journal, at 872).

[22] The majority opinion further stated that "notwithstanding . . . our holding that the plaintiffs need not be 'competitors' of, or 'in competition' with, HMSA, the question remains whether the nature of the competition must be sufficiently alleged. Contrary to the dissent, we conclude that it does . . . ." Id. at 111, 148 P.3d at 1213. Justice Acoba and Justice Nakayama, who concurred in the result, nevertheless characterized the majority's holding as requiring that plaintiffs be in competition with defendants and dissented on those grounds. Id. at 119, 148 P.3d at 1221 (Acoba, J. and Nakayama, J., dissenting) ("it is unnecessary to **[***43]** allege, as the majority indicates, that HMSA and all the plaintiffs are in competition with each other for the same 'customers.'"). However, the dissent agreed that something more than an unfair or deceptive act or practice must be alleged in order to bring a claim for unfair methods of competition. Id. ("In my view it is sufficient that 'unfair methods of competition' adversely impact the plaintiffs and allegations in that respect are made, beyond any allegations of unfair and deceptive acts or practices.").

[23] This court specifically stated that

> HMSA facilitates access to the dispensing of medical services, and the plaintiffs provide medical services directly. Thus, in our view, HMSA and the plaintiffs share the same goal or mission, i.e., ensuring that medical services are accessible to their "customers." Their success in meeting the common goal-and, in turn, ensuring the profitability of their respective businesses-is dependent upon their ability to effectively provide medical services to their customers, i.e., the patients. However, if HMSA engages in acts or practices that impede or interfere with physicians' ability to provide effective healthcare services to their patients and/or **[***44]** create incentives for patients to look elsewhere for medical services-that is, to other participating physicians who may be reluctant to challenge HMSA or to non-participating physicians-such acts or practices can, if proven, constitute unfair methods of competition, notwithstanding the fact that the same conduct could also support a claim of unfair or deceptive acts or practices.

HMA, 113 Hawai'i at 112-13, 148 P.3d at 1214-15.

[24] This court held that HMA sufficiently alleged the "nature of the competition" by, for example, alleging in its complaint that:

> 11. . . . [HMSA's] conduct has adversely impacted, and continues to adversely impact, members of [HMSA's] plans by, among other things: (a) imposing financial hardships on, and in some cases threatening the continued viability of, the medical practices run by [the plaintiffs]; (b) threatening the continuity of care provided to patients by [the plaintiffs], as required by sound medical judgment; (c) requiring [the plaintiffs] to expend considerable resources seeking reimbursement that could otherwise be available to provide enhanced healthcare services to [HMSA's] plan members; (d) making it more

As to the injury in fact requirement, this court concluded that HMA established that it had been injured in its "business or property" by alleging a "diminishment of financial resources" as a result of HMSA's actions. *Id. at 114, 148 P.3d at 1216*. This **[***46]** court quoted *Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 607 P.2d 1304 (1980)*, for the proposition that "it is unnecessary for plaintiffs to allege commercial or competitive injury[;] it is sufficient that plaintiffs allege that injury occurred to personal property through a payment of money wrongfully induced." [25] *Id. at 114, 148 P.3d at 1216* (quoting *Ai, 61 Haw. at 614, 607 P.2d at 1310*) (internal quotation and bracketed text omitted; brackets in original). Therefore, this court held that "HMA need only allege that, by reason of an antitrust violation, it has been injured in its 'business or property.'" Id. HMA clearly alleged a direct injury to its business where "HMA was required to divert substantial resources and time to deal with its members' problems created by HMSA's conduct - resources that otherwise would go to support its principal mission in service of its members." Id. (internal quotation marks omitted).

As discussed below, although Employees have sufficiently alleged a direct injury in fact to their "business or property," Employees **[**317]** **[*437]** did not sufficiently allege the "nature of the competition" as required by *HMA.*

1. Employees have alleged an injury in fact to their "business or property"

Employees sufficiently alleged an injury to their "business or property" within the meaning of *HRS § 480-13(a)*. *HRS § 480-13(a)*'s requirement of alleging an injury to business or property incorporates the fundamental standing requirement that a plaintiff must allege an injury in fact, **[***48]** but narrows it so that a plaintiff must specifically allege an injury in fact to his or her "business or property." Employees argue that Four Seasons' alleged violation of *§ 481B-14* directly injures them in both their "business," which is working as banquet servers, and their "property," in the form of "loss of tip income."

HN13[] The phrase "injury to business or property" found in *HRS § 480-13(a)* is not defined in that section or elsewhere in the chapter. However, as discussed above, this court has established that the requirement is satisfied, for example, if "plaintiffs allege that injury occurred to personal property through a payment of money wrongfully induced," *HMA, 113 Hawai'i at 114, 148 P.3d at 1216* (quoting *Ai, 61 Haw. at 614, 607 P.2d at 1310*), or through the diminishment of financial resources as a result of a defendant's unfair methods of competition or unfair or deceptive acts or practices, id. Therefore, because Employees have alleged that their tip income has been reduced due to Four Seasons' allegedly unlawful conduct, they have alleged an injury to their "business or property."

> costly and difficult for [the plaintiffs] **[***45]** to maintain and enhance the availability and quality of care that all patients receive; and (e) increasing the costs of rendering healthcare services in Hawaii as a result of the additional costs incurred and considerable effort expended by HMA members in seeking reimbursement from HMSA for services rendered. . . .
>
> 26. HMSA dominates the enrollee market in Hawaii with over 65% of Hawaii's population enrolled in one of HMSA's plans. In this regard, HMSA is the largest provider of fee-for-service insurance in the State with more than 90% of the market and is the second largest HMO provider in the State. Similarly, HMSA dominates the physician market, with approximately 90% of Hawaii's physicians participating in HMSA's networks.
>
> 27. It is through such market dominance that HMSA is able to dictate the terms and amount of reimbursement HMA physicians will receive.

HMA, 113 Hawai'i at 112, 148 P.3d at 1214 (emphasis and brackets in original).

[25] Ai's suggestion that allegations of "competitive injury" are the requirement in HMA that a plaintiff allege the "nature of the competition" in order to plead an unfair methods of competition claim under *HRS § 480-2(e)*. However, when this passage from Ai is viewed in **[***47]** the context of the facts the case, it is apparent that this court was explaining that injury to "business or property" means that a private plaintiff does not need to allege that he or she suffered an injury to his or her business property or in a business activity, but rather can allege that he or she suffered an injury to personal property. *Ai, 61 Haw. at 614, 607 P.2d at 1310*. Moreover, Ai involved alleged unfair or deceptive acts or practices, not unfair methods of competition, *id. at 611, 607 P.2d at 1308*, and therefore this court did not address the requirements to properly plead an unfair methods of competition claim.

2. Employees failed to allege the "nature of the competition"

As noted above, Employees allege **[***49]** in their Amended Complaint that Four Seasons failed to distribute the entirety of its service charge to its employees and to clearly disclose to the purchaser of the services that employees were not receiving the entire service charge as tip income, and further allege that such conduct constitutes a violation of *HRS § 481B-14*. Pursuant to *HRS § 481B-4*, such a violation would constitute both an unfair method of competition and an unfair or deceptive act or practice under *HRS § 480-2(a)*. However, Employees cannot pursue a claim for unfair or deceptive acts or practices because such a claim can only be brought by consumers, the attorney general or the director of the office of consumer protection. See *HRS § 480-2(d)*. Therefore, as was the case in HMA, in order to pursue a claim under *§ 480-2(e)* for the unfair methods of competition of Four Seasons, Employees must allege the "nature of the competition." [26] *HMA, 113 Hawai'i at 111, 148 P.3d at 1213*.

Employees **[***51]** allege that they have been directly injured by not receiving a portion of the service charge retained by Four Seasons, or by not receiving the tips hotel patrons might have otherwise left if they had known how the service charge was allocated. Even when viewed in a light most favorable to Employees, the Amended Complaint clearly does not contain any allegations concerning the nature of the competition. However, Employees are required to allege how Four **[**318]** **[*438]** Seasons' conduct will negatively affect competition in order to recover on an unfair methods of competition claim. [27]

Amicus Curiae Rossetto suggests that this court's opinion in *Island Tobacco Co., Ltd., v. R.J. Reynolds Tobacco Co., 63 Haw. 289, 627 P.2d 260 (1981)*, "recognized that there need be no 'injury to competition' in order for [an unfair method of competition] claim to lie under *HRS § 480-2*." For support, Amicus Curiae Rossetto cites to the following passage from that case:

> [W]e view *§ 480-2* as being designed to aid "competitors," as much as to protect "competition." And unlike the Federal Trade Commission Act, the policy of the Hawaii law, as expressed in *HRS § 480-13*, is to foster private

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[26] The dissent suggests that the present case is distinguishable from HMA because HMA involved an unfair methods of competition claim based on claim, and that the requirement in HMA that the plaintiffs allege the nature of the competition was "to **[***50]** preserve the distinction" between the two claims. Dissenting Opinion at 15. The dissent therefore argues that because *HRS § 481B-4* deems a violation of chapter 481 to be both an unfair method of competition and an unfair or deceptive act or practice under *HRS § 480-2*, the need for distinction between the two claims as articulated in HMA is not present in the instant case. Dissenting Opinion at 16-18.

However, this court in HMA did not indicate that a plaintiff alleging an unfair method of competition under *HRS § 480-2(e)* must plead the nature of the competition merely so there is a distinction between claims of unfair or deceptive acts or practices and claims of unfair methods of competition. While recognizing that such distinction is necessary, this court further indicated that "the existence of the competition is what distinguishes a claim of unfair or deceptive acts or practices from a claim of unfair methods of competition." *HMA, 113 Hawai'i at 112, 148 P.3d at 1214*. In other words, this court indicated that the pleading requirement is based on the differences in the nature of the underlying causes of action. Therefore, HMA's holding is equally applicable to the instant case.

[27] Thus, we respectfully disagree with the dissent's suggestion that the Amended Complaint sufficiently alleged the nature of the competition. Dissenting Opinion at 36-38. In HMA, after recognizing that the standard of review for a motion to dismiss or motion for judgment on the pleadings requires this court to accept the allegations in the complaint as true and construe the allegations in the light most favorable to the plaintiff, we held that this standard does not relieve plaintiffs from the requirement of pleading the nature of the competition in the complaint itself. See *HMA, 113 Hawai'i at 113, 148 P.3d at 1215* ("In **[***52]** sum, we hold that any person may bring a claim of unfair methods of competition based upon conduct that could also support a claim of unfair or deceptive acts or practices as long as the nature of the competition is sufficiently alleged in the complaint") (emphasis added). In, we concluded that HMA sufficiently alleged the nature of the anti-competitive effect HMSA's alleged actions would have on the marketplace for healthcare services in Hawai'i and that HMA's injury directly resulted from these unfair methods of competition. See supra, section II-C and notes 23

> suits grounded on unfair or deceptive trade **[***53]** practices, even where the unlawful acts to [sic] not culminate in injury to "competition."

Island Tobacco, 63 Haw. at 301, 627 P.2d at 269 (emphasis added).

This passage, however, does not support Amicus Curiae Rossetto's argument. Rather, this language was limited to claims of unfair or deceptive trade practices, rather than unfair methods of competition, and was used to explain that an act can constitute an unfair or deceptive practice if it injures a competitor, even if it does not injure competition itself. Id. This analysis does not extend to claims involving unfair methods of competition.

Employees argue that "since § 481B-4 'deems' a violation of [§ 481B-14] to be an 'unfair method of competition' under § 480-2, this Court should not require further proof that such a violation is in fact an [unfair method of competition]." Citing to this court's previous holding in Ai, Amicus Curiae Rossetto similarly contends that the legislature, "by 'deeming' a violation of Section 481B-14, through the operation of Section 481B-4, to be a per se [unfair method of competition] has found the necessary element of 'competition' by its legislative action." For the following reasons, these arguments **[***54]** confuse the requirements necessary to bring an unfair methods of competition claim under HRS § 480-2(e).

The requirement that the plaintiff allege the "nature of the competition" in an unfair methods of competition claim is distinct from the requirement that a defendant's conduct constitute an unfair method of competition. The latter requirement stems from HRS § 480-2(a), which provides that unfair methods of competition are declared to be unlawful. See Robert's Hawai'i, 91 Hawai'i at 255, 982 P.2d at 884 ("Generally speaking, competitive conduct is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.") (internal quotations omitted; citation omitted); Cieri, 80 Hawai'i at 61, 905 P.2d at 36 ("It is impossible to frame definitions which embrace all unfair practices. . . . Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case.") (citation omitted).

In contrast, the requirement that a plaintiff allege that he or she was harmed as a result of actions of the defendant that negatively affect competition is derived from HRS § 480-13(a)'s **[***55]** language that "any person who is injured in the person's business or property by reason of anything forbidden or declared **[**319]** **[*439]** unlawful by this chapter . . . [m]ay sue for damages . . . ;" (emphasis added).

In Robert's Hawai'i, this court discussed the elements that must be established to bring a claim under HRS § 480-13(a). 91 Hawai'i at 254 n.31, 982 P.2d at 883 n.31. We held that "the elements of (1) resulting injury to business or property and (2) damages" are "two distinct elements" of HRS § 480-13(a), and went on to note that:

> Indeed, **HN14**[] federal case law has interpreted the "injury to business or property" language of section 4 of the Clayton Act as a causation requirement, requiring a showing of "antitrust injury." "Plaintiffs must prove . . . [an] injury of the type the antitrust laws were intended to prevent[, one] . . . that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the 'type of loss' that the claimed violations . . . would be likely to cause."
>
> Also known as the "fact of damage" requirement, the antitrust plaintiff **[***56]** need not prove with particularity the full scope of profits that might have been earned. Instead, it requires a showing, with some particularity, of actual damage caused by anticompetitive conduct that the antitrust laws were intended to prevent.

Id. (internal citations omitted; ellipses and brackets in original); see also HMA, 113 Hawai'i at 114 n.30, 148 P.3d at 1216 n.30 (citing Robert's Hawai'i, 91 Hawai'i at 254 n.31, 982 P.2d at 883 n.31).

HN15[] HRS § 481B-4 declares that "[a]ny person who violates this chapter shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2." Amicus Curiae Rossetto contends that Employees do not need to allege the "nature of the competition" because Employees' claim is based upon a statutory violation deemed by HRS § 481B-4 to be "per se" an unfair method of competition, rather than a claim based on an unfair or deceptive act or practice that is also being alleged to be an unfair method of competition, as was the case in HMA. However, although the deeming language of HRS § 481B-4 eliminates the requirement that a plaintiff prove that **[***57]** a defendant's conduct that violates chapter 481B (including HRS § 481B-14) constitutes an unfair method of competition, it does not purport to modify the causation requirement of HRS § 480-13.

Moreover, even if this court were to determine that the language of HRS § 481B-4 is ambiguous, the legislative history of HRS § 481B-4 does not reflect an intent to eliminate the causation requirement of HRS § 480-13(a). The current deeming language of HRS § 481B-4 ("deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2") was added in 1996 pursuant to Act 59. 1996 Haw. Sess. Laws Act 59, § 4 at 83. Prior to the enactment of Act 59, HRS chapter 481B contained a variety of different enforcement provisions which were replaced by HRS § 481B-4. See, e.g., id. (replacing the provision in HRS § 481B-4 which provided that violators could be "fined not more than $ 500 for each violation or imprisoned not more than one year or both" with the present deeming language).

The Senate Judiciary Committee report indicates that:

> The purpose of the bill is to provide a consistent penalty for certain **[***58]** specific unfair and deceptive acts or practices of regulated industries under chapter 480, . . . governing monopolies and restraint of trade.
>
> Your Committee finds that this bill is intended to delete duplicative or unnecessary penalty provisions and by deeming the violations to constitute unfair and deceptive business practices under section 480-2[.]

S. Stand. Comm. Rep. No. 2103, in 1996 Senate Journal, at 1016-17.

The report of the House Consumer Protection & Commerce and Judiciary committees similarly provides that "[t]he purpose of this bill is to provide consistency in the consumer protection statutes by amending certain provisions **[**320]** **[*440]** so that they uniformly relate to the unfair or deceptive acts or practices statute" and that the "bill is designed to remove duplicative or unnecessary recitation of penalty provisions in favor of a simple reference to the unfair or deceptive acts or practices statute." H. Stand. Comm. Rep. No. 1459-96, in 1996 House Journal, at 1610.

While the committee reports reflect a desire for consistency in enforcement, they do not indicate that the legislature intended to modify the causation requirements which are generally applicable to unfair methods of competition **[***59]** claims under HRS § 480-13(a).

The dissent argues that because the legislative history indicates that HRS § 481B-14 was intended to prevent harm to employees, it can therefore be inferred that the legislature did not intend to require that a plaintiff plead the nature of the competition in order to bring an unfair methods of competition claim under HRS § 480-2(e). Dissenting Opinion at 30-32. However, as we discuss above in section II-B-2, the legislative history of HRS § 481B-14 indicates that both employees and consumers may be negatively impacted when a hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so. Moreover, the legislature chose to place HRS § 481B-14 within Hawaii's consumer protection statutes and provided that it be enforced through HRS § 480-13. Therefore, while the legislative history of HRS § 481B-14 recognizes that employees are negatively impacted when a hotel or restaurant does not properly distribute the service charge, neither this recognition nor anything else in the legislative history of HRS §§ 481B-14, 481B-4, or 480-2(e) indicate that the legislature intended to eliminate the causation requirements of HRS § 480-13 **[***60]** for unfair methods of competition claims brought under HRS § 480-2(e).

This analysis is consistent with Ai, which involved debt collection practices alleged to be unfair or deceptive acts or practices in violation of Chapter 443 and a "deeming" provision similar to HRS § 481B-4. 61 Haw. at 608-10, 607 P.2d at 1307-08. That provision provided that: "[a] violation of this part by a collection agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of section 480-2." Ai, 61 Haw. at 610 n.5, 607 P.2d at 1308 n.5 (citing HRS § 443-47). This court discussed the relationship between that provision and HRS § 480-2, recognizing that:

> the legislature . . . did not leave to the judiciary the unfettered discretion to independently determine in every case brought under [§] 480-2 whether a defendant's conduct had been "unfair or deceptive" within the comprehension of the statute. The legislature instead found it desirable to predetermine that violations of HRS Chapter 443 would constitute per se "unfair or deceptive acts or practices" for the purposes of § 480-2

Id. at 616, 607 P.2d at 1311 **[***61]** (emphasis added).

Applying Ai's reasoning here, by "deeming" a violation of § 481B-14 to be an unfair method of competition, the legislature "predetermine[d]" that violations of HRS Chapter 481B would constitute per se unfair methods of competition for the purposes of § 480-2, and therefore a plaintiff with standing need not prove that conduct which violates HRS § 481B constitutes an unfair method of competition. See id. However, by so doing, the legislature did not determine that an injury suffered by "any person" as a result of a violation of chapter 481B necessarily stems from the negative effect on competition caused by the violation. In other words, the legislature was not making a determination that any person injured as a result of a violation of Chapter 481B automatically has standing to sue pursuant to HRS § 480-2 and 480-13. Instead, a private person must separately allege the nature of the competition in accordance with this court's holding in HMA.

At the time Ai was decided, HRS § 480-13 required the plaintiff to show that the suit would be in the public interest or that the defendant is a merchant. This requirement was eliminated by the 1987 amendment to HRS §§ 480-2 and **[***62]** -13. See HMA, 113 Hawai'i at 114 n.31, 148 P.3d at 1216 n.31 (citing S. Conf. Comm. Rep. No. 105, in 1987 Senate Journal, at 872). In Ai, this court **[**321]** **[*441]** held that "[s]ince plaintiffs herein have supplied allegations adequate to show that such a per se violation of [§] 480-2 has occurred, we accordingly find that the public interest has been sufficiently made out to confer standing to plaintiffs under § 480-13." Id. at 617, 607 P.2d at 1311. The dissent argues that this public interest requirement "is directly analogous to the . . . requirement that [Employees] plead the 'nature of [the] competition' inasmuch as both are aimed at addressing the anti-competitive effects of such conduct[,]" and therefore this court's holding in Ai indicates that in cases of per se violations of HRS § 480-2, a plaintiff need not allege the nature of the competition in order to assert an unfair methods of competition claim. Dissenting Opinion at 23. Amicus Curiae Rossetto similarly asserts that Ai indicates that when there is a per se violation of Hawai'i's antitrust or consumer protection laws, the plaintiff does not need to allege the nature of the competition in order to bring an unfair methods of competition **[***63]** claim under HRS § 480-2(e).

However, this argument misconstrues Ai. As discussed above, Ai merely emphasized that when the legislature "deems" a practice to be a per se unfair method of competition or unfair or deceptive act or practice within the meaning of HRS § 480-2, a plaintiff with standing to sue does not need to prove that the defendant's action actually constituted either an unfair method of competition or unfair or deceptive act or practice, and does not need to make any additional showing that the suit was in the public interest. Id. at 616, 607 P.2d at 1311. Moreover, the now-repealed public interest requirement was not "directly analogous" to the nature of the competition, as the dissent suggests. Although this court in Ai indicated the public interest requirement can be satisfied when "the unfair method employed threatens the existence of present or potential competition[,]" we also indicated that the requirement can be satisfied in circumstances where there is no such threat, including when "the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong." Ai, 61 Haw. at 614-15, 607 P.2d at 1310 (citing FTC v. Klesner, 280 U.S. 19, 28, 50 S. Ct. 1, 74 L. Ed. 138, 13 F.T.C. 581 (1929) **[***64]** (explaining that the purpose of the public interest requirement is to ensure that a suit brought by the FTC under the FTCA is truly in the interest of the public as a whole, not merely private individuals); see Ailetcher v. Beneficial Finance Co., 2 Haw. App. 301, 306, 632 P.2d 1071, 1076 (1981) (finding the public interest requirement was satisfied in an unfair or deceptive practices case because, even though "the action of the [defendant finance company was not] such as to constitute an unfair method of competition, a restraint of trade or a monopolization of an area of commerce[,]" there was "flagrant oppression of the weak by the strong"), abrogated on other grounds by Hac v. Univ. of Hawaii, 102 Hawai'i 92, 105-06, 73 P.3d 46, 59-60 (2003); T.W. Electrical Serv., Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 636 (9th Cir. 1987) ("Under Hawai'i law, an unfair act is committed, and the public interest requirement is met, whenever the unfair method is being employed under circumstances which involved flagrant oppression of the weak by the strong."). Therefore, contrary to the dissent's and Amicus Curiae Rossetto's assertions, this court's holding in Ai does not stand **[***65]** for the proposition that where a statute deems an action to be a per se violation of Hawai'i's antitrust or consumer protection laws, the plaintiff is relieved of alleging the nature of the competition in order to have standing to sue under *HRS § 480-2(e)*.

Amicus Curiae Rossetto also cites to *Flores v. Rawlings Co., LLC, 117 Hawai'i 153, 177 P.3d 341 (2008)*, for the proposition that Employees do not need to allege the nature of competition because *HRS § 481B-4* "deems" a violation of *HRS § 481B-14* to be an unfair method of competition. However, Flores does not support this argument.

The plaintiffs in Flores were members of HMSA's benefit plans and brought an action against a company (Rawlings) that had contracted with HMSA to provide subrogation and "claims recovery services." *Id. at 155-57, 177 P.3d at 343-45*. The plaintiffs alleged that they were injured by Rawlings' failure to register as a debt collection agency as required by *HRS § 443B-3(a)* (1993), which, pursuant to *HRS § 443B-20*, would constitute **[**322]** **[*442]** an unfair or deceptive act or practice within the meaning of *HRS § 480-2*. [28] Id. Similar to HRS *§ 481B-4, HRS § 443B-20 (1993)* provides that "[a] violation of this chapter by a collection **[***66]** agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of *section 480-2*." *Id. at 162, 177 P.3d at 350*. Because the plaintiffs alleged that Rawlings' actions constituted unfair or deceptive acts or practices rather than unfair methods of competition, *HRS § 480-13(b)* was applicable, requiring plaintiffs to show that they were "consumers" who were "injured" within the meaning of *§ 480-13(b)* and *HRS § 480-1*. [29] Id. This court held that the plaintiffs were "consumers" without having to prove that they "purchased" something from the defendant. *Id. at 162-66, 177 P.3d at 350-54*.

This **[***67]** court recognized that "[b]y deeming violations of HRS chapter 443B an unfair or deceptive act or practice for the purposes of *HRS § 480-2*, it is evident that the legislature wished to have chapter 443B be enforceable in the same manner as other unfair trade practices under chapter 480[,]" i.e., enforceable by individual consumers under *HRS § 480-2(d)*. *Id. at 164, 177 P.3d at 352*. If private enforcement was limited to those who purchased from a collection agency, then as a practical matter consumers would not be able to enforce the statute and enforcement "would be left entirely in the hands of the state[,]" because consumers do not typically purchase goods or services from collection agencies. Id. This would be "an inconsistent, if not absurd, result that the legislature would not have intended." Id. Therefore, this court held that:

> Rather, in the context of consumer debt, the determination of whether the individual seeking suit is a "consumer" should rest on whether the underlying transaction which gave rise to the obligation was for a good or service that is "primarily for personal, family, or household purposes," *HRS § 480-1*. This reading is supported by the definition of "debt" **[***68]** in *HRS § 443B-1*, as well as the fact that the statutory structure of HRS chapter 480 does not require that one be a "consumer" of the defendant's but merely a "consumer."

Id. at 164, 177 P.3d at 352 (emphasis in original).

Although this court held that the plaintiffs had established standing as consumers, we further concluded that the plaintiffs failed to demonstrate that they were injured as a result of Rawlings' conduct because, although Rawlings had failed to register as required by *HRS § 443B-3*, the underlying debt was nevertheless valid. *Id. at 169, 177 P.3d at 357*. We observed that "Rawlings's conduct in violation of *HRS § 443B-3*, while injurious to the state's interest in regulation of collection agencies, did not directly harm Plaintiffs." *Id. at 171, 177 P.3d at 359*.

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[28] *HRS § 443B-3(a) (1993)* provides:

> No collection agency shall collect or attempt to collect any money or any other forms of indebtedness alleged to be due and owing from any person who registering under this chapter.

[29] *HRS § 480-1 (1993)* defines "consumer" as: "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment." *Flores, 117 Hawai'i at 162-63, 177 P.3d at 350-51*.

This court's analysis in Flores addressed alleged unfair or deceptive acts or practices in the area of consumer debt collection and did not extend to cases involving alleged unfair methods of competition. Unlike the present case, this court in Flores was construing HRS § 480-13(b), which provides the cause of action for unfair or deceptive acts or practices. Thus, Flores cannot be construed to mean that unfair methods **[***69]** of competition claims may be brought under HRS § 480-2(e) and § 480-13(a) without any reference to the effect on competition simply because HRS § 481B-4 "deems" a violation of § 481B-14 to be an unfair method of competition. [30] In any event, even though Flores **[**323]** **[*443]** involved a deeming provision similar to that here, this court acknowledged that the requirements imposed by HRS § 480-13 were nonetheless applicable. See Flores, 117 Hawai'i at 162, 177 P.3d at 350 ("In order for Rawlings's failure to register to be actionable by private litigants, the threshold requirements of HRS § 480-13 must be satisfied.").

Therefore, although Employees allege that they have suffered an injury resulting from Four Seasons' violation of § 481B-14, which is deemed to be an unfair method of competition by § 481B-4, Employees are additionally required to allege the "nature of the competition." HMA, 113 Hawai'i at 113, 148 P.3d at 1215. Employees have made no such allegation, and therefore have not satisfied the requirements to pursue a claim under HRS § 480-2(e). [31]

We note that this result is consistent with the principles of causation that have been developed in the federal antitrust context. In both Robert's Hawai'i and HMA, this court recognized that "federal case law has interpreted the 'injury to business or property' language **[***72]** of section 4 of the Clayton Act as a causation requirement, requiring a showing of 'antitrust injury.'" Robert's Hawai'i, 91 Hawai'i at 254 n.31, 982 P.2d at 883 n.31; HMA, 113 Hawai'i at 114 n.30, 148 P.3d at 1216 n.30 (quoting Robert's Hawai'i, 91 Hawai'i at 254 n.31, 982 P.2d at 883 n.31). In Robert's Hawai'i, this court further noted that the antitrust injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 91 Hawai'i at 254 n.31, 982 P.2d at 883 n.31 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)).

When examining HRS § 480-2, this court has recognized that "[t]he genesis of Hawai'i's consumer protection statute is in federal ***antitrust law***," with a shared "concern for the preservation of unrestrained economic competition and free trade." Cieri v. Leticia Query Realty, Inc., 80 Haw. 54, 59, 905 P.2d 29, 34 (1995). HRS § 480-2(a), which declares that unfair methods of competition and unfair or deceptive acts or practices are unlawful, is "a

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[30] Amicus Curiae Rossetto additionally cites to Fuller v. Pacific Medical Collections, Inc., 78 Hawai'i 213, 891 P.2d 300 (App. 1995), in which the Intermediate Court of Appeals held that although the Director of the Department of Commerce and Consumer Affairs was designated to enforce HRS chapter 443, a consumer could maintain an action under HRS § 480-2(d) for an unfair or deceptive act or practice claim because HRS § 443B-20 provided that violations of chapter 443 constitute unfair or deceptive acts or practices. Id. at 218, 891 P.2d at 305. However, because Fuller involved only claims **[***70]** of unfair or deceptive acts or practices pursuant to HRS § 480-2(d), it does not address the distinct issue of whether Employees must allege the nature of the competition in order to maintain an unfair methods of competition claim under HRS § 480-2(e).

[31] Without expressing an opinion regarding its sufficiency, we note that in their Reply Brief, Employees described how they would characterize the "nature of the competition" if they were required to allege it:

> [E]ven if there were some requirement that the unfair method of competition be asserted, the remedy would not be dismissal, but at worst, to allow the plaintiffs to allege such "unfair method". Indeed, it is obvious that if one hotel obeys the laws and remits the entire service charge to the employees **[***71]** serving at the banquet and another hotel/competitor skims the service charge and keeps 4-5% for itself without disclosure, the hotel acting unlawfully can undercut its stated price for the banquet knowing that it will be receiving improper gains from the misleading description of its service charge. This is clearly a

Amicus Curiae Rossetto similarly states that:

> In this case, hotels and restaurants that do not inform customers that they are keeping the imposed service charge and not paying it to employees gain a clear competitive advantage because they have deceived their patrons. They are able to "reduce" the published cost of their food and beverages in order to entice patronage away from their honest competitors who either pay out the service charge to employees or frankly inform patrons that management is keeping all or a part of the service charge (thereby telling patrons that they will still have to tip employees).

virtual counterpart of [§] 5(a)(1) of the Federal Trade Commission Act [FTCA]." *Island Tobacco, 63 Haw. at 300, 627 P.2d at 268*. ***HN16***[] *HRS § 480-2(b)* **[***73]** declares that "[i]n construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission [FTC] and the federal courts interpreting section 5(a)(1) of the [FTCA] . . . ." However, *section 480-2* "differs from section 5 of the FTCA in one essential aspect - enforcement. Section 5 of the FTCA contains no private remedy, rather enforcement of its provisions is vested in the [FTC]." *HMA, 113 Hawai'i at 109, 148* ***[**324]*** ***[*444]*** *P.3d at 1211* (quoting *Star Markets, Ltd. v. Texaco, Inc., 945 F. Supp. 1344, 1346 (D. Haw. 1996)* and citing *Robert's Hawai'i, 91 Hawai'i at 249, 982 P.2d at 878*) (internal parenthetical and quotation marks omitted). Therefore, federal interpretations of the FTCA, although helpful in determining whether a defendant's actions constitute an unfair or deceptive act or practice or an unfair method of competition, are of limited relevance in interpreting the standing requirements applicable to the private right of action provided by *HRS § 480-2(e)*. [32]

HN17[] *HRS § 480-13(a)* tracks the language of section 4 of the Clayton Act, which provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor…., and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (emphasis added).

Additionally, ***HN18***[] *HRS § 480-3* provides that "[chapter 480] shall be construed in accordance with judicial interpretations of similar federal antitrust statutes." Pursuant to this instruction, this court **[***75]** has indicated that it is appropriate to look to "the guidance of similar federal antitrust statutes as permitted in *HRS § 480-3*." *Robert's Hawai'i, 91 Hawai'i at 251, 982 P.2d at 880*. [33]

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[32] When interpreting *HRS § 480-2(e)*, Amicus Curiae Rossetto urges this court to only consider federal interpretations of section 5(a)(1) of the FTCA **[***74]** pursuant to *HRS § 480-2(b)*, and not interpretations of section 4 of the Clayton Act. Specifically, Amicus Curie Rossetto argues that section 5(a)(1) of the FTCA has been interpreted in *FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)*, to empower the FTC to define unfair practices to include practices without anti-competitive effects. However, this argument is misplaced, because as discussed above, interpretations of section 5(a)(1) of the FTCA are of limited relevance in analyzing standing requirements for *HRS § 480-2(e)* since the FTCA does not have a comparable private right of action. See supra, note 8.

[33] Four Seasons argues that because *§ 480-13(a)* is similar to section 4 of the Clayton Act, this court should examine relevant federal judicial interpretations of that statute pursuant to *HRS § 480-3*, citing, for example, to *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (hereinafter "AGC"). In AGC, the Supreme Court discussed the concept of standing under section 4 of the Clayton Act to sue for violations of federal ***antitrust law***, and noted that standing in the antitrust context is more limited than the broad "any person" language of the statute would suggest. *Id. at 534-35*.

The Supreme Court identified a number of factors to assist courts in determining whether a plaintiff has established federal antitrust standing. The first factor, which was described by the Court in AGC as the "nature of the plaintiff's alleged injury[,]" and which considered whether the injury is the "type that Congress sought to redress," *AGC, 459 U.S. at 538* (citation **[***76]** omitted), has since been referred to as "antitrust injury," meaning an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful[,]" see, e.g., *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001)*. The other factors identified by the Court in AGC are: the "directness or indirectness of the asserted injury," the "speculative measure of harm," the "risk of duplicate recoveries" or "danger of complex apportionment of damages" and "the existence of more direct victims of the alleged [violation]." *AGC, 459 U.S. at 538-545*; see also *Atlantic Richfield, 495 U.S. at 334*; *American Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1054 (9th Cir. 1999)*.

Other than recognizing that federal courts have consistently applied the concept of antitrust injury when determining if a plaintiff has federal antitrust standing, this court has not expressly applied the AGC analysis to unfair methods of competition claims arising under HRS chapter 480. *Robert's Hawai'i, 91 Hawai'i at 254 n.31, 982 P.2d at 883 n.31*; *HMA, 113 Hawai'i at 114 n.30,* The Supreme Court first articulated the concept of "antitrust injury" in *Brunswick. 429 U.S. at 489*. Several bowling centers brought suit, challenging the acquisition of several of their competitors by Brunswick Corporation as creating a monopoly in violation of section 7 of the Clayton Act, *15 U.S.C. § 18*, [34] and seeking treble **[**325]** **[*445]** damages under section 4 of the Clayton Act for profits they would have received had the acquired centers gone out of business. *429 U.S. at 480-81*. The plaintiffs "attempted to show that had [the defendant] allowed the defaulting centers to close, [the plaintiffs'] profits would have increased." *Id. at 481*. The Court noted that plaintiffs were not complaining that Brunswick's actions had reduced competition, but rather preserved it and therefore deprived plaintiffs of increased concentration. *Id. at 488*. Accordingly, the Court found that the plaintiffs' injury was not of "'the **[***78]** type that the statute was intended to forestall.'" *Id. at 487-88* (citation omitted).

The Court examined the underlying purpose of section 7, noting that although "[e]very merger . . . has the potential for producing economic readjustments that adversely affect some persons . . . Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects." *Id. at 487* (emphasis added). Therefore, the Court held that ***HN19***[] in order to recover treble damages under section 4 of the Clayton Act based on section 7 violations, "[p]laintiffs must prove antitrust injury, which . . . should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id. at 489*.

Additionally, the Supreme Court has clearly established that even where a plaintiff alleges a per se violation of the antitrust laws, the plaintiff must still allege and prove antitrust injury by alleging the nature of the competition in order to ensure that the injury results **[***79]** from a competition-reducing aspect of the defendant's behavior. For example, in *Atlantic Richfield Co. v. USA Petroleum Co.,* [35] *495 U.S. 328, 341, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*, the Court "reject[ed] respondent's suggestion that no antitrust injury need be shown where a per se violation is involved." "The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule . . . ." *Id. at 344* (emphasis in original); see also *Glen Holly Entm't, Inc. v. Tektronix, Inc., 343 F.3d 1000, 1008 (9th Cir. 2003)* ("If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal per se.") (citation omitted); *Pace Elecs., Inc. v. Canon Computer Sys., 213 F.3d 118, 123-24 (3d. Cir. 2000)* (in order to show standing for a per se antitrust violation, the plaintiff need not allege that its injury actually "produced an anticompetitive result," but instead must allege that its injury "resulted from the anticompetitive aspect of the challenged conduct").

The Ninth Circuit reviewed the purpose of requiring plaintiffs to allege loss stemming from an anticompetitive effect of the defendant's actions in Glen Holly. Two manufacturers of film editing equipment entered into an agreement to jointly market certain products, with the agreement also prohibiting one of the manufacturers from selling the products to certain customers, such as the **[***81]** plaintiff. *Id. at 1005-06*. The plaintiff alleged that this joint venture caused the plaintiff to lose its customers and was "purposefully anti-competitive" in violation of sections 1 and 2 of the Sherman Act and California ***antitrust law*** because it created a monopoly and destroyed competition in the relevant market. *Id. at 1006-07*. The court recognized that "[t]he central purpose of the antitrust laws, state and

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148 P.3d at 1216 n.30. Since **[***77]** we have decided, based on our analysis of *HRS § 480-13(a)* and Hawai'i caselaw, that Employees must allege the nature of the competition, we do not need to consider the applicability of the *AGC* approach in order to answer the certified question.

[34] Section 7 of the Clayton Act proscribes mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly." *Brunswick, 429 U.S. at 485*.

[35] It **[***80]** is important to note that Atlantic Richfield involved a judicially recognized per se antitrust violation, whereas the per se violation of Hawai'i ***antitrust law*** in this case is established by HRS § 481B-4. However, this distinction has no bearing on the underlying analysis for the antitrust injury requirement in the circumstances here, where we have concluded that the legislature did not intend to modify the causation requirements imposed by HRS § 480-13. Thus, it makes no difference whether the courts or the legislature have "deemed" certain action to be anti-competitive, because the purpose of the antitrust injury requirement is to ensure that the plaintiff's alleged injury stems from this anti-competitive aspect, rather than some pro-competitive or neutral effect of the defendant's antitrust violation.

federal, is to preserve competition. It is competition . . . that these **[**326] [*446]** statutes recognize as vital to the public interest." *Id. at 1010* (quoting *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000))* (emphasis added). The court then held that the plaintiff sufficiently alleged that the defendants' agreement to "unlawful[ly] remove[] a competitive product from the market" was the type of conduct the antitrust laws were designed to prevent and that plaintiff's "allegation of 'loss stems from a competition-reducing aspect or effect of [defendants'] behavior,'" thus satisfying the antitrust injury requirement. *Id. at 1014* (citation omitted; emphasis added).

This court has similarly recognized that Hawaii's consumer protection laws are also intended to preserve **[***82]** competition. For instance, in Cieri, which involved claims that the vendors and broker involved in the sale of a residence engaged in unfair or deceptive practices in violation of *HRS § 480-2* when they failed to disclose a plumbing problem, this court discussed the underlying purpose of Hawai'i antitrust and consumer protection laws:

> The genesis of Hawai'i's consumer protection statute is in federal ***antitrust law***. Although the federal arsenal of antitrust laws is comprised of several differently worded statutes of varying scope that have generated volumes of case law, all of the acts have a common focus on trade, commerce, and business, and all share a concern for the preservation of unrestrained economic competition and free trade.

80 Hawai'i at 59, 905 P.2d at 34 (emphasis added).

"Embodied in Hawai'i's virtually word-for-word adoption of the prohibitions contained in the Sherman, Clayton, and FTC acts is the federal antitrust laws' focus on commerce, the economy, and competition." *Id. at 60, 905 P.2d at 35*. This court also recognized that *HRS § 480-13* similarly reflects this focus on preserving competition. *Id. at 61, 905 P.2d at 36*.

Thus, ***HN20***[] Hawaii's requirement that a plaintiff allege **[***83]** the "nature of the competition" in his or her complaint in order to maintain an action for unfair methods of competition pursuant to *HRS § 480-2(e)*, *HMA, 113 Hawai'i at 113, 148 P.3d at 1215*, is consistent with the federal requirement that a plaintiff allege that his or her injury "reflect[s] the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation," in order to have standing pursuant to section 4 of the Clayton Act. *Brunswick, 429 U.S. at 489*. Furthermore, this requirement reflects the underlying purpose of both the federal and Hawai'i antitrust laws, which is to preserve unrestrained competition.

III. CONCLUSION

For the foregoing reasons, this court answers the certified question as follows:

Employees are "any persons" within the meaning of *HRS §§ 480-1* and *480-2(e)* and are within the category of plaintiffs who have standing to bring a claim under *HRS § 480-2(e)* for a violation of *HRS § 481B-14*.

However, based on the allegations contained in Employees' Amended Complaint, Employees have not sufficiently alleged the "nature of the competition" to bring a claim for damages against Four Seasons under *HRS §§ 480-2(e)* and *480-13(a)* for **[***84]** a violation of *HRS § 481B-14*.

Dissent by: ACOBA

Dissent

DISSENTING OPINION BY ACOBA, J.

I respectfully dissent.

The certified question presented is whether

> [w]here plaintiff banquet server employees allege that their employer violated the notice provisions of [Hawai'i Revised Statutes (HRS)] § 481B-14 by not clearly disclosing to purchasers that a portion of a service charge was used to pay expenses other than wages and tips of employees, and where the plaintiff banquet server employees do not plead the existence of competition or an effect thereon, do the plaintiff banquet server employees have standing under [HRS] § 480-2(e) to bring a claim for damages against their employer?

(Emphasis added.)

[327]** **[*447]** As noted by Plaintiffs-Appellants, [1] the certified question arose as a result of a motion to dismiss filed by Defendants-Appellees Four Seasons Hotel Limited, dba Four Seasons Resort, Maui and Four Seasons Resort, Hualalai, and MSD Capital, Inc. [collectively, Defendants]. Hence, the standard pertaining to such motions applies. In this jurisdiction, a circuit court's ruling on a motion to dismiss is reviewed de novo. *Wright v. Home Depot U.S.A., Inc., 111 Hawai'i 401, 406-07, 142 P.3d 265, 270-71 (2006)*. **[***85]** In that review,

> [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. [This court] must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing a circuit court's order dismissing a complaint[, this court's] consideration is strictly limited to the allegations of the complaint, and [this court] must deem those allegations to be true.

In re Estate of Rogers, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003) (citations, brackets, and ellipsis omitted) (emphasis in original). [2] In my view, it is not beyond doubt that Plaintiffs can establish no set of facts under which relief could be granted. Accordingly, Plaintiffs' amended complaint should not be dismissed.

I.

HRS § 481B-14 (2008 Repl.) states:

> **Hotel or restaurant service charge; disposition.** Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wage and tips of employees.

(Boldfaced font in original.) (Emphasis added.) In conjunction with HRS *§ 481B-14, HRS § 481B-4 (2008 Repl.)*, entitled **[***87]** "Remedies," states that "[a]ny person who violates this chapter [(HRS 481B)] shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of *section 480-2*." (Emphases added.) In that regard, *HRS § 480-2(a)* (2008 Repl.) states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." Further, *HRS § 480-2(e) (2008 Repl.)* provides that "[a]ny person may bring an action

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[1] Plaintiffs-Appellants are Daryl Dean Davis, Mark Apana, Elizabeth Valdez Kyne, Earl Tanaka, Thomas Perryman, and Deborah Scarfone, on behalf of themselves and all others similarly situated, and are hereinafter **[***86]** referred to collectively, as "Plaintiffs."

[2] The federal standard of review is the same.

> We review de novo the district court's decision to grant a motion to dismiss pursuant to [*Federal Rules of Civil Procedure Rule] 12(b)(6)*. *ASW v. Oregon, 424 F.3d 970, 974 (9th Cir. 2005)*. We accept as true all well-pleaded facts in the complaint and construe them in the light most favorable to the nonmoving party. Id. A claim should be dismissed only if it appears beyond doubt that the plaintiff can establish no set of facts under which relief could be granted. *Pacheco v. United States, 220 F.3d 1126, 1129 (9th Cir. 2000)*.

Watson v. Weeks, 436 F.3d 1152, 1157 (9th Cir. 2006).

based on unfair methods of competition declared unlawful by this section." HRS § 480-1 (2008 Repl.) provides in part that "'[p]erson' or 'persons' includes individuals[.]"

The amended complaint states in relevant part that:

> 4. For banquets, events, meetings and in other instances, the defendants add a preset charge to customers' bills for food and beverage provided at the hotels.
>
> 5. However, the defendants do not remit the total proceeds of the service charge as tips income to the employees who serve the food and beverages.
>
> 6. Instead, the defendants have a policy and practice of retaining for themselves a portion of these service charges (or using **[***88]** it to pay managers or other non-tipped **[**328]** **[*448]** employees who do not serve food and beverages).
>
> 7. The defendants do not disclose to the hotel's customers that the service charges are not remitted in full to the employees who serve the food and beverages.
> 8. For this reason, customers are misled into believing that the entire service charge imposed by the defendants is being distributed to the employees who served them food or beverage when, in fact, a smaller percentage is being remitted to the servers. . . .
> . . . .
>
> 9. . . . The class to be certified includes all food and beverage servers who . . . have served food or beverage at meetings, events, banquets, room service or other such instances where the defendants have added a service charge to the bill for food and beverage service, but have not remitted the entire amount of this service charge to the employees serving the food and beverage. . . .
> . . . .
>
> The action of the defendants as set forth above are in violation of [HRS §] 481B-14. Pursuant to Section 481B-4, such violation constitutes an unfair method of competition or unfair and deceptive act or practice within the meaning of Section 480-2. . . .
> . . . .
>
> WHEREFORE, the plaintiffs request **[***89]** this Honorable Court to . . . (2) grant the plaintiffs make whole damage compensating them for the loss of service charge income which they are entitled to receive; . . . and (4) award the plaintiffs any other relief to which they are entitled.

(Emphases added.)

II.

HRS § 481B-4 is clear and unambiguous. "Under the canons of statutory construction, 'where the language of the law in question is plain and unambiguous courts must give effect to the law according to its plain and obvious meaning.'" County of Hawai'i v. C & J Coupe Family Ltd. P'ship, 119 Hawai'i 352, 362, 198 P.3d 615, 625 (2008) (quoting Mikelson v. United Servs. Auto. Ass'n, 108 Hawai'i 358, 360, 120 P.3d 257, 259 (2005)). Thus, "[i]t is well-settled in this jurisdiction that courts turn to legislative history as an interpretive tool only where a statute is unclear or ambiguous." T-Mobile USA, Inc. v. County of Hawaii Planning Comm'n, 106 Hawai'i 343, 352, 104 P.3d 930, 939 (2005) (citing State v. Mueller, 102 Hawai'i 391, 394, 76 P.3d 943, 946 (2003)).

Based on the plain language of HRS § 481B-4, any violation of 481B-14 is a violation of section 480-2(a). The term "deemed" is not defined in HRS chapter 481B. Accordingly, **[***90]** "[t]his court has said that we may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms not statutorily defined." Rapozo v. Better Hearing of Hawaii, LLC, 119 Hawai'i 483, 493, 199 P.3d 72, 82 (2008) (quoting Leslie v. Bd. of Appeals of County of Hawaii, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006)) (brackets omitted).

Applying that principle, the term "deem" means

1. To treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have <<although the document was not in fact signed until April 21, it explicitly states that it must be deemed to have been signed on April 14>. 2. To consider, think, or judge <<she deemed it necessary>.

> "Deem" has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what it is[.]

Black's Law Dictionary 477-78 (8th ed. 2004) (emphasis added). Because it is "deemed," i.e., established, that a violation of HRS chapter 481B and, hence, of *HRS § 481B-14*, is an "unfair method of competition [(UMOC)] and unfair **[***91]** or deceptive act or practice [(UDAP)]," *HRS § 481B-4* renders a violation of *HRS § 481B-14*, in and of itself, both a UDAP and UMOC. To construe the statute as requiring further allegations or proof of a UDAP or UMOC in addition to the violation would render the term **[**329]** **[*449]** "deemed" superfluous. "It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute." *Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984)* (citing *In re Ainoa, 60 Haw. 487, 490, 591 P.2d 607, 609 (1979))*; *Lopez v. Bd. of Trustees, 66 Haw. 127, 657 P.2d 1040 (1983))*. In order to give full effect to *HRS § 481B-4*, the phrase "shall be deemed" must be construed as establishing a UMOC violation. The drafters of *HRS § 481B-4* did not insert conditional language or provide any additional limitations on access to the remedies in *HRS § 480-13 (2008 Repl.)* after a "deemed" UMOC violation has been established. Rather, the plain language of **[***92]** the statute demonstrates an intent to allow those who have suffered a violation under *HRS § 481B-14* to bring an action to enforce their rights under *HRS § 480-13*. The majority's construction of *HRS § 481B-4* deprives the statute of its force and undermines the legislature's manifest intent in enacting the law.

Consequently, based on the plain language of *HRS § 481B-4*, the amended complaint need not allege any fact to establish Defendants' liability under *HRS § 481B-14*, other than a violation. In the amended complaint, Plaintiffs have alleged that Defendants have collected service charges relating to the sale of food or beverages but did not distribute the entire service charges directly to their employees and did not disclose this fact to the purchasers. Taking the allegations in the amended complaint as true, as this court is required to do, Plaintiffs have alleged a manifest violation of *HRS § 481B-14*. [3]

III.

A.

As to other matters raised by the parties, *HRS § 480-2* explains who may bring an action for engaging in an unfair or deceptive act or practice or unfair method of competition. In relevant part *HRS § 480-2* states:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.
>
> . . . .
>
> (d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.
>
> (e) Any person may bring an action based on unfair methods of competition declared unlawful by this section.

(Emphases added.) *HRS § 481B-4* allows a violation of *HRS § 481B-14* to be brought as a UMOC action and a UDAP action. As a result, under *HRS 480-2(d)*, a suit for the failure to remit tips may be brought by a consumer, the attorney general, or the director of the Office of Consumer Affairs as a UDAP. In contrast, any "person" is entitled to

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[3] It should be noted that, at oral argument, Defendants conceded that portions of the service charge were not distributed to the servers as tip income and that notice of this practice was not given to the customers to whom the service charge was applied. Defendants also asserted that **[***93]** this practice has since been changed, and the required *HRS § 481B-14* notice given.

bring a UMOC action. As noted before, "person," as defined in HRS § 480-1 includes "individuals[.]" Plaintiffs **[***94]** concede that they cannot bring a UDAP action because they are not "consumers" under HRS 480-2(d). However, Plaintiffs may bring an action against Defendants claiming UMOC inasmuch as employees individually do qualify as "any person" under HRS § 480-2. Thus, Plaintiffs' suit is correctly premised on their status as "individuals" allowed to bring suit as "persons" for a UMOC. HRS § 480-1.

B.

HRS § 480-13, which applies to HRS chapter 480, allows those harmed by either a UDAP or a UMOC to bring an action for damages and to enjoin the illegal practice. HRS 480-13 states in relevant part:

> (a) Except as provided in subsections (b) and (c), any person who is injured in the person's business or property by reason of **[**330]** **[*450]** anything forbidden or declared unlawful by this chapter:
>
> (1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $ 1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit . . . and
>
> (2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded **[***95]** reasonable attorney's fees together with the costs of suit.

(Emphasis added.) In the amended complaint, Plaintiffs have alleged that Defendants have collected service charges relating to the sale of food or beverages but did not distribute the entire service charges directly to its employees and did not disclose this fact to the purchasers. Plaintiffs' "Wherefore" clause in the amended complaint alleges that they did not receive the full amount of the service charge levied on purchasers. Taking the allegations as true, the language in HRS § 480-13 permitting a suit based on injuries to "business or property" manifestly includes the economic loss of withheld tip income. Because the disclosure was not made, the tip income did not belong to Defendants. If Plaintiffs are not recompensed as indicated under the statute, a windfall would accrue to Defendants by virtue of a violation of HRS § 481B-14. [4]

C.

The statutes also mandate that the courts look to federal case law when interpreting HRS chapter 480. HRS § 480-3 (2008 Repl.), entitled **[***96]** "Interpretation," provides that "[t]his chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes, except that lawsuits by indirect purchasers may be brought as provided in this chapter." HRS § 480-2(b) states that

> [i]n construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission [(FTC)] and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act [(FTCA)] (15 U.S.C. 45(a)(1)), as from time to time amended.

Moreover, HRS § 480-13 was modeled after section 4 of the Clayton Act, 15 U.S.C. § 15(a), and, pursuant to HRS § 480-3, must be construed in light of federal decisions. However, HRS § 481B-14 contains no federal analogue and, as the statutory language indicates, was not enacted simply to prevent anti-competitive conduct that affects consumers and businesses, but was specifically intended to address the direct injuries to the "business and property" of employees such as Plaintiffs, caused by withholding service charges. See discussion infra. The enforcement provisions in HRS § 480-13 must also **[***97]** be construed in light of the purpose of HRS § 481B-14. Thus, federal law is not a bar to Plaintiffs' action and a plain language construction of HRS § 481B-14 does not contravene HRS § 480-2(b) or HRS § 480-3.

D.

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[4] As noted at oral argument, "consumers" and other "persons" may also sue, and an equitable apportionment of damages may be required in any particular case.

Defendants argue that "[i]f [Plaintiffs] are correct that *[HRS] § 481B-14* was intended to create a wage claim for employees, it is strikingly - if not unconstitutionally - vague." [5] Defendants assert that the statute **[**331]** **[*451]** "does not specify which employees should be paid the service charge as tip income." In other words, Defendants argue "the plain language of the statute allows the employer to pick any employee to receive the monies [derived from the service charge] in any amount."

However, *HRS § 481B-14* is not vague. The text mandates that the hotel or restaurant "shall distribute the service charge directly to its employees as tip income[.]" *HRS § 481B-14* (emphasis added). Although "tip" or "tip income" is not defined in HRS chapter 481B, the dictionary definition in this context is "a gift or a usu[ally] small **[***99]** sum of money tendered in payment or often in excess of prescribed or suitable payment for a service performed or anticipated." Webster's Third New Int'l Dictionary 2398 (1961).

"[T]o constitute a deprivation of due process, [the civil statute] must be 'so vague and indefinite as really to be no rule or standard at all.'" *Paul v. Dep't of Transp., State of Haw., 115 Hawai'i 416, 431, 168 P.3d 546, 561 (2007)* (quoting *A.B. Small v. Am. Sugar Refining, 267 U.S. 233, 239, 45 S. Ct. 295, 69 L. Ed. 589 (1925))*. "To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible." Id. (citation omitted). Inasmuch as the tip is a gratuity given for service to those who perform such service and the service charge is to be distributed as tip income, it is manifest that the "service charge for the sale of food or beverage services," *HRS § 481B-14*, is to be given to the employees who provided that service. Hence, the term "employee" cannot be reasonably construed as "allow[ing] the employer to pick any employee to receive the monies in any amount," as Defendants argue. Defendants have not demonstrated a sufficient ambiguity or potential for misunderstanding **[***100]** inherent in the term "employee" as it relates to the term "tip income." See also *Tauese v. State, Dept. of Labor & Indus. Relations, 113 Hawai'i 1, 28 n.27, 147 P.3d 785, 812 n.27 (2006)* ("Because this term is easily definable and allows a person of ordinary intelligence to obtain an adequate description of the prohibited conduct, the statute is not unconstitutionally vague."). Consequently, this argument is unpersuasive.

E.

Briefly summarized, Plaintiffs have alleged in their amended complaint that Defendants have violated *HRS § 481B-14*. *HRS § 481B-4* permits all violations in chapter 481B to be brought as a UDAP and a UMOC pursuant to *HRS § 480-2(d)* and *(e)*. Plaintiffs do not qualify as "consumers" to bring a UDAP action under *480-2(d)*, but do qualify individually as "any person" under *HRS § 480-2(e)*, permitting them to bring a UMOC action against Defendants, provided they allege an injury to their business or property pursuant to *HRS § 480-13*. Plaintiffs have satisfied *HRS § 480-13*, which encompasses HRS chapter 480 and permits suits for money damages resulting from UMOC, by adequately pleading an economic injury. [6]

IV.

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[5] The majority states that it declines to address this matter because it "does not relate to the issue of whether or not employees have standing under *HRS § 480-2(e)* to bring a claim for damages for a violation of *HRS § 481B-14*, but instead relates to the merits of such a claim." Majority opinion at 11 n.13. However, the certified question states that "[t]he [c]ourt's phrasing of the question should not restrict the [Hawai'i Supreme Court's] consideration of the problems and issues involved." Certified question **[***98]** at 5 (citing *Allstate Ins. Co. v. Alamo Rent-A-Car, Inc., 137 F.3d 634, 637 (9th Cir. 1998)*. Moreover, this court is not required to limit itself to the question certified. See *Richardson v. City & County of Honolulu, 76 Hawai'i 46, 53, 868 P.2d 1193, 1200 (1994)* (addressing the issue of whether the City of Honolulu had authority to enact an ordinance despite the fact that the question was "not expressly placed in issue by the federal court's certified question"). Also, whether Plaintiffs have "standing" in this case is substantially related to whether they are included in the category of employees described in *HRS § 481B-14*, a proposition Defendants argue is constitutionally barred. Finally, the constitutionality of the statute as disputed between the parties is obviously germane to the viability of the proceeding in federal court. Thus, it is addressed.

[6] Plaintiffs argue that they believe if the nature of the competition **[***101]** must be pled, they can amend their complaint. However, that would not resolve the case law in this jurisdiction with respect to the application of the term "deemed" in *HRS § 481B-4*.

However, the majority requires that Plaintiffs allege "the nature of the competition" before they may bring a UMOC action for a violation of *HRS § 481B-14* and, therefore, concludes that the amended complaint must be dismissed. The majority bases this additional requirement on four grounds: (1) the application of *HRS § 480-13*; (2) its interpretation of *Hawaii Medical Ass'n v. Hawaii Medical Service Ass'n, 113 Hawai'i 77, 148 P.3d 1179 (2006)* [hereinafter, "HMA"] and **[**332]** **[*452]** certain other Hawai'i cases, (3) the legislative history of *HRS § 481B-14*, and (4) federal cases addressing federal ***antitrust law*** provisions.

A.

With respect to the first ground, the majority contends that "[t]he requirement that the plaintiff allege the 'nature of the competition' in [a UMOC] claim is distinct from the requirement that a defendant's conduct constituted [a UMOC]." Majority opinion at 38. According to the majority, the necessity that Plaintiffs plead a UMOC "stems from *HRS § 480-2(a)*, which provides that" UMOCs are unlawful. Id. **[***102]** The majority maintains that a plaintiff must also demonstrate that harm is "a result of actions of the defendant that negatively affect competition [] derived from *HRS § 480-13(a)*'s language that 'any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter . . . [m]ay sue for damages[.]" Id. at 39 (emphasis in original). The majority asserts that Plaintiffs have not met this burden.

To the contrary, Plaintiffs have met the requirements that they plead both a UMOC and an injury "by reason of anything forbidden or declared unlawful by" HRS chapter 480. Plaintiffs have pled a UMOC in alleging that Defendants violated *HRS § 481B-14* by withholding monies accrued from the service charge without notifying customers of that fact. The failure to distribute the service charge is unlawful inasmuch *HRS § 481B-4* "deems" it a UMOC in violation of *HRS § 480-2(e)*. Thus, Plaintiffs have alleged that Defendants' conduct constituted a UMOC.

Plaintiffs have also pled a resulting injury to "business or property by reason of" actions declared unlawful by HRS chapter 480. As stated previously, *HRS 481B-4* specifically "deems" Defendants' **[***103]** alleged conduct "an unfair method of competition . . . in the conduct of any trade or commerce within the meaning of *section 480-2*." (Emphasis added.) In paragraphs 5, 6, 9 and in the "Wherefore" clause of the amended complaint, Plaintiffs have alleged an injury to their "business or property" in the loss of income stemming directly from Defendants' failure to distribute the entire service charge or to notify customers that they were doing so. *HRS § 480-13*. According to the plain language of *HRS § 480-13(a)*, a plaintiff who has demonstrated an injury that stems directly from the unlawful UMOC is entitled to sue for money damages and injunctive relief.

Thus, there is a direct causal link between the injury to property and the acts "forbidden or declared unlawful by" HRS chapter 480 on the face of the amended complaint. As noted before, to construe the statute as requiring plaintiffs to allege the "nature of the competition" in addition to a per se UMOC violation renders the term "deemed" superfluous.

B.

1.

As to the second ground, the majority derives from HMA the requirement that Plaintiffs allege the "nature of the competition" before they may bring a UMOC action. In HMA, a plaintiff **[***104]** medical group consisting of physicians had entered into an agreement with defendant Hawai'i Medical Service Association (HMSA), to provide medical care to HMSA plan members at reduced rates. *113 Hawai'i at 81, 148 P.3d at 1183*. The HMA physicians alleged that HMSA had engaged in unfair methods of competition in violation of *HRS § 480-2(e)*. *Id. at 82, 148 P.3d at 1184*.

HMA determined that the plaintiffs' allegations against the defendants consisted of UDAP claims, which could only be brought by consumers. However, HMA allowed plaintiffs to bring a UMOC action for claims that would also support a UDAP action, provided the plaintiffs, in addition to identifying a UMOC, also alleged how their injury stemmed from the anti-competitive act, i.e., the "nature of the competition." *Id. at 111-13, 148 P.3d 1213-15*. The reason for this was to preserve the distinction between unfair methods of competition, on one hand, and unfair or deceptive acts or practices that may also constitute unfair methods of competition, on the other hand. Id. Thus, HMA **[**333] [*453]** said that "the existence of the competition is what distinguishes a claim of unfair or deceptive acts or practices from a claim of unfair methods of competition." **[***105]** *Id. at 112, 148 P.3d at 1214*.

According to this court,

> notwithstanding . . . our holding that the plaintiffs need not be "competitors" of, or "in competition" with, HMA, the question remains whether the nature of the competition must be sufficiently alleged. Contrary to the dissent, we conclude that it does because, in the absence of such allegations, the distinction between claims of unfair or deceptive *acts or practices* and claims of unfair methods *of competition* that are based upon such acts or practices would be lost where both claims are based on unfair and deceptive acts or practices. In other words, the existence of the competition is what distinguishes a claim of unfair or deceptive acts or practices from a claim of unfair methods of competition.

Id. at 111-12, 148 P.3d at 1213-14 (emphases in original and emphases added). Otherwise, "[t]he distinction between a claim of unfair and deceptive acts or practices and a claim of unfair methods of competition that are based upon such acts or practices would be lost[.]" *Id. at 111, 148 P.3d at 1213*. This motivated the majority in HMA to require allegations that "sufficiently allege unfair competition claims" based upon "conduct that **[***106]** would also support claims of unfair or deceptive acts or practices[.]" *Id. at 111, 148 P.3d at 1213* (emphasis added). But that distinction is not controlling here.

The differentiation in HMA is wholly irrelevant under the plain language and inherent legislative intent of *HRS §§ 481B-14* and *481B-4*. See *State v. Buch, 83 Hawai'i 308, 326, 926 P.2d 599, 617 (1996)* ("This court derives legislative intent primarily from the language of the statute and follows the general rule that[,] in the absence of clear legislative intent to the contrary, the plain meaning of the statute will be given effect.") (Citing *State v. Akina, 73 Haw. 75, 78, 828 P.2d 269, 271 (1992)*.)) (Brackets omitted.) *HRS § 481B-4* renders the distinction and hence, any allegations of the "nature of the competition" unnecessary inasmuch as a violation of *HRS § 481B-14*, by virtue of *HRS § 481B-4*, establishes both a UDAP and UMOC under *HRS § 480-2*. Hence, no allegations in the amended complaint are necessary to draw the distinction made in HMA. Even if the word "and" in *HRS § 481B-4* ("unfair method of competition and unfair or deceptive act or practice" (emphasis added)) is read as "or," the result is the same. In that event **[***107]** the violation would qualify as either a UDAC or a UMOC. [7]

Under the facts of this case, allegations of competition are unnecessary because unlike in HMA, here the violation of *HRS § 481B-4* established that the conduct, i.e., non-disclosure, was sufficient itself to constitute, i.e., be deemed, both an unfair and deceptive act or practice and unfair method of competition. In contrast, HMA did not involve conduct that the legislature had by statute deemed a per se UMOC. Rather, HMA allowed the plaintiffs to bring a UMOC action based on UDAP claims to demonstrate that anti-competitive conduct caused their injury. Hence, HMA is not determinative in this situation. Inasmuch as in the instant case a violation is deemed to be an unfair and deceptive act or practice and (or for the sake of argument, "or") an unfair method of competition, there is no requirement or need to distinguish between unfair methods of competition and unfair and deceptive acts that may also constitute unfair methods of competition.

Nevertheless, the majority maintains that the distinction between UDAP and UMOC claims is still relevant to the instant **[***108]** case because HMA stated that "'the existence of the competition is what distinguishes a claim of unfair or deceptive acts or practices from a claim of unfair methods of competition.'" Majority opinion at 36 n.26 (quoting *HMA, 113 Hawai'i at 112, 148 P.3d at 1214*). Thus, according to the majority, the pleading requirement of HMA "is based on the differences in the nature of the underlying causes of action." Id. at 36 n.26. With all due respect, this view is taken wholly out of context.

[334] [*454]** The circuit court in HMA had concluded that, although plaintiffs had brought their action as a UMOC, the claims were actually UDAP and, consequently, dismissed plaintiffs' action. *HMA, 113 Hawai'i at 111,*

[7] Obviously, as indicated supra, Plaintiffs may only bring a UMOC claim.

148 P.3d at 1213. However, as noted before, this court vacated the dismissal, holding that "plaintiffs may bring claims of [UMOC] based on conduct that would also support claims of [UDAP]." Id. (emphasis added) (citation omitted). In other words, HMA's holding was that UDAP and UMOC could be treated the same, provided that plaintiffs bringing UMOC claims also pled the nature of the competition. Thus, contrary to the majority's argument, the pleading requirement interposed between UDAP and UMOC is not "based **[***109]** on differences in the nature of the underlying causes of action[,]" majority opinion at 36 n.26, but is necessitated in situations where they share a commonality.

Taken at face value, a difference "in nature" between UMOC and UDAP would have prevented this court from regarding the two causes of action under the facts in HMA as interchangeable. HMA expressly focused on whether UDAP claims could also be brought as UMOC claims. Therefore, the "nature of the competition" pleading requirement was to establish that because "a claim of unfair or deceptive acts or practices" could constitute "a claim of unfair methods of competition[,]" majority opinion at 36 n.26 (citing *HMA, 113 Hawai'i at 112, 148 P.3d at 1214*), it was necessary in such circumstances that the nature of the competition be alleged.

As previously discussed, HMA simply did not involve the deeming language in *HRS § 481B-4*. On its face and without qualification, *HRS § 481B-4* states that violations of *HRS § 481B-14* can be brought both as a UMOC and a UDAP. Thus, the "distinction" thought necessary in HMA is not presented in this case. As a result, there are no "differences in the underlying causes of action" upon which the majority **[***110]** can premise its "pleading requirement." Because it nevertheless does so, the majority disregards the straightforward text of *HRS § 481B-4* and, consequently, gives no effect to the legislative mandate that a violation of *HRS § 481B-14* is already "deemed" a violation of *HRS § 480-2*.

2.

The majority further relies on this court's decisions in *Ai v. Frank Huff Agency, 61 Haw. 607, 607 P.2d 1304 (1980)*, and *Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportation Co., 91 Hawai'i 224, 982 P.2d 853 (1999)*. The majority states that the "deemed" in *§ 481B-14* indicates the legislature "'predetermine[d]' that violations of HRS [c]hapter 481B would constitute per se unfair methods of competition for the purposes of *§ 480-2*, and therefore a plaintiff with standing need not prove that conduct which violates HRS [chapter] 481B constitutes an unfair method of competition." Majority opinion at 42-43 (citing *Ai, 61 Haw. at 616, 607 P.2d at 1311*) (emphasis added). The majority thus excludes from consideration what in fact is a "standing" factor, i.e., that the violation itself establishes the negative impact on competition. *HRS § 481B-4*. With all due respect, the majority arrives at its position **[***111]** by misconstruing this court's holding in Ai and concluding that "the legislature did not determine that an injury suffered by 'any person' as a result of a violation of chapter 481B necessarily stems from the negative effect on competition caused by the violation." Majority opinion at 43-44 (emphasis in original). According to the majority, "the legislature was not making a determination that any person injured as a result of a violation of [c]hapter 481B automatically has standing to sue pursuant to HRS §*[§] 480-2* and *480-13*. Instead, a private person must separately allege the nature of the competition in accordance with this court's holding in HMA." Id. at 44. Contrary to the majority's view, the holding in Ai does indeed support the conclusion of automatic standing and in that situation, HMA does not require a separate allegation regarding the nature of the competition. See discussion supra.

Ai involved the violation of HRS § 443-44(8) which "prohibit[ed] a **[***112]** collection agency from making any representation that an existing **[**335]** **[*455]** obligation of a debtor may be increased by the addition of attorney's fees when in fact such fees may not legally be added to the existing obligation of the debtor." *61 Haw. at 617, 607 P.2d at 1312*. Furthermore, according to Ai, HRS § 443-47 established that HRS § 443-44(8) was a "per se" UMOC violation by stating that "[a] violation of this part by a collection agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of *section 480-2*." *Id. at 615, 607 P.2d 1310-11* (emphasis added). The debtor plaintiffs in Ai alleged a per se violation of HRS § 443-44(8), claiming that the promissory note plaintiffs executed and delivered to defendant contained an illegal provision that plaintiffs would pay attorney's fees at the rate of 33-1/3% -- above the 25% chargeable under the law if a collection suit was filed. Id.

Ai stated that HRS "§ 480-13 establishes four essential elements: (1) a violation of chapter 480; (2) injury to plaintiff's business or property resulting from such violation; (3) proof of the amount of damages; and (4) a **[***113]** showing that the action is in the public interest or that the defendant is a merchant." *Id. at 617, 607 P.2d at 1311*. Ai went on to decide that the plaintiffs had established a per se violation of the statute in that "[t]he representation that the [attorney fees] obligation of the debtor could be so increased was . . . in violation of § 443-44(8)." *Id. at 618, 607 P.2d at 1312*. However, Ai explained that, "[w]hile proof of a violation of chapter 480 is an essential element of an action under *§ 480-13*, the mere existence of a violation is not sufficient ipso facto to support the action; forbidden acts cannot be relevant unless they cause private damage." Id. (citation omitted).

Ai concluded that injury under *HRS § 480-13* required only a showing of economic loss. "[I]t is unnecessary for plaintiffs to allege commercial or competitive injury in order for plaintiffs to have standing under *HRS § 480-13*; it is sufficient that plaintiffs allege that injury occurred to personal property through a payment of money wrongfully induced." *Id. at 614, 607 P.2d 1310* (citation omitted) (emphasis added). Likewise, in the instant case, a similar showing of injury to personal property is all that is required **[***114]** under the same statute, *HRS § 480-13*. As noted before, Plaintiffs have sufficiently alleged that injury.

Ai further concluded that the fourth requirement inherent in *HRS § 480-13*, i.e., "a showing that the action is in the public interest[,]" had been satisfied because the plaintiffs had "supplied allegations adequate to show that such a per se violation of *[§] 480-2* ha[d] occurred." *Id. at 617, 607 P.2d at 1311*. Thus, under Ai, "the public interest ha[d] been sufficiently made out to confer standing to plaintiffs under *[HRS §] 480-13*." *Id. at 617, 607 P.2d at 1311*. The public interest requirement is directly analogous to the majority's requirement that Plaintiffs plead the "nature of competition" inasmuch as both are aimed at addressing the anti-competitive effects of such conduct. However, contrary to the majority's position, the fact that Ai concluded that those harmed by per se violations need not show that the action is in the public interest supports the conclusion that plaintiffs harmed by a per se UMOC violation need not allege the "nature of the competition."

The majority's attempt to rebut the analogy between the "public interest" requirement in Ai and the majority's requirement **[***115]** that the "nature of the competition" be pled is unpersuasive. The majority states that the public interest requirement was satisfied if a plaintiff pleads an effect on competition, or the UMOC "is being employed under circumstances which involve flagrant oppression of the weak by the strong." Majority opinion at 46 (quoting *Ai, 61 Haw. at 614, 607 P.2d at 1310*). However, the majority maintains that the presence of a second method of satisfying the public interest requirement, i.e., that the unfair methods employed "involve a flagrant oppression of the weak by the strong," id., undermines the analogy. But Ai expressly confirmed that the "public interest" was satisfied by showing a negative effect on competition. *Ai, 61 Haw. at 614, 607 P.2d at 1310* ("To justify filing a complaint the public interest must be specific and substantial. Often it is so, because **[**336]** **[*456]** the unfair method employed threatens the existence of present or potential competition."). Indeed, the majority concedes that the "public interest" requirement is satisfied by alleging a negative effect on competition.

Consequently, that there is an additional means of satisfying the "public interest" in no way affects the analogy. **[***116]** In Ai, this court recognized that either a negative impact on competition or "flagrant oppression of the weak" would satisfy the "public interest" requirement. *Id. at 614-15, 607 P.2d at 1310*. In other words, the "nature of the competition" prong was encompassed by the "public interest" requirement. Inasmuch as the negative impact on competition described in Ai and encompassed in the public interest requirement is conceptually the same impact that the majority indicates must be pled in the instant case, the requirements are analogous.

However, in Ai, this court concluded that it did not need to determine whether there had been a negative impact on competition or "flagrant oppression of the weak" because there was a per se violation of the statute. *Id. at 615, 607 P.2d at 1310-11*. As Ai explained, HRS § 443-44(8) established a prohibition against adding interest on attorney's fees in contracts. In that connection, HRS § 443-47 stated that a violation of HRS § 443-44(8) "shall constitute" a UMOC or UDAP. Thus, Ai concluded that an allegation of a violation of HRS § 443-44(8) was sufficient to confer standing upon plaintiffs without any further showing of an effect on the "public interest" **[***117]** by means of a negative impact on competition or oppression of the weak. Id. Moreover, the analysis in Ai made clear that, similar to allegations of an negative impact on competition, a plaintiff need not plead "flagrant oppression of the weak by the strong" to have standing in cases where there was a per se UMOC violation. *Id. at 614, 607 P.2d at 1310*.

None of the cases the majority cites compels a different conclusion inasmuch as those cases do not involve per se UMOC violations. In *T.W. Electrical Service, Inc., v. Pacific Electical Contractors Ass'n, 809 F.2d 626, 636 (1987)*, the court of appeals for the ninth circuit concluded that plaintiff-contractor's UMOC claim under *HRS § 480-2* against a defendant-trade association did not have merit because the defendant was not in competition with the plaintiff. The ninth circuit took note of the "flagrant oppression" prong as satisfying the "public interest" requirement, but did not apply that standard or in any way contradict this court's holding in Ai. In *Ailetcher v. Beneficial Finance Co. of Hawaii, 2 Haw. App. 301, 306, 632 P.2d 1071, 1076 (1981)*, the ICA overturned the directed verdict against plaintiff-business owner who had alleged **[***118]** an unfair practice in violation of *HRS § 480-2* against the defendant. The plaintiff had argued that defendant had ordered a halt on all financing transactions at his car dealership, resulting in harm and loss to plaintiff's business. *Id. at 303-04, 632 P.2d at 1074*. The ICA applied the "flagrant oppression" standard, concluding that the circuit court erred in granting a directed verdict for defendant because plaintiff had presented facts sufficient to support a jury verdict that defendant's acts amounted to a "flagrant oppression of the weak by the strong." *Id. at 304-05, 632 P.2d at 1075*. However, the ICA expressly distinguished its holding from Ai inasmuch as there was "no statutory violation involved in [that] case." *Id. at 306, 632 P.2d at 1076*. In other words, Ailetcher did not involve a per se violation of the statute like that in Ai.

The majority also cites *Federal Trade Commission v. Klesner, 280 U.S. 19, 50 S. Ct. 1, 74 L. Ed. 138, 13 F.T.C. 581 (1929)*, which Ai cited for the proposition that the public interest was satisfied by a showing of a "flagrant oppression of the weak by the strong." *Id. at 30*. In Klesner, the United States Supreme Court concluded that the "flagrant oppression" standard did not apply to the **[***119]** facts before it. Klesner involved an action brought by the FTC against a business owner to enjoin him from using the name "shade shop" "as an identification of the business conducted by him" because that trade name belonged to another business. *Id. at 22*. The Supreme Court dismissed the FTC's action. Inasmuch as the case involved a purely private dispute between individuals with no discernable effect on competition, it did not satisfy the public interest requirement. **[**337]** **[*457]** *Id. at 30*. Additionally, Klesner did not involve "flagrant oppression of the weak by the strong" or any of the issues presented in the instant case. Thus, Klesner does not contradict Ai's holding that an injury to the public interest need not be alleged in per se violations of *HRS § 480-2*. As a result, the majority's citation to these cases is inapposite inasmuch as the cases are not inconsistent with the central holding of Ai, i.e., that a per se violation of the statute obviates the need to plead a negative impact on competition or oppressive conduct.

The majority's attempt to draw distinctions between effects on "public interest" and "competition" aside, the majority plainly contravenes this court's decision in Ai regarding **[***120]** per se UDAP and UMOC violations despite the presence of nearly identical provisions. Similar to the "deemed" language in *HRS § 481B-4*, the language in HRS § 443-47 at issue in Ai stated that "[a] violation of this part by a collection agency shall constitute unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce for the purpose of *section 480-2*." *Ai, 61 Haw. at 610 n.5, 607 P.2d at 1308 n.5* (emphasis added). In Ai, the plaintiffs thus established a per se violation of § HRS § 443-44(8), which the legislature had commanded "shall constitute" a violation of *480-2*. Id. As noted before, a similar mandate for a violation of *HRS § 481B-14* appears in the instant case under *HRS § 481B-4*. Consequently, as Ai concluded, "[s]ince plaintiffs herein have supplied allegations adequate to show that such a per se violation of *§ 480-2* has occurred, we accordingly find that the public interest has been sufficiently made out to confer standing to plaintiffs under *§ 480-13*." *Id. at 617, 607 P.2d at 1311*. Likewise, Plaintiffs here have alleged, via *HRS §§ 481B-14* and *481B-4*, a "per se violation of *HRS § 480-2* sufficient[] to confer standing to [P]laintiffs **[***121]** under *[HRS] § 480-13*." Id.

Based on the foregoing, the rationale in Ai applies to the instant case. Nonetheless, the majority construes the nearly identical language regarding per se violations to mean that a plaintiff does not need to prove that an act is a UMOC, but must still prove that the UMOC causing plaintiff's injury negatively impacts "competition." If Ai had adopted the majority's construction of "shall constitute," then this court in Ai would have had to require that the plaintiffs additionally allege that the UMOC negatively impacted the "public interest." That obviously was not the case. Rather, Ai unequivocally held that an act that "constitutes" a UMOC violation was "all the law require[d]" to satisfy the "public interest" requirement. *Id. at 615, 607 P.2d at 1310-11* (emphasis added). There is no basis for distinguishing the analysis and outcome in Ai from the instant case.

The less stringent requirement for alleging an injury in cases of per se UMOC violations in Ai also distinguishes this court's holding in Robert's Hawaii. Robert's Hawaii stated that the third requirement of *HRS § 480-13*, i.e., "proof of the amount of damages," *Ai, 61 Haw. at 617, 607 P.2d at 1311*, **[***122]** sets forth a different requirement than merely injury to "business or property." "Also known as the 'fact of damage' requirement, the antitrust plaintiff need not prove with particularity the full scope of profits that might have been earned. Instead, it requires a showing, with some particularity, of actual damage caused by anticompetitive conduct that the antitrust laws were intended to prevent." *Robert's Hawaii, 91 Hawai'i at 254 n.31, 982 P.2d at 883 n.31* (citation omitted) (emphasis added). However, as stated previously, the legislature has deemed the violation of HRS chapter 481B in the instant case to constitute a UMOC. Contrastingly, Robert's Hawaii did not involve a per se violation of the statute.

C.

With respect to the third ground, the majority's statement that "the legislative history of *HRS § 481B-4* does not reflect an intent to eliminate the causation requirement of *HRS § 480-13(a)*," majority opinion at 40, incorrectly characterizes the importance of the legislature's findings. Similarly, the majority's statement that the legislative history does not reflect an intent "to eliminate the causation requirements of *HRS § 480-13*," id., misconstrues the issue. As noted previously, **[***123]** the majority's rendering of "the causation requirement of *HRS § 480-13*" **[**338]** **[*458]** includes proof that the Plaintiffs' injury stems from the anti-competitive effect of the UMOC. However, in enacting *HRS § 481B-14*, the legislature emphasized the importance of protecting employees, and through *HRS § 481B-4*, deemed the violation of the statute a UMOC. The plain language of *HRS § 481B-14* evinces the legislature's rationale that if the entire service charge is not distributed to employees, customers should be notified that an additional gratuity would be necessary if their intent was to reward the employees serving them.

From its inception, *HRS § 481B-14* related to a perceived injury to employees. Act 16, which became *HRS § 481B-14*, was entitled "A Bill for an Act Relating to Wages and Tips of Employees." 2000 Haw. Sess. Laws Act 16, § 1 at 21 (emphasis added). "In construing an act, the title may be resorted to for the purpose of ascertaining the meaning of the act." *Spears v. Honda, 51 Haw. 1, 16-17, 449 P.2d 130, 139 (1968)*. This court ay also consider the title of a statute in determining the group of individuals primarily covered by the statute. See *Moyle v. Y & Y Hyup Shin, Corp., 118 Hawai'i 385, 412, 191 P.3d 1062, 1089 (2008)* **[***124]** (Acoba, J., concurring) ("As to the purpose of the [Uniform Contribution Among Tortfeasors Act], which is also pertinent to the construction of its language, the title of the statute--the Uniform Contribution Among Tortfeasors Act--clearly indicates to whom it is applicable.") (Emphasis added.)) (Citation omitted.) In that regard, the legislature stated that its reason for enacting *HRS § 481B-14* was "to require hotels and restaurants that apply a service charge for food or beverage services, not distributed to employees as tip income, to advise customers that the service charge is being used to pay for costs or expenses other than wages and tips of employees." 2000 Haw. Sess. Laws Act 16, § 1 at 22 (emphases added).

The majority's own discussion of the Committee on Commerce and Consumer Protection's findings emphasized that "moneys collected as a service charge are not always distributed to the employees as gratuities and are sometimes used to pay the employer's administrative costs." S. Stand. Comm. Rep. No. 3077, in 2000 Senate Journal, at 1287. The majority notes that when employers withhold a portion of the service charge, "the employee does not receive the money intended as a gratuity **[***125]** by the customer, and the customer is misled into believing that the employee has been rewarded for providing good service." Majority opinion at 26 (citing S. Stand. Comm. Rep. No. 3077, in 2000 Senate Journal, at 1286-87) (emphasis in original). But the result of the customers being misled was that they may "not leave additional tips for service employees." H. Stand. Comm. Rep. No. 479-00, in 2000 House Journal, at 1155 (emphasis added). In other words, the deceptive act practiced on the customer resulted in an injury to the employee because the customer's misapprehension of how the employee was compensated meant that the employee was deprived of an intended gratuity. The legislative history does not evince a concern with an injury to a consumer's personal, family, or household purchases, or investment. See *HRS § 480-1*.

As the legislature explained, "the problem lies with consumers who may not leave tips for the service employees, mistakenly thinking that the service charges they paid were tips, so they did not leave additional tips for service employees." H. Stand. Comm. Rep. No. 479-00, in 2000 House Journal, at 1155 (emphases added). In light of this history, it would be incongruous **[***126]** to assert, as the majority does, that in addition to alleging injury for an already per se violation of *HRS § 480-2(e)*, Plaintiffs must also allege "actual damage caused by anticompetitive conduct." Majority opinion at 39.

The majority further asserts that the legislature's placement of *HRS § 481B-14* "within Hawaii's consumer protection statutes" does not indicate "that the legislature intended to eliminate the causation requirements," majority opinion at 43, that Plaintiffs "allege how [Defendants'] conduct will negatively affect competition in order to recover an [UMOC] claim[,]" id. at 36. As noted above, the legislature deemed a violation of *HRS § 481B-14* a UMOC under *HRS § 480-2*, actionable under *HRS § 480-13*. The only **[**339]** **[*459]** "causation" requirement necessary to satisfy *HRS § 480-13* is that Plaintiffs' amended complaint allege facts sufficient to establish Defendants' liability under *HRS § 481B-14*. Plaintiffs have satisfied the necessary causation requirement because they have alleged a causal connection between their injury and the violation of *HRS § 481B-14*. The majority's additional requirement that Plaintiffs allege that their injury stems from the anti-competitive effect of the UMOC **[***127]** is not present in the plain language of *HRS §§ 480-13* or *481B-4* and not expressed in the legislative history.

D.

With respect to the fourth ground, the majority relies on federal court interpretations of federal statutes. The majority notes that, although *HRS § 480-2* is based on Section 5 of the FTCA, the difference between the two statutes is that the former contains a private right of action, whereas the latter vests enforcement with the FTC. Majority opinion at 51 (citing *HMA, 113 Hawai'i at 109, 148 P.3d at 1211*). Thus, according to the majority, "federal interpretations of the FTCA, although helpful in determining whether a defendant's actions constitute [a UDAP] or [a UMOC], are of limited relevance in interpreting the standing requirements applicable to the private right of action provided by *HRS § 480-2(e)*." Id. at 53. The majority also points out that *HRS § 480-13* is derived from section 4 of the Clayton Act, which states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor[.]" *15 U.S.C. § 15(a)*. The majority argues that, as a result, this court must follow federal case law requiring plaintiffs **[***128]** show "antitrust injury," "which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333, (1990)* (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*.

According to the majority, "[t]he antitrust requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of defendant's behavior." Majority opinion at 56 (citing *Atlantic Richfield, 495 U.S. at 344*) (emphasis in original). However, as discussed previously, the "deemed" provision of *HRS § 481B-14* obviates the need for Plaintiffs to allege a "competition reducing" effect inasmuch as such behavior is deemed to be anti-competitive. When an act is deemed to constitute a UMOC, the plaintiff is left to allege an injury that stems directly from that UMOC and damages. Thus, requiring that Plaintiffs demonstrate their injury stems from the anti-competitive effect of *HRS § 481B-14* renders the term "deemed" in *HRS § 481B-4* superfluous. Furthermore, as noted before, the legislative history of *481B-14* demonstrates that the legislature **[***129]** was not simply concerned with the anti-competitive effect of the conduct on consumers and businesses; but, rather, took into account the direct effect of such conduct on employees. See S. Stand. Comm. Rep. No. 3077, in 2000 Senate Journal, at 1286-87. As such, the federal requirement that plaintiffs demonstrate an antitrust injury even in cases of per se violations is not controlling.

Additionally, as the majority recognizes, "Atlantic Richfield involved a judicially recognized per se antitrust violation, whereas the per se violation of Hawai'i ***antitrust law*** in this case is established by *HRS § 481B-14*." Majority opinion at 56 n.33. However, the majority is incorrect in asserting that "this distinction has no bearing on the underlying analysis for the antitrust injury requirement in the circumstances here[.]" Id. Inasmuch as the legislative intent evinces concerns for economic injury to employees, this court must give due consideration to those concerns, especially since federal precedent does not contain any analogous provision to HRS §§ 481B-4 and 481B-14 or reflect the same concerns. The absence in federal case law and statutes of the considerations that motivated the legislature **[***130]** in enacting HRS § 481B-14 is manifest grounds for distinguishing such case law from the instant case.

[340] [*460]** E.

Finally, under our pleading rules anti-competitive conduct is readily apparent on the face of the amended complaint.[8] As Plaintiffs state:

---

[8] Plaintiffs' amended complaint reiterated in pertinent part, states as follows:

I. INTRODUCTION

. . . As set forth below, the [D]efendants have imposed a service charge on the sale of certain food and beverage . . . but have failed to distribute the total proceeds of the service charge to these employees as tip income, as required by Hawaii law. This conduct violates [HRS §] 481B-14 and is actionable under [§§] 481B-4, 480-2, and 480-13. . . .

. . . .

III. PARTIES

. . . .

2. . . . This class is brought pursuant to Rule 23 of the Federal Rules of Civil Procedure and [HRS §] 480-13. . . .

. . . .

IV. FACTS

4. For banquets, events, meetings and in other instances, the [D]efendants add a preset service charge to customers' bills for food and beverage provided at the hotels.

5. However, the [D]efendants do not remit the total proceeds of the service charge as tip income to the employees who serve the food and beverages.

6. Instead, the [D]efendants **[***132]** have a policy and practice of retaining for themselves a portion of these service charges (or using it to pay managers or other non-tipped employees who do not serve food and beverages).

7. The [D]efendants do not disclose to the hotel's customers that the service charges are not remitted in full to the employees who serve the food and beverages.

. . . .

V. CLASS ACTION ALLEGATIONS

9. This section is properly maintainable as a class action pursuant to [HRS §] 480-13 and Rule 23 of the Federal Rules of Civil Procedure. . . .

. . . .

COUNT I

([HRS §§] 481B-14, 481B-4, and 480-2)

The action of the [D]efendants as set forth above are in violation of [HRS §] 481B-14. Pursuant to Section 481B-4, such violation constitutes an unfair method of competition or unfair and deceptive act or practice within the meaning of Section 480-2. Section 480-2(e) permits an action based on such unfair methods of competition to be brought in the appropriate court, and a class action for such violation is permitted and authorized by Section 480-13 and Rule 23 of the Federal Rules of Civil Procedure.

(Boldfaced font in original.) (Emphases added.)

> Indeed, it is obvious that if one hotel obeys the laws and remits the entire service charge to the employees serving at the banquet and another hotel/competitor skims the service charge and keeps 4-5% for itself without disclosure, the hotel acting unlawfully can undercut its stated price for the banquet knowing that it will be receiving improper gains from the misleading description of its service charge. This is clearly a form of unfair competition.

(Emphases added.) Thus, not only is the majority's additional pleading requirement wrong in light of *HRS § 481B-4*, it contravenes this court's notice pleading case law concerning liberal construction of pleadings. See *Henderson v. Prof'l Coatings Corp., 72 Haw. 387, 399, 819 P.2d 84, 92 (1991)* ("Pleadings should not be construed technically when determining what the pleader is attempting to set forth but should be construed liberally so as to do substantial justice.") (Citation omitted.); *Perry v. Planning Comm'n, 62 Haw. 666, 685, 619 P.2d 95, 108 (1980)* **[***131]** ("Modern judicial pleading has been characterized as 'simplified notice pleading.' Its function is to give opposing parties 'fair notice of what the . . . claim is and the grounds upon which it rests.'" (Quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*.)).

Furthermore, the majority's suggestion that an effect on competition is **[***133]** not related by the amended complaint is incorrect inasmuch as illegal competition may reasonably be inferred from the facts and the claims alleged. See supra note 8. Defendants facing allegations that they have engaged in methods of competition that are unfair, as described in the amended complaint, are, by dint of the allegations, given sufficient notice of the nature of the competition affected. Courts construing such allegations are required to view them in the light most favorable to the plaintiff. See *Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai'i 159, 164, 172 P.3d 471, 476 (2007)* ("We must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative **[**341]** **[*461]** theory." (Quoting *In re Estate of Rogers, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003)*.)). As noted before, dismissal is appropriate only when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Rogers, 103 Hawai'i at 280, 81 P.3d at 1195* (citations omitted). Viewing the amended complaint in the light most **[***134]** favorable to the Plaintiffs, it cannot reasonably be concluded that under the amended complaint Plaintiffs will be unable to "prove no set of facts," id. (emphasis added), i.e., a causal connection between the injury plaintiffs suffered and the UMOC, as their case progresses. Hence, requiring Plaintiffs to allege more is also inconsistent with this court's jurisprudence.

V.

Tracing the statutory language relevant to an action based on UMOC, Plaintiffs have set forth facts in their amended complaint sufficient to sustain their action against Defendants and are not required to allege the nature of the competition. Therefore, answering the certified question in the affirmative, I would hold that Plaintiffs' amended complaint should not be dismissed and that Defendants' motion to dismiss should be denied.

End of Document

Fox v. Good Samaritan L.P.

United States District Court for the Northern District of California, San Jose Division

March 29, 2010, Decided; March 29, 2010, Filed

No. C 04-0874 RS

Reporter

801 F. Supp. 2d 883 *; 2010 U.S. Dist. LEXIS 29768 **

RICHARD B. FOX, Plaintiff, v. GOOD SAMARITAN L.P., et al, Defendants.

Subsequent History: Motion to vacate denied by, Motion denied by Fox v. Good Samaritan L.P., 2010 U.S. Dist. LEXIS 70447 (N.D. Cal., June 30, 2010)

Affirmed by Fox v. Good Samaritan Hosp. LP, 467 Fed. Appx. 731, 2012 U.S. App. LEXIS 2229 (9th Cir. Cal., 2012)

Related proceeding at Fox v. HCA Holdings, Inc., 2015 U.S. Dist. LEXIS 151282 (N.D. Cal., Nov. 4, 2015)

Prior History: Fox v. Good Samaritan Hosp. LP, 2008 U.S. Dist. LEXIS 111023 (N.D. Cal., July 17, 2008)

Core Terms

privileges, summary judgment, immunity, circumstances, antitrust, patients, damages, notice, summary judgment motion, defendants', pleadings, competence, suspension, contends, triable issue of fact, motion to dismiss, direct liability, loyalty oath, non-moving, undisputed, pediatric, suspend, argues, entity, second amended complaint, supplemental briefing, motion for judgment, material fact, patient care, retaliation

LexisNexis® Headnotes

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

HN1[] Summary Judgment, Entitlement as Matter of Law

Summary judgment is proper if the pleadings and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses.

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

HN2[] Burdens of Proof, Movant Persuasion & Proof

The moving party always bears the initial responsibility of informing the district court of the basis for its summary judgment motion, and identifying those portions of the pleadings and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

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

HN3[] **Burdens of Proof, Nonmovant Persuasion & Proof**

If the moving party meets its burden, then the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., facts that might affect the outcome of the suit under the governing law. Factual disputes that are irrelevant or unnecessary will not be counted. The opposing party must do more than simply show that there is some metaphysical doubt as to the material facts.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN4[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. However, where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN5[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

See *42 U.S.C.S. § 11101(4)*.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN6[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

The Health Care Quality Improvement Act of 1986, *42 U.S.C.S. § 11101 et seq.*, plainly contemplates situations where a peer review committee has prompted an action against a physician's privileges based on concerns regarding the competency of the particular physician in question.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN7[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

See *42 U.S.C.S. § 11151(9)*.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN8[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

See *42 U.S.C.S. § 11151(10)*.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN9[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

The statutory definition in *42 U.S.C.S. § 11151(9)* is disjunctive--it applies to decision relating to competence or professional conduct.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN10[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

42 U.S.C.S. § 11151(9)(D) excludes from the definition of "professional review action" any privileging decision based on a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional. While the provision is certainly directed at excluding from statutory protection any privileging decision based on a physician's professional associations, it cannot be stretched to encompass the application of a rule which, by its terms, does not mandate the designation or exclusion of any particular doctor or group.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN11[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

42 U.S.C.S. § 11111 provides, among other things, that a professional review action will only qualify for immunity if it meets all the standards specified in *42 U.S.C.S. § 11112(a)*. *Section 11112(a)*, in turn, requires that a professional review action must be taken (1) in the reasonable belief that the action was in the furtherance of quality health care; (2) after a reasonable effort to obtain the facts of the matter; (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of *§ 11112(a)(3)*. *Section 11112(a)* goes on to provide that a professional review action shall be presumed to have met the preceding standards unless the presumption is rebutted by a preponderance of the evidence.

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

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN12[] **Appellate Review, Standards of Review**

As the Ninth Circuit has explained, because the reasonableness requirements of *42 U.S.C.S. § 11112(a)* were intended to create an objective standard, rather than a subjective standard, this inquiry may be resolved on summary judgment. Moreover, the rebuttable presumption creates a somewhat unusual standard of review for summary judgment because the inquiry focuses on whether the plaintiff has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed that their action was warranted by the facts. Evidence of bad faith or hostility towards the plaintiff on the part of the actual decision-makers is simply irrelevant and cannot serve to create a material issue of fact on this point.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN13[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

42 U.S.C.S. § 11112(b) lists procedures that will be deemed to satisfy *§ 11112(a)*, if provided. *Section 11112(b)*, however, only provides a safe harbor--it also expressly provides that a failure to comply with all of its provisions shall not, in itself, constitute failure to meet the standards of *§ 11112(a)*. The text of *§ 11112(a)* itself reveals that not even adequate notice and hearing procedures--much less all those specified in *§ 11112(b)*--are necessarily required. Rather, such other procedures as are fair to the physician under the circumstances will suffice in appropriate circumstances. A hearing regarding a physician's suspension is not necessary in all circumstances for Health Care Quality Improvement Act of 1986, *42 U.S.C.S. § 11101 et seq.*, immunity to apply. Rather, the statutory language, "such other procedures as are fair under the circumstances," reflects a congressional intent that a physician be afforded adequate and fair procedures with regard to professional review actions, which could be something other than a formal hearing in some circumstances.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN14[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

Under the Health Care Quality Improvement Act of 1986, *42 U.S.C.S. § 11101 et seq.*, a hospital must report to the Board of Medical Examiners whenever it takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days. *42 U.S.C.S. § 11133(a)(1)(A)*.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN15[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

See *42 U.S.C.S. § 11111(b)*.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN16[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

Under *42 U.S.C.S. § 11111(b)*, failure to report can result in a loss of the protections provided by the Health Care Quality Improvement Act of 1986, *42 U.S.C.S. § 11101 et seq.*, against damages claims, but only after an involved investigation by governmental authorities and publication in the Federal Register. The failure to report in a specific case does not automatically result in a loss of immunity in that particular case.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN17[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

Where the only evidence presented is of subjective biases or motives, it does not overcome the presumption of immunity under the Health Care Quality Improvement Act of 1986, *42 U.S.C.S. § 11101 et seq.*

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > Health Care Quality Improvement Act

Healthcare Law > Business Administration & Organization > Peer Review > Peer Review Statutes

HN18[] **Governmental & Nonprofit Liability, Health Care Quality Improvement Act**

42 U.S.C.S. § 11111 once included a provision that *§ 11111(a)* did not apply to state laws in a state for actions commenced on or after October 14, 1989, if the state by legislation elected such treatment. Congress, however, revoked that option in 1987.

Civil Procedure > Judgments > Summary Judgment > General Overview

HN19[] Judgments, Summary Judgment

There is nothing that precludes a defendant from seeking to adjudicate by summary judgment issues that survived a *Fed. R. Civ. P. 12* motion.

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN20[] Regulated Practices, Private Actions

Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. Of course, this does not mean summary judgment should never be granted with respect to antitrust issues.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN21[] Judgments, Summary Judgment

While a summary judgment motion does go beyond the pleadings in the sense that it tests the sufficiency of the evidence to support the allegations of the complaint, those allegations still serve to frame--and limit--the issues. For the same reason, it is not correct to say that a summary judgment motion should be deemed a motion for judgment on the pleadings simply because the movant has focused on those elements of the complaint that survived a motion to dismiss. In either a motion to dismiss or a motion for judgment on the pleadings, the allegations of the complaint are presumed true, and the only question is whether those allegations would support liability. At summary judgment, however, the question is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. The question is not whether there are other unpleaded facts or theories which might support liability.

Business & Corporate Law > ... > Corporate Existence, Powers & Purpose > Existence > Distinct & Separate Legal Entity

HN22[] Existence, Distinct & Separate Legal Entity

Without facts supporting an inference that the challenged conduct was undertaken for the benefit of the parent company, a party cannot overcome the presumption that an individual is wearing the hat of the subsidiary when conducting the business of the subsidiary.

Counsel: [1]** For M.D. Richard B. Fox, Plaintiff: James A. Hennefer, LEAD ATTORNEY, Hennefer & Wood, San Francisco, CA; Joseph H. C. Wood, Attorney at Law, San Francisco, CA.

For Good Samaritan Hospital Medical Staff, a California unincorporated association, Defendant: David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, A Professional Law Corporation, Sacramento, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; Amy E Craig, PRO HAC

VICE, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL; Eric Peter Schoonveld, Hall Prangle & Schoonvled, LLC, Chicago, IL; Jane Allison Stevens, East Palo Alto, CA; Mary Kelly Persyn, PRO HAC VICE, Ropes & Gray, San Francisco, CA.

For Good Samaritan Hospital LP, a Delaware Limited Partnership, Defendant: David C. Hall, LEAD ATTORNEY, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, A Professional Law Corporation, Sacramento, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; Amy E Craig, PRO HAC VICE, Ropes & Gray LLP, San Francisco, CA; Mary Kelly Persyn, PRO HAC **[**2]** VICE, Ropes & Gray, San Francisco, CA.

For Samaritan, LLC, a Delaware limited liability company, Defendant: David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, A Professional Law Corporation, Sacramento, CA; Amy E Craig, PRO HAC VICE, Ropes & Gray LLP, San Francisco, CA; Mary Kelly Persyn, PRO HAC VICE, Ropes & Gray, San Francisco, CA; Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA.

For HCA, Inc, a Delaware corporation, Defendant: David C. Hall, LEAD ATTORNEY, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, A Professional Law Corporation, Sacramento, CA; Michael Li-Ming Wong, Thad Alan Davis, LEAD ATTORNEYS, Ropes & Gray LLP, San Francisco, CA; Adam C Kiehne, George Albert Shannon, Jr., Megan Dean Richardson, Shannon Martin Finkelstein & Alvarado, P.C., Houston, TX; Alicia M. Matsuhima, Shannon Martin Finkelstein & Alvarado, Houston, TX; Carlos A. Mattioli, Elizabeth D. Alvarado, Houston, TX.

For William Piche, Defendant: David C. Hall, LEAD ATTORNEY, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, A Professional Law Corporation, Sacramento, CA; **[**3]** Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA.

For M.D. Paul N Beaupre, Defendant: David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, A Professional Law Corporation, Sacramento, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL.

For M.D. Arthur W Douville, M.D. Kenneth I Tan, Defendants: Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, Hardy Erich Brown and Wilson, Sacramento, CA.

For Mark S McConnell, Defendant: Michael A. Hurwitz, LEAD ATTORNEY, Law Offices of Michael A. Hurwitz, San Jose, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, Hardy Erich Brown and Wilson, Sacramento, CA.

Judges: RICHARD SEEBORG, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD SEEBORG

Opinion

[*885] ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action had its genesis in 1999 when plaintiff Richard B. Fox, who **[**4]** by all accounts is a highly competent and well respected pediatrician, had his privileges to practice at Good Samaritan Hospital ("GSH") suspended. The ostensible basis for that action was Fox's refusal to comply with a then newly imposed rule requiring pediatricians to designate as "back-ups" two physicians holding privileges identical to those of the applying physician. Fox insists, however, that the true reasons for the adoption of the rule and its application to him were, (1) to retaliate against him for his having advocated patients rights and for criticizing some elements of patient care at the hospital in instances dating back to 1992, and (2) an effort by the **[*886]** hospital to impose a monopoly in the provision of pediatric intensive care services.

A decade of litigation has followed, both in the state courts and here, the tortuous history of which has been amply described in prior orders and need not be recounted. The Court is keenly aware of the significant resources the parties, and a number of courts, including this one, have devoted to this matter. Nevertheless, it has become apparent in this final wave of motion practice that Congress has by statute unambiguously and definitively **[**5]** barred plaintiffs in Fox's position from recovering damages in actions like this, under the circumstances that exist here. Additionally, GSH's corporate parent, defendant HCA, Inc., has shown that under the undisputed facts and the Court's prior orders, there is no basis for imposing liability against it in any event. Accordingly, summary judgment will be entered in favor of all defendants.

II. BACKGROUND

The general factual and procedural background of these consolidated actions has been exhaustively set forth in numerous prior orders, and will not be repeated here. In a nutshell, Fox practiced pediatric pulmonology and pediatric critical care medicine at GSH as a member of its medical staff beginning in 1989. Fox's privileges to practice were subject to renewal every two years. In April 1999, GSH's Medical Staff Executive Committee, on recommendation of the Credentials Committee and the Department of Pediatrics, adopted the "identical privileges" rule, requiring that a physician's designated "back-ups" hold the same set of privileges as the applicant. [1] Fox declined to comply with the rule, resulting in the suspension of his privileges in June of 1999, "until such time as documentation **[**6]** of call coverage by providers with identical privileges has been provided or a written request for waiver by the Staff Executive Committee has been approved." Although Fox was successful in having his privileges restored at certain later points in time, the issue never went away, and Fox no longer practices at GSH.

In 2001, Fox sought a writ of mandate in the state courts. The Santa Clara County Superior Court held that plaintiff was not entitled to a judicial review hearing and that "the alternate call coverage rule is rationally related to improving patient care, and is not arbitrary and capricious." *Fox v. Good Samaritan Hosp.,* No. CV802341 (Cal. Superior Court February 28, 2002). In affirming the trial court, the Sixth District Court of Appeal stated, among other things, that the "Hospital's alternate call coverage rule was based upon 'professional criteria' and was 'uniformly applied to all medical staff applicants and members.'" *Fox v. Good Samaritan Hosp., 2003 Cal. App. Unpub. LEXIS 6902, 2003 WL 21675515 * 5 (Cal. Ct. App. July 18, 2003)*. **[**7]** This action followed in 2004.

III. LEGAL STANDARD

The standards on summary judgment are well settled. ***HN1***[] Summary judgment is proper "if the pleadings and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett, 477 U.S. 317, 323-324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

[*887] ***HN2***[] The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Id. at 323*. ***HN3***[] If the moving party meets this burden, then the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary **[**8]** judgment, the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

[1] A version of the rule was initially implemented in 1997, causing a delay in approving Fox's biennial application for reappointment in 1998, but his privileges were temporarily continued while the Medical Staff further considered the matter.

The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. ***HN4***[] "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248*. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita, 475 U.S. at 587*.

These general standards are subject to some additional refinement both in the context of antitrust actions and in connection with the statute that extends immunity from damages in cases of this nature. Those specific considerations are discussed further where relevant below.

IV. DISCUSSION

A. The Motion for Summary Judgment **[**9]** brought by all defendants [2]

1. HCQIA

Defendants contend that all of Fox's claims in this actions are barred under the provisions of the Health Care Quality Improvement Act of 1986, *42 U.S.C. §§ 11101, et seq.* ("HCQIA"). Congress enacted that statute for the stated purpose of addressing the concern that, ***HN5***[] "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal ***antitrust law***, unreasonably discourages physicians from participating in effective professional peer review." *§ 11101(4)*.

> **[*888]** The Act creates a form of protection from liability in damages for hospitals and peer review participants. Although it never actually uses the term "immunity," the Act provides that if a "professional review action" meets the Act's standards, the peer reviewers "shall not be liable in damages under any law of the United States or of any State … with respect to the [professional review] action." *42 U.S.C. § 11111(a)(1)*.

Manion v. Evans, 986 F.2d 1036, 1037-1038 (6th Cir. 1993).

The question, therefore, is whether the undisputed facts establish that HCQIA applies to all of the claims in this action and whether its **[**11]** standards for immunity against damages have been satisfied.

a. Definitions

HN6[] HCQIA plainly contemplates situations where a peer review committee has prompted an action against a physician's privileges based on concerns regarding the competency of the particular physician in question. Here, it is undisputed that at no time did any questions arise as to Fox's *own* competency. Yet, until his supplemental briefing, Fox made no argument that the statute is so narrowly drawn that it cannot apply here for that reason. Review of the statutory definitions reveals HCQIA is in fact implicated under these circumstances.

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[2] At the hearing on the motion brought by all defendants, Fox cited for the first time *Williams v. University Medical Center of Southern Nevada, 688 F. Supp. 2d 1111, 2010 U.S. Dist. LEXIS 23281, 2010 WL 668512 (D. Nev. Feb. 24, 2010)*. The Court authorized defendants to respond to *Williams* by post-hearing letter brief, and gave Fox permission to reply thereafter to such submission. Defendants filed a letter brief that arguably went substantially beyond merely responding to *Williams,* but which did not clearly violate any rule. Fox, in turn, filed a brief that went even further beyond the spirit of the leave that had been given for supplemental briefing, in that it raised several entirely new arguments. Predictably, defendants filed another brief crying foul, and urging the Court to strike the new arguments. Fox responded yet again, contending his prior brief was proper. When the fourth brief came in, the Court gave serious consideration to issuing a one word order: "STOP!" Fortunately, that did not prove necessary. While violations of the rules on unsolicited briefing are not to be ignored, given the enormous consequences of the issues raised in the additional briefing, the Court is exercising its discretion **[**10]** to consider all of the substantive points raised by both sides therein.

At the outset, the decision to suspend Fox's privileges for failure to comply with the alternate coverage rules was a "professional review activity" as defined in the statute. *§ 11151(10)*. [3] Next, the term ***HN7***[] "professional review *action*" is defined to include privileging decisions "based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients) and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician." *§ 11151(9)*. **[**12]** In his supplemental briefing, Fox argues for the first time that this language precludes application of the statute here, where the concern related to the privileges of Fox's designated alternates, rather than his own medical competence. This argument fails for at least three reasons.

First, while Fox's own medical "competence" may not have been in question *per se,* the issue *did* involve the quality of care he was able to provide to his patients through his designees. [4] Second, even assuming the matter could not be characterized as implicating Fox's *competence* in any sense, the decision to suspend Fox's privileges for his refusal to comply with the identical privileges rule plainly was a matter involving Fox's own professional *conduct.* ***HN9***[] The statutory definition **[**13]** is disjunctive--it applies to decision relating to competence *or* professional conduct. Third, Fox's new argument that the statute is simply inapplicable is undermined by his own complaint in which he specifically **[*889]** alleged that HCQIA was available to immunize defendants' conduct provided its substantive provisions were met. Second Amended Complaint PP 77-78. Even assuming this does not rise to the level of a judicial estoppel, it serves as an additional basis to refuse to construe the statute as narrowly as Fox now urges, in a hyper-technical reading at odds with its general intent and purposes.

Fox's supplemental briefing makes the additional argument that the statute is inapplicable by virtue of ***HN10***[] *section 11151(9)(D)* of HCQIA, which excludes from the definition of "professional review **[**14]** action" any privileging decision based on "a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional." Fox argues this provision is implicated because he refused to designate as his backups members of the NorCal PICU associates. While the provision is certainly directed at excluding from statutory protection any privileging decision based on a physician's professional associations, it cannot be stretched to encompass the application of GSH's identical privileges rule, which by its terms did not mandate the designation or exclusion of any particular doctor or group. Accordingly, the decision to suspend Fox's privileges was an action within the ambit of HCQIA such that its prohibition against damages is available if its provisions are otherwise satisfied.

b. Immunity

As noted, the immunity from damages is set out in *section 11111*. ***HN11***[] That section provides, among other things, that the "professional review action" will only qualify for immunity if it "meets all the standards specified in *section 11112(a)*." *Section 11112(a)*, **[**15]** in turn, requires that a professional review action must be taken--

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

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[3] That subdivision provides: ***HN8***[] "The term "professional review activity" means an activity of a health care entity with respect to an individual physician--

(A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,

(B) to determine the scope or conditions of such privileges or membership, or

(C) to change or modify such privileges or membership."

All three circumstances apply here.

[4] This is not to suggest that there was any concern that the physicians designated by Fox for his alternate coverage had ever demonstrated "incompetence" in the sense that they had deviated from the standard of care. That said, the identical privileges rule was directed to ensuring competence in the sense of appropriate qualifications, experience, and training on the part of the designated back-up doctors.

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

Critically, however, section 11112(a) goes on to provide that "[a] professional review action *shall be presumed to have met the preceding standards* . . . unless the presumption is rebutted by a preponderance of the evidence. Furthermore, **HN12**[] as the Ninth Circuit has explained, "[b]ecause the 'reasonableness' requirements of § 11112(a) were intended to create an objective standard, rather than a subjective standard, this inquiry may be resolved on summary judgment." *Smith v. Ricks, 31 F.3d 1478, 1485 (9th Cir. 1994)*. [5]

[*890] Moreover, "the rebuttable presumption 'creates a somewhat unusual standard' of review for summary judgment because the 'inquiry focuses on whether [plaintiff] has provided sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed that their action was warranted by the facts." *Id.* (quoting *Austin v. McNamara, 979 F.2d 728, 734 (9th Cir.1992)*. **[**17]** Importantly, evidence of bad faith or hostility towards Fox on the part of the actual decision-makers is simply *irrelevant* and cannot serve to create a material issue of fact on this point. *Austin, 979 F.2d at 734* (Plaintiff's "assertions of hostility do not support his position because they are irrelevant to the reasonableness standards of § 11112(a). The test is an objective one, so bad faith is immaterial.")

The *only* argument Fox offered in his original opposition that the fairness standard of § 11112(a) was not satisfied here was the naked two-sentence assertion: "The fairness standards required, *inter alia,* that Dr. Fox have the right to a representation to a record [sic] and to call and examine witnesses. Dr. Fox was accorded none of these rights by defendants." It appears that Fox may have believed that "fairness" necessarily includes those rights in light of **HN13**[] § 11112(**b**), which lists such procedures, among others, that will be *deemed* to satisfy § 11112(a), if provided. Section 11112(b), however, only provides a "safe harbor"--it also expressly provides that a failure to comply with all of its provisions, "shall not, in itself, constitute failure to meet the standards of subsection (a)." **[**18]** See *Ricks, supra, 31 F.3d at 1485 n. 5* ("we reject as dicta any suggestion in *Austin* that a hospital [must] satisfy § 11112(b) in order to receive immunity.")

The text of section 11112(a) itself reveals that not even "adequate notice and hearing procedures"--much less all those specified in subsection (b)--are necessarily required. Rather, "such other procedures as are fair to the physician under the circumstances" will suffice in appropriate circumstances. Here, Fox's contention that he was entitled to something more than he was given was rejected by the California state courts. Even assuming the state court's determination is not binding in any *res judicata* sense, it undermines any claim Fox could otherwise now make that there is a triable issue of fact as to the procedural "fairness" of the professional review action.

At the hearing and in his supplemental briefing, Fox made the more nuanced argument that two separate decisions are actually at issue. First, the *adoption* of the "equal privileges" rule was, Fox contends, a quasi-legislative act. While Fox does not concede that he had adequate notice and hearing even with respect to the adoption of the rule, there is some merit to his **[**19]** contention that the *application* of the rule to him requires a separate fairness analysis. Nevertheless, Fox has not met his burden to show that he was entitled to further notice or hearing before his privileges were suspended for failure to comply with the rule. In *Wahi v. Charleston Area Medical Center, 562 F.3d 599 (4th Cir. 2009)*, the court expressly held that a hearing regarding a physician's suspension is not

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[5] As explained in *Bryan v. James E. Holmes Reg'l Med. Ctr., 33 F.3d 1318 (11th Cir. 1994)*: "A district court should **[**16]** consider the issue of HCQIA immunity from damages at the summary judgment stage. If it determines that the defendant is not entitled to such protection, then the merits of the case should be submitted to the jury without reference to the immunity issue. If there are disputed subsidiary issues of fact concerning HCQIA immunity, such as whether the disciplined physician was given adequate notice of the charges and the appropriate opportunity to be heard, the court may ask the jury to resolve the subsidiary factual questions by responding to special interrogatories . . . . Under no circumstances should the ultimate question of whether the defendant is immune from monetary liability under HCQIA be submitted to the jury." *33 F.3d at 1333*.

necessary in all circumstances for HCQIA immunity to apply. Rather, the statutory language, "such other procedures as are fair under the circumstances," reflects a Congressional intent that "a physician be afforded adequate and fair 'procedures' with regard to professional review actions, which could be something other than a formal hearing in some circumstances." Wahi, 562 F.3d at 609; *see also* **[*891]** Singh v. Blue Cross and Blue Shield of Mass. Inc., 182 F.Supp.2d 164, 173 (D.Mass. 2001) ("no hearing is required under the HCQIA").

Here, it is highly relevant that the professional review actions at issue did *not* involve complicated factual issues as to whether Fox had met the standard of care in specific patient cases. The sole question to be decided was whether Fox had complied **[**20]** with the rule, and there is no dispute that he had not. Fox was given *multiple* notices that he must comply. More fundamentally, Fox has not shown that a hearing, a right to representation, a right to call witnesses, and similar procedures were necessary to make the proceedings fair under the circumstances because he does not suggest that he would ever have been able to show either that the rule did not exist or that he was in compliance with it, regardless of how many witnesses he called. Thus, Fox was in circumstances wholly unlike that of a doctor who has been charged with an instance of deviating from the standard of care in one or more patient cases. The process Fox was given here was "fair to the physician under the circumstances," and he has not demonstrated a factual dispute to the contrary. [6]

Fox's bare assertion that the procedure was unfair because he did **[**21]** not have representation, the right to call witnesses, and the like, is insufficient to meet his burden to "provide sufficient evidence to permit a jury to find that he has overcome, by a preponderance of the evidence, the presumption that physicians in the defendants' position would reasonably have believed that their action was warranted by the facts." Ricks, supra, 31 F.3d at 1485. It is not "evidence" at all, but mere unsupported argument.

c. Reporting requirement

HN14[] Under HCQIA, a hospital must report to the Board of Medical Examiners whenever it "takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days." § 11133(a)(1)(A). Defendants grudgingly admit that this provision at least arguably required them to report Fox's suspension, and there is no dispute they did not do so. Nevertheless, Fox's argument that this defeats immunity under HCQIA is not well taken.

Section 11111(b), entitled "Exception," provides:

> ***HN15***[] If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing **[**22]** notice of noncompliance, an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 3-year period beginning 30 days after the date of publication of the name.

HN16[] In other words, failure to report can result in a loss of the protections **[*892]** provided by HCQIA against damages claims, but only after an involved investigation by governmental authorities and publication in the Federal Register. The failure to report in a specific case does not automatically result in a loss of immunity in that particular

[6] As noted above, at the hearing Fox submitted Williams v. University Medical Center of Southern Nevada, 2010 U.S. Dist. LEXIS 23281, 2010 WL 668512 in support of his contention that he should have been given a hearing. In *Williams,* the doctor's conduct was in the context of specific patient medical care decisions, making it of little application here.

case. *See* *Imperial v. Suburban Hosp. Ass'n, Inc. 37 F.3d 1026, 1030 (4th Cir. 1994)* (rejecting argument of automatic loss of immunity from failure to report in the plaintiff's case as "frivolous.") [7]

In his supplemental briefing, Fox asserts that he is not relying on the *§ 11111(b)* "exception" to immunity *per se.* Rather, Fox argues, defendants should be estopped from now contending that the suspension of his privileges is eligible for immunity under HCQIA when they previously took the position that it was not a reportable event under the statute. Fox has not shown that this gives rise to an estoppel, particularly given that the statute contemplates that hospitals will sometimes fail to report and provides a specific remedy for such failures.

d. *Clark v. Columbia/HCA Information Services, Inc.*

Relying on the Nevada Supreme Court decision in *Clark v. Columbia/HCA Information Services, Inc, 117 Nev. 468, 25 P.3d 215 (2001)*, Fox argues that HQCIA immunity cannot extend to **[**24]** his claims for retaliation, allegedly against his protected "whistle blowing" activities. The *Clark* court, however, expressly recognized that the facts before it were "unique." *117 Nev. at 478*. The hospital in *Clark* based its revocation of the plaintiff's privileges *expressly* on his having made complaints to outside agencies, and *not* on any issue of patient care. *Id.*

If defendants here had suspended Fox's privileges specifically citing the conduct he contends was "whistle blowing," *Clark* would be relevant, though still not controlling, authority. As the stated basis of Fox's suspension was his failure to comply with the alternative coverage rule, *Clark* has no application here, except to the extent that even it recognized and acknowledged that ***HN17***[↑] where the only "evidence presented [is] of subjective biases or motives, [it does] not overcome the presumption of immunity." *117 Nev. at 478*.

e. *Cal. Bus. & Prof. Code § 809*

Finally, Fox contends his state law claims are not subject to HQCIA immunity because California exercised a right to "opt-out" of HQCIA by enacting *California Business & Professions Code § 809*, which governs peer review proceedings in this state. ***HN18***[↑] *Section 11111* once included **[**25]** a provision that "Subsection (a) of this section shall not apply to State laws in a State for actions commenced on or after October 14, 1989, if the State by legislation elects such treatment." Congress, however, revoked that option in 1987. Whatever force *California Business & Professions Code § 809* may continue to have in other settings, it does not serve to override HQCIA immunity now. Accordingly, for all of the reasons set out above, all defendants are entitled to immunity from damages in this action. As damages are a necessary element of all of Fox's claims, summary judgment in defendants' favor must be entered.

[*893] 2. Antitrust and other issues

As an initial matter, Fox contends that most of the other grounds proffered by defendants as a basis for summary judgment constitute an improper request for reconsideration of the Court's October 9, 2007 order granting in part and denying in part a motion for partial summary judgment, and/or a March 17, 2005 order granting in part and denying in part a motion for judgment on the pleadings under *Rule 12 of the Federal Rules of Civil Procedure*. As to the prior *Rule 12* motion, ***HN19***[↑] there is nothing that precludes a defendant from seeking to adjudicate **[**26]** by summary judgment issues that survived a Rule 12 motion. As to the prior summary judgment motion, new defendants have been added to the case since then who are entitled to seek summary judgment on any grounds they believe may be viable. While perhaps technically those defendants who were party to the prior summary judgment motion are thereby evading the usual restrictions on seeking reconsideration, if summary judgment were

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[7] The *Ricks* court **[**23]** listed the reporting requirement as one of the conditions for HCQIA immunity without discussing the further steps of an investigation by the Secretary and publication in the Federal Register. *See* *31 F.3d at 1485*. As the reporting requirement was not at issue in *Ricks,* this appears to reflect a convenient shorthand for the Court, rather than a declaration that the provisions of *Section 11111(b)* are not applicable in this Circuit.

proper on any of the grounds put forward, it would elevate form over substance to grant it only in favor of the new defendants, and to require the prior defendants to go to trial on meritless claims.

That said, upon review of the present record, no sufficient reason appears to depart from the prior rulings. The 2007 summary judgment order found that Fox had shown, albeit narrowly, the existence of sufficient triable issues of facts to support antitrust standing, an antitrust conspiracy, and a relevant geographic market. The Court concluded that beyond injury to himself, Fox had produced some evidence that the quality and availability of pediatric services at GSH suffered when his privileges were revoked. Although the inferences Fox sought to draw to support the **[**27]** existence of a conspiracy were "problematic," the timing of events precluded a conclusion as a matter of law that no conspiracy existed. Finally, Fox's reliance on a one-hospital geographic market was not fatal to his claims in light of the evidence as to how at least some patients obtain pediatric intensive care services, in an "after-market" upon entering GSH at the outset.

One main thrust of defendants' argument now is that despite the substantial additional written discovery and deposition practice that has taken place since the prior rulings, Fox cannot (defendants contend) point to any additional evidence to support his claims. To the extent that Fox does not have *more* evidence to support triable issues of fact, that does not somehow undermine the existence of triable issues of fact in the first instance.

Defendants are on more solid ground conceptually, however, when they argue that there is new affirmative evidence that refutes one or more of the Court's prior identifications of triable issues of fact. In this regard, defendants make four main points. First, defendants point to the deposition of Dr. R. Lawrence Berkowitz, who had previously offered a declaration that Fox's suspension **[**28]** "may have" impacted his ability to treat his patients, but who has now testified that there was no such negative impact. While the Court's 2007 order did expressly refer to the Berkowitz declaration as *one* example of "evidence that suggests a reduction in the quality of services to patients," resulting from Fox's suspension, it was not the sole evidence on which the Court rested its conclusion that triable factual issues existed. See October 9, 2007 Order at 9:2-12.

Second, and similarly, defendants point to the fact that Dr. Mendoza has now testified that he alone decided to withdraw his application for additional privileges, and that he was not pressured to do so by anyone else. Again, the Court's 2007 order **[*894]** listed GSH's purported failure to approve such privileging applications as *one* example of evidence supporting an inference of conspiracy, but only one. See October 9, 2007 Order at 10:23-11:7.

Third, and to the same effect, defendants have now mounted a full-out assault on Fox's evidence that he was told "watch your back" after he had raised complaints about certain patient care incidents. Although the statement may constitute inadmissible hearsay were it offered to support the **[**29]** existence of a conspiracy, taking it out of the equation does not result in a record devoid of any other evidence sufficient to create a triable issue of fact. [8]

Finally, defendants suggest that minutes of the Medical Quality Review Committee, recently produced over their objections, tend to show that Fox's complaints regarding patient care were actually taken as well-founded and addressed accordingly. While that may be so, the fact that the Committee agreed with Fox's concerns does not rule out the possibility that he might have suffered **[**30]** retaliation for having brought the issues to light in the first place. [9]

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[8] Defendants have filed a separate motion to strike regarding the "watch your back" statement, set to be heard on April 14, 2010. The Court has reviewed Fox's opposition to that motion, and agrees that the statement could be considered non-declarative, or non-hearsay, or otherwise admissible for certain limited purposes. In none of those circumstances, however, would the statement be probative of the existence of a conspiracy. As this order reflects, however, ultimately it is of little consequence, because there is other evidence sufficient to create a triable issue. More fundamentally, though, in light of the disposition of this order, the issue is moot.

[9] In one instance, the GSH Chief of Staff requested that Fox review a patient case. Contrary to defendants' suggestion, however, the fact that the review process was initiated by GSH does not conclusively establish that Fox was not the victim of retaliation for his resulting report. For example, Fox would be entitled to argue to a jury that defendants were unhappy that his report did not go far enough in attempting to defend or justify the patient care that had been given.

As the parties are aware, the Court's 2007 Order included language suggesting that the evidence supporting triable issues of fact was not particularly strong in many respects, and expressly observing that "persuasive alternative inferences can be drawn." In the present motion, defendants have perhaps kicked out a few more props supporting the case that the Court previously suggested was somewhat wobbly in the first instance. The Court's prior observations about summary judgment in the antitrust context, however, remain relevant.

> In overturning a summary judgment in an antitrust case, the Supreme Court noted ***HN20***[] "[s]ummary procedures should be used sparingly **[**31]** in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 500, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)*; see *In re Citric Acid Litigation, 191 F.3d 1090, 1106 n.10 (9th Cir. 1999)* ("[R]are is the antitrust case in which there is absolutely no evidence which could support some inference of an antitrust violation.").

October 9, 2007 Order at 7:10-16.

Defendants are of course correct that this does not mean summary judgment should never be granted with respect to antitrust issues. They have not persuasively shown, however, that it would be warranted here, were it not for HQCIA immunity.

3. Spoliation

Fox suggests that summary judgment should be denied based on his claim **[*895]** that defendants admit they destroyed certain records. Fox, however, has not established that any relevant documents were destroyed at any point in time when defendants should have been aware of their potential relevance. Nor has Fox otherwise shown that this would be a basis for denying summary judgment, particularly on the HCQIA immunity issue, to which any such destroyed documents **[**32]** would necessarily be irrelevant.

4. *Rule 56(f)*

Fox generally requests that a ruling on summary judgment be deferred pending further discovery. Even if Fox had adequately shown the potential relevance of further discovery to the substantive claims, there is no basis to believe that further discovery could possibly serve to create a material factual dispute regarding HCQIA immunity.

B. The HCA Motion

In a motion separately noticed and heard, defendant HCA, Inc. argues that regardless of the outcome of the motion brought by all the defendants, separate and independent grounds warrant summary judgment in its favor. The undisputed evidence, according to HCA, demonstrates that Fox cannot prove the sole allegation in the complaint previously identified by the Court as support for direct HCA liability, and that the circumstances do not warrant piercing the corporate veil to impose indirect liability. Because Fox fails to raise a material issue of triable fact, summary judgment for HCA will be entered on that additional and independent ground.

1. Additional Background as to HCA

Pertinent to this motion is the fact that defendant HCA acquired ownership of defendant GSH in 1995, some years after the **[**33]** earliest incidents giving rise to Fox's contention that he has suffered retaliation, but several years prior to his 2004 initiation of this action. Fox did not seek to add HCA as a defendant herein until March 31, 2006.

In 2008, HCA filed a motion to dismiss the operative second amended complaint, arguing, among other things, that the allegations did not support imposing direct liability on it for purported wrongdoing by GSH or other defendants. HCA expressly argued that under *U.S. v. Best Foods, 524 U.S. 51, 64, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998)*, Fox was obligated to plead (and ultimately prove) facts demonstrating that HCA, as a separate entity, was a "direct participant" in actionable conduct. HCA also argued that many of the alleged acts for which Fox sought to hold HCA directly liable were time-barred.

On October 30, 2008, the Court issued an order granting in part and denying in part HCA's motion to dismiss. The Court first found that Fox's claims against HCA did not "relate back" to the filing of this action, with the result that no conduct occurring prior to March 31, 2002 could serve as a basis for imposing liability against HCA. [10] The Court further found that Fox had alleged an adequate basis for imposing **[**34]** direct liability against HCA with respect to only one series of alleged events, namely, the "efforts to mandate what Fox characterizes as the 2006 non-negotiable HCA corporate loyalty oath." See October 30, 2008 Order at 7:21-22 (referencing Second Amended Complaint PP 37-39, 43, 58-59). The Court explained that because Fox had alleged facts supporting an inference that those efforts were undertaken by GSH's CEO William Piche *for the benefit of HCA* (albeit not the **[*896]** *sole* benefit of HCA), there was a sufficient basis to proceed against HCA as a direct participant in the alleged wrongdoing. The Court expressly declined to reach Fox's alternate theories of indirect liability.

2. Standards

The standards for summary judgment have been discussed above. In connection with this motion in particular, Fox's written opposition reflects a misapprehension of the relationship among motions to dismiss, motions for judgment on the pleadings, and motions for summary judgment. Fox correctly **[**35]** states that motions testing the sufficiency of a complaint, both motions to dismiss and motions for judgment on the pleadings, look only to what is contained within the four corners of the pleading (except where it is appropriate also to consider matters than can be judicially-noticed). Fox's apparent suggestion, however, that the contents of the complaint do not serve as a limitation at the summary judgment stage, is incorrect. ***HN21***[] While a summary judgment motion does go beyond the pleadings in the sense that it tests the sufficiency of the evidence to *support the allegations of the complaint,* those allegations still serve to frame--and limit--the issues.

For the same reason, Fox is not correct that HCA's motion should be deemed a motion for judgment on the pleadings simply because HCA's has focused on those elements of the complaint that survived the motion to dismiss. HCA does not challenge the sufficiency of the *allegations* to state a claim; it has, for purposes of this motion, accepted the Court's prior rulings in that regard. Rather, HCA is now contending that the *evidence* establishes as a matter of undisputed fact that Fox is unable to *prove* any of the allegations of the complaint **[**36]** that the Court previously found would support imposition of liability against HCA, *if proven.*

Thus, in either a motion to dismiss or a motion for judgment on the pleadings, the allegations of the complaint are presumed true, and the only question is whether those allegations would support liability. At summary judgment, however, the question is whether the *evidence* "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248*. The question is *not* whether there are other unpleaded facts or theories which might support liability. [11]

3. The evidence

Much of Fox's opposition is devoted to establishing that William Piche, the CEO of GSH was also an HCA employee, as was former CEO Thomas May, who is Piche's superior, and who remains an officer of GSH's general partner. From these facts, Fox contends, it can be inferred that *any* alleged wrongdoing by either Piche or May can be ascribed to HCA, or at least there is an issue of fact as to which "hat" these individuals were wearing at the time. These arguments, however, were considered and rejected in the context of the prior motion to dismiss. As reflected in the October 30, 2008 order, ***HN22***[] without facts supporting an inference that the challenged conduct was undertaken for the benefit of HCA, Fox cannot overcome the **[*897]** presumption that an individual is wearing the "hat" of the subsidiary when conducting the business of the subsidiary. See *Best Foods, 524 U.S. at 69-70*.

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[10] The statute of limitations on Fox's federal claims is four years. The state law claims have a two year statute of limitations, such that only conduct occurring after March 31, 2004 can support those particular claims.

[11] This is not to say that factual details beyond those explicitly set out in a complaint are out of bounds at the summary judgment stage, so long as those details do not represent new or different grounds for asserted liability beyond those properly noticed by the complaint. Fox is also correct that *Rule 15* provides a mechanism for filing a supplemental complaint, to bring in conduct taking place after the date of the operative pleading. Fox has not sought leave to file a supplemental complaint, however, and the theoretical possibility that one could be filed is not a basis for considering post-complaint conduct **[**37]** in evaluating this summary judgment motion.

Applying that principle, the Court previously concluded that the only non-time-barred matters alleged in the second amended complaint that could fairly be ascribed to HCA was the alleged imposition of the "loyalty oath." Even assuming it were appropriate for the Court **[**38]** now to revisit the question of whether other matters, such as Piche's involvement in Fox's privileging between 2002 and 2004, theoretically could support direct liability against HCA, Fox has not pointed to any further facts or evidence giving rise to an inference that Piche was acting for the benefit of HCA in such matters.

Furthermore, regardless of which hat Piche or May was wearing, Fox cannot avoid summary judgment by pointing to purported factual issues related to conduct occurring prior to March 31, 2002 (four years prior to the time HCA was added as a defendant herein) or after the then-proposed second amended complaint was filed on April 18, 2008. Accordingly, HCA's focus on the issue of the "loyalty oath" as the dispositive question is appropriate.

On that point, HCA has produced undisputed evidence that defendants withdrew any requirement for Fox to sign the "loyalty oath" as a condition for obtaining privileges, and so informed Fox by letter dated May 25, 2006. Declaration of Carol Ostermann, Exhibits B & C. [12] The same letter informed Fox that his application for reappointment would be presented to the next meeting of GSH's Board of Trustees, with a recommendation that it **[**39]** be approved. Ostermann Decl., Exh. C. Fox's application for privileges was in fact granted at that meeting. Declaration of William Piche, Exhibit B.

Fox does not dispute these facts. Instead, Fox points out that GSH failed thereafter to send him written notice that his reappointment had been approved. Defendants contend this was mere administrative "oversight," but Fox argues that in light of the entire history between him and GSH, there is a reasonable inference that it was the result of further retaliation. The shortcoming in this argument is that it at most might create an issue of fact as to whether *GSH* wrongfully withheld formal notification of Fox's reappointment. As the Court's October 30, 2008 order indicated, there may have been a reasonable inference that imposing the requirement of the "loyalty oath" was an act that benefited HCA, but once that **[**40]** requirement was lifted, any connection to HCA was severed. Fox does not dispute he received notice that no "loyalty oath" to HCA would be required. Any subsequent failure to notify Fox of his reappointment was no more an act on behalf of HCA than any of the other matters involving Fox's privileging that the Court has found do not support direct liability against HCA. Accordingly, summary judgment in favor of HCA on all of Fox's direct liability claims is warranted. [13]

Finally, HCA's motion set forth evidence and argument that there is no basis to impose indirect liability against it under an alter ego theory. Fox's opposition elected not to offer any evidence or argument to **[*898]** the contrary, resting instead on his assertion that direct liability exists. Accordingly, summary judgment in favor of HCA on the indirect liability claims is also appropriate.

IV. CONCLUSION

Defendants' motions for summary judgment are granted. A separate judgment will be entered.

IT IS SO ORDERED.

Dated: 03/29/2010

/s/ Richard Seeborg

RICHARD SEEBORG

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[12] Indeed, it appears that the GSH Medical Executive Committee eliminated the "loyalty oath" requirement precisely because it agreed with Fox's objections to it. The committee minutes state: "A physician's objections to language in the Confidentiality and Security Agreement were reviewed and found to be valid." Ostermann Decl., Exh. B.

[13] Fox's suggestion that the matter be continued under *Rule 56(f)* to permit further discovery fails to show with adequate specificity what further discovery might accomplish.

UNITED **[**41]** STATES DISTRICT JUDGE

JUDGMENT

Based on the order issued herewith, granting defendants' motions for summary judgment, the Court enters judgment in favor of defendants and against plaintiff in the above-entitled action.

IT IS SO ORDERED.

Dated: 03/29/2010

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

King Drug Co. of Florence v. Cephalon, Inc.

United States District Court for the Eastern District of Pennsylvania

March 29, 2010, Decided; March 29, 2010, Filed

CIVIL ACTION No. 2:06-cv-1797; CIVIL ACTION No. 2:06-cv-1833; CIVIL ACTION No. 2:06-cv-2768; CIVIL ACTION No. 2:08-cv-2141

Reporter

702 F. Supp. 2d 514 *; 2010 U.S. Dist. LEXIS 29905 **; 2010-1 Trade Cas. (CCH) P76,950

KING DRUG COMPANY OF FLORENCE, INC., et al., Plaintiffs, v. CEPHALON, INC., et al., Defendants. VISTA HEALTHPLAN, INC., et al., Plaintiffs, v. CEPHALON, INC., et al., Defendants. APOTEX, INC., Plaintiff, v. CEPHALON, INC., et al., Defendants. FEDERAL TRADE COMMISSION, Plaintiff, v. CEPHALON, INC., Defendant.

Subsequent History: Motion denied by *Apotex, Inc. v. Cephalon, Inc., 2010 U.S. Dist. LEXIS 147205 (E.D. Pa., Apr. 8, 2010)*

Motion denied by *King Drug Co. of Florence v. Cephalon, Inc., 2010 U.S. Dist. LEXIS 147696 (E.D. Pa., Nov. 22, 2010)*

Later proceeding at *King Drug Co. of Florence v. Cephalon, Inc., 2015 U.S. Dist. LEXIS 182022 (E.D. Pa., Mar. 27, 2015)*

Class certification denied by *Vista Healthplan, Inc. v. Cephalon, Inc., 2015 U.S. Dist. LEXIS 74846 (E.D. Pa., June 10, 2015)*

Prior History: *Apotex, Inc. v. Cephalon, Inc., 2010 U.S. Dist. LEXIS 16940 (E.D. Pa., Feb. 23, 2010)*

Core Terms

patent, generic, settlement agreement, modafinil, motion to dismiss, manufacturer, antitrust, Defendants', settlement, infringement, Plaintiffs', invalid, products, exclusionary, payor, allegations, complaints, cases, rights, FDA, anticompetitive, certification, licenses, pled, class action, generic drug, Purchaser, effects, sham, brand name

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > Claim Interpretation > Aids & Extrinsic Evidence

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Drug Price Competition and Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, *21 U.S.C.S. § 355(j)*, creates the Abbreviated New Drug Application process (ANDA), which allows a generic drug application to piggyback on safety and efficacy studies conducted for the pioneer drug. Under the Hatch-Waxman Act, the pharmaceutical company is still required to file a New Drug Application (NDA) with full-scale safety and efficacy studies listing the patents that generics might infringe in the future. *§ 355(b)(1)*. However, the Hatch-Waxman Act is designed to allow generic companies to bypass the studies required under a NDA and file an ANDA, which requires only that generic companies prove that the new drug is the bioequivalent of a brand name drug on the market. *§ 355(j)(2)(A)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > Claim Interpretation > Aids & Extrinsic Evidence

HN2[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

An Abbreviated New Drug Application process (ANDA) filer must select one (1) of the following certifications: (1) that the patent information has not been filed on the generic's brand name equivalent, a Paragraph I certification; (2) that a patent on the branded drug has expired, a Paragraph II certification; (3) that a brand name patent exists, including the date on which such patent will expire, with a promise not to market until that date, a Paragraph III certification; or (4) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted, a Paragraph IV certification. *21 U.S.C.S. § 355(j)(2)(A)(vii)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Ownership > Patents as Property

HN3[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

If the generic Abbreviated New Drug Application process (ANDA) filer selects a Paragraph IV certification, it must consult the Orange Book and provide notification to each New Drug Application (NDA) or patent owner impacted by the ANDA certification not later than 20 days after the date of the postmark on the notice with which the Secretary informs the applicant that the application has been filed. *21 U.S.C.S. § 355(j)(2)(B)(ii)(I)*. The filing of an ANDA Paragraph IV certification allows the patent holders to sue, as it is considered a technical act of infringement. The patent owners have 45 days to bring an infringement suit against the generic. If the affected patent owners do not file suit, the United States Federal Drug Administration can approve the ANDA without delay. *§ 355(j)(5)(B)(iii)*. If an affected patent owner brings an infringement suit, approval of the application is automatically stayed for 30 months, or until a district court issues a final decision concluding that the patent has not been infringed or is otherwise invalid.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > Claim Interpretation > Construction Preferences

HN4[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

In order to provide generic drug makers with an incentive to incur the expense and risk of a potential infringement suit by the patent holder, the first Abbreviated New Drug Application process (ANDA) filer maintains a 180-day exclusivity period. *21 U.S.C.S. § 355(j)(5)(B)(iv)*. During that period, the United States Federal Drug Administration cannot approve any other generic manufacturer's ANDA until 180-days after the earlier of (1) the date of the first ANDA filer's commercial marketing of its generic drug; or (2) the date of a court decision that the patent is invalid or not infringed. *§ 355(j)(5)(B)(iii)(I)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] **Actual Monopolization, Claims**

With the ultimate goal of stimulating competition and innovation, the Sherman Act, *15 U.S.C.S. § 1*, provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Although the statute prohibits all restraints of trade, the United States Supreme Court has long recognized that the United States Congress intends to outlaw only unreasonable restraints. The Sherman Act also states that a monopoly of any part of trade or commerce is illegal. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN6[] **Actual Monopolization, Monopoly Power**

In determining whether an alleged restraint of trade is unreasonable, courts generally apply either a per se rule or what is referred to as a rule-of-reason analysis. A per se analysis is applicable only where courts have previously considered the type of conduct at issue and have found that its expected effects are overwhelmingly anticompetitive. Id. In the rule-of-reason analysis, the question is whether the conduct at issue is anticompetitive taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed and the restraint's history, nature and effect. The rule-of-reason tests whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. By contrast, but also with the goal of stimulating competition and innovation, patent law grants an innovator the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States. *35 U.S.C.S. § 154(a)(1)* and *(2)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN7[] **Actual Monopolization, Monopoly Power**

In focusing on the rights afforded by the granting of a patent, one court has noted that engrafted into patent law is the notion that a patent grant bestows the right to exclude others from profiting by the patented invention. Thus, the Patent Act essentially provides the patent owner with what amounts to a permissible monopoly over the patented work. Other cases have stressed, however, that patent rights cannot create a monopoly beyond the scope of the patent. The possession of a valid patent does not give the patentee any exemption from the provisions of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, beyond the limits of the patent monopoly. Thus, if the challenged activity simply serves as a device to circumvent ***antitrust law***, then that activity is typically susceptible to an antitrust suit.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN8[] **Actual Monopolization, Monopoly Power**

The United States District Court for the Eastern District of Pennsylvania will apply a framework which examines whether any of the agreements in question exceed the exclusionary patent rights granted to a patent owner. A patent grants its owner the lawful right to exclude others. The essence of a patent grant is the right to exclude others from profiting by the patented invention. That exclusionary right is granted to allow the patentee to exploit whatever degree of market power it might gain thereby as an incentive to induce investment in innovation and the public disclosure of inventions. A patentee can choose to exclude everyone from producing the patented article or can choose to be the sole supplier itself, or grant exclusive territorial licenses carving up the United States among its licensees. Within reason, patentees can also subdivide markets in ways other than territorial, such as by customer class. A patentee's allocation of territories is not always the kind of territorial market allocation that triggers antitrust liability. In a reverse-payment case, the settlement leaves the competitive situation unchanged from before the defendant tried to enter the market. At the same time, to the extent that the agreements in question improperly afford more rights than those granted under the patent, antitrust principles may apply.

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

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

HN9[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted examines the legal sufficiency of the complaint.

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

HN10[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a)(2) requires that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief. According to the United States Supreme Court, the *Rule 8* pleading standard does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

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

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

HN11[] **Motions to Dismiss, Failure to State Claim**

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

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

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

HN12[] **Motions to Dismiss, Failure to State Claim**

A court must accept as true all of the factual allegations made in a pleading, but not the legal conclusions. Only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining plausibility is a context specific task. In short, where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not shown-that the pleader is entitled to relief. The Third Circuit has found that in light of Twombly, it is no longer sufficient to make an unsupported statement asserting an entitlement to relief; instead a complaint must state a claim and the grounds supporting the claim.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN13[] **Standing, Requirements**

The following test is applicable in determining antitrust standing: (1) the causal connection between antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages. That standing analysis is essentially a balancing test comprised of many constant and variable factors and there is no talismanic test capable of resolving all standing problems.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under Mississippi law, the plaintiffs need only have to plead facts that would lead to a reasonable inference that the defendant and its co-conspirators wanted the Mississippi vendors to charge Mississippi consumers a higher price as a result of the lack of competition. The Utah Antitrust Act, Utah Code Ann. § 76-10-913 (2010), has no such requirement, but instead bars all antitrust activity with regard to trade or commerce. The statute defines trade or commerce as all economic activity involving, or relating to, any commodity, service, or business activity.

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

Governments > Legislation > Interpretation

Governments > Legislation > Types of Statutes

HN15[] **Private Actions, State Regulation**

The West Virginia antitrust statute, *W. Va. Code § 47-18-16* (2010), specifically dictates that it is to be construed liberally.

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

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN16[] **Private Actions, State Regulation**

Unjust enrichment claims are viable regardless of the applicable state antitrust laws. It has long been recognized that plaintiffs are allowed to plead alternative causes of action and unjust enrichment is commonly recognized as one of those permissible alternative causes of action.

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

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

HN17[] **Private Actions, State Regulation**

It has been held in an antitrust case that the allegation that a name brand manufacturer brought a sham patent infringement suit against a generic manufacturer with the purpose of keeping it out of the generic drug market is sufficient to state a claim for tortious interference with prospective business advantages.

Counsel: **[**1]** For VISTA HEALTHPLAN, INC., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff (2:06-cv-01833-MSG): JOSEPH H. MELTZER, TERENCE S. ZIEGLER, LEAD ATTORNEYS, BARROWAY TOPAZ KESSLER MELTZER & CHECK LLP, RADNOR, PA; KEVIN B. LOVE, LEAD ATTORNEY, HANZMAN CRIDEN & LOVE, P.A., SOUTH MIAMI, FL; LAWRENCE KENDALL SATTERFIELD, LEAD ATTORNEY, FINKELSTEIN THOMPSON LLP, WASHINGTON, DC; THEODORE M. LIEVERMAN, LEAD ATTORNEY, SPECTOR ROSEMAN KODROFF & WILLIS, P.C., PHILADELPHIA, PA; ROBERT W. SINK, LAW OFFICES OF ROBERT W. SINK, MEDIA, PA.

For PENNSYLVANIA TURNPIKE COMMISSION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, PENNSYLVANIA EMPLOYEES BENEFIT TRUST FUND, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN, Plaintiffs (2:06-cv-01833-MSG): JOSEPH H. MELTZER, TERENCE S. ZIEGLER, LEAD ATTORNEYS, BARROWAY TOPAZ KESSLER MELTZER & CHECK LLP, RADNOR, PA; KEVIN B. LOVE, LEAD ATTORNEY, HANZMAN CRIDEN & LOVE, P.A., SOUTH MIAMI, FL; THEODORE M. LIEVERMAN, LEAD ATTORNEY, SPECTOR ROSEMAN KODROFF & WILLIS, P.C., PHILADELPHIA, PA; LAWRENCE KENDALL SATTERFIELD, FINKELSTEIN THOMPSON LLP, WASHINGTON, DC; ROBERT W. SINK, LAW OFFICES OF ROBERT **[**2]** W. SINK, MEDIA, PA.

For AVMED, INC., Plaintiff (2:06-cv-01833-MSG): DAVID S. NALVEN, THOMAS M. SOBOL, LEAD ATTORNEYS, HAGENS BERMAN SOBOL SHAPIRO LLP, CAMBRIDGE, MA; JEFFREY C. SWANN, LEAD ATTORNEY, RAWLINGS & ASSOCIATES PLLC, LAGRANGE, KY; KENDALL SCOTT ZYLSTRA, LEAD ATTORNEY, FARUQI & FARUQI LLP, HUNTINGDON VALLEY, PA; MARK D. FISCHER, LEAD ATTORNEY, RAWLINGS & ASSOC., LOUISVILLE, KY; MARK M. SANDMANN, LEAD ATTORNEY, RAWLINGS & ASSOCIATES PLLC, LOUISVILLE,

KY; RICHARD D. SCHWARTZ, LEAD ATTORNEY, FARUQI & FARUQI LLP, NEW YORK, NY; JOSEPH H. MELTZER, BARROWAY TOPAZ KESSLER MELTZER & CHECK LLP, RADNOR, PA.

For DEBRA LANGAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, Plaintiff (2:06-cv-01833-MSG): KEVIN B. LOVE, LEAD ATTORNEY, HANZMAN CRIDEN & LOVE, P.A., SOUTH MIAMI, FL; ROBERT W. SINK, LEAD ATTORNEY, LAW OFFICES OF ROBERT W. SINK, MEDIA, PA; TERENCE S. ZIEGLER, LEAD ATTORNEY, JOSEPH H. MELTZER, BARROWAY TOPAZ KESSLER MELTZER & CHECK LLP, RADNOR, PA; THEODORE M. LIEVERMAN, LEAD ATTORNEY, SPECTOR ROSEMAN KODROFF & WILLIS, P.C., PHILADELPHIA, PA; LAWRENCE KENDALL SATTERFIELD, FINKELSTEIN THOMPSON LLP, WASHINGTON, DC.

For CEPHALON, INC., Defendant (2:06-cv-01833-MSG): GREGORY **[**3]** P. TERAN, LEAD ATTORNEY, WILMER CUTLER PICKERING HALE & DORR LLP, BOSTON, MA; PETER J. KOLOVOS, LEAD ATTORNEY, MARK A. FORD, WILMER CUTLER PICKERING HALE DORR LLP, BOSTON, MA; ROBERT J. GUNTHER, JR., LEAD ATTORNEY, WILMER CUTLER PICKERING HALE DORR LLP, NEW YORK, NY; FRANK R. EMMERICH, JR., CONRAD O'BRIEN PC, PHILADELPHIA, PA; JAMES C. BURLING, WILMER CUTLER PICKERING HALE & DORR, BOSTON, MA; JOHN A. GUERNSEY, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILADELPHIA, PA; MICHELLE D. MILLER, WILMER CUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; NANCY J. GELLMAN, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILA, PA; PETER A. SPAETH, WILMER BUTLER PICKERING HALE AND DORR LLP, BOSTON, MA.

For BARR LABORATORIES, INC., Defendant (2:06-cv-01833-MSG): GREGORY L. SKIDMORE, JOHN C. O'QUINN, LEAD ATTORNEYS, KIRKLAND ELLIS LLP, WASHINGTON, DC; JAY P. LEFKOWITZ, LEAD ATTORNEY, KIRKLAND & ELLIS, NEW YORK, NY; KAREN N. WALKER, LEAD ATTORNEY, KIRKLAND & ELLIS, WASHINGTON, DC; LATHROP B. NELSON, III, LEAD ATTORNEY, MONTGOMERY MCCRACKEN WALKER AND RHOADS, L.L.P., PHILADELPHIA, PA; RICHARD L. SCHEFF, LEAD ATTORNEY, MONTGOMERY MCCRACKEN WALKER & RHOADS LLP, PHILADELPHIA, PA.

For MYLAN LABORATORIES, INC., Defendant (2:06-cv-01833-MSG): **[**4]** C. FAIRLEY SPILLMAN, PAUL B. HEWITT, LEAD ATTORNEYS, AKIN GUMP STRAUSS HAUER & FELD LLP, WASHINGTON, DC; DAVID L. COMERFORD, JEFFERY A. DAILEY, KATHERINE M. KATCHEN, MATTHEW RYAN VARZALLY, LEAD ATTORNEYS, AKIN GUMP STRAUSS HAUER & FELD LLP, PHILADELPHIA, PA.

For TEVA PHARMACEUTICAL INDUSTRIES, LTD., TEVA PHARMACEUTICALS USA, INC., Defendants (2:06-cv-01833-MSG): JEFFREY B. KORN, LEAD ATTORNEY, WILLKIE FARR GALLAGHER LLP, NEW YORK, NY; JOSEPH E. WOLFSON, LEAD ATTORNEY, STEVENS & LEE, KING OF PRUSSIA, PA; WILLIAM H. ROONEY, WILLKIE, FARR & GALLAGHER, NEW YORK, NY.

For RANBAXY LABORATORIES, LTD., RANBAXY PHARMACEUTICALS, INC., Defendants (2:06-cv-01833-MSG): DANIELLE R. FOLEY, J. DOUGLAS BALDRIDGE, LISA JOSE FALES, LEAD ATTORNEYS, PRO HAC VICE, VENABLE, LLP, WASHINGTON, DC; VINCENT E. VERROCCHIO, LEAD ATTORNEY, VENABLE, LLP, WASHINGTON, DC; ANTHONY S. VOLPE, JOHN J. O'MALLEY, VOLPE & KOENIG PC, PHILADELPHIA, PA.

For ECKERD CORPORATION, Defendant (2:06-cv-01833-MSG): MONICA L. REBUCK, LEAD ATTORNEY, HANGLEY ARONCHICH SEGAL & PUDLIN, HARRISBURG, PA; STEVE D. SHADOWEN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, PA.

For APOTEX, INC., Plaintiff (2:06-cv-02768-MSG): BRIAN J. SODIKOFF, **[**5]** ROBERT B. BREISBLATT, LEAD ATTORNEYS, KATTEN, MUCHIN, ROSENMANN, LLP, CHICAGO, IL; EDWARD A. DIVER, LEAD ATTORNEY, HOWARD I. LANGER, LANGER & GROGAN P.C., PHILADELPHIA, PA; MARTIN S. MASAR, KATTEN MUCHIN ROSENMAN LLP, CHICAGO, IL.

For CEPHALON, INC., Defendant (2:06-cv-02768-MSG): AMY K. WIGMORE, WILMER HALE, WASHINGTON, DC; DANIEL M. ESRICK, GREGORY P. TERAN, WILMER CUTLER PICKERING HALE & DORR LLP, BOSTON, MA; FRANK R. EMMERICH, JR., CONRAD O'BRIEN PC, PHILADELPHIA, PA; JAMES C. BURLING, WILMER CUTLER PICKERING HALE & DORR, BOSTON, MA; JOHN A. GUERNSEY, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILADELPHIA, PA; MARK A. FORD, PETER J. KOLOVOS, WILMER CUTLER PICKERING HALE

DORR LLP, BOSTON, MA; MICHELLE D. MILLER, WILMER CUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; NANCY J. GELLMAN, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILA, PA; PETER A. SPAETH, WILMER BUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; ROBERT J. GUNTHER, JR., WILMER CUTLER PICKERING HALE DORR LLP, NEW YORK, NY; SARAH B. PETTY, PRO HAC VICE, WILMER CUTLER PICKERING HALE & DORR LLP, BOSTON, MA.

For BARR LABORATORIES, INC., Defendant (2:06-cv-02768-MSG): KAREN N. WALKER, LEAD ATTORNEY, KIRKLAND & ELLIS, WASHINGTON, DC; LATHROP B. **[**6]** NELSON, III, LEAD ATTORNEY, MONTGOMERY MCCRACKEN WALKER AND RHOADS, L.L.P., PHILADELPHIA, PA; RICHARD L. SCHEFF, LEAD ATTORNEY, MONTGOMERY MCCRACKEN WALKER & RHOADS LLP, PHILADELPHIA, PA; GREGORY L. SKIDMORE, JOHN C. O'QUINN, KIRKLAND ELLIS LLP, WASHINGTON, DC; JAY P. LEFKOWITZ, KIRKLAND & ELLIS, NEW YORK, NY.

For MYLAN LABORATORIES, INC., Defendant (2:06-cv-02768-MSG): C. FAIRLEY SPILLMAN, PAUL B. HEWITT, LEAD ATTORNEYS, AKIN GUMP STRAUSS HAUER & FELD LLP, WASHINGTON, DC; DAVID L. COMERFORD, JEFFERY A. DAILEY, KATHERINE M. KATCHEN, MATTHEW RYAN VARZALLY, LEAD ATTORNEYS, AKIN GUMP STRAUSS HAUER & FELD LLP, PHILADELPHIA, PA.

For TEVA PHARMACEUTICAL INDUSTRIES, LTD., TEVA PHARMACEUTICALS USA, INC., Defendants (2:06-cv-02768-MSG): JEFFREY B. KORN, LEAD ATTORNEY, WILLKIE FARR GALLAGHER LLP, NEW YORK, NY; JOSEPH E. WOLFSON, LEAD ATTORNEY, STEVENS & LEE, KING OF PRUSSIA, PA; WILLIAM H. ROONEY, LEAD ATTORNEY, WILLKIE, FARR & GALLAGHER, NEW YORK, NY.

For RANBAXY LABORATORIES, LTD., RANBAXY PHARMACEUTICALS, INC., Defendants (2:06-cv-02768-MSG): DANIELLE R. FOLEY, J. DOUGLAS BALDRIDGE, LISA JOSE FALES, LEAD ATTORNEYS, VENABLE, LLP, WASHINGTON, DC; ANTHONY S. VOLPE, JOHN J. O'MALLEY, VOLPE & KOENIG **[**7]** PC, PHILADELPHIA, PA.

For CEPHALON, INC., Counter Claimant (2:06-cv-02768-MSG): AMY K. WIGMORE, WILMER HALE, WASHINGTON, DC; FRANK R. EMMERICH, JR., CONRAD O'BRIEN PC, PHILADELPHIA, PA; GREGORY P. TERAN, WILMER CUTLER PICKERING HALE & DORR LLP, BOSTON, MA; JAMES C. BURLING, WILMER CUTLER PICKERING HALE & DORR, BOSTON, MA; JOHN A. GUERNSEY, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILADELPHIA, PA; MARK A. FORD, PETER J. KOLOVOS, WILMER CUTLER PICKERING HALE DORR LLP, BOSTON, MA; MICHELLE D. MILLER, WILMER CUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; NANCY J. GELLMAN, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILA, PA; PETER A. SPAETH, WILMER BUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; ROBERT J. GUNTHER, JR., WILMER CUTLER PICKERING HALE DORR LLP, NEW YORK, NY.

For APOTEX, INC., Counter Defendant (2:06-cv-02768-MSG): BRIAN J. SODIKOFF, ROBERT B. BREISBLATT, LEAD ATTORNEYS, KATTEN, MUCHIN, ROSENMANN, LLP, CHICAGO, IL; EDWARD A. DIVER, LEAD ATTORNEY, HOWARD I. LANGER, LANGER & GROGAN P.C., PHILADELPHIA, PA; MARTIN S. MASAR, KATTEN MUCHIN ROSENMAN LLP, CHICAGO, IL.

For KING DRUG COMPANY OF FLORENCE, INC., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff (2:06-cv-01797-MSG): ANDREW **[**8]** WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DAN LITVIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, LEAD ATTORNEY, DAVID F. SORENSEN, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID C. RAPHAEL, JR., LEAD ATTORNEY, PRO HAC VICE, THE SMITH FOOTE LAW FIRM LLP, ALEXANDRIA, LA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; ERIN C. BURNS, LEAD ATTORNEY, RODA NAST PC, LANCASTER, PA; JOHN D. RADICE, LINDA P. NUSSBAUM, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; SUSAN C. SEGURA, LEAD ATTORNEY, THE SMITH FOOTE LAW FIRM LLP, ALEXANDRIA, LA; DANIEL C. SIMONS, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA; RUSSELL A. CHORUSH, PRO HAC VICE, 600 TRAVIS STE 6710, HOUSTON, TX.

For J M SMITH CORPORATION, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED doing business as SMITH DRUG COMPANY, Plaintiff (2:06-cv-01797-MSG): ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, **[**9]** LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DAN LITVIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, LEAD ATTORNEYS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DANIEL C. SIMONS, LEAD ATTORNEY, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA; DAVID C. RAPHAEL, JR., LEAD ATTORNEY, PRO HAC VICE, THE SMITH FOOTE LAW FIRM LLP, ALEXANDRIA, LA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; ERIN C. BURNS, LEAD ATTORNEY, RODA NAST PC, LANCASTER, PA; JOHN D. RADICE, LINDA P. NUSSBAUM, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; SUSAN C. SEGURA, LEAD ATTORNEY, THE SMITH FOOTE LAW FIRM LLP, ALEXANDRIA, LA.

For MEIJER, INC., MEIJER DISTRIBUTION, INC., Plaintiffs (2:06-cv-01797-MSG): ALLEN D. BLACK, LEAD ATTORNEY, FINE, KAPLAN & BLACK, PHILADELPHIA, PA; ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, LEAD ATTORNEYS, **[**10]** BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DANIEL C. SIMONS, LEAD ATTORNEY, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA; DAVID P. GERMAINE, LEAD ATTORNEY, JOSEPH M. VANEK, VANEK, VICKERS, & MASINI, P.C., CHICAGO, IL; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; ERIN C. BURNS, LEAD ATTORNEY, RODA NAST PC, LANCASTER, PA; JOHN D. RADICE, LEAD ATTORNEY, LINDA P. NUSSBAUM, RICHARD J. KILSHEIMER, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; JOSEPH OPPER, LEAD ATTORNEY, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY.

For ROCHESTER DRUG CO-OPERATIVE, INC., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff (2:06-cv-01797-MSG): ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, ERIC L. CRAMER, SARAH SCHALMAN-BERGEN, LEAD ATTORNEYS, BERGER & MONTAGUE PC, PHILADELPHIA, PA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; **[**11]** ERIN C. BURNS, LEAD ATTORNEY, RODA NAST PC, LANCASTER, PA; JOHN D. RADICE, LINDA P. NUSSBAUM, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; JOSEPH OPPER, LEAD ATTORNEY, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL C. SIMONS, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA.

For STEPHEN L. LAFRANCE HOLDINGS, INC., Plaintiff (2:06-cv-01797-MSG): ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, LEAD ATTORNEYS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; ERIN C. BURNS, LEAD ATTORNEY, RODA NAST PC, LANCASTER, PA; JOHN D. RADICE, LINDA P. NUSSBAUM, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; JOSEPH OPPER, LEAD ATTORNEY, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; MICHAEL L. ROBERTS, LEAD ATTORNEY, ROBERTS LAW FIRM, LITTLE ROCK, AR; DANIEL C. SIMONS, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA; DIANNE M. NAST, RODA & NAST, PC, LANCASTER, PA.

For BURLINGTON DRUG COMPANY, INC., Plaintiff (2:06-cv-01797-MSG): ANDREW WILLIAM **[**12]** KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DAN LITVIN, JOSEPH OPPER, LEAD ATTORNEYS, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, LEAD ATTORNEYS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DAVID C. RAPHAEL, JR., LEAD ATTORNEY, PRO HAC VICE, THE SMITH FOOTE LAW FIRM LLP,

ALEXANDRIA, LA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; ERIN C. BURNS, LEAD ATTORNEY, RODA NAST PC, LANCASTER, PA; JOHN D. RADICE, LINDA P. NUSSBAUM, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; SUSAN C. SEGURA, LEAD ATTORNEY, THE SMITH FOOTE LAW FIRM LLP, ALEXANDRIA, LA; DANIEL C. SIMONS, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA.

For STEPHEN L. LAFRANCE PHARMACY, D/B/A SAJ DISTRIBUTORS, INC., Plaintiff (2:06-cv-01797-MSG): ANDREW WILLIAM KELLY, STUART E. DESROCHES, LEAD ATTORNEYS, ODOM & DES ROCHES LLP, NEW ORLEANS, LA; BRUCE E. GERSTEIN, LEAD ATTORNEY, GARWIN GERSTEIN AND FISHER L.L.P., NEW YORK, NY; DANIEL BERGER, DAVID F. SORENSEN, LEAD **[**13]** ATTORNEYS, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA; DANIEL C. SIMONS, LEAD ATTORNEY, BERGER AND MONTAGUE P.C., PHILADELPHIA, PA; DAVID P. SMITH, W. ROSS FOOTE, LEAD ATTORNEYS, PERCY SMITH & FOOTE LLP, ALEXANDRIA, LA; DIANNE M. NAST, LEAD ATTORNEY, RODA & NAST, PC, LANCASTER, PA; ERIN C. BURNS, LEAD ATTORNEY, RODA NAST PC, LANCASTER, PA; JOHN D. RADICE, LINDA P. NUSSBAUM, LEAD ATTORNEYS, KAPLAN FOX & KILSHEIMER LLP, NEW YORK, NY; JOSEPH OPPER, LEAD ATTORNEY, GARWIN GERSTEIN & FISHER LLP, NEW YORK, NY; MICHAEL L. ROBERTS, LEAD ATTORNEY, ROBERTS LAW FIRM, LITTLE ROCK, AR.

For WALGREEN CO., THE KROGER CO., SAFEWAY INC., AMERICAN SALES CO., INC., HEB GROCERY COMPANY, LP, Plaintiffs (2:06-cv-01797-MSG): MONICA L. REBUCK, LEAD ATTORNEY, HANGLEY ARONCHICH SEGAL & PUDLIN, HARRISBURG, PA; SCOTT E. PERWIN, LEAD ATTORNEY, KENNY NACHWALTER, P.A., MIAMI, FL.

For RITE AID CORPORATION, RITE AID HDQTRS. CORP., JCG (PJC) USA, LLC, ECKERD CORPORATION, MAXI DRUG, INC., D/B/A BROOKS PHARMACY, CVS CAREMARK CORPORATION, Plaintiffs (2:06-cv-01797-MSG): MONICA L. REBUCK, LEAD ATTORNEY, HANGLEY ARONCHICH SEGAL & PUDLIN, HARRISBURG, PA; STEVE D. SHADOWEN, LEAD ATTORNEY, HANGLEY ARONCHICK SEGAL & PUDLIN, HARRISBURG, **[**14]** PA.

For CEPHALON, INC., Defendant (2:06-cv-01797-MSG): GREGORY P. TERAN, LEAD ATTORNEY, WILMER CUTLER PICKERING HALE & DORR LLP, BOSTON, MA; JAMES C. BURLING, LEAD ATTORNEY, WILMER CUTLER PICKERING HALE & DORR, BOSTON, MA; MARK A. FORD, PETER J. KOLOVOS, LEAD ATTORNEYS, WILMER CUTLER PICKERING HALE DORR LLP, BOSTON, MA; MICHELLE D. MILLER, LEAD ATTORNEY, WILMER CUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; PETER A. SPAETH, LEAD ATTORNEY, WILMER BUTLER PICKERING HALE AND DORR LLP, BOSTON, MA; ROBERT J. GUNTHER, JR., LEAD ATTORNEY, WILMER CUTLER PICKERING HALE DORR LLP, NEW YORK, NY; FRANK R. EMMERICH, JR., CONRAD O'BRIEN PC, PHILADELPHIA, PA; JOHN A. GUERNSEY, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILADELPHIA, PA; NANCY J. GELLMAN, CONRAD O'BRIEN GELLMAN & ROHN PC, PHILA, PA.

For MYLAN LABORATORIES, INC., Defendant (2:06-cv-01797-MSG): C. FAIRLEY SPILLMAN, PAUL B. HEWITT, LEAD ATTORNEYS, AKIN GUMP STRAUSS HAUER & FELD LLP, WASHINGTON, DC; DAVID L. COMERFORD, JEFFERY A. DAILEY, KATHERINE M. KATCHEN, LEAD ATTORNEYS, MATTHEW RYAN VARZALLY, AKIN GUMP STRAUSS HAUER & FELD LLP, PHILADELPHIA, PA.

For TEVA PHARMACEUTICAL INDUSTRIES, LTD., TEVA PHARMACEUTICALS USA, INC., Defendants (2:06-cv-01797-MSG): **[**15]** JEFFREY B. KORN, LEAD ATTORNEY, WILLKIE FARR GALLAGHER LLP, NEW YORK, NY; JOSEPH E. WOLFSON, LEAD ATTORNEY, STEVENS & LEE, KING OF PRUSSIA, PA; WILLIAM H. ROONEY, WILLKIE, FARR & GALLAGHER, NEW YORK, NY.

For RANBAXY LABORATORIES, LTD., RANBAXY PHARMACEUTICALS, INC., Defendants (2:06-cv-01797-MSG): CHRISTOPHER K. DIAMOND, LEAD ATTORNEY, PRO HAC VICE, VENABLE LLP, WASHINGTON, DC; DANIELLE R. FOLEY, J. DOUGLAS BALDRIDGE, LISA JOSE FALES, LEAD ATTORNEYS, VENABLE, LLP, WASHINGTON, DC; ANTHONY S. VOLPE, JOHN J. O'MALLEY, VOLPE & KOENIG PC, PHILADELPHIA, PA.

For TADEKA PHARMACEUTICAL NORTH AMERICA, INC., Movant (2:06-cv-01797-MSG): NATALIE GRILL EINSIG, PEPPER HAMILTON LLP, HARRISBURG, PA.

Judges: MITCHELL S. GOLDBERG, UNITED STATES DISTRICT JUDGE.

Opinion by: MITCHELL S. GOLDBERG

Opinion

[*517] ***MEMORANDUM OPINION***

Currently pending are Defendants' motions to dismiss the antitrust complaints filed by numerous parties. [1] The issue raised in these motions is whether Plaintiffs **[*518]** have pled sufficient antitrust allegations pursuant to the Sherman Antitrust Act, *15 U.S.C. §§ 1*, *2*, to survive Defendants' motions to dismiss. The answer to this question necessitates a somewhat protracted review of divergent precedent regarding the appropriate **[**16]** framework to apply in analyzing what is commonly referred to as a "reverse payment settlement." These settlements are typically entered into as a result of patent litigation between a brand name drug manufacturer and generic drug manufacturers. The multi-party antitrust litigation before the Court stems from four (4) such reverse payment settlements consummated in late 2005 and early 2006, regarding the drug Provigil(R). [2] The agreements at issue were between the pharmaceutical company Cephalon, Inc., and several generic drug manufacturers (hereinafter "the Generic Defendants"), all of whom are Defendants in the cases before this Court. Plaintiffs generally allege that these agreements constitute an unlawful restraint of trade. For the reasons detailed below, except for selected counts brought under several state statutes, Defendants' motions will be denied.

I. *BACKGROUND*

A. *Structure of the Litigation and Parties*

Sixteen (16) separate cases, many of which are class actions, commenced as a result of the patent litigation settlements noted above. These cases are now collectively referred to as the *In re Modafinil* litigation and were consolidated into four (4) subcategories pursuant to *Fed. R. Civ. P. 42(a)*. These subcategories are: The King Drug Direct Purchaser Class Action; The Vista Healthplan End Payor Class Action; The Apotex Litigation; and The F.T.C. Litigation. A brief description of the Plaintiffs in each of the four (4) cases is as follows:

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[1] The specific motions at issue are: "Defendant Cephalon, Inc.'s Motion to Dismiss the Direct Purchasers' First Consolidated Amended Complaint and the Rite Aid Complaint," (doc. no. 200); "Generic Defendants' Motion to Dismiss the Amended Complaints of the Direct Purchaser Plaintiffs and End Payor Plaintiffs," (doc. no. 201); "Defendant **[**17]** Cephalon, Inc.'s Motion to Dismiss the Walgreen Complaint," (doc. no. 211); and "The Generic Defendants' Motion to Dismiss the Complaint Filed by Walgreen Co., et al.," (doc. no. 216), in *King Drug Co. of Florence, Inc., et al. v. Cephalon, Inc., et al*., 2:06-cv-1797.

"Defendant Cephalon, Inc.'s Motion to Dismiss the Amended Consolidated Class Action Complaint of End Payors and the Amended Complaint of Avmed, Inc.," (doc. no. 86); and "Generic Defendants' Motion to Dismiss the Amended Complaints of the Direct Purchaser Plaintiffs and End Payor Plaintiffs," (doc. no. 87) in *Vista Healthplan, Inc., et al. v. Cephalon, Inc., et al*., 2:06-cv-1833.

"Defendant Cephalon, Inc.'s Motion to Dismiss Counts III Through XIII of the Amended Complaint and to Strike Prayers for Relief," (doc. no. 157); and "Generic Defendants' Motion to Dismiss Apotex's First Amended Complaint," (doc. no. 158), in *Apotex, Inc. v. Cephalon, Inc., et al*., 2:06-cv-2768.

"Defendant Cephalon, Inc.'s Motion to Dismiss the First Amended Complaint," (doc. no. 43) in *Fed. Trade Comm'n v. Cephalon, Inc*., 2:08-cv-2141.

[2] These settlements were reached in the case of *Cephalon, Inc. v. Mylan Pharms., Inc., et al*., No. 2:03-cv-1394 **[**18]** (D.N.J.).

All direct purchaser proposed class action cases were consolidated into *King Drug Co. of Florence, Inc., et al. v. Cephalon, Inc., et al*., 2:06-cv-1797. [3] The Plaintiffs in these cases are companies who directly purchased Provigil(R) from Cephalon for re-distribution. The end payor proposed class action cases were consolidated into *Vista Healthplan, Inc., et al. v. Cephalon, Inc., et al*., 2:06-cv-1833. [4] This **[*519]** group of Plaintiffs includes individuals who indirectly purchased Provigil(R) and companies who paid for those purchases. The third case involves a generic drug manufacturer, Apotex, **[**19]** who has raised non-infringement and patent invalidity allegations, as well as antitrust claims in *Apotex, Inc. v. Cephalon, Inc., et al*., 2:06-cv-2768. [5] Finally, the Federal Trade Commission (hereainfter "F.T.C.") has brought Sherman Act claims in *Fed. Trade Comm'n v. Cephalon, Inc*., 2:08-cv-2141.

The Defendants in each of these cases are the parties who entered into four (4) reverse settlement agreements: Cephalon **[**20]** and the Generic Defendants - Barr Laboratories, Inc.; Mylan Laboratories, Inc.; Teva Pharmaceutical Industries, Ltd., and Teva Pharmaceuticals USA, Inc.; and Ranbaxy Laboratories, Ltd., and Ranbaxy Pharmaceuticals, Inc.

B. *Procedural History - In re Modafinil Litigation*

The *In re Modafinil* litigation commenced when The King Direct Purchaser Class Action was filed on April 27, 2006, in the Eastern District of Pennsylvania. The Vista Healthplan End Payor Class Action was filed three (3) days later on May 1, 2006, followed by The Apotex Litigation on June 26, 2006. Nine (9) other related cases were filed later in 2006 and 2007. The F.T.C. Litigation was filed on February 13, 2008, in the United States District Court for the District of Columbia and subsequently transferred to this Court on April 28, 2008. [6]

On April 28, 2009, all of the cases referenced above were re-assigned to the undersigned. At that time, eighteen (18) separate motions were pending, including the motions to dismiss at issue, which were denied without prejudice. The filing of amended consolidated complaints then followed as did Cephalon and the Generic **[**21]** Defendants' filing of consolidated motions to dismiss which are currently before the Court. [7]

C. *The Drug at Issue*

The U.S. Food and Drug Administration (hereinafter "FDA") approved Cephalon's New Drug Application (hereinafter "NDA") No. 20-717 for Provigil(R) on December 24, 1998. Provigil(R) is a prescription drug used to promote wakefulness in adults with sleep disorders such as shift work disorder, obstructive sleep apnea and narcolepsy. Modafinil, the main pharmacological component of Provigil(R), is a psychostimulant that enhances wakefulness and vigilance. Modafinil is an acetamide that is prescribed in 100 mg and 200 mg tablets and has the efficacy and side effects similar to amphetamines and methylphenidates (*e.g*., Ritalin(R)), but those drugs are not reasonably interchangeable **[**22]** with Provigil(R). Cephalon's sales of Provigil(R) exceeded $ 420 million in 2004,

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[3] *Rochester Drug Co-Operative, Inc. v. Cephalon, Inc., et al*., 2:06-cv-1868; *Meijer, Inc., et al. v. Cephalon, Inc., et al*., 2:06-cv-1911; *Burlington Drug Co., Inc. v. Cephalon, Inc., et al*., 2:06-cv-2052; *J. M. Smith Corp. v. Cephalon, Inc., et al*., 2:06-cv-2146; *SAJ Distribs., Inc., et al. v. Cephalon, Inc*., 2:06-cv-3450; *Rite Aid Corp., et al. v. Cephalon, Inc., et al*., 2:09-cv-3820 (opt out); and *Walgreen Co., et al. v. Cephalon, Inc., et al*., 2:09-cv-3956 (opt out).

[4] *Pa. Tpk. Comm'n v. Cephalon, Inc., et al*., 2:06-cv-2020; *Langan v. Cephalon, Inc., et al*., 2:06-cv-2507; *Pa. Employees Benefit Trust Fund v. Cephalon, Inc., et al*., 2:06-cv-2883; and *Avmed, Inc. v. Cephalon, Inc., et al*., 2:07-cv-3793 (opt out).

[5] Consolidated with *Apotex, Inc. v. Cephalon, Inc*., 2:09-cv-2416.

[6] *Fed. Trade Comm'n v. Cephalon, Inc., 551 F.Supp.2d 21 (D.D.C. 2008)*.

[7] On February 23, 2010, after bifurcation of Apotex's patent invalidity/non-infringement and antitrust claims, the Court denied "Defendant Cephalon, Inc.'s Motion to Dismiss Counts III Through XIII of the Amended Complaint and to Strike Prayers for Relief," as it related to counts III-V. These counts included the bifurcated patent claims. *Apotex, Inc. v. Cephalon, Inc., 2010 U.S. Dist. LEXIS 16940, 2010 WL 678104 (E.D.Pa. Feb. 23, 2010)*.

$ 500 million in 2005, $ 690 million in 2006, $ 800 million in 2007, and $ 920 million in 2008. (*See* Apotex Second Am. Compl., PP 20, 39-40, 75.)

D. *Statutory and Regulatory Framework - The Hatch-Waxman Act*

The circuit court cases that are reviewed later in this Opinion provide an extensive **[*520]** analysis of the statutory and regulatory framework of the Hatch-Waxman Act. Consequently, we will not re-plow the same ground here, but rather summarize portions of the Act that are pertinent to the issues currently before the Court.

Typically, through the submission of a NDA a pharmaceutical company must obtain approval from the FDA to market a prescription drug. This application details all safety and efficacy studies, the components in the drug, the methods used in "the manufacture, process and packaging" of the drug, and any patents issued on the composition or methods of using the drug. *21 U.S.C. § 355(b)(1)*. The FDA publishes the patent information in the "Approved Drug Products with Therapeutic Equivalence Evaluations," otherwise known as the "Orange Book." *See* FDA Electronic Orange Book (Jan. 2010), *http://www.fda.gov/cder/ob/*.

Prior **[**23]** to 1984, a generic drug company also had to undertake its own costly studies regarding the efficacy and safety of a drug and file its own NDA. *See Schering-Plough Corp. v. Fed. Trade Comm'n, 402 F.3d 1056, 1058-59 n. 2 (11th Cir. 2005)*. However, in 1984, Congress enacted the Drug Price Competition & Patent Term Restoration Act, commonly known as the Hatch-Waxman Act, *Pub.L. No. 98-417, 98 Stat. 1585* (codified at various sections of Titles 21 and 35 of the United States Code). Among its key provisions, the Hatch-Waxman Act ***HN1***[] created the Abbreviated New Drug Application process (hereinafter "ANDA"), which allows a generic drug application to piggyback on safety and efficacy studies conducted for the pioneer drug. *See generally 21 U.S.C. § 355(j)*.

Under the Hatch-Waxman Act, the pharmaceutical company is still required to file a NDA with full-scale safety and efficacy studies listing the patents that generics might infringe in the future. *Id*. at *§ 355(b)(1)*. However, the Hatch-Waxman Act was designed to allow generic companies to bypass the studies required under a NDA and file an ANDA, which requires only that generic companies prove that the new drug is the bioequivalent of a brand name **[**24]** drug on the market. *Id*. at *§ 355(j)(2)(A)*. ***HN2***[] An ANDA filer must, thereafter, select one (1) of the following certifications: (1) that the "patent information has not been filed" on the generic's brand name equivalent (a Paragraph I certification); (2) that a patent on the branded drug has expired (a Paragraph II certification); (3) that a brand name patent exists, including "the date on which such patent will expire," with a promise not to market until that date (a Paragraph III certification); or (4) "that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted" (a Paragraph IV certification). *Id*. at *§ 355(j)(2)(A)(vii)*.

HN3[] If the generic ANDA filer selects a Paragraph IV certification, it must consult the Orange Book and provide notification to each NDA or patent owner impacted by the ANDA certification "not later than [twenty] days after the date of the postmark on the notice with which the Secretary informs the applicant that the application has been filed." *Id*. at *§ 355(j)(2)(B)(ii)(I)*. The filing of an ANDA Paragraph IV certification allows the patent holders to sue, as it is considered a technical act **[**25]** of infringement. The patent owners have forty-five (45) days to bring an infringement suit against the generic. If the affected patent owners do not file suit, the FDA can approve the ANDA without delay. *Id*. at *§ 355(j)(5)(B)(iii)*. If an affected patent owner brings an infringement suit, approval of the application is automatically stayed for thirty (30) months, or until a district court issues a final decision concluding **[*521]** that the patent has not been infringed or is otherwise invalid. *Id*.

HN4[] In order to provide generic drug makers with an incentive to incur the expense and risk of a potential infringement suit by the patent holder, the first ANDA filer maintains a 180-day exclusivity period. *Id*. at *§ 355(j)(5)(B)(iv)*. During this period, the FDA cannot approve any other generic manufacturer's ANDA until 180-days after the earlier of (1) the date of the first ANDA filer's commercial marketing of its generic drug; or (2) the date of a "court [decision] that the patent is invalid or not infringed." *Id*. at *§ 355(j)(5)(B)(iii)(I)*.

E. *The Patent*

The main patent protecting Cephalon's exclusivity over modafinil in the form of Provigil(R) is the RE'516 patent. Cephalon is the owner by assignment **[**26]** of the RE'516 patent, which expires on October 6, 2014. The Patent and Trademark Office (hereinafter "the PTO") issued the RE'516 patent on January 15, 2002, as a reissue patent for the 5,618,845 patent (hereinafter "'845"), which Cephalon surrendered on that date. In December, 2002, Cephalon requested that the RE'516 patent be listed in the FDA's Orange Book. In addition to the FDA's approval of Provigil(R) in 1998, the FDA granted Provigil(R) pediatric exclusivity, as a result of studies in children, which extended the patent exclusivity to April 6, 2015. (*See* Apotex Second Am. Compl., PP 22, 46.)

The FDA recognized modafinil as a new chemical entity, which under the Hatch-Waxman Act, extended the original date that generic drug companies could file an ANDA to December 24, 2002. [8] The FDA also granted Provigil(R) orphan drug exclusivity because it is indicated for the treatment of a rare disease - narcolepsy. Along with the pediatric exclusivity, the orphan drug exclusivity extended the date that the FDA could approve ANDAs to June, 2006. (*See* Apotex Second Am. Compl., PP 41, 43, 51.)

The RE'516 patent does not cover all tablets that contain modafinil. Rather, the RE'516 patent is a formulation patent for an acetamide derivative, modafinil, having defined particle size. (*See* Apotex Second Am. Compl., P 52.) Specifically, the RE'516 patent covers a pharmaceutical composition comprised of a "substantially homogenous mixture of modafinil particles, wherein at least 95% of the cumulative total of modafinil particles in said composition have a diameter of less than about 200 microns ([mu] m)." U.S. Patent No. RE37, 516 E col. 10 l. 49-53 (filed Apr. 1, 1999). The modafinil particles have a median diameter ranging between 2 [mu] m and 60 [mu] m. *Id*. at l. 54-56. The composition and effective amount is between 50 milligrams and 700 milligrams a day. *Id*. at l. 57-59, 65-68.

In laymen's terms, the patent appears to cover a drug consumed orally, that is composed of at least 95% modafinil particles, which have a diameter less than 200 [mu] m. The drug can contain between 50 and 700 milligrams of the specified modafinil particles and is designed to alter a person's sleep state.

F. *Summary of the Settlement Agreements Between [28] Cephalon and the Generic Defendants***

As noted above, Plaintiffs' antitrust allegations stem from Cephalon's four (4) settlement agreements with Teva, Ranbaxy, Mylan, and Barr. Cephalon filed the underlying patent infringement suit against all four (4) Generic Defendants on March 28, 2003, alleging that the Generic Defendants' ANDAs for generic Provigil(R) infringed on Cephalon's RE'516 patent. **[*522]** The Generic Defendants each asserted patent invalidity, patent unenforceability and/or non-infringement as defenses in that litigation. By February 1, 2006, Cephalon had reached settlement agreements with each of the Generic Defendants, resolving the underlying patent infringement suit.

In each of these settlements, the Generic Defendants agreed not to market their generic versions of Provigil(R) until a date certain in exchange for significant payments by Cephalon for various licensing agreements, supply agreements and research and development deals. The settlement agreements are substantially similar in terms of their relation to the RE'516 patent and Provigil(R), but different in terms of the side-term inducements. Cephalon was expected to pay Teva, Ranbaxy and Barr up to $ 136 million under **[**29]** these agreements and $ 45 million to Mylan. (Apotex Second Am. Compl., P 136; King Second Am. Compl., P 122.) Although each respective agreement has many terms, the pertinent portions of each are discussed below.

Teva settled with Cephalon on December 8, 2005, agreeing that until April 6, 2012, Teva will:

> not make, use, offer to sell, or sell or actively induce or assist any other entity to make, use, offer to sell, or sell any finished pharmaceutical product containing modafinil that is manufactured and sold pursuant to (a) NDA 20-717 and all of its current and future supplements, or (b) an ANDA for which the reference listed drug is (i) Provigil, (ii) any other product that is the subject of NDA 20-717 and all of its current and future supplements, or (iii) any other finished pharmaceutical products that contain the compound modafinil, including, without limitation, its salts, esters, enantiomers, isomers and polymorphs, including without limitation, Provigil, Sparlon,

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[8] On that date, the four (4) Generic Defendants filed Paragraph IV certifications with respect to the **[**27]** RE'516 patent. (*See* Apotex Second Am. Compl., P 51.)

> and Nuvigil, sold by Cephalon, its Affiliates, distributors and resellers that is the subject of an NDA or supplemental NDA filed or held by Cephalon for which the RE'516 Patent is listed in the Orange Book . . . .

(Teva **[**30]** Agreement, P 2.1 with definitions.) In turn, Cephalon paid Teva tens of millions of dollars for licenses to Teva's worldwide intellectual property relating to the manufacture, development and formulation of modafinil. (Teva Agreement, P 2.2(a).) Teva also agreed to manufacture and supply modafinil to Cephalon at a fixed price. (Teva Agreement, P 2.4.)

Ranbaxy settled with Cephalon on December 22, 2005, agreeing that until April 6, 2012, Ranbaxy will:

> not make, use, offer to sell, or sell, or actively induce or assist any other entity to make, use, offer to sell, or sell any product that is the subject of ANDA No. 76-595, or the subject of an ANDA filed or held by Ranbaxy or its Affiliates for which the reference listed drug is Provigil, within the United States, or to import or cause to be imported any product that is the subject of ANDA No. 76-595, or the subject of an ANDA filed or held by Ranbaxy or its Affiliates for which the reference listed drug is Provigil, into the United States, except as otherwise permitted under, and according to the terms of, the license granted by Cephalon in this Agreement . . . .

(Ranbaxy Agreement, P 2.1 with definitions.) Ranbaxy then agreed to supply **[**31]** modafinil to Cephalon at a fixed price and gave Cephalon licenses to intellectual property rights related to modafinil. (Ranbaxy Agreement, PP 2.3, 2.5.)

Mylan entered into a settlement agreement with Cephalon on January 9, 2006, agreeing that until April 6, 2012, Mylan will:

> not make, use, offer to sell, or sell, or actively induce or assist any other entity **[*523]** to make, use, offer to sell, or sell any product that is the subject of the ANDA No. 76-594, or the subject of an ANDA filed or held by Mylan or its Affiliates for which the reference listed drug is (i) Provigil, (ii) any other product that is the subject of NDA 20-717 and all of its current and future supplements (provided that the RE'516 Patent has not been de-listed), or (iii) any other product that is the subject of an NDA or supplemental NDA filed or held by Cephalon for which the RE'516 Patent is listed in the Orange Book (provided that the RE'516 Patent has not been de-listed), within the United States, or to import or cause to be imported any product that is the subject of the ANDA No. 76-594, or the subject of an ANDA filed or held by Mylan or its Affiliates for which the reference listed drug is (i) Provigil, (ii) any **[**32]** other product that is the subject of NDA 20-717 and all of its current and future supplements (provided that the RE'516 Patent has not been de-listed), or (iii) any other product that is the subject of an NDA or supplemental NDA filed or held by Cephalon for which the RE'516 Patent is listed in the Orange Book (provided that the RE'516 Patent has not been de-listed), into the United States, except as otherwise permitted under, and according to the terms of, the license granted by Cephalon in this Agreement . . . .

(Mylan Agreement, P 2.1 with definitions.) Cephalon and Mylan also entered into a production development collaboration agreement on January 9, 2006, for other unrelated products, under which Cephalon has paid Mylan $ 45 million. (King Second Am. Compl., P 122.)

Barr settled with Cephalon on February 1, 2006, agreeing:

> that the RE'516 would be infringed by making, using, offering to sell, or selling any product that is the subject of the ANDA No. 76-597, or the subject of an ANDA filed or held by Barr or its Affiliates for which the reference listed drug is Provigil (the commercial formulation of modafinil developed, manufactured and, as of the date of this Agreement, sold by **[**33]** Cephalon pursuant to FDA approval of Cephalon's NDA 20-717) by Barr and/or its Affiliates within the United States, or by importing or causing to be imported any product that is the subject of the ANDA No. 76-597, or the subject of an ANDA filed or held by Barr or its Affiliates for which the reference listed drug is Provigil (the commercial formulation of modafinil developed, manufactured and, as of the date of this Agreement, sold by Cephalon pursuant to FDA approval of Cephalon's NDA 20-717) by Barr and/or its Affiliates into the United States, without a license to do so . . . .

(Barr Agreement, P 3.1 with definitions.) Barr also agreed that until April 6, 2012:

> it will not sell (a) any modafinil product that is manufactured or sold pursuant to an ANDA for which the reference listed drug is Provigil, or (b) any generic version of Cephalon's Provigil product manufactured pursuant to NDA 20-717, in the United States prior to the effective date of the license granted by Cephalon to Barr pursuant to the terms of the Modafinil License and Supply Agreement . . . .

(Barr Agreement, P 3.2 with definitions.) Cephalon agreed to buy modafinil from Barr through a supply agreement and Barr gave **[**34]** Cephalon licenses to the Ahmed Application. (Barr Agreement, PP 3.4, 3.5.)

G. *Summary of Arguments Raised in Defendants' Motions to Dismiss*

With the exception of counts I and II of The Apotex Litigation (which relate to the declaratory judgment action on the RE'516 patent), Defendants have collectively moved to dismiss the complaints in **[*524]** their entirety. Defendants focus the bulk of their argument on the applicability of the scope of the patent test and assert that under this test, the settlement agreements do not go outside the scope of the patent because they do not include products beyond that scope and provide for generic market entry three (3) years prior to the end of the patent. Additionally, Defendants posit that the settlement agreements are pro-competitive and a natural consequence of the Hatch-Waxman Act. [9]

Plaintiffs have raised numerous responses. The F.T.C. in particular has urged that the Cephalon settlement agreements with the Generic Defendants be declared a *per se* antitrust violation. Collectively, Plaintiffs **[**35]** have pointed to numerous examples where the agreements go beyond the rights afforded to Cephalon under the applicable patent.

II. *PRECEDENT - REVERSE PAYMENT AGREEMENTS*

A. *General Precedent - Patent/Antitrust Cases*

Plaintiffs have brought claims under the Sherman Act alleging that Cephalon used the settlements with the Generic Defendants to exclude its horizontal competitors in violation of *Section 1 of the Sherman Act*. ***HN5***[] With the ultimate goal of stimulating competition and innovation, the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. Although the statute prohibits all restraints of trade, the Supreme Court "has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3,10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. The Sherman Act also states that a monopoly of any part of trade or commerce is illegal. *15 U.S.C. § 2*.

HN6[] In determining whether an alleged restraint of trade is "unreasonable," courts generally apply either a *per se* rule or what is referred to as a "rule-of-reason analysis." **[**36]** *State Oil Co., 522 U.S. at 10*. A *per se* analysis is applicable only where courts have previously considered the type of conduct at issue and have found that its expected effects are overwhelmingly anticompetitive. *Id*. In the rule-of-reason analysis, the question is whether the conduct at issue is anticompetitive "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed and the restraint's history, nature and effect." *Id*. The rule-of-reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Fed. Trade Comm'n v. Ind. Fed'n of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* (citations omitted).

By contrast, but also with the goal of stimulating competition and innovation, patent law grants an innovator "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States." *35 U.S.C. § 154(a)(1)*&*(2)*; *see also* *Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 215, 100 S. Ct. 2601, 65 L. Ed. 2d 696 (1980)*.

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[9] Defendants also moved to dismiss the complaints on other grounds such as lack of standing and other count specific arguments. (*See generally*, Defs.' Memo., *supra* n. 2.)

B. *Precedent [37] - Reverse Payment Agreements***

To date, neither the Third Circuit nor any judge in this district has established a **[*525]** framework under which reverse payment patent settlements should be analyzed. Consequently, the applicable legal standard in this case rests in large part, upon our examination of how other courts have dealt with the issue. *See* *Schaffer v. Prudential Ins. Co. of Am., 301 F.Supp.2d 383, 388 (E.D.Pa. 2003)*. While the outcomes have varied, those courts that have considered reverse payment agreements all recognize the tension that these agreements create between patent rights and antitrust principles. ***HN7***[] In focusing on the rights afforded by the granting of a patent, one (1) court has noted that:

> Engrafted into patent law is the notion that a patent grant bestows "the right to exclude others from profiting by the patented invention." Thus, the Patent Act essentially provides the patent owner "with what amounts to a permissible monopoly over the patented work."

Schering, 402 F.3d at 1066 (citations omitted).

Other cases have stressed, however, that patent rights cannot create a monopoly beyond the scope of the patent. *Mallinckrodt, Inc. v. Medipart, Inc., 976 F.2d 700, 708 (Fed. Cir. 1992)* **[**38]** (the possession of a valid patent does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly). Thus, if the challenged activity simply serves as a device to circumvent ***antitrust law***, then that activity is typically susceptible to an antitrust suit. *Asahi Glass Co., Ltd. v. Pentech Pharms., Inc., 289 F.Supp.2d 986, 991 (N.D.Ill. 2003)*.

In 2003, the Sixth Circuit Court of Appeals found a reverse payment settlement to be a *per se* illegal restraint of trade in violation of the Sherman Act. Subsequently, however, the Second, Eleventh, and Federal Circuits have taken a different approach and have adopted what is referred to as the "scope of the patent test." [10] In determining which framework to apply to this case, we first briefly review this precedent and its rationale.

1. *Sixth Circuit - In re Cardizem CD Antitrust Litig., 332 F.3d 896 (6th Cir. 2003)*.

The **[**39]** dispute in *Cardizem* arose after the generic manufacturer, Andrx, filed an ANDA with a Paragraph IV certification for a generic version of the drug Cardizem. *Id. at 902*. Because Andrx was the first generic filer, it obtained the 180-day market exclusivity rights. *Id*. The manufacturer responded by filing a patent infringement suit and, thereafter, the FDA conditionally approved Andrx's ANDA application, pending the outcome of the infringement litigation. *Id*.

The manufacturer and Andrx subsequently entered into an agreement that provided quarterly payments of $ 10 million to Andrx. *Id*. In exchange, Andrx agreed not to market a generic version of Cardizem until the earliest of the following occurred: (1) there was a final, unappealable decision in the patent infringement case allowing Andrx to market the drug; (2) the manufacturer and Andrx entered into a licensing agreement; or (3) the manufacturer entered into a licensing agreement for generic Cardizem with a third party. *Id. at 903*. Andrx also agreed to not "relinquish or otherwise compromise" its 180-day period of exclusivity. [11] *Id. at 902*.

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[10] *See also* *In re K-Dur Antitrust Litig., 2009 U.S. Dist. LEXIS 126249, 2009 WL 508869 (D.N.J. Feb. 6, 2009)*. This opinion, authored by a special master in the District of New Jersey, undertakes a comprehensive review of precedent regarding reverse payment settlements and also adopts the "scope of the patent" standard.

[11] The agreement in *Cardizem* is unique because it delayed the generic manufacturer's entry into **[**40]** the market, but did not terminate the patent infringement suit. *Id. at 902*. Rather, the quarterly payments were designed to delay entry by the generic manufacturer from the expiration of the thirty (30) month waiting period (or earlier if a district court ruled against the patent) until the resolution of the patent infringement case by the Supreme Court of the United States, either by denying *certiorari* or hearing the case. *Id*.

The case was reviewed by the Sixth Circuit after the district court granted the **[*526]** plaintiffs' motion for partial summary judgment. *Id. at 899-900*. The Sixth Circuit held that the settlement agreements were *per se* illegal as classic horizontal and anticompetitive agreements. *Id. at 908*. In so ruling, the Sixth Circuit was particularly troubled by the bottleneck effect created by Andrx's agreement not to relinquish its 180-day market exclusivity rights. *Id. at 907-08*. Because no other competitor could enter the market for the generic drug, the court reasoned that:

> There is simply no escaping the conclusion that the Agreement, all of its other conditions and provisions notwithstanding, was, at its core, a horizontal agreement to eliminate competition in the market **[**41]** for Cardizem CD throughout the entire United States, a classic example of a *per se* illegal restraint of trade.

Id. at 908.

2. *Eleventh Circuit - Valley Drug Co. v. Geneva Pharms., Inc., 344 F.3d 1294 (11th Cir. 2003)*.

Several months after *Cardizem* was decided, the Eleventh Circuit reversed a district court's *per se* antitrust application and grant of summary judgment for the plaintiffs in a case which was factually similar to Cardizem. *Id. at 1295*. The *Valley Drug* case involved two (2) separate settlement agreements entered into within one (1) day of each other, whereby the manufacturer agreed to pay generic companies in exchange for the generic companies' agreements to refrain from selling the generic drug until the expiration of the applicable patents and to refrain from transferring their respective 180-day market exclusivity rights as first-filers. *Id. at 1300*. The district court found the agreements to be *per se* violations of the Sherman Act, because they were "part of a larger scheme to restrain the domestic sale of generic terazosin hydrochloride." *In re Terazosin Antitrust Litig., 164 F.Supp.2d 1340, 1353 (S.D. Fla. 2000)*. In reversing and remanding, the Eleventh Circuit held that **[**42]** while reverse payment agreements may be viewed as a restraint on competition, they also constitute an enforcement of the exclusivity rights held by the patent holder. *Valley Drug, 344 F.3d at 1305-06*. Focusing on the lawful rights of the patent holder, the court applied a threshold analysis to determine if the anticompetitive effects of the agreements were within the scope of the patent protection. *Id*.

In remanding, the Eleventh Circuit instructed the district court to consider the plaintiffs' challenge that the agreements prohibited the marketing of "any" generic terazosin and the generic's agreement not to waive its 180-day exclusivity. *Id. at 1311-12*. The court stressed that these issues "require consideration of the scope of the exclusionary potential of the patent, the extent to which these provisions of the [a]greements exceed the scope, and the anticompetitive effects thereof." *Id. at 1312*. The court concluded that any provision of the agreements that went beyond the exclusionary effects of the patent "may be subject to traditional antitrust analysis." *Id*.

3. *Eleventh Circuit - Schering-Plough Corp. v. Fed. Trade Comm 'n, 402 F.3d 1056 (11th Cir. 2005)*.

The Eleventh Circuit further **[**43]** clarified the standard set forth in *Valley Drug* when it reversed the F.T.C.'s determination that Schering had entered into illegal **[*527]** reverse payment agreements. *Id. at 1065-66*. The court emphasized that because of the inherent anticompetitive rights accompanying a patent, "an analysis of the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects" is required. *Id*. (quoting *Valley Drug, 344 F.3d at 1311, n. 27*).

The court reiterated that the threshold question was the extent to which the agreements exceeded the scope of the exclusionary potential of the patent and that a finding that the agreements did so would implicate an antitrust analysis. *Id. at 1066*. Because the agreements at issue allowed for the generic company to enter the market years prior to the expiration of the patent, and no other products were delayed by the agreements, the court found that such agreements were within the exclusionary scope of the patent. *Id. at 1068-73*.

Notably, the Eleventh Circuit's review encompassed the entire record and decision of the F.T.C. after a full hearing **[**44]** before an administrative law judge, which included numerous witnesses and exhibits. *Id. at 1061*. This is an entirely different procedural posture than the cases that are before us.

4. ***Second Circuit - In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2d Cir. 2006)***.

Tamoxifen continued the trend towards an analytical framework that examined whether the settlement agreement in question exceeded the scope of the patent. The Second Circuit upheld the district court's granting of the brand name manufacturer's motion to dismiss, reasoning that absent evidence of fraud or sham litigation, "there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent." *Id. at 213*. It is important to note that this is the only circuit case we are aware of involving a reverse payment settlement where the lawsuit was dismissed at the pleadings stage rather than on a motion for summary judgment.

The underlying agreements in *Tamoxifen* were entered into after the generic company obtained an order declaring the name brand manufacturer's patent invalid. *Id. at 194*. While that ruling was pending on appeal, the parties entered into **[**45]** an agreement whereby $ 61 million was paid to the generic in return for their promise to not market the drug at issue, tamoxifen, until the expiration of the patent in 2002. *Id*. In upholding the district court's dismissal of the plaintiffs' claims, the Second Circuit concluded that while at first blush the reverse payments may seem suspicious, "suspicion abates upon reflection." *Id. at 208*. The court joined the Eleventh Circuit in holding that the mere fact that "a brand name pharmaceutical company holding a patent paid its generic competitor money cannot be the sole basis for a violation of ***antitrust law*** unless the exclusionary effects of the agreement exceed the scope of the patents protection." *Id. at 212*. The court also focused on the benefits of settlement and emphasized the court's "longstanding adherence to the principle that 'courts are bound to encourage' the settlement of litigation." *Id. at 202* (citing *Gambale v. Deutsche Bank AG, 377 F.3d 133, 143 (2d Cir. 2004))*.

5. ***Federal Circuit - In re Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (Fed. Cir. 2008)***.

In *Cipro* there were four (4) agreements at issue: three (3) settlement agreements between Bayer, the name **[**46]** brand manufacturer and three (3) generic drug manufacturers in similar patent infringement suits, and one (1) supply agreement. *Id. at 1328*. The first three (3) agreements provided **[*528]** that the generic manufacturers would not challenge the validity of Bayer's patent covering the drug at issue, Cipro(R), in exchange for payment by Bayer. *Id. at 1328-29*. Under the fourth agreement, the "Cipro Supply Agreement," Bayer agreed to supply one (1) of the generics with Cipro(R) for resale or, alternatively, make quarterly payments to the generic until six (6) months before the expiration of the patent. *Id*. Subsequent to the agreements, but prior to the filing of the antitrust suit, Bayer successfully defended its patent in a bench trial. *Bayer AG v. Schein Pharm., Inc., 129 F.Supp.2d 705 (D.N.J. 2001)*. None of the agreements under review implicated the 180-day exclusivity period because the generic manufacturers converted their ANDA filings to Paragraph III certifications under the settlement agreements. *Cipro, 544 F.3d at 1329*.

The Federal Circuit cited with approval to both the Eleventh and Second Circuits' analysis of reverse payments and applied a rule-of-reason analysis in affirming the district **[**47]** court's grant of the defendants' motion for summary judgment. In so doing, the Federal Circuit found it unnecessary to go beyond the first step of the rule-of-reason analysis because it found no anticompetitive effects beyond the exclusionary zone of the patent. *Id. at 1335-36*. Further, the court found no evidence of fraud on the PTO or sham litigation, and no manipulation of the 180-day exclusivity period. *Id. at 1336*. However, the Federal Circuit left open the possibility that any of those three (3) factors, if present, may result in anticompetitive effects outside of the exclusionary zone of the patent. *Id. at 1333*.

III. ***APPLICABLE FRAMEWORK***

A. ***The Scope of the Patent Framework Applies***

After careful consideration, ***HN8***[] we will apply a framework which examines whether any of the agreements in question exceed the exclusionary patent rights granted to Cephalon. We do so for several reasons.

First, a reflexive conclusion that the agreements in question are *per se* antitrust violations, as urged by Plaintiffs, and in particular the F.T.C., ignores the "exclusionary" patent rights afforded to Cephalon. Simply stated, a patent grants its owner the lawful right to exclude others. *See 35 U.S.C. §§ 271(a)* **[**48]** (defining infringement) & 283 (providing injunctive relief for infringement); Dawson Chem. Co. v. Rohm & Haas Co., 448 U.S. 176, 215, 100 S. Ct. 2601, 65 L. Ed. 2d 696 (1980) ("[T]he essence of a patent grant is the right to exclude others from profiting by the patented invention."). As the Eleventh Circuit explained in the *Valley Drug* case:

> This exclusionary right is granted to allow the patentee to exploit whatever degree of market power it might gain thereby as an incentive to induce investment in innovation and the public disclosure of inventions . . . [A] patentee can choose to exclude everyone from producing the patented article or can choose to be the sole supplier itself, or grant exclusive territorial licenses carving up the United States among its licensees. Within reason, patentees can also subdivide markets in ways other than territorial, such as by customer class . . . .
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> * * *
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> [A] patentee's allocation of territories is not always the kind of territorial market allocation that triggers antitrust liability and this is so because the patent gives its owner a lawful exclusionary right.

Valley Drug, 344 F.3d at 1304-05 (citations omitted). Put another way in *Asahi Glass*, "in a reverse-payment case, the settlement **[**49]** leaves the competitive situation unchanged from before the [d]efendant **[*529]** tried to enter the market." Asahi Glass, 289 F.Supp.2d at 994.

Adopting the scope of the patent framework takes into account the patent principles noted above. At the same time, to the extent that the agreements in question improperly afford more rights than those granted under the patent, antitrust principles may apply. This approach appears to strike the proper balance between competing patent and antitrust principles.

Second, adopting the scope of the patent framework does not preclude resolution of Plaintiffs' claims that the patent in question was procured by fraud. Indeed, several Plaintiffs have asserted that Cephalon misrepresented material facts regarding its clinical trials to the PTO and that the Generic Defendants were aware of these facts when they entered into the settlement agreements with Cephalon. (King Second Am. Compl., PP 62, 73-81; Rite Aid Compl., PP 50-51, 61-68, 70; Walgreen Compl., PP 52-53, 62-72; Vista Am. Compl., PP 63, 65, 72-78; Avmed Am. Compl., PP 52, 54, 64-70; Apotex Second Am. Compl., PP 17, 21-37, 68-69, 71; F.T.C. Am. Compl., PP 44-46.) Applying the scope of the patent framework **[**50]** allows exploration of these allegations.

Third, applying a rule that the reverse payment agreements in this case are *per se* anticompetitive would tend to ignore the long standing preference under the law favoring settlements. Several circuit courts have emphasized that while analyzing the rights protected by patent and antitrust principles, it is important to consider the general principles favoring settlement of litigation. This consideration also extends to the settlement of patent infringement suits. *See* Tamoxifen, 466 F.3d at 212 (settlement of patent litigation encouraged for a variety of reasons even if it leads to the survival of monopolies created by what would otherwise be weak patents); Cipro, 544 F.3d at 1333 (there is a long-standing policy in the law in favor of settlements, and this policy extends to patent infringement litigation); Asahi Glass, 289 F.Supp.2d at 994 ("If any settlement agreement is thus to be classified as involving a forbidden 'reverse payment' we shall have no more patent settlements.").

Finally, and as extensively detailed by the Second Circuit in Tamoxifen, reverse payment settlements seem to be a natural consequence of the Hatch-Waxman Act. Schering, 402 F.3d at 1074. **[**51]** Prior to this Act, generic drug manufacturers had to run the risk of entering the market, subjecting themselves to a finding of infringement which would forever preclude them from selling the infringing product, loss of investment revenue, and possible payment of damages to the brand name manufacturer. However, under Hatch-Waxman, the patent holder typically brings suit after the Paragraph IV ANDA filing but before marketing revenues are expended and before the generic exposes itself to possible infringement damages. This framework significantly reduces the risks involved in challenging a patent held by a brand name manufacturer. Settlements of these patent suits seem to be a logical progression of the Hatch-Waxman regulatory framework. We agree with the Eleventh Circuit's reasoning that imposing a *per se* prohibition on reverse payment settlements would reduce a generic manufacturer's incentive to challenge patents. Id. ; Asahi Glass, 289 F.Supp.2d at 994.

IV. *LEGAL ANALYSIS - MOTION TO DISMISS*

A. *Dismissal Under Federal Rule of Civil Procedure 12(b)(6)*

With the applicable legal framework decided, we now turn to the pending motions to dismiss. ***HN9***[] A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* **[**52]** for failure to state a claim upon which relief can be granted **[*530]** examines the legal sufficiency of the complaint. *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. *Fed. R. Civ. P. 8(a)(2)* ***HN10***[] requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." According to the Supreme Court, the *Rule 8* pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. The *Iqbal* Court recently summarized the pleading standard established in *Twombly*:

> ***HN11***[] To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a **[**53]** complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Iqbal, 129 S.Ct. at 1949 (citations omitted).

The *Iqbal* Court articulated two (2) principles that underlie *Twombly's* holding. First, ***HN12***[] a court must accept as true all of the factual allegations made in a pleading, but not the legal conclusions. *Id*. Second, only a complaint that states a "plausible claim for relief survives a motion to dismiss." *Id. at 1950*. Determining plausibility is a "context specific task." *Id*. In short, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not shown-that the pleader is entitled to relief." *Id*. (citations omitted). The Third Circuit has found that in light of *Twombly*, it is no longer sufficient to make an unsupported statement asserting an entitlement to relief; instead a complaint must state a claim and the grounds supporting the claim. *Phillips v. County of Allegheny, 515 F.3d 224, 233-34 (3d Cir. 2008)* (citing *Twombly, 127 S. Ct. at 1969 n. 8*).

B. *Allegations in the Complaints*

Among the four **[**54]** (4) groups of cases, there are seven (7) complaints before the Court. [12] The complaints are lengthy, some in excess of three hundred (300) paragraphs. They generally allege that the settlement agreements between Cephalon and the Generic Defendants are *per se* antitrust violations. In the alternative, the complaints also assert that the settlement agreements create antitrust liability because they go beyond the scope of the RE'516 patent. In summary, the complaints allege that the agreements exceed the patent's exclusionary authority in four (4) different ways: (1) the RE'516 patent was invalid, unenforceable, and/or non-infringed; (2) the Generic Defendants agreement not to relinquish their 180-day exclusivity period creates a bottleneck preventing other generic entry, a right not conferred through Cephalon's patent; (3) the individual settlement agreements were part of a larger antitrust conspiracy; and **[*531]** (4) the settlement agreements prevent the sale of generic equivalents of Provigil(R) that were not at issue in the underlying litigation. The specific allegations set forth in the complaints are summarized as follows:

1. *The RE '516 Patent was Invalid, Unenforceable and/or Non-Infringed*

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[12] Specifically, there is one (1) complaint from each of the class **[**55]** Plaintiffs, opt-out Plaintiffs Rite-Aid and related Plaintiffs, and opt-out Plaintiffs Walgreen and related Plaintiffs in The King Drug Direct Purchaser Class Action; one (1) complaint each from the class Plaintiffs and opt-out Plaintiff Avmed in The Vista Healthplan End Payor Class Action; one (1) in The Apotex Litigation; and one (1) in The F.T.C. Litigation.

Plaintiffs first pled that the settlement agreements exceeded the scope of the RE'516 patent because Cephalon knew prior to the underlying patent litigation that the patent was invalid, unenforceable and/or not infringed by the Generic Defendants' proffered products.

Specifically, the complaints assert that Cephalon knew the patent was invalid and/or unenforceable, and, therefore, any settlement agreements based on that patent were outside its scope, because the patent at issue had no scope and Cephalon's knowledge of that fact rendered the patent litigation a "sham." (Apotex Second Am. Compl., PP 65-67.) Plaintiffs base these allegations on the following facts:

- Cephalon violated a duty of candor to the PTO, in that the modafinil compositions and methods were **[**56]** developed by a French company, Labortoire L. Lafon, and not by Cephalon, which renders the RE'516 patent, as the reissue patent for the '845 patent, invalid or unenforceable;

- Cephalon bought modafinil from Lafon prior to its patent filing, which could make the patent invalid under the on-sale bar pursuant to *35 U.S.C. § 102(b)*; and
- Cephalon misrepresented material facts regarding its clinical trials to the PTO.

Plaintiffs allege that the Generic Defendants were aware of the above facts when they entered into the settlement agreements with Cephalon, because the Generic Defendants raised many of the same arguments in their answers and dispositive motions filed in the underlying litigation. Thus, Plaintiffs conclude that the settlement agreements on an invalid and/or unenforceable patent fall outside the scope of the patent, because a patent's scope is bound by its validity and enforceability. (King Second Am. Compl., PP 62, 73-81; Rite Aid Compl., PP 50-51, 61-68, 70; Walgreen Compl., PP 52-53, 62-72; Vista Am. Compl., PP 63, 65, 72-78; Avmed Am. Compl., PP 52, 54, 64-70; Apotex Second Am. Compl., PP 17, 21-37, 68-69, 71; F.T.C. Am. Compl., PP 44-46.)

The complaints also allege that **[**57]** if the patent was not infringed by the proposed generic products, then any settlement based on infringement is outside the scope of the patent. In opposition to Defendants' motions to dismiss, Plaintiffs focus on the fact that the RE'516 patent is a narrow formulation patent for modafinil, not a patent on modafinil itself. They assert that the patent for the compound modafinil was issued in 1979 and expired in 2001, and point out that the Generic Defendants' proposed generic products did not infringe on the RE'516 patent as stated in their ANDA's for generic Provigil(R) filed on December 24, 2002, because the generic products had different compositions and/or particle sizes of modafinil. Thus, according to Plaintiffs, if the proposed generic products did not infringe on the RE'516 patent, then settlement agreements based on the infringement of that patent are outside the scope of the patent. (King Second Am. Compl., PP 59-60, 65, 67-70; Rite Aid Compl., PP 48, 52-53, 55-58; Walgreen Compl., PP 50, 54-55, 57-60; Vista Am. Compl., PP 66-69; Avmed Am. Compl., PP 46, 50, 56, 58-61; Apotex Second Am. Compl., PP 46, 72; F.T.C. Am. Compl., PP 34, 38-39.)

[*532] In summary, Plaintiffs claim that the **[**58]** underlying litigation was nothing more than "sham" litigation, and that the settlement agreements based on the patent exceeded its scope. The complaints allege that if Cephalon knew its patent was invalid and/or not infringed, then the underlying patent litigation, and subsequent settlement, exceeded the exclusionary power of Cephalon's patent. Thus, Plaintiffs assert that Cephalon entered into the settlement agreements to obtain protection from competition precisely because they knew they could not have won an injunction preventing generic competition from a patent court. Therefore, Plaintiffs explain, Cephalon obtained "relief" above and beyond what it could have obtained from a patent court on the RE'516 patent, and thus, the settlement agreements affording Cephalon market security were outside the scope of the patent. (King Second Am. Compl., PP 83-88, 93; Rite Aid Compl., PP 6, 69, 71, 80, 101; Walgreen Compl., PP 6, 71, 73, 82, 103; Vista Am. Compl., PP 5, 71, 79-81, 83, 88, 107; Avmed Am. Compl., PP 6, 55-56, 63, 71-75, 80, 85, 104; Apotex Second Am. Compl., PP 70-79; F.T.C. Am. Compl., P 47.)

2. *The Settlements Created a Bottleneck*

The second theory pled by Plaintiffs as to how **[**59]** the settlement agreements fall outside the scope of the patent, is that the agreements created a bottleneck preventing entry into the market by other generic companies, such as Apotex. Under the Hatch-Waxman Act, the first ANDA filers, are awarded 180-days of market exclusivity after the RE'516 patent expires or is declared invalid, unenforceable and/or not infringed. Thus, Plaintiffs explain that if the 180-day period of exclusivity is never triggered for the first-filers - here, the Generic Defendants, then all subsequent generic companies such as Apotex will be blocked from the market. Plaintiffs posit that the settlement agreements included provisions in which the Generic Defendants agreed not to give up their 180-day exclusivity, thus preventing other generic companies from entering the market. Plaintiffs' complaints point out that even if the settlement agreements do not explicitly require the Generic Defendants to maintain their 180-day exclusivity, then there were secondary agreements between all of the companies who agreed not to relinquish their first-filer exclusivity. Plaintiffs contend that such agreements are outside the scope of the patent because they extended Cephalon's **[**60]** right to market exclusivity by preventing generic entry beyond that which Cephalon would ordinarily be entitled to by the patent itself. (King Second Am. Compl., PP 49, 51, 56, 108-09, 116, 120, 124, 128, 131-37; Rite Aid Compl., PP 121-24; Walgreen Compl., PP 123-26; Vista Am. Compl., PP 128-30; Avmed Am. Compl., PP 39, 57, 124-27; Apotex Second Am. Compl., PP 96, 99, 113-14, 122-24, 146, 159-60, 166, 171-72; F.T.C. Am. Compl., PP 87-90.)

3. *The Agreements Were Part of a Larger Antitrust Conspiracy*

The third theory pled by Plaintiffs as to how the settlement agreements were outside the scope of the patent is that all of the agreements were part of an overall elaborate horizontal agreement not to compete. Plaintiffs allege that this conspiracy and the ensuing reverse settlement agreements allocated all sales of modafinil in the United States to Cephalon, prevented the sale of generic versions of Provigil(R) for six (6) or more years, and fixed the price of Provigil(R) because there is no generic competition.

In support of these allegations, Plaintiffs highlight that each agreement contained a "most favored nation clause," which guaranteed that each of the Generic Defendants' licensed **[**61]** entry date would be accelerated if any other Generic Defendant **[*533]** did not settle or entered early. Plaintiffs also point out that each of the agreements contain the same entry date of April 6, 2012. Thus, they assert that in order to induce any individual Generic Defendant to sign the settlement agreements, Cephalon had to induce all of the Generic Defendants to sign the agreements because no Generic Defendant would agree to stay off the market unless all its competitors did so as well. Plaintiffs also allege that agreements contain numerous side-term inducements related to intellectual property licenses, supply agreements, and co-development deals, which were not independent business transactions, but rather, were inexplicably related to the Provigil(R) agreements. In sum, Plaintiffs allege that all of the above amounts to anticompetitive behavior that goes well beyond the exclusivity rights Cephalon ordinarily would have had under the patent. (King Second Am. Compl, PP 7, 85-88, 104-09, 111-28, 180-84; Rite Aid Compl, PP 5, 75, 92, 94-97, 99, 104, 108, 111, 140, 147, 154, 161, 168; Walgreen Compl, PP 5, 77, 94, 96-99, 101, 106, 110, 113, 142, 149, 156, 163, 170; Vista Am. Compl, PP **[**62]** 4, 97-99, 102-06, 111, 114-15, 118, 121, 123, 152; Avmed Am. Compl, PP 5, 79, 96, 98-99, 101-03, 107, 109-11, 113, 115-16, 118, 145; Apotex Second Am. Compl, PP 97, 99, 104, 106, 125-27, 133-40, 146, 168-70; F.T.C. Am. Compl, PP 58-60, 62-64, 66-69, 71-72, 74-77.)

4. *The Agreements Prohibit the Sale of Other Products in Addition to Generic Equivalents of Provigil*

The fourth theory pled by Plaintiffs as to how the settlement agreements extended beyond the scope of the patent is that the language of the agreements themselves prohibit the sale of products other than generic equivalents of Provigil(R). For instance, Plaintiffs alleged that the Teva and Mylan agreements prohibit the sale of all generic Provigil(R) and generic equivalents of successor products, not just the generic Provigil(R) equivalent at issue in the underlying litigation. As the Direct Purchasers point out in their responses to the Court's follow-up questions to counsel, the Teva agreement "provides that Teva will not sell 'Subject Modafinil Products - defined in P 1.19 to include any generic version of Provigil, any generic versions of drugs that may be subject to future supplements . . . and any other Cephalon modafinil **[**63]** products.'" (Direct Purchasers' Resp. to Ct.'s Questions, p. 3.) Plaintiffs also claimed that the Ranbaxy and Barr settlement agreements prohibit the sale of not only the generic Provigil(R) at issue in the underlying litigation, but also any other generic versions of Provigil(R), which is also outside the scope of the patent. (King Second Am. Compl., PP 108, 116, 120, 124; Rite Aid Compl., PP 96, 104, 108, 111; Walgreen Compl., PP 98, 106, 110, 113; Apotex Second Am. Compl., P 147; F.T.C. Am. Compl., PP 79-81.)

C. *Under the Scope of the Patent Test Plaintiffs Have Pled a Plausible Cause of Action*

Having determined that the scope of the patent test framework applies, and viewing the complaints and the allegations contained therein in the light most favorable to Plaintiffs, we find that sufficient facts have been alleged to establish that the agreements in question grant greater rights than those conferred under the patent. As detailed above, the complaints allege fraud and misrepresentations to the PTO, non-infringement, patent invalidity, "sham litigation," the creation of a bottleneck, antitrust conspiracy and agreements between Cephalon and the Generic Defendants regarding products **[**64]** not protected by Cephalon's patent. Indeed, some of the terms of the agreements referenced in the complaints contemplate "future supplements" and "any other Cephalon Modafinil Products."

[*534] To the extent that a factual basis exists on any of these theories, Plaintiffs may be able to prevail under the scope of the patent test and move forward with their antitrust claims. Indeed, Cephalon seems to acknowledge, at least as it pertains to the issue of "side-term inducements," that a factual dispute may exist. In their motions to dismiss, Cephalon argues that the "record" will support that these "side-term inducements" were in fact "legitimate business arrangements for which fair consideration was paid." (Cephalon Memo., p. 8. (doc. no. 200 in 2:06-cv-1797).) The record in this case has not, however, been developed. If in fact, Cephalon and the Generic Defendants did have "side-term inducements," a fact we must accept as true at this stage of the case, those facts could sustain Plaintiffs' antitrust claims. Consequently, plausible antitrust allegations have been pled.

The reasoning of several cases previously discussed supports our conclusion that Defendants' request to have the case dismissed **[**65]** at this stage should be rejected. For instance, in *Valley Drug*, in reversing the district court's determination that the settlement agreements were *per se* illegal, the Eleventh Circuit noted that on remand the district court should consider the allegations raised by plaintiffs that the agreements went beyond the scope of the patent. *Valley Drug, 344 F.3d at 1312-13*. Plaintiffs' allegations included claims that the agreements exceeded the scope of the patent due to the fact that they: (1) prohibited marketing of non-infringing products; (2) prohibited marketing of non-infringing products beyond a court's declaration of invalidity of the patents; and (3) prohibited the generic companies from waiving the 180-day exclusivity period. *Id. at 1306 n. 18*. The court stressed that, "these prohibitions may be beyond the scope of Abbott's lawful right to exclude, and, if so, would expose appellants to antitrust liability for any actual exclusionary effects resulting from these provisions that appellees can prove at the causation and damages stages of litigation." *Id*. The court also noted that the plaintiffs' allegations that the litigation that led to the settlement was a "sham" should also be **[**66]** considered by the district court. *Id. at 1306*.

On remand, the district court did in fact conclude that the agreements exceeded the scope of the patent. The court reached this conclusion as the agreement by the generic companies to refrain from entering the market until there was a final, non-appealable judgment of invalidity against the patent, exceeded the exclusionary power of that patent because similar protection could not have been obtained by enforcing the patent through litigation. *In re Terazosin Hydrochloride Antitrust Litig., 352 F.Supp.2d 1279, 1307-08 (S.D.Fla. 2005)*.

Many of the same claims that were raised in *Valley Drug* that eventually led to a finding in favor of the plaintiffs are also pressed by Plaintiffs in this case. For instance, Plaintiffs allege that the agreements cover all generic modafinil products and include products not covered by any of Cephalon's patents. (King Second Am. Compl, PP 108, 116, 120, 124; Rite Aid Compl, PP 96, 104, 108, 111; Walgreen Compl, PP 98, 106, 110, 113; Apotex Second Am. Compl, P 147; F.T.C. Am. Compl, PP 79-81.) The Eleventh Circuit explicitly recognized that such agreements could expose the brand name manufacturer to antitrust **[**67]** liability. *Valley Drug, 344 F.3d at 1312* ("Any provisions of the [a]greements found to have effects beyond the exclusionary effects of Abbott's patent may then be subject to traditional antitrust analysis."). Further, Plaintiffs allege that Cephalon knew their patent was invalid from the beginning, and therefore any agreement exceeds the scope of the patent, because **[*535]** an invalid patent has no scope. (King Second Am. Compl, PP 62, 73-81; Rite Aid Compl, PP 50-51, 61-68, 70; Walgreen Compl, PP 52-53, 62-72; Vista Am. Compl, PP 63, 65, 72-78; Avmed Am. Compl, PP 52, 54, 64-70; Apotex Second Am. Compl, PP 17, 21-37, 68-69, 71; F.T.C. Am. Compl, PP 44-46.) While the Eleventh Circuit did not address the validity of this argument, they did state that "many lower courts" recognize that these claims are valid under ***antitrust law***. *Valley Drug, 344 F.3d at 1309*.

In *Schering*, the Eleventh Circuit vacated a F.T.C. determination that reverse settlement agreements violate *Section 1 of the Sherman Act*. *Schering, 402 F.3d at 1066-68*. In reversing the F.T.C. and reiterating that "the scope of the exclusionary potential of the patent" must be considered, the court noted that the plaintiffs had not raised **[**68]** allegations that the patent itself was invalid or that the resulting infringement suits were "shams." *Id*. Here, unlike *Schering*, Plaintiffs have alleged that the patent is invalid and that Cephalon committed a fraud on the PTO. (King Second Am. Compl., PP 62, 73-81; Rite Aid Compl., PP 50-51, 61-68, 70; Walgreen Compl., PP 52-53, 62-72; Vista Am. Compl., PP 63, 65, 72-78; Avmed Am. Compl., PP 52, 54, 64-70; Apotex Second Am. Compl., PP 17, 21-37, 68-69, 71; F.T.C. Am. Compl., PP 44-46.) Moreover, at this stage of the litigation, wherein we are examining the complaints, we must accept as true Plaintiffs' contentions that the agreements were drafted as broadly as possible, affording Cephalon greater exclusionary rights than they may be entitled to under the patent. This is far different than the conclusions reached in *Schering* where the court found that the agreements in question "demonstrate an efficient narrowness," and did so after review of a comprehensive administrative court hearing. *Schering, 402 F.3d at 1073*.

In *Tamoxifen*, the court, in validating a reverse payment agreement, noted that "so long as the patent litigation is neither a sham nor otherwise baseless, the patent holder **[**69]** is seeking to arrive at a settlement in order to protect that to which it presumably entitled: a lawful monopoly." *Tamoxifen, 466 F.3d at 208-09*. In the case before us, Plaintiffs have alleged sham litigation and, at this stage, we are obligated to view this allegation in a favorable light and allow discovery to proceed. (King Second Am. Compl., PP 83-88, 93; Rite Aid Compl., PP 6, 69, 71, 80, 101; Walgreen Compl., PP 6, 71, 73, 82, 103; Vista Am. Compl., PP 5, 71, 79-81, 83, 88, 107; Avmed Am. Compl., PP 6, 55-56, 63, 71-75, 80, 85, 104; Apotex Second Am. Compl., P 79; F.T.C. Am. Compl., P 47.)

Certain findings in the Federal Circuit *Cipro* case also support our decision to deny Defendants' motions to dismiss. There, the reverse payment agreements all required the generic companies to convert their ANDA filings to Paragraph III certifications, thereby alleviating any possible bottleneck by forfeiting any claim to 180-day exclusivity and clearing a path for other generic companies to challenge the brand name manufacturer's patent. *Cipro, 544 F.3d at 1329*. Here, Plaintiffs have alleged that the Generic Defendants have done just the opposite by maintaining their 180-day exclusivity with **[**70]** no intention of going to market. (King Second Am. Compl., PP 49, 51, 56, 108-09, 116, 120, 124, 128, 131-37; Rite Aid Compl., PP 121-24; Walgreen Compl., PP 123-26; Vista Am. Compl., PP 128-30; Avmed Am. Compl., PP 39, 57, 124-27; Apotex Second Am. Compl., PP 96, 99, 113-14, 122-24, 146, 159-60, 166, 171-72; F.T.C. Am. Compl., PP 87-90.) Indeed, there is no mention in any of Defendants' memoranda filed in support of their motions to dismiss that the agreements required the Generic Defendants to convert their ANDA filings **[*536]** from Paragraph IV certifications to Paragraph III certifications. Moreover, unlike the claims before this Court, in *Cipro*, there were no allegations of fraud or inequitable conduct before the PTO. Rather, the strength of the brand name manufacturer's patent was demonstrated multiple times when it successfully defended patent infringement suits against subsequent generic ANDA Paragraph IV filers. *Cipro, 544 F.3d at 1329*.

We also note that all of the circuit courts, except one (1), who have adopted the scope of the patent framework and dismissed the case, did so where the litigation was at the summary judgment stage of the proceedings. [13] In *Valley Drug*, the facts were **[**71]** "largely uncontested by the parties," which is certainly not the case here. *Valley Drug, 344 F.3d at 1298 n. 7*. In *Schering*, the Eleventh Circuit's analysis was based upon review of an extensive administrative hearing which included numerous exhibits and witnesses, also not present here. *Schering, 402 F.3d at 1061*. Given the fact that a Rule 16 Conference in these cases has not yet taken place, the record before us is only Plaintiffs' complaints, which must be viewed in a light favorable to Plaintiffs, and the settlement agreements.

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[13] Although the district court in *Tamoxifen* dismissed the complaint at the motion to dismiss phase, the facts of *Tamoxifen* are almost entirely different from those in the case *sub judice*. *In re Tamoxifen Citrate Antitrust Litig., 277 F.Supp.2d 121 (E.D.N.Y. 2003)*. Most notably, the plaintiffs in *Tamoxifen* made no allegations whatsoever that the terms of the agreements went outside the scope of the patent, either by restricting the sale of additional drugs not implicated by the patent, or by virtue of fraud on the PTO by the patent-holder. *Id*. Rather, the Second Circuit's discussion focuses on the good-faith nature of the settlement after a district court **[**72]** ruling of invalidity. *Tamoxifen, 466 F.3d at 204-06*. Those issues are simply not present in our case.

Lastly, we have carefully considered the costs of discovery and are cognizant of the admonition that if there is "nothing suspicious about the circumstances of patent settlement," a third party should not be permitted to haul the parties to a patent settlement "over the hot coals of antitrust litigation." *Asahi Glass, 289 F.Supp.2d at 992*. It may ultimately be proven that the agreements in question do not confer Cephalon greater exclusionary authority than the patent, and that any "suspicions" about the settlements are unfounded. Nonetheless, Plaintiffs have set forth sufficient, plausible allegations to establish the contrary.

IV. *STANDING*

Defendants also challenge Plaintiffs' standing to pursue antitrust claims. ***HN13***[] The following te is applicable in determining antitrust standing:

> (1) the causal connection between antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the **[**73]** directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993). This "standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving **[*537]** all § 4 standing problems." *Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99 (3d Cir. 1977)*.

The only argument raised by Defendants regarding standing is causation. Defendants assert that Plaintiffs' argument that "but-for" Defendants' settlement agreements a generic company would have entered the market is too speculative to satisfy the causation requirement for standing. (*See, i.e*., Cephalon Memo., pp.40-44 (doc. no. 200 in 2:06-cv-1797); Cephalon Memo., pp. 29-32 (doc. no. 157 in 2:06-cv-2768).) Plaintiffs respond that "but-for" Defendants' settlement agreements, companies such as the Generic Defendants and/or Apotex would have entered **[**74]** the market resulting in Provigil(R) being available in cheaper generic form. Plaintiffs' claim that the overcharges on their purchases of Provigil(R) and Apotex's barrier to market entry are precisely the type of injuries which directly resulted from the specific type of antitrust activity the Sherman Act was intended to prevent. (*See, i.e*., Direct Purchasers Memo., pp. 57-62 (doc. no. 213 in 2:06-cv-1797); Apotex Memo., pp. 20-26 (doc. no. 161 in 2:06-cv-2768).)

In the *In re K-Dur Antitrust Litigation*, the court extensively addressed this very issue, and, consequently, we will not engage in a protracted analysis here. *In re K-Dur Antitrust Litig., 338 F.Supp.2d 517, 534-35 (D.N.J. 2004)*. The court found that the plaintiffs' allegations that anticompetitive agreement(s) between a name brand manufacturer and generic companies, which blocked generic entry into the market causing higher prices on the name brand pharmaceutical product, could survive a motion to dismiss premised upon lack of standing. *Id. at 535*. The court reasoned that it was the alleged anticompetitive agreement(s) which caused the antitrust injury, not the Hatch-Waxman Act, because the Hatch-Waxman Act was designed to **[**75]** promote competition between name brand manufacturers and generic companies. [14] *Id*.

Here, the direct purchaser and end payor Plaintiffs have alleged that absent the anticompetitive settlement agreements between Cephalon and the Generic Defendants, they would have been able to purchase generic Provigil(R) at significantly reduced prices. (King Second Am. Compl., P 8; Rite Aid Compl., P 10; Walgreen Compl., P 10; Vista Am. Compl., P 6; Avmed Am. Compl., P 8.) Therefore, the direct purchaser and end payor Plaintiffs

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[14] The court distinguished the facts before it from those in *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256 (3d Cir. 1998)*, because of the distinctive designs of the applicable statutory framework. *K-Dur, 338 F.Supp.2d at 535*. That same analysis is applicable to the instant cases as well.

have sufficiently pled an antitrust injury which stems from the Defendants' conduct, and accordingly, meet the pleading requirements for standing.

As to the Defendants' challenge to Apotex's standing in the antitrust context, we have previously addressed Apotex's standing to pursue a declaratory judgment action on the RE'516 and '346 patents in *Apotex, Inc. v. Cephalon, Inc., 2010 U.S. Dist. LEXIS 16940, 2010 WL 678104, at * 3-6*. **[**76]** There, we held that Apotex's injury was premised on the barrier to market entry as a result of Defendants' anticompetitive settlement agreements. The same analysis which applied in the patent declaratory judgment framework applies to Apotex's standing in the antitrust context and thus, Apotex's claims will be allowed to proceed.

[*538] V. *ADDITIONAL ISSUES RAISED IN THE DEFENDANTS' MOTIONS TO DISMISS*

A. *Vista Healthplan Class Action - Count IV - For Compensatory and Multiple Damages Under Antitrust and/or Consumer Protection Statutes of Indirect Purchaser States and Avmed - Count II - Violation of Florida Deceptive and Unfair Trade Practices Act*

The class Plaintiffs in The Vista Healthplan End Payor Class Action have brought claims under the antitrust and/or consumer protection statutes of twenty-six (26) states, and Avmed has brought claims under the consumer protection statute of Florida. Defendants have moved to dismiss all of these claims for a litany of reasons. The end payor class Plaintiffs voluntarily withdrew their claims under the antitrust statutes of Louisiana, Massachusetts and New York, and their claims under the consumer protection statutes of Kentucky, Louisiana and Wisconsin, **[**77]** and consequently, the motions to dismiss will be granted regarding those claims. (Plaintiff Memo., p. 65 n. 2 (doc. no. 92 in 2:06-cv-1833).) Additionally, Defendants moved to dismiss the end payor class Plaintiffs' claims under Florida's antitrust statute, *Fla. Stat. Ann. § 542.15* (West 2010), and the end payor class Plaintiffs did not respond to that portion of the motion. Therefore, the Court will consider this issue conceded and the motions to dismiss will be granted on that claim as well. The remaining issues in the motions to dismiss will be addressed in the order in which they have been raised.

Defendants first assert that all consumer protection and antitrust claims brought where none of the named Plaintiffs reside should be dismissed for lack of standing. [15] (*See* Cephalon Memo., p. 22 (doc. no. 86 in 2:06-cv-1833).) In support of their argument, Defendants rely almost entirely on *In re Wellbutrin XL Antitrust Litig., 260 F.R.D. 143 (E.D.Pa. 2009)*. This reliance is misplaced because, while the court in *Wellbutrin* held that it was proper to determine standing prior to class certification and considered only the named plaintiffs, the court went on to find the named plaintiffs **[**78]** had standing in any state in which their member constituents resided. *Id. at 156*.

In this case, end payor class Plaintiffs have alleged that Plaintiff District Council 37 Health & Security Plan has members residing in forty-nine (49) states, while Plaintiff Pennsylvania Employees Benefit Trust Fund has over 270,000 members, residing in a number of states. (Vista Am. Compl., PP 16-17.) Therefore, Plaintiffs "have identified an injury in fact that is fairly traceable to conduct taking place in states where their members purchased" Provigil(R). *Wellbutrin, 260 F.R.D. at 156*. The injuries "would be redressed by a favorable determination under the laws of the states where their members purchased" Provigil(R). *Id*. Plaintiffs, therefore, have standing in forty-nine (49) states, including the twenty-six (26) named in their complaints.

Defendants next argue that all of the state law claims should be dismissed because the statutes must be construed consistently with federal ***antitrust law***. (*See* Cephalon Memo., p. 25 (doc. **[**79]** no. 86 in 2:06-cv-1833).) Accepting *arguendo* that Defendants are correct in their interpretation of the state statutes, this argument must still be rejected because the federal antitrust claims are proceeding.

[*539] Defendants next argue that the claims under the Mississippi, Utah, and West Virginia antitrust statutes should be dismissed because the statutes only apply to conduct which is primarily intrastate. (*See* Cephalon

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[15] The named end payor class Plaintiffs reside in Pennsylvania and New York. (Vista Am. Compl., PP 13-17.) Avmed, an opt-out Plaintiff, resides in Florida. (Avmed Am. Compl., P 16.)

Memo., p. 34 (doc. no. 86 in 2:06-cv-1833).) The laws of Mississippi, Utah, and West Virginia, however, do not have such a requirement. Consequently, Defendants' argument on that point is meritless.

HN14[] Under Mississippi law, Plaintiffs need "only have to plead facts that would lead to a reasonable inference that the defendant and its co-conspirators wanted the Mississippi vendors to charge Mississippi consumers a higher price as a result of the lack of competition." *Hood ex rel. State v. BASF Corp*, 2006 WL 308378, at * 10 (Miss. Ch. Jan. 17, 2006). The allegations in Plaintiffs' complaint clearly allege such facts. (*See* Vista Am. Compl., PP 147-48, 175.)

The Utah Antitrust Act has no such requirement, but instead bars all antitrust activity with regard to "trade or commerce." **[**80]** The statute defines "trade or commerce" as "all economic activity involving, or relating to, any commodity, service, or business activity." Utah Code Ann. § 76-10-913 (West 2010). The Defendants' citation to a definition of "commerce" from a separate section of the Utah Code is unconvincing. (*See* Cephalon Memo., p. 35 (doc. no. 86 in 2:06-cv-1833).)

With regard to West Virginia, Defendant asks this Court to find that the statute is limited to intrastate commerce based on a single line from *Anziulewicz v. Bluefield Cmty. Hosp., Inc., 531 F.Supp. 49, 53 (S.D. W.Va. 1981)*, a case discussing federal jurisdiction and the *Supremacy Clause*. *Id*. This issue has not been specifically addressed in West Virginia; however, the West Virginia antitrust statute ***HN15***[] specifically dictates that it is to be "construed liberally." *W. Va. Code § 47-18-16* (West 2010). One (1) sentence from a case completely unrelated to the issues before this Court is insufficient to warrant a finding to the contrary.

Finally, Defendants argue that the end payor Plaintiffs have not alleged fraudulent or deceptive conduct, and, therefore, their claims under various consumer protection laws should be dismissed. (*See* Cephalon Memo., **[**81]** p. 41 (doc. no. 86 in 2:06-cv-1833).) Accepting the Plaintiffs' claims as true, Plaintiffs have clearly alleged that Cephalon and the Generic Defendants engaged in fraudulent or deceptive conduct by entering into confidential illegal agreements with the goal of keeping the price of Provigil(R) artificially high. (*See* Vista Am. Compl., PP 97-124.) *See, e.g., Cox v. Microsoft Corp., 8 A.D.3d 39, 778 N.Y.S.2d 147, 148 (N.Y.App.Div. 2004)*.

B. *Vista Healthplan Class Action - Count V - Unjust Enrichment and Avmed - Count III - Unjust Enrichment*

Defendants argue that the end payor Plaintiffs' unjust enrichment claims should be dismissed because Plaintiffs cannot establish a violation of state and/or federal law. As has been previously discussed, this argument fails because Plaintiffs have pled sufficient facts to establish violations of ***antitrust law*** at this stage in the litigation. Defendants also argue that the end payor Plaintiffs' unjust enrichment claim should be dismissed as an "end-run" around statutory limitations on remedies. (Cephalon Memo., p. 47 (doc. no. 86 in 2:06-cv-1833).) Several courts, however, have found just the opposite. End payor unjust enrichment claims survived motions to dismiss **[**82]** in *In re Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 679 n. 40 (S.D.Fla. 2004)*, and *In re Cardizem CD Antitrust Litig., 105 F.Supp.2d 618, **[*540]** 669-71 (E.D.Mich. 2000)*. [16] The courts also explained that ***HN16***[] unjust enrichment claims are viable regardless of the applicable state antitrust laws. *Id*. Furthermore, it has long been recognized that plaintiffs are allowed to plead alternative causes of action and unjust enrichment is commonly recognized as one (1) of those permissible alternative causes of action. *See, e.g., Terazosin, 220 F.R.D. at 697 n. 40*. Accordingly, we will not dismiss the end payors' unjust enrichment counts.

C. *Apotex - Count XII - Patent Misuse*

Cephalon has moved to dismiss Apotex's patent misuse claim but admits that "[t]he standard for patent misuse mirrors the scope of the patent test for an antitrust claim - *i.e*., the conduct is lawful so long as it does not restrain competition to any greater extent than the underlying patents." **[**83]** (Cephalon Memo., p. 33 (doc. no. 157 in 2:06-cv-2768) *citing Monsanto Co. v. McFarling, 363 F.3d 1336, 1341 (Fed. Cir. 2004)*; and *Mallinckrodt, 976 F.2d*

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[16] The court in *Cardizem* also rejected the defendants' arguments regarding privity under New York law, and for the purposes of these motions, we will adopt the same analysis and ruling on that issue. *Cardizem, 105 F.Supp.2d at 669-71*.

at 704.) As we have thoroughly addressed the issue of the scope of the patent test and its application to the facts as pled by all Plaintiffs, including Apotex, we will not reiterate that analysis here. Given that Apotex has sufficiently pled facts establishing that the settlement agreements could go outside the scope of the patent (*see supra* Section IV, subsection C), we also find that Apotex has sufficiently pled facts to survive Cephalon's motion to dismiss the patent misuse claim.

D. *Apotex - Count XIII - Tortious Interference with a Prospective Business Relationship*

Cephalon has also moved to dismiss Apotex's tortious interference with a prospective business relationship claim. Cephalon argues that Apotex's claim fails because it has not identified any potential customer with whom the Defendants interfered, the settlement agreements do not restrict anything beyond the scope of the patent, and the claims cannot be based on mere speculation. (Cephalon Memo., pp. 36-38 (doc. no. 157 in 2:06-cv-2768).)

The second argument fails for the **[**84]** very reasons extensively addressed above. (*See supra* Section IV, subsection C.) As to points one (1) and three (3) of Cephalon's argument:

> ***HN17***[] it has been held in an antitrust case similar to this that the "allegation that [a name brand manufacturer] brought a sham patent infringement suit against [a generic manufacturer] with the purpose of keeping it out of the generic [drug] market [was] sufficient to state a claim for tortious interference with prospective business advantages."

Abbott Labs. v. Teva Pharms. USA, Inc., 432 F.Supp.2d 408, 433 (D.Del. 2006) citing SmithKline Beecham Corp. v. *Apotex Corp., 383 F.Supp.2d 686, 704 (E.D.Pa. 2004)*. Apotex has sufficiently pled that the underlying litigation was a sham and that the sham litigation resulted in agreements which were designed to keep other generic companies, such as Apotex, off the market and interfere with their prospective business relationships. (Apotex Second Am. Compl., PP 79, 96, 99, 113-14, 122-24, 146, 159-60, 166, 171-72, 294, 296-300.) Therefore, we will not dismiss count XIII of Apotex's second amended complaint.

E. *Apotex - Striking Prayers for Relief*

Cephalon has moved to strike Apotex's prayer for relief which seeks a **[**85]** Court order mandating that the Generic Defendants **[*541]** waive their 180-day first-filer exclusivity. (Apotex Second Am. Compl., P 301(i).) Cephalon suggests that this prayer for relief is not appropriate because under *21 U.S.C. § 355(j)(5)(D)(i)(V)* only the F.T.C. or the Attorney General may seek such relief if they successfully challenge a violation of ***antitrust law***. (Cephalon Memo., pp. 38-39 (doc. no. 157 in 2:06-cv-2768).) *21 U.S.C. § 355(j)(5)(D)* provides several ways in which a generic company may forfeit their 180-day first-filer exclusivity, including section (i)(V) addressed above. Given the relatedness of The F.T.C. Litigation to The Apotex Litigation and the several different types of forfeiture events, the applicability of which has yet to be determined in the cases at hand, the Court will not strike Apotex's prayer for relief (i) at this point in the litigation.

Cephalon has also moved to strike Apotex's prayer for relief which seeks a Court order that "the provisions in the agreements between Cephalon and the Generic Defendants that allows for the Generic Defendants to launch generic versions of modafinil upon a third party launch of generic versions of modafinil" be stricken **[**86]** and that "the Generic Defendants not be allowed to enter the market prior to April, 2012." (Apotex Second Am. Compl., P 301(j) & (k).) Cephalon's sole argument for striking this prayer for relief is that the entry provision in the settlement agreements is pro-competitive, so there is no injury justifying such relief by the Court. Apotex has pled, however, that the settlement agreements are anticompetitive and for the purposes of the motions to dismiss that is controlling. (Apotex Second Am. Compl., PP 96, 117.) Therefore, the Court will not strike Apotex's prayer for relief (j) and (k).

VI. *CONCLUSION*

For the reasons set forth above, Defendants' motions to dismiss will be denied in part and granted in part, as explained in this Opinion. Our Order follows.

ORDER

AND NOW, this 29th day of March, 2010, upon consideration of Defendants' Motions to Dismiss, Plaintiffs' responses in opposition, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** as follows:

1) In The King Drug Direct Purchaser Class Action - *King Drug Co. of Florence, Inc., et al. v. Cephalon, Inc., et al*., 2:06-cv-1797, "Defendant Cephalon, Inc.'s Motion to Dismiss the Direct Purchasers' First **[**87]** Consolidated Amended Complaint and the Rite Aid Complaint," (doc. no. 200); "Generic Defendants' Motion to Dismiss the Amended Complaints of the Direct Purchaser Plaintiffs and End Payor Plaintiffs," (doc. no. 201); "Defendant Cephalon, Inc.'s Motion to Dismiss the Walgreen Complaint," (doc. no. 211); and "The Generic Defendants' Motion to Dismiss the Complaint Filed by Walgreen Co., et al.," (doc. no. 216), are **DENIED**.

2) In The Vista Healthplan End Payor Class Action - *Vista Healthplan, Inc., et al. v. Cephalon, Inc., et al*., 2:06-cv-1833, "Defendant Cephalon, Inc.'s Motion to Dismiss the Amended Consolidated Class Action Complaint of End Payors and the Amended Complaint of Avmed, Inc.," (doc. no. 86); and "Generic Defendants' Motion to Dismiss the Amended Complaints of the Direct Purchaser Plaintiffs and End Payor Plaintiffs," (doc. no. 87), are **GRANTED in part** and **DENIED in part**. The Motions are **GRANTED** in that the Vista Healthplan End Payor Class Plaintiffs' claims under the antitrust statutes of Florida (Count IV - P (d)), Louisiana **[*542]** (Count IV - P (i)), Massachusetts (Count IV - P (k)) and New York (Count IV - P (r)), and claims under the consumer protection statutes of Kentucky **[**88]** (Count IV - P (h)), Louisiana (Count IV - P (i)) and Wisconsin (Count IV - P (z)) are **DISMISSED**. The Motions are **DENIED** in all other regards.

3) In The Apotex Litigation - *Apotex, Inc. v. Cephalon, Inc., et al*., 2:06-cv-2768, "Defendant Cephalon, Inc.'s Motion to Dismiss Counts III Through XIII of the Amended Complaint and to Strike Prayers for Relief," (doc. no. 157); and "Generic Defendants' Motion to Dismiss Apotex's First Amended Complaint," (doc. no. 158), are **DENIED**.

4) In The F.T.C. Litigation - *Fed. Trade Comm'n v. Cephalon, Inc*., 2:08-cv-2141 -"Defendant Cephalon, Inc.'s Motion to Dismiss the First Amended Complaint," (doc. no. 43), is **DENIED**.

IT IS FURTHER ORDERED that Defendants shall file Answers to Plaintiffs' Complaints on or before April 19, 2010. A Rule 16 Conference is scheduled for 10:00 a.m. on Thursday, April 22, 2010, in a Courtroom to be assigned. Counsel should contact Chambers at (267) 299-7500, two (2) days prior for Courtroom assignment. Attendance is limited to two (2) counsel per party.

At any time, but no later than April 19, 2010, counsel may submit to the Court suggestions regarding the scheduling of fact discovery; expert discovery; depositions, including **[**89]** coordination with depositions in the bifurcated Apotex patent declaratory judgment action; and dispositive motions. The submissions are limited to three (3) pages, and joint submissions are encouraged.

BY THE COURT:

MITCHELL S. GOLDBERG, J.

Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)

United States District Court for the District of Maryland

March 30, 2010, Decided

MDL 1332; Civil No. JFM-05-1087

Reporter

699 F. Supp. 2d 730 *; 2010 U.S. Dist. LEXIS 30756 **; 2010-1 Trade Cas. (CCH) P76,983

IN RE MICROSOFT CORP. ANTITRUST LITIGATION; NOVELL, INC., v. MICROSOFT CORP.

Subsequent History: Reversed by, Remanded by *Novell, Inc. v. Microsoft Corp., 2011 U.S. App. LEXIS 9062 (4th Cir. Md., May 3, 2011)*

Prior History: *Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 2007 U.S. App. LEXIS 24101 (4th Cir. Md., 2007)*

Core Terms

operating system, anticompetitive, software, products, functionality, distributors, cooperate, license, anticompetitive conduct, competitor, consumers, discount, parties, percent, monopolist, namespace, assigned, monopoly, markets, relevant market, antitrust, tolled, monopoly power, foreclosure, foreclose, alleges, summary judgment, monopolization, resellers, argues

LexisNexis® Headnotes

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN1[] **Summary Judgment, Evidentiary Considerations**

A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The materiality of facts is determined by the underlying substantive law. A genuine dispute about a material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. When considering a motion for summary judgment, a district court draws reasonable inferences and views the evidence in the light most favorable to the non-moving party.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN2[] **Regulated Industries, Communications**

Although the summary judgment standard does not differ when applied to antitrust claims, because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for *Fed. R. Civ. P. 56* utilization.

Contracts Law > Contract Interpretation > General Overview

HN3[] **Contracts Law, Contract Interpretation**

Under Utah law, a court looks to the language of the contract to determine its meaning and the intent of the contracting parties. Only if the language of the contract is ambiguous will a court consider extrinsic evidence of the parties' intent.

Contracts Law > Contract Interpretation > General Overview

HN4[] **Contracts Law, Contract Interpretation**

The Utah Supreme Court, while not disavowing the holding in Ward, has clarified its meaning and states that the Court did not intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit and that a correct application of the Ward rule to determine what the writing means begins and ends with the language of the contract.

Contracts Law > Contract Interpretation > General Overview

HN5[] **Contracts Law, Contract Interpretation**

Where the parties have attached the same meaning to a promise or agreement or a term of art, it is interpreted in accordance with that meaning. Under that rule, in determining the subjective intent of the parties to a contract, a court ordinarily looks only to their contemporaneous conduct, not to what they aver they intended after a controversy with a third party has arisen. The parties' intent must be gathered from the perspective of a reasonably intelligent person acquainted with the contemporary circumstances. That is both sensible and fair because there is no reason that the law should countenance the parties to an agreement retrospectively placing a subjective interpretation upon the agreement's language, contrary to its objective meaning, to the detriment of a third person who has become embroiled in a dispute with one of the parties to the agreement.

Contracts Law > Contract Interpretation > General Overview

HN6[] **Contracts Law, Contract Interpretation**

Where the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language.

Contracts Law > Contract Interpretation > General Overview

HN7[] **Contracts Law, Contract Interpretation**

Under Utah law where the language of a contract is not ambiguous, courts are to resolve its meaning by looking within its four corners. To attempt to identify the potentialities that were known to the contracting parties at the time the agreement was entered into would, in effect, be to inquire into their subjective intentions and undermine the principle that unambiguous contract language must be construed objectively and reasonably.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Contracts Law > Third Parties > General Overview

Contracts Law > Standards of Performance > Assignments > General Overview

HN8[] **Ownership & Transfer of Rights, Assignments**

Although the assignment of antitrust claims must be express, courts have found valid transfers where all-inclusive language was used.

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN9[] **Complaints, Requirements for Complaint**

A complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. Although specific facts are not necessary, the complaint must give the defendant fair notice of what the claim is and the grounds upon which it rests.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN10[] **Scope, Monopolization Offenses**

To violate *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, the defendant must (1) have monopoly power in the relevant market and (2) engage in monopolizing conduct-that is, willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. To prove the second element, the plaintiff generally must show that the defendant (a) engaged in anticompetitive conduct that (b) caused anticompetitive harm in the relevant market. The plaintiff must prove that the defendant (1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury. Exclusionary conduct is defined as conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. However, those last two issues, anticompetitive conduct and causation/anticompetitive harm, are not neat, distinct inquiries, but often involve overlapping considerations and analyses.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Penalties

HN11[] Scope, Monopolization Offenses

The Sherman Act, *15 U.S.C.S. § 2*, reads: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN12[] Scope, Monopolization Offenses

Some courts break a monopolization analysis into three elements: (1) monopoly power, (2) willful acquisition/maintenance of monopoly power, or anticompetitive conduct, and (3) causation. Regardless of how the elements are organized, the substantive analysis remains the same.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN13[] Scope, Monopolization Offenses

Although a monopolist generally has a right to refuse to cooperate with a competitor, this right is not unqualified: a refusal to cooperate may be anticompetitive if it is an attempt to exclude rivals on some basis other than efficiency. That said, courts should be very cautious in recognizing exceptions to the right to refuse to cooperate because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying the anticompetitive conduct by a single firm.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN14[] Scope, Monopolization Offenses

In determining whether a refusal to cooperate is impermissible, a court may consider the entirety of the monopolist's pattern of conduct, the potential impact on consumers, and the monopolist's motive--for example, whether the monopolist had a legitimate business justification for its actions or sacrificed short-term profits in an effort to destroy a competitor. The unilateral termination of a voluntary and thus presumably profitable course of dealing suggests a willingness to forsake short-term profits to achieve an anticompetitive end.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN15[] Scope, Monopolization Offenses

In explaining the right to refuse to cooperate, ***antitrust law*** generally only imposes negative, not positive, duties.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN16[] Sherman Act, Claims

Even though exclusivity arrangements are often analyzed under the Sherman Act, *15 U.S.C.S. § 1*, such exclusionary conduct may also be an element in a *15 U.S.C.S. § 2* claim. Exclusive contracts, in certain circumstances, may give rise to a *§ 2* violation even though the contracts foreclose less than the roughly 40 percent or 50 percent share usually required in order to establish a *15 U.S.C.S. § 1* violation.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN17[] Attempts to Monopolize, Elements

To prove a monopolization claim under the Sherman Act, *15 U.S.C.S. § 2*, the plaintiff generally must prove not only that the defendant's conduct was anticompetitive, but also that it caused anticompetitive harm in the relevant market. More specifically, the plaintiff must establish that it suffered injury caused by conduct which damaged the competitive process itself. In most *§ 2* cases, that analysis hinges on whether the exclusionary conduct harmed competition in the market in which the plaintiff was competing with the defendant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN18[] Attempts to Monopolize, Elements

To satisfy this causation requirement, a plaintiff needs to show that the conduct at issue contributed significantly to a defendant's continued monopoly power. Exclusionary conduct is defined as conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power. *Section 2* liability requires that the pricing have a measurable impact on the plaintiff's overall viability as a competitor.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN19[] Attempts to Monopolize, Elements

Under the contributed significantly standard, the plaintiffs need not present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct. To require such proof would require that the Sherman Act, *15 U.S.C.S. § 2* liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct, which would only encourage monopolists to take more and earlier anticompetitive action. When a firm has engaged in anticompetitive conduct, courts should be reluctant to demand too much certainty in proving that such conduct caused anticompetitive harm because to some degree, the defendant is made to suffer the uncertain consequences of its own undesirable conduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN20[] Sherman Act, Claims

The Sherman Act, *15 U.S.C.S. § 1*, reads, in part, that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN21[] Conspiracy to Monopolize, Elements

Exclusive dealing occurs when a buyer agrees to purchase, license or lease all or a substantial portion of its requirements of a product or service exclusively from a particular seller. Agreements violate the Sherman Act, *15 U.S.C.S. § 1*, when they unreasonably restrain trade. Exclusive dealing agreements that are alleged to violate *§ 1* are evaluated under the Rule of Reason, which balances the procompetitive justifications against the anticompetitive harm. The substantial foreclosure framework basically serves as a proxy for the Rule of Reason in analyzing exclusive dealing allegations. The Tampa Electric framework clearly is to determine the anticompetitive effects of exclusive-dealing arrangements. Under Tampa Electric, *§ 1* liability requires the plaintiff to prove that (1) the agreements in question were in fact exclusive, and (2) the exclusive dealing substantially lessened competition--that is, the agreements foreclosed competition in a substantial share of the relevant market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN22[] Attempts to Monopolize, Elements

The Sherman Act, *15 U.S.C.S. § 1*, only covers contracts, combinations or conspiracies. In contrast to the pattern of unilateral conduct that was considered in analyzing a *15 U.S.C.S. § 2* claim.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN23[] Sherman Act, Claims

To be considered exclusive under antitrust laws, an agreement must either expressly preclude a party from doing business with the defendant's competitors, or highly incentivize or have the practical effect of exclusivity. In analyzing a Sherman Act, *15 U.S.C.S. § 2* claim, the unilaterally imposed quantity discounts can foreclose the opportunities of rivals when a dealer can obtain its best discount only by dealing exclusively with the dominant firm. Exclusive dealing arrangements typically involve requirements contracts, non-competition clauses, and agreements giving discounts in exchange for exclusivity.

Antitrust & Trade Law > Clayton Act > Claims

Governments > Legislation > Statute of Limitations > Tolling

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN24[] Clayton Act, Claims

Section 5(i) of the Clayton Act, *15 U.S.C.S. § 16(i)*, provides that government antitrust proceedings toll the statute of limitations for private antitrust actions based in whole or in part on any matter complained of by the government. The governing test is whether the matters complained of in the private action bear a real relation to a matter complained of in the government suit.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN25[] Attempts to Monopolize, Elements

To succeed on a Sherman Act, *15 U.S.C.S. § 1*, claim under Tampa Electric, a plaintiff must prove that the defendant's conduct foreclosed competition in a substantial share of the relevant market. Substantial foreclosure depends on many factors, the parties' market strength, the degree of exclusivity, business justifications for the agreement, duration of the agreement, barriers to entry in the market, etc., but requires that the agreements at issue cover at least 20 percent of the relevant market, and usually significantly more than that. The roughly 40 percent or 50 percent share usually required in order to establish a *§ 1* violation. The lowest coverage courts and commentators have found significant is 20 percent and courts have found agreements covering up to 50 percent of the market to not be substantial. The relevant market for that purpose includes the full range of selling opportunities reasonably open to rivals.

Counsel: [1]** For Blaine Cox, on behalf of himself and other consumers similarly situated (JFM-00-1242), Debra Cunningham, (JFM-00-1242), Elizabeth Strickland, (JFM-00-1242), Rene Gonzalez, (JFM-00-1242), Eric Ferrell, on behalf of themselves and others similarly sitiuated (JFM-00-1242), Plaintiffs: David D Shelby, Robert B Roden, Shelby and Cartee LLC, Birmingham, AL; M Shane Luckado, Law Office, Birmingham, AL.

For Wayne Mims, Individually and on behalf of all others similarly situated (JFM-00-1243), Plaintiff: Alan M Mansfield, PRO HAC VICE, Dennis Stewart, Milberg Weiss Bershad Hynes and Lerach, San Diego, CA; Andrew Steven Friedman, Bonnett Fairbourn Friedman and Balint PC, Phoenix, AZ; David J Bershad, Robert A Wallner, Milberg Weiss Bershad and Schulman LLP, New York, NY; David Daniel Weinzweig, Bonnett Fairbourn Friedman and Balint PC, Phoenix, AZ; Kenneth J Vianale, Milberg Weiss Bershad Hynes and Lerach, Boca Raton, FL; Leonard B Simon, Lerach Coughlin Stoia Geller Rudman and Robbins LLP, San Diego, CA; Mark D Bogen, PRO HAC VICE, Law Office of Mark D Bogen, Deerfield, FL; Michael James Flannery, Carey and Danis LLC, St Louis, MO.

For Clay Tyler, (JFM-00-1244), Peter Haklar, on behalf of **[**2]** themselves and all others similarly situated (JFM-00-1244), Plaintiffs: Donald F Hildre, Dougherty Hildre Dudek and Haklar, San Diego, CA; Stanley M Chesley, Waite Schneider Bayless and ChesleyCo LPA, Cincinnati, OH.

For Gravity Inc, as class representatives and individually (JFM-00-1247), Plaintiff: Gregory Baruch, J Daniel Leftwich, Michael J Quinn, R Stephen Berry, Berry and Leftwich, Washington, DC; Mark C Hansen, Kellogg Huber HansenTodd Evans and Figel PLLC, Washington, DC; Michael K Kellogg, Steven F Benz, Kellogg Huber Hansen Todd Evans and Figel PLLC, Washington, DC; Nelson Roach, Nix Patterson and Roach, Daingerfield, TX; Scott K Attaway, Kellogg Huber Hansen Todd and Evans PLLC, Washington, DC.

For 403 West Loop 820 N, (JFM-00-1247), Plaintiff: Gregory Baruch, J Daniel Leftwich, Michael J Quinn, R Stephen Berry, Berry and Leftwich, Washington, DC; Mark C Hansen, Kellogg Huber HansenTodd Evans and Figel PLLC, Washington, DC; Michael K Kellogg, Steven F Benz, Kellogg Huber Hansen Todd Evans and Figel PLLC, Washington, DC.

For Eleaders Inc, a corporation (JFM-00-1248), Plaintiff: Thomas Graham Thompson, Jr, Finkelstein Thompson Loughran, Washington, DC; Tracy Diana Rezvani, Finkelstein **[**3]** Thompson and Loughran, Washington, DC.

For Franklin L DeJulius, individually and on behalf of all those similarly situated (JFM-00-1249), Plaintiff: David J Frantz, Conlon Frantz Phelan and Varma, Washington, DC.

For Paul A Deiter, on behalf of himself and all others similarly situated (JFM-00-1250), Plaintiff: Justin Witkin, Aylstock Witkin Sasser PLC, Gulf Breeze, FL; Paul T Gallagher, Law Office, Washington, DC; Robert J Wozniak, Jr, Freed Kanner London & Millen, LLC, Bannockburn, IL.

For Eric S Lazarus, individually and on behalf of all those similarly situated (JFM-00-1251), Plaintiff: Alan Michael Grunspan, Kaufman Miller Dickstein and Grunspan, Miami, FL; Alice McInerney, Kirby McInerney and Squire, New York, NY; Daniel Hume, Kirby McInerney and Squire LLP, New York, NY.

For To The Rescue Comprehensive Computer Services, on behalf of itself and all others similarly situated (JFM-00-1252), Plaintiff: D Michael Campbell, Campbell and Associates, Miami, FL.

For Precision Billing Services Inc, (JFM-00-1256), MSC Systems Inc, on behalf of themselves and all others similarly situated (JFM-00-1256), Plaintiffs: William F Sasser, Carey and Danis, St Louis, MO.

For Gary Leach, on behalf of **[**4]** themselves and all others similarly situated (JFM-00-1256), Plaintiff: Douglas R Sprong, Carr Korein Tillery Kunin Montroy Cates, Belleville, IL.

For Elizabeth A Wilson, individually and on behalf of all those similarly situated (JFM-00-1257), Plaintiff: Daniel Hume, LEAD ATTORNEY, Kirby McInerney and Squire LLP, New York, NY; Alice McInerney, Kirby McInerney and Squire, New York, NY; Robert W Coykendall, Morris Laing Evans Brock and Kennedy Chtd, Topeka, KS.

For Jay S Quigley, individually and on behalf of all persons similarly situated in the USA (JFM-00-1258), Plaintiff: Frank C Dudenhefer, Jr, John J Cummings, III, Cummings Cummings and Dudenhefer, New Orleans, LA; Gladstone N Jones, III, Randall A Smith, Sarah R Ranier, Smith Jones and Fawer, New Orleans, LA; Spiro J Verras, Jones Verras and Freiberg LLC, New Orleans, LA.

For John W Redmann, individually and on behalf of all persons similarly situated in the USA (JFM-00-1258), Plaintiff: Gladstone N Jones, III, Randall A Smith, Sarah R Ranier, Smith Jones and Fawer, New Orleans, LA; Spiro J Verras, Jones Verras and Freiberg LLC, New Orleans, LA.

For D's Pet Supplies Inc, individually and on behalf of all those similarly situated (JFM-00-1259), **[**5]** Plaintiff: Andrew J Morganti, Miller Faucher and Cafferty LLP, Ann Arbor, MI; Christopher Lovell, Lovell and Stewart LLP, New York, NY; Patrick E Cafferty, Miller Faucher and Cafferty LLP, Ste 885, Ann Arbor, MI.

For David Bach, individually and on behalf of all those similarly situated (JFM-00-1260), Plaintiff: Alice McInerney, Kirby McInerney and Squire, New York, NY; Daniel Hume, Kirby McInerney and Squire LLP, New York, NY; Elwood S Simon, Brimingham, MI; John P Zuccarini, Elwood S Simon and Associates PC, Brimingham, MI; Lance C Young, PRO HAC VICE, Birmingham, MI.

For The Rubbright Group, individually and on behalf of those similarly situated (JFM-00-1261), James M Burt, (JFM-00-1261), Reclaim Center Inc, individually and on behalf of those similarly situated (JFM-00-1261), Plaintiffs: Michelle K Enright, Law Office, Minneapolis, MN; Richard M Hagstrom, Law Office, Minneapolis, MN.

For Steven Nielsen, individually and as representative of all persons similarly situated (JFM-00-1262), Plaintiff: Ben Barnow, Barnow and Goldberg, Chicago, IL; Daniel J Petroski, Jr, Vahldiek Cano Grayson Hovenkamp Petroski, Houston, TX; David H Weinstein, PRO HAC VICE, Weinstein Kirchenoff Scarlato **[**6]** and Goldman, Philadelphia, PA; George R Serdar, Madhulika Jain, Messerli and Kramer, Minneapolis, MN; James M Ziegler, Kenneth B McClain, Ralph K Phalen, Humphrey Farrington and McClain PC, Independence, MO; William R Steinmetz, Norris and Rieselbach, Milwaukee, WI.

For Raymond Pryor, individually and on behalf of all those similarly situated (JFM-00-1263), Plaintiff: Christopher Lovell, Lovell and Stewart LLP, New York, NY; Jonathan Kord Lagemann, Law Office, New York, NY.

For Seastrom Associates LTD, individually and on behalf of all those similarly situated (JFM-00-1264), Plaintiff: Christopher Lovell, Gary S Jacobson, Lovell and Stewart LLP, New York, NY.

For Chris Campbell, on his own behalf and through whom a class of persons similarly situated may also each appear despite their great numbers (JFM-00-1267), Plaintiff: Gregg Meyers, Gregg Meyers Attorney at Law, Charleston, SC; J David Flowers, Law Office, Greenville, SC; Michael S Seekings, Charleston, SC.

For Denise Davenport, individually and (JFM-00-1268), doing business as, D&D Staffing, Plaintiff: Robert L Lieff, Lieff Cabraser Heimann and Bernstein LLP, San Francisco, CA; Thomas Matthew Sobol, Hagens Berman LLP, Boston, MA; **[**7]** William Gordon Ball, Ball and Scott, Knoxville, TN.

For Sara Cheeseman, on behalf of herself and all others similarly situated (JFM-00-1269), Plaintiff: Jacob B Perkinson, LEAD ATTORNEY, Dennis J Johnson, Johnson and Perkinson, South Burlington, VT.

For Ronald Rodjenski, on behalf of himself and all others similarly situated (JFM-00-1269), Plaintiff: Dennis J Johnson, Johnson and Perkinson, South Burlington, VT.

For Harold A Phillips, (JFM-00-1271), Plaintiff: Alice McInerney, Kirby McInerney and Squire, New York, NY; Daniel Hume, Kirby McInerney and Squire LLP, New York, NY; Joshua I Barrett, Rudolph L DiTrapano, Sean P McGinley, Ditrapano Barrett and Dipiero, Charleston, WV.

For Matthew W O'Neill, individually and as representative of all similarly situated individuals (JFM-00-1272), Plaintiff: Ben Barnow, Barnow and Goldberg, Chicago, IL; Daniel J Petroski, Jr, Vahldiek Cano Grayson Hovenkamp Petroski, Houston, TX; William R Steinmetz, Norris and Rieselbach, Milwaukee, WI.

For Robert Weinke, individually and on behalf of all others similarly situated (JFM-00-1273), David Jaffee, individually and on behalf of all others similarly situated (JFM-00-1603), Plaintiffs: Alan M Mansfield, PRO **[**8]** HAC VICE, Dennis Stewart, Milberg Weiss Bershad Hynes and Lerach, San Diego, CA; David J Bershad, Robert A Wallner, Milberg Weiss Bershad and Schulman LLP, New York, NY; Kenneth J Vianale, Milberg Weiss Bershad Hynes and Lerach, Boca Raton, FL; Leonard B Simon, Lerach Coughlin Stoia Geller Rudman and Robbins LLP, San Diego, CA.

For Idy Klein, individually and on behalf of all of those similarly situated (JFM-00-1602), Dawn Brandt, individually and on behalf of all others similarly situated (JFM-00-2146), Plaintiffs: Charles Selcer Zimmerman, Zimmerman Reed, Minneapolis, MN; Stanley M Chesley, Waite Schneider Bayless and ChesleyCo LPA, Cincinnati, OH.

For Avi Mandel, individually and on behalf of all those similarly situated (JFM-00-1604), Plaintiff: Joseph M Weiss, Law Office, New York, NY; Jules Brody, Stull Stull and Brody, New York, NY; Lynn Lincoln Sarko, PRO HAC VICE, Keller Rohrback LLP, Seattle, WA.

For John Glase, individually and on behalf of all those similarly situated (JFM-00-1605), Bruce Wright, individually and on behalf of all those similarly situated (JFM-00-1605), Plaintiffs: Edward W Cochran, Cochran and Cochran, Shaker Heights, OH.

For Johanna M McWhinney, individually **[**9]** and on behalf of all others similarly situated (JFM-00-1606), Plaintiff: Kenneth P McKay, Law Office, Pittsburgh, PA.

For South Dakota Association of Plumbing Heating and Cooling Contractors, a non-profit corporation (JFM-00-1607), Plaintiff: James C Robbennolt, Olinger Lovald Robbennolt McCahren, Pierre, SD.

For Johnnie Moon, (JFM-00-1608), Plaintiff: Christopher Lovell, Lovell and Stewart LLP, New York, NY; F Thomas Olson, Hall Charne Burce and Olson, Milwaukee, WI.

For Robert Lee Colebank, individually and as representative of all persons similarly situated (JFM-00-1610), Plaintiff: Ben Barnow, Barnow and Goldberg, Chicago, IL; Daniel J Petroski, Jr, Vahldiek Cano Grayson Hovenkamp Petroski, Houston, TX; David H Weinstein, PRO HAC VICE, Weinstein Kirchenoff Scarlato and Goldman, Philadelphia, PA; James F Humphreys, James Humphreys and Associates LC, Charleston, WV.

For Bryan K Manson, (JFM-00-2302), Plaintiff: David W Dogan, III, Dogan and Wilkinson, Jackson, MS.

For Silverware Ltd, an English Corp. (JFM-00-1682), Datacrown LTD, an English Corp. on behalf of themselves and all others similarly situated (JFM-00-1682), Plaintiffs: James P Ulwick, Kramon and Graham PA, Baltimore, MD; Melissa **[**10]** H Maxman, Baker and Hostetler, Washington, DC; Michael M Baylson, Duane Morris and Hecksher, Philadelphia, PA.

For Data Unit AG, a Swiss Corp. (JFM-00-1682), Plaintiff: Melissa H Maxman, Baker and Hostetler, Washington, DC.

For Fred Luce, (JFM-00-1740), Plaintiff: Mario N Alioto, Trump Alioto Trump and Prescott LLP, San Francisco, CA.

Edward Michael O'Brien, (JFM-00-1817)(JFM-02-3832), Plaintiff, Pro se, Santa Barbara, CA.

For Cynthia M Aikens, (JFM-00-2132), Plaintiff: Ben Barnow, Barnow and Goldberg, Chicago, IL; Daniel J Petroski, Jr, Vahldiek Cano Grayson Hovenkamp Petroski, Houston, TX; David H Weinstein, PRO HAC VICE, Weinstein Kirchenoff Scarlato and Goldman, Philadelphia, PA; Kenneth B McClain, Humphrey Farrington and McClain PC, Independence, MO; Michael G Stag, Sacks and Smith LLC, New Orleans, LA.

For Clair Falgoust, (JFM-00-2133), Carlton Falgoust, on behalf of themselves and all other persons similarly situated (JFM-00-2133), Plaintiffs: Daniel E Becnel, Law Offices of Daniel E Becnel, Reserve, LA; Dianne M Nast, Roda and Nast PC, Lancaster, PA; Richard Joseph Arsenault, PRO HAC VICE, Alexandria, LA; Thomas J Kliebert, Jr., Kliebert and Heltz, Gramercy, LA.

For Manual Knight, **[**11]** (JFM-00-2134), Plaintiff: Thomas Coffin Willcox, Law Office of Thomas Willcox, Washington, DC; William Charles Claiborne, III, Law Offices of William Claiborne, Washington, DC.

For Webster T Knight, (JFM-00-2134), James Rudasil, on behalf of themselves and all others similarly situated (JFM-00-2134), Plaintiffs: Thomas Coffin Willcox, Law Office of Thomas Willcox, Washington, DC.

For Aubrey Bernard, individually and on behalf of all others similarly situated (JFM-00-2135), Plaintiff: Richard D Heideman, Heideman Nudelman and Kalik PC, Washington, DC.

For O'Sullivan Hicks and Patton LLP, on behalf of itself and all others similarly situated (JFM-00-2137), Plaintiff: Justin Witkin, Aylstock Witkin Sasser PLC, Gulf Breeze, FL; Raymond Lawler, Law Office, Town and Country Professional Offices, Marion, IL.

For Carl C Conrad, on behalf of himself and all others similarly situated (JFM-00-2138), Plaintiff: T Evan Schaeffer, Carey and Danis, St. Louis, MO.

For Geraldine Guice, (JFM-00-2140), Plaintiff: Charles E Griffin, Griffin and Associates, Jackson, MS.

For William Brand Pryor, on behalf of himself and all others similarly situated (JFM-00-2141), Plaintiff: Christopher Lovell, Lovell and Stewart **[**12]** LLP, New York, NY; Morgan W Bentley, Law Office, Newark, NJ.

For Pacific Coast Systems, (JFM-00-2142), Teri Gordon, on behalf of themselves and all others similarly situated (JFM-00-2142), Elham Shirzai, on behalf of herself and all others similarly situated (JFM-00-2142 & 00-2145), Plaintiffs: Bennet McConaughy, Sandler Ahern and McConaughy, Seattle, WA; William M Audet, The Alexander Law Firm, San Jose, CA.

For Michael Shevekov, on behalf of himself and all others similarly situated (JFM-00-2142 & 00-2144), Plaintiff: Bennet McConaughy, Sandler Ahern and McConaughy, Seattle, WA.

For Donald J Gianni, Jr, (JFM-00-2147), Rinaldo Veltri, (JFM-00-2147), Mario Traffichini, on behalf of themselves and all others similarly situated (JFM-00-2147), Plaintiffs: M Eric Frankovitch, Frankovitch Anetakis Colantonio and Simon, Weirton, WV.

For John F Siegenthaler, on behalf of themselves and all others similarly situated (JFM-99-3897), Caren M McCall, (JFM-99-3897), Plaintiffs: Ronald B Rubin, Circuit Court for Montgomery County, Rockville, MD.

For Larry A Penix, individually and on behalf of all those similarly situated (JFM-00-2148), Turner Corporation, (JFM-00-2139), Plaintiffs: Christopher Lovell, **[**13]** Lovell and Stewart LLP, New York, NY.

For Pryce M Haynes, II, (JFM-00-2149), Plaintiff: Alan M Mansfield, PRO HAC VICE, Dennis Stewart, Milberg Weiss Bershad Hynes and Lerach, San Diego, CA; Leonard B Simon, Lerach Coughlin Stoia Geller Rudman and Robbins LLP, San Diego, CA; Michael James Flannery, Carey and Danis LLC, St Louis, MO.

For John K Heidlage, (JFM-00-1265), Ryan D Reynolds, on behalf of themselves and all others similarly situated (JFM-00-1265), Thomas McCaleb, (JFM-00-1265, 00-1266 & 00-2117), Vicki McCaleb, (JFM-00-1265 & 00-2117), Gale Ruffin, (JFM-00-1265, 00-1266 & 00-2117), Steven Master, (JFM-00-1266), Thomas Infante, (JFM-00-1266), James Woods, (JFM-00-1266), Leyton T Brown, (JFM-00-1266), Plaintiffs: Robert Heuck, II, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH; Stanley M Chesley, Waite Schneider Bayless and ChesleyCo LPA, Cincinnati, OH; Wilbert B Markovits, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH.

For Linda Dameron Kloth, (JFM-00-1265, 00-1266 & 00-2117, Plaintiff: Christopher Lovell, Lovell and Stewart LLP, New York, NY; Mary N Strimel, United States Department of Justice, Antitrust Division Networks and Technology Section, Washington, **[**14]** DC; Michael D Hausfeld, Cohen Milstein Hausfeld and Toll PLLC, Washington, DC; Robert Heuck, II, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH; Robert J Wozniak, Jr, Freed Kanner London & Millen, LLC, Bannockburn, IL; Stanley M Chesley, Waite Schneider Bayless and ChesleyCo LPA, Cincinnati, OH; Wilbert B Markovits, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH.

For Daniel C Ray, individually and on behalf of all others similarly situated (JFM-00-2441), Julie Tinkham, on behalf of herself and all others similarly situated (JFM-00-2450), Plaintiffs: Charles Selcer Zimmerman, Zimmerman Reed, Minneapolis, MN; Robert Heuck, II, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH; Stanley M Chesley, Waite Schneider Bayless and ChesleyCo LPA, Cincinnati, OH; Wilbert B Markovits, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH.

For GTI System Integrators, on behalf of itself and all others similarly situated (JFM-00-2443), Plaintiff: Daniel C Girard, Girard Gibbs LLP, San Francisco, CA, PRO HAC VICE; William A Kershaw, PRO HAC VICE, Kronick Moskovitz Tiedemann and Girard, Sacramento, CA.

For Tzirl Fine, on behalf of herself and others similarly situated **[**15]** (JFM-00-2449), Plaintiff: Norman L Lippitt, Jyman and Lippitt, Birmingham, MI.

For Derek M Prentice, on behalf of himself and all other Oklahoma citizens similarly situated (JFM-00-2451), Kurt C Carter, on behalf of themselves and all other Oklahoma citizens similarly situated (JFM-00-2451), Plaintiffs: Larry Derryberry, Derryberry Quigley Solomon and Neifeh, Oklahoma City, OK.

For James T Brems, (JFM-00-2445), Plaintiff: Christopher Lovell, Lovell and Stewart LLP, New York, NY; Patrick M Roby, Elderkin Law Firm, Cedar Rapids, IA.

For Tim Applegate, individually and on behalf of all others similarly situated (JFM-00-2448), Plaintiff: Alan M Mansfield, PRO HAC VICE, Dennis Stewart, Milberg Weiss Bershad Hynes and Lerach, San Diego, CA; David J Bershad, Robert A Wallner, Milberg Weiss Bershad and Schulman LLP, New York, NY; Kenneth J Vianale, Milberg Weiss Bershad Hynes and Lerach, Boca Raton, FL; Leonard B Simon, Lerach Coughlin Stoia Geller Rudman and Robbins LLP, San Diego, CA; Mark D Bogen, PRO HAC VICE, Law Office of Mark D Bogen, Deerfield, FL; Michael James Flannery, Carey and Danis LLC, St Louis, MO.

For Paul L Howard, on behalf of himself and all others similarly situated (JFM-00-2446), **[**16]** Plaintiff: James Fletcher Keller, Waite Schneider Bayless and Chesley Co, Cincinnati, OH; Robert Heuck, II, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH; Stanley M Chesley, Waite Schneider Bayless and ChesleyCo LPA, Cincinnati, OH; Wilbert B Markovits, Waite Schneider Bayless and Chesley Co LPA, Cincinnati, OH.

For John A Supernovich, (JFM-00-3471), Marlene K Supernovich, individually and on behalf of all others similarly situated (JFM-00-3471), Plaintiffs: Alfred G Yates, Jr, Law Offices of Alfred G Yates Jr, Pittsburgh, PA; Paul M Goltz, Law Office, Pittsburgh, PA.

For Sherwood, Plaintiff: Edmund L Carey, Jr, Barrett Johnston and Parsley, Nashville, TN.

For Automatik Design Inc, individually and on behalf of all persons similarly situated in the State of Louisiana(JFM-02-153), Plaintiff: Frank C Dudenhefer, Jr, Cummings Cummings and Dudenhefer, New Orleans, LA; Gladstone N Jones, III, Smith Jones and Fawer, New Orleans, LA; Spiro J Verras, Jones Verras and Freiberg LLC, New Orleans, LA.

For State of West Virginia, ex rel Darrell V McGraw Jr Attorney General (JFM-02-2091), Plaintiff: Benjamin L Bailey, Bailey and Glasser LLP, Charleston, WV; Douglas L Davis, West Virginia **[**17]** Attorney Generals Office, Charleston, WV; John W Barrett, Barrett Law Firm PLLC, Charleston, WV.

For Netscape Communications Corp, Case transferred to MDL from D., D.C., C.A. No. 1:02-97, Plaintiff: James P Ulwick, Kramon and Graham PA, Baltimore, MD.

For Sun Microsystem, Plaintiff: John Bucher Isbister, William Stuart Heyman, Tydings and Rosenberg LLP, Baltimore, MD; Kirk Robert Ruthenberg, Michael Asher Schlanger, Sonnenschein Nath and Rosenthal LLP, Washington, DC; Robert M Galvin, Day Casebeer Madrid and Batchelder LLP, Cupertino, CA.

For Be Incorporated, Plaintiff: James T Southwick, Susman Godfrey LLP, Houston, TX; Parker C Folse, III, Susman Godfrey LLP, Seattle, WA.

For Burst.com Inc, Plaintiff: Bruce Joshua Wecker, Spencer Hosie, Hosie Frost Large and McArthur, San Francisco, CA; Robert J Yorio, Carr and Ferrell LLP, Palo Alto, CA.

For Keith F Cooper, as responsible person and liquidating trustee for CHS Electronics, Inc., on behalf of itself and all others similarly situated (JFM-02-3332), Plaintiff: Robert J Wozniak, Jr, Freed Kanner London & Millen, LLC, Bannockburn, IL.

For Conway, Mackenzie & Dunleavy, P.C., as Trustee of INCA Computer Company, u/a/d 12/10/98, on behalf of **[**18]** itself and all others similarly situated (JFM-02-3331), Plaintiff: Christopher James Cormier, Cohen Milstein Hausfeld and Toll PLLC, Washington, DC; Robert J Wozniak, Jr, Freed Kanner London & Millen, LLC, Bannockburn, IL.

For Rhoda Henning, (JFM-02-3920), Plaintiff: Elwood S Simon, LEAD ATTORNEY, Brimingham, MI; Robert J Wozniak, Jr, Freed Kanner London & Millen, LLC, Bannockburn, IL.

For John Roby, (JFM-03-741), Henry Mascagni, (JFM-03-743), Hayley J. Gardner, (JFM-03-744), Steve Grubb, (JFM-03-745), Linda Stewart, (JFM-03-746), Murline Addington, (JFM-03-747), Travis D. McHann, Jr., (JFM-03-748), Billy Lewis, (JFM-03-749), Booker T. Bailey, Jr., (JFM-03-750), James Pigg, (JFM-03-751), Angela Brinkley, (JFM-03-752), Delanious Harried, (JFM-03-753), Gertrude Green, (JFM-03-754), Camelia Calvert, (JFM-03-755), Mary Wyatt, (JFM-03-756), Emma Walton, (JFM-03-757), Iletha Green, (JFM-03-758), Plaintiffs: Brent Hardy Hazzard, LEAD ATTORNEY, Hazzard Law LLC, Jackson, MS; Christopher W Cofer, Cofer and Associates PA, Jackson, MS.

For Michael NMI Lewis, (JFM-03-742), Plaintiff: Brent Hardy Hazzard, LEAD ATTORNEY, Hazzard Law LLC, Jackson, MS.

For Realnetworks, Inc., JFM-04-968, Plaintiff: G Stewart **[**19]** Webb, Jr, LEAD ATTORNEY, Venable LLP, Baltimore, MD; John David Byars, Reeghan W Raffals, Bartlit Beck Herman Palenchar and Scott LLP, Chicago, IL; Eric R Olson, Bartlit Beck Herman Palenchar and Scott LLP, Denver, CO; James P Ulwick, Kramon and Graham PA, Baltimore, MD; Lynn Marie Engel, The Summit Law Group, Seattle, WA; Sean William Gallagher, Bartlit Beck Herman Palenchar and Scott LLP, Courthouse Pl, Chicago, IL.

For Birdsong Tractor and Supply, Inc., Plaintiff: Richard Lee Quintus, Roberts Law Firm PA, Little Rock, AR.

For City and County of San Francisco, County of Santa Clara, County of Los Angeles, City of Los Angeles, County of San Mateo, County of Contra Costa, Plaintiffs: Mark T Jansen, LEAD ATTORNEY, Townsend and Towsend and Crew LLP, San Francisco, CA; Craig C Corbitt, Zelle Hofmann Voelbel Mason and Gette LLP, San Francisco, CA; Daniel J Furniss, Townsend and Townsend and Crew LLP, Palo Alto, CA; Eugene Chatham Crew, Louise E Ma, Townsend and Townsend and Crew LLP, San Francisco, CA; Steven F Benz, Kellogg Huber Hansen Todd Evans and Figel PLLC, Washington, DC.

For Novell, Inc., Plaintiff: Jeffrey M Johnson, LEAD ATTORNEY, Milton A Marquis, R Bruce Holcomb, Dickstein Shapiro **[**20]** LLP, Washington, DC.

For Michael I Mark, Plaintiff: Ben Barnow, LEAD ATTORNEY, Barnow and Goldberg, Chicago, IL.

For Go Computer, Inc., JFM-05-2413, S. Jerrold Kaplan, JFM-05-2413, Plaintiffs: Steven F Benz, LEAD ATTORNEY, Michael K Kellogg, Kellogg Huber Hansen Todd Evans and Figel PLLC, Washington, DC; Eugene Chatham Crew, Townsend and Townsend and Crew LLP, San Francisco, CA.

For Daisy Mountain Fire District, Plaintiff: Mark D Samson, Keller Rohrback PLC, Phoenix, AZ.

For Pradeep Sujan, Individually and on behalf of all others similarly situated (JFM-02-3397), Consol Plaintiff:

For Microsoft Corporation, Defendant: Matthew L Larrabee, LEAD ATTORNEY, Heller Ehrman White and McAuliffe, San Francisco, CA; Bradley S Phillips, Munger Tolles and Olson LLP, Los Angeles, CA; G Stewart Webb, Jr, Randolph Stuart Sergent, Venable LLP, Baltimore, MD; John A Jurata, Jr, PRO HAC VICE, Orrick, Herrington & Sutcliffe LLP, Washington, DC; Jonathan H Blavin, Rohit K Singla, Samuel N Weinstein, Ted Dane, Munger Tolles and Olson LLP, San Francisco, CA; Michael James DeVinne, Venable LLP, Baltimore, MD; Charles B Casper, Montgomery McCracken Walker and Rhoads, Philadelphia, PA; Daryl A Libow, David B Tulchin, **[**21]** Joseph E Neuhaus, Justin J Daniels, Richard C Pepperman, II, Sullivan and Cromwell, New York, NY; Maureen P Sheehan, New York, NY; Richard Wallis, Steven J Aeschbacher, Thomas W Burt, Microsoft Corporation, One Microsoft Way, Redmond, WA; Steve William Berman, Hagens Berman LLP, Seattle, WA.

For Compaq Computer Corporation, (JFM-00-1247 Gravity), Defendant: Gaynelle Jones, Compaq Computer Corporation, Houston, TX; John F. Cooney, Venable Baetjer Howard and Civiletti, Washington, DC; Martin L Saad, Venable LLP, Baltimore, MD.

For Dell Computer, (JFM-00-1247 Gravity), Defendant: Heather K Gerken, Jenner and Block, Washington, DC; Jerold S Solovy, Jenner and Block, Chicago, IL; Paul March Smith, Jenner and Block LLC, Washington, DC; Samuel R Miller, Folger Levin and Kahn LLP, San Francisco, CA.

For Packard Bell Nec Inc, (JFM-00-1247 Gravity), Defendant: George Brian Busey, Morrison and Foerster LLP, Washington, DC; Penelope A Preovolos, Morrison and Foerster, San Francisco, CA; W Stephen Smith, Morrison and Foerster, Washington, DC.

For International Business Machines Corporation, International Business Machines Corporation, The Walt Disney Company, The Walt Disney Company, AOL Time Warner, **[**22]** Inc., The Walt Disney Company, Defendants: Patrick M Shields, Quinn Emanuel Urguhart Oliver And Hedges, Los Angeles, CA.

For Radio Shack Corporation, Defendant: Martin L Saad, Venable LLP, Baltimore, MD.

For National Plaintiffs' Counsel, Movant: Brent W Landau, Christopher James Cormier, Cohen Milstein Hausfeld and Toll PLLC, Washington, DC.

Kevin Mitnick, Movant, Pro se.

Jonathan Lee Riches, Movant, Pro se.

Barry Worthington Keenan, Movant, Pro se.

Jonathan Lee Riches, Movant, Pro se, Lexington, KY.

For WildTangent Inc., (JFM-02-2739), Interested Party: Edward J Kessler, LEAD ATTORNEY, Sterne Kessler Goldstein and Fox PLLC, Washington, DC.

For Eastman Kodak Company, Interested Party: Charles S Fax, Rifkin Livingston Levitan and Silver, Greenbelt, MD.

For Gateway, Inc., Interested Party: John G Froemming, LEAD ATTORNEY, Howrey LLP, Washington, DC.

For Kirby, McInerney & Squire, LLP, Lerach Coughlin Stoia Geller Rudman & Robbins LLP, Lieff Cabraser, Heiman & Bernstein, LLP, Interested Partys: Andrew Marc Dansicker, Law Office of Andrew M. Dansicker, LLC, Hunt Valley, MD.

For Zelle, Hofmann, Voebel, Mason & Gette LLP, Interested Party: William P McGrath, Jr, Porter Wright Morris and Arthur LLP, **[**23]** Washington, DC.

For Nortel Networks, Amicus:

For Software and Information Industry Association, Intervenor: Stephanie Ann Joyce, Kelley Drye and Warren LLP, Washington, DC.

For Clifford Kupperberg, Special Appearance of Previously Certified Classes of California Plaintiffs, Intervenor: Eugene Chatham Crew, Townsend and Townsend and Crew LLP, San Francisco, CA.

For Gregg Lachterman, Intervenor: Robert J Wozniak, Jr, Freed Kanner London & Millen, LLC, Bannockburn, IL.

For Microsoft Corporation, Counter Claimant: G Stewart Webb, Jr, Venable LLP, Baltimore, MD.

For Sun Microsystem, Counter Defendant: Michael Asher Schlanger, Sonnenschein Nath and Rosenthal LLP, Washington, DC; Robert M Galvin, Day Casebeer Madrid and Batchelder LLP, Cupertino, CA.

Judges: J. Frederick Motz, United States District Judge.

Opinion by: J. Frederick Motz

Opinion

[*734] This lawsuit, brought by Novell, Inc. against Microsoft, Corp., is the last action pending in MDL 1332, *In re Microsoft Corp. Antitrust Litigation*. Earlier in the litigation, on an interlocutory appeal, the Fourth Circuit affirmed a ruling I had made dismissing Counts II through V of Novell's complaint on limitations grounds. These Counts asserted antitrust claims for harm caused to Novell's **[**24]** software applications as a result of Microsoft's monopolization and attempted monopolization of the word processing and spreadsheet markets. The Fourth Circuit held (as had I) that these claims were not tolled during the pendency of the action brought by the United States against Microsoft because, unlike the government case, they were based upon conduct committed by Microsoft in the software applications, not the operating system, market.

Two claims, asserted respectively in Counts I and VI, remain pending: (1) Microsoft violated *§ 2* of the Sherman Act by taking anticompetitive actions against, and causing damage to, software applications owned by Novell for the purpose of obtaining and maintaining its monopoly in the operating system market; and (2) Microsoft violated *§ 1* of the Sherman Act by entering into agreements with third parties "not to license or distribute Novell's office productivity applications or to do so only on terms that materially disadvantaged those products."

[*735] Discovery on the remaining claims has been completed, and the parties have filed cross-motions for summary judgment. The motions raise two questions: (1) whether Novell continues to own the claims it now asserts **[**25]** or transferred them to Caldera, Inc., and (2) if Novell does continue to own the claims, whether they are viable under the Sherman Act. For the reasons stated in this Opinion, I find that Novell no longer owns the claims and may not pursue them here. As a matter of strict analysis, that is the end of the case. However, in light of the age of MDL 1332 in general and of this lawsuit in particular, I will also address the substantive viability of Novell's claims. This will enable the Fourth Circuit, upon an appeal of my rulings, to address the antitrust issues presented, in the event that it disagrees with my conclusion relating to the claims ownership issue. As to the antitrust claims, I find that, had Novell not assigned them to Caldera, Count I would have survived Microsoft's summary judgment motion but Count VI would not have survived Microsoft's motion.

I.

HN1[] A motion for summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *FED. R. CIV. P. 56(c)*. The materiality of facts is determined by the underlying substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A genuine dispute **[**26]** about a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. When considering a motion for summary judgment, a district court draws reasonable inferences and views the evidence in the light most favorable to the non-moving party. *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P., 57 F.3d 1317, 1323 (4th Cir. 1995)*. ***HN2***[] Although "[t]he summary judgment standard does not differ when applied to antitrust claims. . . . 'because of the unusual entanglement of legal and factual issues frequently presented in antitrust cases, the task of sorting them out may be particularly well-suited for *Rule 56* utilization.'" *Bepco, Inc. v. Allied-Signal, Inc., 106 F. Supp. 2d 814, 822 (M.D.N.C. 2000)* (quoting *Thompson Everett, 57 F.3d at 1322*).

II.

Under an Asset Purchase Agreement ("APA") dated July 23, 1996, Novell assigned to Caldera claims "held by Novell at the Closing Date and associated directly or indirectly with any of the DOS Products . . ." [1] The term "DOS Products" was defined in the APA to include Novell's PC operating systems DR DOS and Novell DOS, among other products. Novell had previously sold to Corel Corporation its Business **[**27]** Applications Division, which encompassed various software applications, including WordPerfect (its word processing program), Quattro Pro (its spreadsheet program), and PerfectOffice (a combination of WordPerfect and Quattro Pro). In its agreement with Corel, Novell expressly retained "the antitrust claims for harm that Microsoft caused" to those products.

In my earlier opinion dismissing Counts II through V, I ruled that Novell did not assign to Caldera the claims asserted in Counts I and VI because those claims focused upon harm suffered by Novell's software applications, not upon harm suffered **[*736]** by the operating systems transferred to Caldera. In reaching that conclusion I stated, "[i]t is a far stretch to infer (and Microsoft has presented nothing to establish) that simply because DOS **[**28]** competed in the operating system market, such a claim [for damage to software applications] was either a 'direct' or 'indirect' claims intended to be transferred from Novell to Caldera." *In re Microsoft Corp. Antitrust Litig., Civ. JFM-05-1087, 2005 U.S. Dist. LEXIS 11520, 2005 WL 1398643, *1 (D. Md. June 10, 2005)*. The Fourth Circuit did not review that ruling because it was not certified for interlocutory appeal. *Novell, Inc. v. Microsoft Corp., 505 F.3d 302, 306 n.10 (4th Cir. 2007)*.

Upon further reflection I have decided that my earlier ruling was wrong. Although the claims asserted by Novell in Counts I and VI are for damage caused to it software applications, the reason Microsoft allegedly engaged in the conduct causing the damage was to obtain and maintain its monopoly in the operating system market -- the market in which the DOS Products competed. Novell's theory as to those claims is that Microsoft intentionally took actions

[1] The APA also assigned to Caldera claims "associated directly or indirectly with . . . Related Technology," and "Related Technology" was defined to mean technology "that is necessary to the performance by the DOS of their intended function and purpose." Microsoft does not argue that the software application programs involved in this action constituted "Related Technology" within the meaning of the APA.

against Novell's applications because (1) if those applications had retained their popularity, consumers might insist upon purchasing operating systems with which the applications were compatible, thereby threatening Windows 95's market power; and (2) "PerfectOffice," developed by **[**29]** Novell, constituted (or nearly constituted) "middleware," which could have been effectively used with any operating system and that therefore would have "commoditized" Windows 95 and undermined the monopoly Microsoft enjoyed in the operating system market.

In short, Counts I and VI assert claims for damage inflicted upon Novell's software applications through the prism of the operating system market. Hybrid in nature, the claims were ingeniously designed to survive Microsoft's anticipated limitations defense by permitting Novell to argue that the pendency of the government case against Microsoft -- which was based upon Microsoft's antitrust violations in the operating system market -- tolled limitations. [2] Successful though that argument has been in defeating Microsoft's limitations defense, it is fatal to Novell's position on the claims ownership issue. By associating claims for harm to applications with the operating system market in which the DOS products competed, the argument establishes that the claims were transferred by Novell to Caldera under the APA.

Reduced to its essence, Novell's primary contention is that all that the APA meant to assign was claims for *harm* inflicted upon the DOS products. [3] As previously **[*737]** indicated, I accepted this argument when making my prior ruling. However, that is not what the APA itself actually says was assigned. The assignment clause does not mention "harm" but rather "associat[ion]." ***HN3***[] Under Utah law, which the parties agree applies to this action by **[**31]** virtue of a choice of law provision contained in the APA, a court "look[s] to the language of the contract to determine its meaning and the intent of the contracting parties." *Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC, 2009 UT 27, 207 P.3d 1235, 1240 (Utah 2009)*. "Only if the language of the contract is ambiguous will . . . [a court]

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[2] The record suggests, and the parties implicitly agree, that the claims asserted in Counts I and VI were not envisioned until **[**30]** the complaint in this action was prepared, long after the APA was executed. Although contemporaneous memoranda reflect that Novell was aware prior to entering into the APA that it had potential claims against Microsoft for antitrust damage caused to Novell's software applications, these claims were based upon Microsoft allegedly having leveraged its monopoly in the operating system market into a monopoly or near monopoly in the applications markets. Such claims are qualitatively different from those asserted in Counts I and VI. Unquestionably, Novell retained the claims based on Microsoft leveraging its operating system market monopoly into a monopoly in the applications markets, but, as the dismissal of Counts II through V manifest, they are time barred.

[3] Novell also contends that the claims it is asserting in Counts I and VI are not "associated" with the DOS Products because although the DR DOS did compete in the operating system market, it was no longer being marketed and supported by Novell in October 1994, when the unlawful conduct alleged in this action began. This contention is not frivolous but it fails for several reasons. First, Novell owned DR DOS in October 1994 and its value certainly would have been affected by anticompetitive activity in the operating system market. Second, although Novell announced in September 1994 that it would exit **[**32]** the DR DOS business, according to the allegations made in the Caldera amended complaint against Microsoft, Novell continued to sell some DR DOS products thereafter. Third, both in its original complaint and in the amended complaint filed in its action against Microsoft, Caldera sought, *inter alia*, an injunction "requiring Microsoft, for a period often years, to disclose to Caldera all [application program interfaces ("APIs")] for any operating system it produces, as well as any modifications, enhancements, updates, or new versions of such operating systems at the time that such products are released for beta testing." This request for relief necessarily was premised upon the fact that the failure of Microsoft to disclose APIs (an important part of Novell's claim asserted in Count I of this action) was damaging DR DOS. Fourth, the allegations of misconduct by Microsoft made in this action were undertaken in a market that already was dominated by Microsoft, allegedly in part because of anticompetitive actions it had previously taken against DR DOS. Just as Novell's expert concedes that in order to have antitrust significance the conduct Microsoft directed against Novell's software applications **[**33]** must be considered in light of conduct that Microsoft directed against other competitors, (*see* Novell's Opp. to Microsoft's Mot. for Summ. J. ("Dkt. No. 1952"), Exh. 4 at 6 (Reply Report of Roger G. Noll); Microsoft's Mem. in Supp. of its Mot. for Summ. J. ("Dkt. 1947"), Exh. 3 at 40-43), so too the actions launched by Microsoft against various software application producers must be considered against the background of the anticompetitive conduct it directed against DR DOS in earlier years. Fifth, Novell's expert asserts that Microsoft was motivated to act anticompetitively against Novell in part because of Novell's purchase of DR DOS. (*See* Dkt. No. 1952, Exh. 3 at 89 (Declaration of Roger G. Noll).) All of these facts establish the "association" between the claims asserted in this action and the DR DOS Product claims assigned to Caldera under the APA.

consider extrinsic evidence of the parties' intent." *Id. Accord* Webbank v. Am. Gen. Annuity Serv. Corp., 2002 UT 88, 54 P.3d 1139, 1144-45 (Utah 2002). [4] Here, there is no ambiguity in the APA. It encompasses all claims "associated directly or indirectly" with the DOS Products. [5]

[*738] Novell also relies upon the proposition stated in *Restatement (Second) of Contracts Section 201(1)* (1981), that ***HN5***[] "[w]here the parties have attached the same meaning to a promise or agreement or a term of art, it is interpreted in accordance with that meaning.' Novell's contention that this rule would be adopted by the Utah Supreme Court is somewhat questionable in light of the fact that the case upon which Novell relies, Flying J Inc. v. Comdata Network, Inc., 405 F.3d 821, 834 n.6 (10th Cir. 2005), predicts that the Utah Supreme Court would adopt *Section 201(3)(b)*, not *Section 201(1), of the Restatement (Second)*. [6] In any event, under the Restatement rule, in determining the subjective intent of the parties to a contract, a court ordinarily looks only to their contemporaneous conduct, not to what they aver they intended after a controversy with a third party has arisen. *See, e.g.,* Alvin Ltd. v. U.S. Postal Serv., 816 F.2d 1562, 1565-66 (Fed. Cir. 1987) ("The parties' intent must be gathered . . . from the perspective of a reasonably intelligent person **[**37]** acquainted with the contemporary circumstances." (internal quotations and citations omitted)). This is both sensible and fair because there is no reason that the law should countenance the parties to an agreement retrospectively placing a subjective interpretation upon the agreement's language, contrary to its objective meaning, to the detriment of a third person who has become embroiled in a dispute with one of the parties to the agreement.

Furthermore, even if I were to consider the extrinsic evidence proffered by Novell, I would not find that it supports Novell's contention about the meaning of the assignment language in the APA because that evidence is itself ambiguous and inconclusive. [7] Novell points to the testimony **[*739]** of Novell's former General Counsel, David

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[4] Ironically, during the discovery phase of this case, Microsoft took the position that it was entitled to inquire into matters concerning the negotiating history of the APA because under Utah law extrinsic evidence should be considered in making the threshold determination of whether contractual language is ambiguous. In Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 268-69 (Utah 1995), **[**34]** a case now cited by Novell, the Utah Supreme Court did indicate that extrinsic evidence is relevant to an inquiry into ambiguity. However, in Daines v. Vincent, 2008 UT 51, 190 P.3d 1269, 1276-77 (Utah 2008), ***HN4***[] the Utah Supreme Court, while not disavowing the holding in *Ward*, clarified its meaning and stated that "we did not [in *Ward]* intend that a judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit" and that "a correct application of the *Ward* rule to determine what the writing means begins and ends with the language of the contract." Moreover, as stated in the text, *infra*, the extrinsic evidence cited by Novell as to the meaning of the APA is itself ambiguous and inconclusive.

[5] The inclusion of the word "indirectly" before the words "associated with" in the APA, while not dispositive, underscores the fact that there is no ambiguity in the agreement. Novell attempts to explain that "indirectly" was added to the APA on the ground that Novell did not want to be perceived as being connected with the suit filed by Caldera against Microsoft. According to Novell, a previous draft of the APA had defined the assigned claims as "any and all **[**35]** claims or causes of action associated with any of the DOS Products or Related Technology, including but not limited to any claims or causes of action for copyright or patent infringement, trade secret misappropriation or violation of any applicable antitrust laws." Novell asserts that it was "worried that the specific reference to the antitrust claim would draw attention to Novell's role in instigating the lawsuit." (Mem. of Law in Supp. of Novell's Renewed Mot. for Summ. J. on Microsoft's Affirmative Defenses ("Dkt. No. 1948") at 19.) Apparently, the reason for this concern was that the commercial value of Novell's office productivity applications would be harmed if consumers were led to believe that Novell's applications were not compatible with Windows 95. Of course, to any reasonable person objectively reviewing the APA, "claims indirectly associated" with "DOS Products" does not mean "claims for copyright or patent infringement, trade secret misappropriation or violation of any applicable antitrust laws" related to those products. Moreover, the fact that Novell chose to obfuscate its role in the Caldera litigation, *see* Novell, Inc. v. Canopy Group, Inc., 92 P.3d 768, 2004 UT App 162 (Utah App. 2004), **[**36]** hardly entitles it to challenge the objective meaning of the language it wrote by reference to its own subjective (and secreted) intent.

[6] For the ***Restatement (Second) Section 201(1)*** to be compatible with Utah case law, it would need to apply only where the express language of the contract is ambiguous. *See, e.g.,* Cafe Rio, 207 P.3d at 1240 ***HN6***[] ("Where the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language." (internal quotations and citation omitted)).

Bradford, **[**38]** that Novell and Caldera never "discussed antitrust claims concerning damage caused to Novell's Business Applications business" in connection with the sale of DR DOS, and the similar testimony of Paul Graf, who represented Caldera when the APA was negotiated, that "[n] either party contemplated their claims 'directly or indirectly' related to 'the DOS Products or Related Technology' would include Novell's antitrust claims for harm to its business applications.'" The truth of this testimony may be assumed, but its meaning is limited. I have no doubt that the parties did not discuss -- and that the APA did not intend to assign from Novell to Caldera -- claims for harm to Novell's software applications caused by unlawful conduct engaged in by Microsoft for the purpose of monopolizing those applications' markets. Such claims were asserted in Counts II through V of this lawsuit, and they have been dismissed not because Novell does not continue to own them but because they are barred by limitations. Thus, Bradford's and Graf's statements beg the relevant question: whether claims for damage to Novell's applications *caused by unlawful conduct designed to impact the operating system market* were **[**39]** encompassed within the "directly or indirectly associated with" language of the APA. As both parties implicitly agree, the fact of the matter is that any such claims simply were not contemplated, and thus were not discussed, when the APA was negotiated because they were conceptualized and formulated only when it became apparent they would be needed to defeat Microsoft's anticipated limitations defense via the tolling doctrine. [8]

In short, if Novell had intended, as it now argues, to assign to Caldera only claims for harm inflicted upon the DOS Products and Related Technology, it should have so stated in the APA. It did not do so, and the language it in fact employed encompasses the claims that it now seeks to assert in this action because these claims are "associated directly or indirectly with . . . the DOS Products." [9]

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[7] There is at least one piece of extrinsic evidence that favors Microsoft. As indicated in note 3, *supra*, in the *Caldera* suit one of the claims for relief asserted by Caldera was for an injunction "requiring Microsoft, for a period often years, to disclose to all software developments the APIs for any operating system it produces, as well as any modifications, enhancements, updates, or new versions of such operating systems that the time that such products are release for beta testing." This request for relief manifests that Caldera was taking the position, as asserted by Novell in this action, that Microsoft's refusal to open APIs for its competitors constituted a violation of *§ 2* of the Sherman Act. Novell contends that this request for relief by Caldera is **[**40]** irrelevant for present purposes because Caldera asserted that the refusal to open APIs was harming the DOS Products and that it was not concerned about harm being inflicted upon Novell's software applications by virtue of the same activity. That may well be true, but the fact that Caldera was requesting an injunction requiring the opening of APIs demonstrates the association (direct or indirect) between the claims assigned to Caldera that it was asserting in its lawsuit and Novell's claims in the present action.

[8] Of course, the fact that Novell had not yet envisioned the claims that it now asserts in this action at the time the APA was executed does not mean the claims were not assigned. As previously indicated, ***HN7***[] under Utah law where the language of a contract is not ambiguous, courts are to resolve its meaning by looking within its four corners. To attempt to identify the potentialities that were known to the contracting parties at the time the agreement was entered into would, in effect, be to inquire into their subjective intentions and undermine the principle that unambiguous contract language must be construed objectively and reasonably. *See generally IIE. Allan Farnsworth*, FARNSWORTH ON CONTRACTS Section 7.9 **[**41]** (3d Ed. 2004). Furthermore, this result is consistent with precedent regarding assignment of antitrust claims. ***HN8***[] Although the assignment of antitrust claims must be "express," *see, e.g., Sullivan v. Nat 'l Football League, 34 F.3d 1091, 1106 (1 st Cir. 1994)*, courts have found valid transfers where "all-inclusive" language was used. *See, e.g., Lerman v. Joyce Int'l, Inc., 10 F.3d 106, 112 (3d Cir. 1993)* (finding valid assignment where contract language purported to transfer "any and all . . . causes of action, claims and demands of whatsoever nature").

[9] Microsoft also argues that the claims asserted in Counts I and VI are barred by *res judicata* because they could have been, and were not, asserted in the Caldera suit. To the extent these claims were assigned by Novell to Caldera (as I find they **[**42]** were), I agree with Microsoft that they are barred by *res judicata*. However, the *res judicata* argument adds nothing because the assignment of the present claims by Novell to Caldera itself prevents Novell from asserting them here, *res judicata* concerns aside. If, however, I am incorrect on the ownership of claims issue, in my judgment Microsoft's *res judicata* contention fails because (1) Caldera could not have asserted on behalf of Novell claims Caldera did not possess, and (2) Microsoft now concedes that although Novell had a financial interest in the Caldera litigation, it did not control that litigation.

[*740] III.

I now turn to the merits of the antitrust claims for monopolization in violation of *§ 2* (Count I) and unreasonable restraint of trade in violation of *§ 1* (Count VI). As stated at the outset of this opinion, I find that, had Novell not assigned them to Caldera, Count I would have survived Microsoft's Motion for Summary Judgment and Count VI would not have.

A.

From the early 1980s through the mid 1990s, Microsoft worked with Novell, and other independent software vendors ("ISVs"), to ensure that Novell's software applications could function properly on Microsoft's personal computer **[**43]** ("PC") operating systems. (*See, e.g.*, Dkt. No. 1952, Exh. 1 (Expert Report of Ronald S. Alepin) at 33.) Such cooperation was in the interest of both parties: Microsoft's PC operating systems were able to support Novell's popular applications and Novell's applications were able to better function on the popular Microsoft PC operating systems.

In June of 1994, Novell acquired WordPerfect, Quattro Pro, and Group Wise (an e-mail application). By this time, Microsoft had acquired monopoly power in the PC operating system market, (*see id*. at 4 n.3.), and had begun developing a new operating system, Windows 95. However, particularly after Novell's acquisition of these three applications, Microsoft began to view Novell as a threat to its monopoly in the PC operating system market. (*See* Dkt. No. 1952, Exh. 1 at 9-11 (Alepin Expert Report).) Specifically, the capabilities, popularity, number, and diversity of Novell's software applications "could make Microsoft's operating system irrelevant if [Novell's applications] achieved ubiquity":

> Future versions of WordPerfect combined with Novell's networking technologies . . . would make PerfectOffice a compelling proposition for users in the next generation **[**44]** of computing. . . . [A] new operating system vendor would need only to recruit PerfectOffice to its platform to develop a credible threat to Microsoft's PC operating systems business.

(*Id*., Exh. 1 at 77 (Alepin Expert Report).) Microsoft executives were well aware of and concerned by this threat. (*See, e.g., id*., Exh. 54 (Microsoft executive explaining to investor Warren Buffet that "[i]f we own the key 'franchises' built on top of the operating system, we dramatically widen the 'moat' that protects the operating system").)

While Windows 95 was being developed, Novell's cooperative relationship with Microsoft began to fracture. First, Novell complains of Microsoft's conduct regarding Windows 95 "namespace extensions." In 1993 and 1994, prior to the Windows 95 launch, Microsoft "evangelized" among ISVs the use of APIs called "namespace extensions." [10] (*Id*., Exh. 1 at 12 (Alepin Expert Report).) These namespace extensions allowed "ISVs to integrate custom namespace objects into the Windows 95 shell namespace" and "provide rich, custom views of data." In the fall of 1993, Microsoft informed WordPerfect that it **[*741]** would publish/document the namespace extensions. (*Id*., Exh. 1 at 85-86 (Alepin **[**45]** Expert Report).) In June of 1994, Microsoft disclosed to Novell and other ISVs "enough documentation of the namespace extensions 'for people to understand what we're doing and write some code.'" (*See id*., Exh. 1 at 87 (Alepin Expert Report) (internal citation omitted).) Novell began to rely on this documentation to develop versions of WordPerfect and Quattro Pro to function on Windows 95. (*See id*., Exh. 1 at 87-88 (Alepin Expert Report).) However, in the fall of 1994, Microsoft reversed course and Bill Gates "ordered the withdrawal of the documentation for the namespace extension mechanism . . . ." (*Id*., Exh. 1 at 91-92 (Alepin Expert Report).) Further, "Microsoft told ISVs that the namespace extensions' functionality would soon disappear from [Windows 95]: 'Applications that have architected themselves to achieve this functionality need to remove themselves from the

[10] Access to information about Windows **[**46]** 95's APIs-which are "hooks" in an operating system that allow applications to achieve functionality within that operating system-was critical for ISVs because it allowed them to develop programs that could function within Windows 95.

system . . . .'" (*Id*., Exh. 1 at 93 (Alepin Expert Report) (internal citation omitted).) Microsoft's reversal delayed the release and impaired the development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95. (*Id*., Exh. 1 at 11, 14 (Alepin Expert Report).)

Second, Novell alleges that as it was preparing WordPerfect's printing function for Windows 95, Microsoft misled it about what APIs and printing functionality Windows 95 would possess. (*Id*., Exh. 1 at 160-63 (Alepin Expert Report).) "Microsoft's failure to provide this functionality… cost Novell substantial resources and degraded its final products' functionality." (*Id*., Exh. 1 at 163 (Alepin Expert Report).)

Third, Novell alleges Microsoft improperly denied it a logo license for Windows 95. In September of 1994, Microsoft launched its "Designed for Windows 95" logo program, which allowed an ISV to display the Windows 95 logo if the ISV's product met various technical requirements. (*Id*., Exh. 1 at 144 (Alepin Expert Report).) These requirements included the ability to function properly on Windows NT 3.5, Microsoft's operating system for workstations, a market in which Microsoft had only limited success competing. (*Id*., Exh. 1 at 148-49 (Alepin Expert Report).) **[**47]** However, Microsoft also allowed an exemption from the Windows NT-compatibility requirement for products that experienced "incompatibilities . . . attributable to functionality that is significantly different in architecture between Windows 95 and Windows NT." (*Id*., Exh. 1 at 151 (Alepin Expert Report) (internal quotations and citations omitted).) Despite "architectural differences" in fact being the "root cause" of Novell's inability to achieve Windows NT compatibility, Novell was denied an exemption and denied a Windows 95 logo license. (*Id*., Exh. 1 at 152-54 (Alepin Expert Report).)

Fourth, Novell alleges Microsoft injured Group Wise by "withholding and manipulating MAPI," an API designed to improve the functionality of e-mail applications. [11] Specifically, Novell alleges that Microsoft evangelized MAPI among ISVs, and then failed to document the MAPI extensions and failed to properly integrate MAPI with Windows 95. (*See id*., Exh. 1 at 120-23, 127-34 (Alepin Expert Report).) These actions allegedly impeded non-Microsoft e-mail applications, such as Group Wise, from achieving optimal functionality. (*See id*., Exh. 1 at 131-34 (Alepin Expert Report).)

Fifth and finally, Novell asserts that Microsoft pressured large application purchasers--such as original equipment manufacturers **[*742]** ("OEMs"), distributors, and resellers--to enter into agreements that precluded or strongly discouraged them from purchasing WordPerfect and Quattro Pro. [12] More specifically:

> (1) In 1995, under "Project Avalanche" agreements, Microsoft sought to "[i]ncrease and sustain North American share for Word and Excel by >10% points" and "[s]ustain Office share at >80% through Office 95 launch." (*Id*., Exh. 126 at 1; *cf. id*., Exh. 3 at 107-08 (Noll Expert Decl.).) These agreements (i) provided a 2 to 5 percent rebate to distributors and resellers who increased their "blended share" of Microsoft Word and Excel; (ii) provided a rebate (under 5 percent) to distributors and resellers who increased their overall sales of certain Microsoft software applications; (iii) required distributors and resellers to provide Microsoft with weekly reports of their sales of WordPerfect, Quattro Pro, and other competing products; and (iv) required distributors **[**49]** and resellers to abide by various other requirements for marketing and selling certain Microsoft software applications. (*See id*., Exh. 3 at 107-08 (Noll Expert Decl.); *id*., Exh. 123 at B1-B7; *id*., Exh. 126 at 1, 12, 20-27.) These contracts were designed to reward distributors and resellers who increased their share of Microsoft software applications. (*See id*., Exh. 126 at 26; *id*., Exh. 128.)
>
> (2) Microsoft executed "per system" licenses with OEMs. Under per system licenses, an OEM paid "a negotiated royalty multiplied by a number equal to the larger of (a) the number of full or partial copies of the particular Microsoft product distributed by the OEM during the term of the license or (b) the number of Customer Systems shipped by the OEM during the term of the license." (*Id*., Exh. 136.) "Costumer Systems"

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[11] For the reasons explained in *infra* **[**48]** Section III.B, I have decided that the conduct directed at Group Wise should not be considered in analyzing of Novell's claims.

[12] Although these agreements are the crux of the § 1 claim (Count VI), they may also be considered as anticompetitive behavior in the § 2 analysis (Count I). *See infra* note 16.

were defined by characteristics such as microprocessor and model name. (*Id*., Exh. 136.) Novell contends that these agreements "effectively preclude[ed]" the OEMs that agreed to them from licensing Novell's products because "[o]nce under a per system license, an OEM had to develop and market a distinct product line if it wanted to pre-install Novell's applications." (*Id*. at 41.)

(3) "Microsoft **[**50]** forced OEMs to sign contracts with minimum purchase commitments that substantially exceeded a realistic expectation by the OEM." (*Id*., Exh. 3 at 100 (Noll Expert Decl.).) If an OEM fell short of selling enough Microsoft applications to meet its minimum commitment, Microsoft had the right to retain what was the equivalent of a deposit amounting to the unpaid balance on the OEM's commitment. (*See id*., Exh. 3 at 100 (Noll Expert Decl.).) Microsoft often then gave the OEM the choice of forfeiting this deposit or using it as a credit on another contract with Microsoft, "thereby giving the OEM a financial incentive to renew its contract with Microsoft" at the expense of Novell's products. (*See id*., Exh. 3 at 100 (Noll Expert Decl.).)

In March of 1996, Novell sold WordPerfect and Quattro Pro, but retained ownership of GroupWise.

[*743] B.

Novell has raised an issue of triable fact as to whether Microsoft's Novell-injuring conduct was anticompetitive and whether that conduct caused anticompetitive harm in the PC operating system **[**51]** market. I therefore find that, if Novell had not assigned its claims via the APA, summary judgment on Count I would have been inappropriate.

In Count I, Novell alleges that Microsoft violated § 2 of the Sherman Act by willfully and wrongfully maintaining its monopoly in the PC operating system market. The Fourth Circuit described Novell's theory as follows:

> Novell contends that the technological connection between operating systems and applications gives rise to a significant barrier to entry into the operating-systems market and thus protects Microsoft's Windows monopoly. Novell maintains that its office-productivity applications [such as WordPerfect and Quattro Pro] could perform well on a variety of operating systems and that, during the relevant time period, they were the dominant office-productivity applications in the market. The thrust of Novell's argument is that its popular applications, though themselves not competitors or potential competitors to Microsoft's Windows, offered competing operating systems the prospect of surmounting the applications barrier to entry and breaking the Windows monopoly. That is, Novell argues its products could provide a path onto the operating-system **[**52]** playing field for an actual competitor of Windows, because a competing operating system, running the popular Novell software applications, would offer consumers an attractive alternative to Windows.

Novell, 505 F.3d at 308. Furthermore, Novell argues that its package of office productivity applications contained middleware and included a desktop shell which could potentially allow PC users to "live" in that desktop shell in lieu of operating in Windows 95, thereby "threat[ening] to become an alternative platform for applications programs that would reduce the need for end-users to upgrade their operating system in order to obtain new application features." (*See* Dkt. No. 1952, Exh. 3 at 9 (Noll Expert Decl.).)

As a result of the threat Novell's applications posed, Novell argues, as detailed above, that Microsoft engaged in the following anti-competitive conduct:

(1) Withdrawing access to information about, and otherwise changing course regarding, the Windows 95 namespace extensions, thereby delaying and impairing Novell's development of the versions of WordPerfect and Quattro Pro that were optimized for Windows 95.

(2) Misleading Novell about Windows 95 print functionality, thereby increasing **[**53]** WordPerfect's costs and decreasing its functionality.
(3) Refusing to grant a Windows 95 logo license for certain Novell software applications.
(4) Manipulating APIs to harm Group Wise.
(5) Entering into licensing agreements with OEMs, distributors, and resellers that discouraged and/or prevented OEMs and distributors from purchasing Novell's applications.

As a preliminary matter, I agree with Microsoft that the Complaint failed to provide notice that Novell was basing its claims in part on Microsoft's treatment of Group Wise, and therefore any such allegation is not properly a part of this action. **HN9**[] A complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (quoting **[*744]** *FED. R. CIV. P. 8(a)(2)*). Although "specific facts are not necessary," the Complaint must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id*. (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. The Complaint in this case limits itself to anticompetitive conduct directed at applications sold by Novell in March of 1996, which would plainly exclude Group Wise. **[**54]** (*See* Novell's Complaint ("Compl.") P 2 (emphasis added).) Although the Complaint refers to the anticompetitive treatment of multiple "office productivity applications" in addition to WordPerfect, (*see, e.g., id*. PP 5, 105), simply pluralizing "office productivity applications," without any further specificity, is insufficient to put Microsoft on fair notice that Novell would allege antitrust violations based on Microsoft's treatment of Group Wise. While WordPerfect and Quattro Pro were discussed in some detail (*see, e.g., id*. PP 32-37, 51-56, 62-63), Group Wise was not even mentioned in the Complaint. Nor am I moved by the fact, relied upon by Novell, that Microsoft pursued discovery about Group Wise. What material is subject to discovery and what conduct may serve as the basis of a claim are two distinct inquiries with different standards. Further, it would be unfair to penalize Microsoft for engaging in a cautious and thorough discovery strategy.

With that matter out of the way, I turn now to the applicable legal framework for this monopolization claim. **HN10**[] To violate *§ 2* of the Sherman Act, [13] the defendant must (1) have monopoly power in the relevant market and (2) engage in monopolizing **[**55]** conduct-that is, "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (same). To prove the second element, the plaintiff generally must show that the defendant (a) engaged in anticompetitive conduct that (b) caused anticompetitive harm in the relevant market. [14] *See* *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1131 (9th Cir. 2004)* (noting that plaintiff must prove that defendant "(1) possessed monopoly power in the relevant market, (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury"); *Data Gen. Corp. v Grumman Sys. Support Corp., 36 F.3d 1147, 1182 (1st Cir. 1994)*, *abrogated on other ground by Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 127, 176 L. Ed. 2d 18 (March 2, 2010)* ("'Exclusionary conduct' is defined as 'conduct, other than competition on the merits or restraints reasonably **[**56]** necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining **[*745]** monopoly power.'" (internal citations omitted)). However, these last two issues--anticompetitive conduct and causation/anticompetitive harm--are not neat, distinct inquiries, but often involve overlapping considerations and analyses. *Cf., e.g.,* *Aspen Skiing, 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467*.

Because Microsoft's monopoly power in the relevant market is undisputed (Dkt. No. 1947 at 4 n.3), Microsoft would **[**57]** be liable for monopolization under *§ 2* if it willfully and wrongfully maintained its monopoly-that is, engaged in anticompetitive conduct that caused anticompetitive harm.

1. Microsoft's Anticompetitive Conduct

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[13] *Section 2* **HN11**[] reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *15 U.S.C. § 2*.

[14] **HN12**[] Some courts break a monopolization analysis into three elements: (1) monopoly power, (2) willful acquisition/maintenance of monopoly power (or "anticompetitive conduct"), and (3) causation. *See, e.g.,* *Microsoft Corp., 253 F.3d 34,44, 50-79, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*; *MetroNet Servs. Corp., 383 F.3d at 1131*. Regardless of how the elements are organized, the substantive analysis remains the same.

Novell has raised a genuine question of material fact concerning whether Microsoft's behavior, taken as a whole, was anticompetitive.

Microsoft attacks Count I by arguing that that Novell has not presented evidence that Microsoft did anything beyond refusing to cooperate with Novell, and refusing to assist a competitor is not anticompetitive conduct in violation of *§ 2*.

HN13[] Although a monopolist generally has a right to refuse to cooperate with a competitor, this right is not unqualified: a refusal to cooperate may be anticompetitive if it is an "attempt [] to exclude rivals on some basis other than efficiency[.]" *See Aspen Skiing Co., 472 U.S. at 600-01, 605* (internal citations and quotations omitted); *accord Data Gen. Corp., 36 F.3d at 1183* (citing *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*). That said, courts should be "very cautious" in recognizing exceptions to the right to refuse to cooperate "because of the uncertain virtue of forced sharing and the **[**58]** difficulty of identifying and remedying the anticompetitive conduct by a single firm." *Trinko, 540 U.S. at 407*.

HN14[] In determining whether a refusal to cooperate is impermissible, a court may consider the entirety of the monopolist's pattern of conduct, the potential impact on consumers, and the monopolist's motive--for example, whether the monopolist had a legitimate business justification for its actions or sacrificed short-term profits in an effort to destroy a competitor. *See id. at 409* (holding that a refusal to cooperate did not violate *§ 2* because (i) defendant did not remove itself from a previously voluntary course of cooperation or refuse to sell a product at its retail price, (ii) "the services allegedly withheld were not otherwise marketed or available to the public[,]" and (iii) "the existence of a regulatory structure [the Telecommunications Act of 1996] designed to deter and remedy anticompetitive harm [in the industry at issue]" diminished the likelihood of antitrust harm); *Aspen Skiing Co., 472 U.S 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467* (holding that a monopolist-ski mountain owner's refusal to continue offering a multi-day lift pass with a competitor mountain could violate *§ 2* because (i) they had offered **[**59]** the pass successfully for years; (ii) the monopolist refused to even let the competitor buy the monopolist's lift tickets at retail price; (iii) the pass had great appeal among consumers; (iv) elimination of the pass undermined the smaller competitor's ability to compete; and (v) the facts suggest that the monopolist "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival"). [15]

[*746] As an initial matter, it is not entirely clear that Microsoft's conduct was merely a refusal to cooperate: Novell has presented evidence that Microsoft affirmatively misled Novell about Windows 95 and entered into anticompetitive **[**60]** agreements with OEMs. *Cf. Olympia Equip. Leasing Co. v. W. Union Telegraph Co., 797 F.2d 370, 376-77 (7th Cir. 1986)* ***HN15***[] (in explaining the right to refuse to cooperate, noting that ***antitrust law*** generally only imposes negative, not positive, duties).

Even assuming Microsoft's conduct should be characterized as a refusal to cooperate, there is a question of fact about whether it was anticompetitive under *Aspen* and *Trinko*. Microsoft's conduct ran contrary to the preferences of operating system consumers. Just as skiers would have preferred the multi-day pass in *Aspen*, so too would PC users have preferred an operating system that could immediately and optimally support popular Novell applications such as WordPerfect.

Further, Novell has presented evidence of predatory motives. Just as consumer demand for the multi-day pass would have increased the monopolist's short-term profits in *Aspen*, refraining from misleading Novell about the namespace extensions and print functionality may have increased Microsoft's short-term profits by increasing Windows 95's consumer appeal via allowing Novell's popular applications to achieve better functionality on it. (*Cf*. Dkt. No. 1952, Exh. 3 at 11 (Noll Expert **[**61]** Decl.).) A fair inference arises that inhibiting WordPerfect's and Quattro Pro's ability to achieve functionality on Windows 95 was an effort to "sacrifice short-run benefits and

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[15] The *Trinko* Court noted that "*Aspen Skiing* is at or near the outer boundary of *§ 2* liability. . . ." The Court explained that "[t]he unilateral termination of a voluntary (*and thus presumably profitable)* course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end… [and] the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Trinko, 540 U.S. at 409* (internal citations omitted) (emphasis in original).

consumer goodwill in exchange for a perceived long-run [anticompetitive impact]." *See* Aspen, 472 U.S. at 610-11. This inference is particularly believable in light of the substantial concern within Microsoft that popular applications might undermine Microsoft's monopoly in the PC operating system market. (*See, e.g.*, Dkt. No. 1952, Exh. 54.) Further evidence of this anticompetitive motivation is found in:

(1) The history of voluntary, and therefore presumably profitable, Microsoft-Novell cooperation--both generally over the years and specifically in sharing API information pertaining to Windows 95--to optimize application functionality on Microsoft's operating systems. *See* Trinko, 540 U.S. at 409; *see also* Olympia Equip., 797 F.2d at 377 (distinguishing *Aspen* in part because "[t]here is no evidence that suppliers [like the defendants] customarily provide their customers with [the information the deprivation of which plaintiffs allege gave rise to an antitrust violation] . . . .").

(2) The denial of the Windows **[**62]** 95 logo license, despite the purported availability of an exemption for the type of problems that Novell alleges caused the incompatibility. *Cf.* Trinko, 540 U.S. at 409 (distinguishing *Aspen* in part because "the services allegedly withheld were not otherwise marketed or available to the public").

(3) The minimum purchase agreements and per system licenses with OEMs, both of which made it harder for WordPerfect and Quattro Pro to access the OEM market. [16]

[*747] Microsoft argues that "if a monopolist does extend **[**63]** a helping hand, though not required to do so, and later withdraws it . . . does he incur antitrust liability? We think not." (Dkt. No. 1947 at 32 (internal marks omitted) (quoting Olympia Equip., 797 F.2d at 376).) Microsoft's alleged conduct here, however, is distinguishable from the conduct in *Olympia Equipment*. Microsoft did not just withdraw a charitable helping hand; rather, Microsoft allegedly first cooperated in an effort to improve its own product, subsequently misled Novell into relying on information provided pursuant to that cooperation, and then withdrew its cooperation after Novell reasonably relied on Microsoft's representations.

Microsoft also argues that it had legitimate business reasons--fostering and benefiting from innovative software development--for its actions. Although courts should be wary of interpreting antitrust laws in a way that hampers innovation, under the circumstances presented here I am not persuaded by Microsoft's argument. Fostering innovation did not require Microsoft to deny Novell the Windows 95 logo license, nor did it necessitate misleading Novell about the APIs and print functionality. In fact, API innovations arguably would have been more **[**64]** valuable for both consumers and Microsoft if the ISVs had been able to use them to develop applications for Windows 95. *See* Data Gen. Corp., 36 F.3d at 1183 ("In general, a business justification is valid if it related directly or indirectly to the enhancement of consumer welfare."). As Novell's expert has explained, "Microsoft ha[d] no plausible business justification for its actions. The technical acts that undermined the functionality of competing applications were unnecessary and did not improve the functionality or reduce the cost of Microsoft products." [17] (Dkt. No. 1952, Exh. 3 at 11 (Noll Expert Decl.).)

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[16] ***HN16***[] "Even though exclusivity arrangements are often analyzed under § 1, such exclusionary conduct may also be an element in a § 2 claim." *LePage's Inc. v. 3M, 324 F.3d 141, 157 (3d Cir. 2003)*. Just because the agreements with the OEMs do not give rise to a § 1 claim, *see infra* Section III.C, it does not necessarily follow that those agreements do not amount to anticompetitive conduct, or are at least evidence of anticompetitive motives, under § 2. *See* Microsoft, 253 F.3d at 70 ("[E]xclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

[17] Microsoft points to two of my prior opinions to argue that "Microsoft is not required to disclose information to its competitors about new Windows operating systems under development." I have held, in cases brought under the "essential facilities" doctrine, that Microsoft had no antitrust obligation to share information about Windows 95 with IS Vs. *See* *In re Microsoft Corp. Antitrust Litig., 274 F. Supp. 2d 743, 745-46 (D. Md. 2003)* (in so holding, noting that "to require one company to provide its intellectual property to a competitor would significantly chill innovation" **[**65]** and "the essential facility doctrine has never been interpreted to deny a person the right to gain temporary benefits from innovations to its own products"); *see also* *Daisy Mountain Fire Dist. v. Microsoft Corp., 547 F. Supp. 2d 475, 490 (D. Md. 2008)* ("[E]ssential facility claims involving tangible assets are

In short, although, after examining the evidence, a fact-finder may agree with Microsoft that its actions were not anticompetitive under *§ 2*, Novell has presented sufficient evidence to raise a genuine question of fact on this issue.

2. The Anticompetitive Harm Caused by Microsoft's Anticompetitive **[**66]** Conduct As discussed above, ***HN17***[] to prove a monopolization claim under *§ 2*, the plaintiff **[*748]** generally must prove not only that the defendant's conduct was anticompetitive, but also that it caused anticompetitive harm in the relevant market. *See MetroNet, 383 F.3d at 1131*; *Microsoft Corp., 253 F.3d at 78-80*; *Thompson Everett, 57 F.3d at 1325*. More specifically, the plaintiff must establish that it suffered injury caused by conduct which damaged the competitive process itself. *See, e.g., Thompson Everett, 57 F.3d at 1325* (describing when a private party may sue for violations of antitrust laws, pursuant to *§ 4* of the Clayton Act).

In most *§ 2* cases, this analysis hinges on whether the exclusionary conduct harmed competition in the market in which the plaintiff was competing with the defendant. *See, e.g., Microsoft Corp., 253 F.3d at 79*; *LePage's, 324 F.3d at 160-62*. In this case, Novell's unique *§ 2* theory makes the inquiry more complicated: Novell must prove that the specific Microsoft conduct which caused injury to Novell's applications also caused anticompetitive harm in the *PC operating system market*.

HN18[] To satisfy this causation requirement, a plaintiff needs to show that the conduct at issue **[**67]** "contribut[ed] significantly to a defendant's continued monopoly power." [18] *See Microsoft, 253 F.3d at 80* (at least in an equitable enforcement action as opposed to an action for money damages, holding that to prove causation plaintiff must prove the conduct was "reasonably capable of contributing significantly to a defendant's continued monopoly power"); *see also Data Gen. Corp., 36 F.3d at 1182* ("'Exclusionary conduct' is defined as 'conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.'" (internal citations omitted)); *cf. Morgan, 892 F.2d at 1361-63* (in rejecting a § 2 claim arising from alleged predatory pricing, (1) suggesting that § 2 liability requires that the pricing have a "measurable impact on [plaintiff's] overall viability as a competitor[,]" and (2) "find[ing] insufficient evidence" that the pricing "had any more than a negligible impact on [plaintiff's] viability as a competitor").

HN19[] Under this "contributed significantly" standard, plaintiffs need *not* "present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." *Microsoft Corp., 253 F.3d at 79*. To require such proof would "require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct[,]" which "would only encourage monopolists to take more and earlier anticompetitive action." *Id. at 79*. When a firm has engaged in anticompetitive conduct, courts should be reluctant to demand too much certainty in proving that such conduct caused anticompetitive harm because "[t]o some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable **[**69]** conduct.'" *Id*. (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 651C, at 78).

Microsoft argues that Novell's experts never expressly stated that, but for the actions that harmed WordPerfect and **[*749]** Quattro Pro, competition would have been enhanced in the PC operating system market. Rather, Dr. Roger Noll, Novell's expert on this issue, merely concluded that there was anticompetitive harm caused by the

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quite different from claims involving technical innovation, and plaintiff fails to provide a compelling argument for applying the doctrine to technological innovations or information."). However, in the case at hand, Novell is not proceeding under the essential facilities doctrine. Further, Novell has presented evidence that Microsoft did more than just refuse to disclose information about Windows 95. It has also raised a genuine question of fact about whether Microsoft mislead Novell about characteristics of Windows 95 and about what information it would provide in advance of Windows 95's launch.

[18] At times, Microsoft seems to argue that Novell must prove that Microsoft's conduct had a "substantial" anticompetitive impact **[**68]** in the operating system market, (*see* Dkt. No. 1947 at 26), which I would view as a more rigorous test than the contributed significantly standard. Increasing this burden may risk undermining the principle that "antitrust laws are for the benefit of competition." *Cf. Morgan v. Ponder, 892 F.2d 1355, 1360 (8th Cir. 1989)* (quoting *Ball Mem'l Hosp. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986))*.

combination of the conduct directed at Novell's software applications and the anticompetitive conduct directed at Netscape, Java, and other third party applications.

Although Dr. Noll implied that the conduct that injured Novell's software applications by itself caused anticompetitive harm in the PC operating system market, [19] it is true that he only formally concluded that such conduct contributed significantly to anticompetitive harm in light of the conduct directed at third parties. (*See* Dkt. No. 1952, Exh. 4 at 28 (Noll Expert Reply).) In his deposition--in response to repeated questioning from Microsoft's counsel about whether the conduct directed at Novell, in and of itself, caused "a significant or substantial impact on competition"--Dr. Noll stated, "I have not analyzed **[**70]** the effect of each specific act by Microsoft on competition in the market for operating systems. I have analyzed the pattern, the totality of the actions by Microsoft on the market for operating systems." (Dkt. No. 1947, Exh. 3 at 40.) Shortly thereafter, the following exchange occurred:

> [Microsoft's Counsel:] Have you analyzed the aggregate of Microsoft's conduct that was directed against Novell's office productivity applications in order to ascertain whether that universe, that smaller universe, just conduct against Novell's office productivity applications, had some adverse impact on competition in the market for operating systems? . . .
>
> [Dr. Noll:] Had Microsoft behaved differently to all other kinds of applications of middleware vendors than it behaved towards Novell. . . . But all the other producers of middleware and applications had -- they had dealt with them in a pro-competitive way -- and facilitated the development that -- of high-quality applications of middleware that were not produced by Microsoft that ran on the Windows platform, then -- then I suspect there would have been no adverse effect of knocking Novell out of the industry from the actions against Novell, but that's **[**71] -** that's counter [f]actual.

(Dkt. No. 1947, Exh. 3 at 40-43.)

Even taking that answer into account, I conclude that Dr. Noll's proposed testimony raises a genuine issue of fact regarding whether the conduct directed at Novell was a significant contributor to anticompetitive harm in the PC operating system market. Novell has no obligation to create some "hypothetical market place," in which none of the other ISVs or applications had been weakened by anticompetitive conduct, and then prove that the conduct at issue would still have significantly contributed to anticompetitive harm in that hypothetical market. *Cf.* *Microsoft Corp., 253 F.3d at 79*. It would be contrary to the purpose of *§ 2* to immunize a monopolist for anticompetitive conduct, which in fact significantly contributed to anticompetitive harm, simply because that harm was caused by conduct directed at multiple small threats, none of which could prove that the conduct directed at any single firm would have by itself significantly **[**72]** contributed to the defendant's monopoly if none of the other small firms had been similarly weakened. *See supra* note 18; *Microsoft Corp., 253 F.3d at 79*. [20] Rather, **[*750]** Novell need only prove that the conduct that harmed its software applications contributed significantly to Microsoft's monopoly in the PC operating system market considering all the characteristics of that market at the time, including the condition of other ISVs and applications.

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[19] (Dkt. No. 1952, Exh. 4 at 32 (Noll Expert Reply) ("I do not agree that Professor Murphy has proven that the acts against Novell alone had no effect on competition for the x86 operating systems . . . .").)

[20] (*See also* Dkt. No. 1952, Exh. 4 at 27 (Noll Expert Reply) ("In a 1000-firm market, the harm to any one competitor would not cause harm to competition, but that is irrelevant to ascertaining whether the entire pattern of conduct against all 1000 firms caused anticompetitive harm.").)

Microsoft seems to concede that, under some circumstances, the anticompetitive harm caused by a defendant's anticompetitive conduct toward multiple small competitors could be aggregated to reach a significant contribution finding in the relevant market. Microsoft distinguishes itself from such a hypothetical defendant, however, by asserting that its conduct toward Novell was fundamentally different than the anticompetitive conduct Microsoft directed against other ISVs **[**73]** and applications. This argument is unpersuasive. I am not convinced that the conduct directed at the other ISVs is distinguishable in any material way from the conduct directed at Novell. Regardless, I do not think a defendant can avoid antitrust liability by engaging in "different" anticompetitive conduct toward each of its small competitors.

To be sure, Novell cannot piggy-back on the anticompetitive harm caused by conduct directed at third parties without actually showing the conduct which injured its applications had an anticompetitive impact as well. But Novell is not doing so. Despite Microsoft's assertions to the contrary, implicit in Dr. Noll's opinion is the conclusion that conduct directed at Novell, in and of itself, caused some anticompetitive harm in the PC operating system market. Dr. Noll's deposition statement that knocking Novell out of the market alone would have "no adverse effect," when viewed in context, is properly understood as Dr. Noll agreeing that eliminating Novell's software applications from the market, on its own in some hypothetical market, would not have undermined Microsoft's monopoly position. Such a conclusion is not inconsistent with a finding that **[**74]** Microsoft's actions toward Novell were a significant contributor to anticompetitive harm in the PC operating system market in light of the weakened state of other applications and ISVs. (*Cf., e.g*., Dkt. No. 1952, Exh. 3 at 9-11 (Noll Expert Decl.); *id*., Exh. 4 at 6-7, 28 (Noll Expert Reply).) A reasonable person may disagree with Dr. Noll, but the decision whether or not to do so is within the province of a jury.

Accordingly, but for Novell selling its claims under the APA, I would have denied Microsoft's Motion for Summary Judgment on Count I.

C.

I will now finally address Count VI. I find that, even if Novell had not assigned this claim, Microsoft would be entitled to summary judgment because the agreements at issue either were not exclusive, were not otherwise anticompetitive, or did not substantially foreclose competition in any market.

Count VI alleges that Microsoft violated *§ 1* of the Sherman Act [21] by entering into "agreements with OEMs and others not to license or distribute Novell's office productivity applications or to do so only on terms that materially disadvantaged these products" thereby "unreasonably restrain[ing] trade by restricting the access of Novell's office productivity **[**75]** applications to significant channels of distribution[.]" (Compl. P 175.)

There is some indication that the parties believe that Count VI concerns only restraining trade in the *software applications markets*, not the *operating system market*. Both parties have briefed the **[*751]** issue as if the operating system market was irrelevant and Microsoft argues that I, in response to Microsoft's earlier motion to dismiss, tolled Count VI at least in part because it concerned agreements with OEMs (suggesting that Microsoft *may* believe that Count VI's tolling was unrelated to its connection to the operating system market).

If this is the parties' view of the matter, it is understandable in light of (i) Count VI's failure to mention the operating system market, (Compl. PP 174-77), (ii) my brief explanation as to why Count VI was tolled, *In re Microsoft Corp. Antitrust Litig., 2005 U.S. Dist. LEXIS 11520, 2005 WL 1398643, at *1* ("Count VI is based upon Microsoft's exclusionary agreements with OEMs, which **[**76]** allegedly were in [sic] unreasonable restraint of trade. Although Microsoft does not expressly concede the point, such agreements also were a subject of the government case. Thus, limitations has been tolled as to the claim asserted in Count VI."), and (iii) the fact that *§ 1*, in comparison with *§ 2*, is sometimes less focused on proving a particular anticompetitive impact in a particular market.

The Fourth Circuit, however, apparently believed that Count VI was tolled because Novell alleged unreasonable restraint of trade in the operating system market (though the court may not have actually reached the issue). [22] *See Novell, 505 F.3d at 306-07*. In contrast, the Fourth Circuit recognized that Counts II through V arose from allegations of anticompetitive impact in the software applications markets. *Id*. ("Because Counts II through V allege

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[21] *Section 1* ***HN20***[] reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

[22] The Fourth Circuit explained: "Counts I and VI . . . are predicated on the theory that Microsoft's conduct injured competition in the market for PC operating systems, a market in which Novell did not directly compete. . . . *Section 5(i)* of the Clayton Act provides that government anti-trust proceedings toll the statute of limitations for private antitrust actions 'based in whole or in part on any matter complained of' by the government. Novell's Counts I and VI are indeed based on Microsoft's anticompetitive conduct in the PC operating-systems market, which was at issue in the DOJ complaint." *See Novell, 505 F.3d at 306-07*.

injury that is not specifically alleged in the DOJ complaint, Microsoft argued these claims were not tolled by the DOJ complaint and thus were time-barred. Microsoft sought dismissal of Novell's claims of injury to competition in the PC operating-systems market . . . in Counts I and VI on different grounds [antitrust standing and claim ownership].") **[**77]** If Novell could prevail on Count VI by proving merely substantial foreclosure in the software applications markets, without proving restraint of trade in the operating system market, Microsoft would have had a persuasive argument that Count VI was not "based in whole or in part" on the government case and thus should not have been tolled. Accordingly, I am of the view that Novell must prove that the agreements at issue in Count VI have unreasonably restrained trade in the *operating system market*. [23]

[*752] Novell has not even attempted to present evidence on this point. [24] Rather, Novell has briefed the issue as if it **[**79]** only needed to prove restraint of trade--in this case, substantial foreclosure--in the software applications markets. In any event, although I believe Novell's failure to show restraint of trade in the operating system market dooms Count VI, because of the confusion surrounding this issue I will nonetheless evaluate whether Microsoft's conduct substantially foreclosed competition in the software applications markets. I find Novell has failed to meet its burden here as well.

a. Substantial Foreclosure Framework

Although Novell never expressly frames it as such, I read Count VI as essentially an allegation of exclusive dealing. [25] More specifically, I understand Count VI as alleging that Microsoft violated *§ 1* by entering into agreements with **[**80]** purchasers--OEMs, distributors, and resellers--which *de facto* committed those purchasers to buy software applications exclusively, or almost exclusively, from Microsoft.

Agreements violate *§ 1* when they unreasonably restrain trade. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Exclusive dealing agreements that are alleged to violate *§ 1* are evaluated under the Rule of Reason, which balances the procompetitive justifications against the anticompetitive harm. *See, e.g*., HOLMES, *supra* note 25. The *Tampa Elec. Co v. Nashville Coal Co., 365 U.S. 320, 327-30, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* substantial foreclosure framework basically serves as a proxy for the Rule of Reason in analyzing exclusive dealing allegations. [26] *Cf. Twin City Sportservice, **[*753]** Inc. v. Charles O.*

[23] In its brief before the Fourth Circuit, Microsoft explained **[**78]** the procedural posture and history of Count VI:

> Because Counts I and VI allege harm in the same PC operating system market at issue in the DOJ Complaint, Microsoft did not argue that those two claims were time-barred. . . . There was some confusion in the district court concerning what market(s) are at issue in Count VI. Although Count VI does not specify a market, it alleges that Microsoft entered into exclusionary distribution agreements in violation of *[§ 1]*. . . . [S]uch a claim requires proof of harm to "competition as a whole within" at least one antitrust market. Novell provided no indication that Count VI might pertain to the PC operating system market (as opposed to the alleged applications markets) until oral argument, at which point Microsoft's counsel immediately responded that to the extent that were so, then Count VI should be dismissed for the same reasons as Count I.

Brief of Defendant-Appellant Microsoft Corp. at *12-*13, *13 n.4, *Novell, Inc. v. Microsoft, Corp*., Nos. 06-1134, 06-1238, 2006 WL 1348322 (4th Cir. Apr. 13, 2006) (internal citations omitted).

[24] Novell may have been able to prove restraint of trade in the operating system market by, in part, establishing substantial foreclosure in various software applications markets. To do so, however, Novell would have to prove more than just substantial foreclosure in those software applications markets; it would also have had to point to evidence showing how and why that substantial foreclosure in fact restrained trade in the operating system market.

[25] ***HN21***[] "Exclusive dealing occurs when . . . a buyer . . . agrees to purchase, license or lease all or a substantial portion of its requirements of a product or service exclusively from a particular seller." WILLIAM C. HOLMES, ***ANTITRUST LAW*** HANDBOOK § 2:19 (2009).

[26] Although *Tampa Electric* involved a Clayton Act claim, its analysis pertains to exclusive dealing under *§ 1* of the Sherman Act as well. *See Tampa Elec., 365 U.S. at 335* ("We need not discuss the respondents' further contention that the contract also violates *§ 1* and *§ 2* of the Sherman Act, for if it does not fall within the broader prescriptions of *§ 3* of the Clayton Act it follows

Finley & Co., 676 F.2d 1291, 1301 (9th Cir. 1982) (the *Tampa Electric* framework "clearly is to determine the anticompetitive effects of exclusive-dealing arrangements"). **[**81]** Under *Tampa Electric*, § 1 liability requires the plaintiff to prove that (1) the agreements in question were in fact exclusive, and (2) the exclusive dealing substantially lessened competition--that is, the agreements foreclosed competition in a substantial share of the relevant market. [27] *See, e.g.,* Tampa Elec., 365 U.S. at 327-30.

b. Project Avalanche Agreements Lacked Exclusivity and Anticompetitiveness **[**83]** [28]

HN23[] To be considered "exclusive" under antitrust laws, an agreement must either expressly preclude a party from doing business with the defendant's competitors, or highly incentivize or have the practical effect of exclusivity. *See* LePage's, 324 F.3d at 157-58 (in analyzing a § 2 claim, noting that "unilaterally imposed quantity discounts can foreclose the opportunities of rivals when a dealer can obtain its best discount only by dealing exclusively with the dominant firm" (quoting 3A PHILLIP E. **[*754]** AREEDA & HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 768b2, at 148)); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058-59 (8th Cir. 2000) (holding that discount

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that it is not forbidden by those of the former."). Some "[c]ourts and commentators disagree as to whether [the *Tampa Electric* test] outlaws a broader range of conduct than does the rule of reason drawn from § 1 of the Sherman Act." Bepco, 106 F. Supp. 2d at 827. I believe (1) that exclusive dealing claims under the Clayton Act and the Sherman Act (§ 1) are either subject to the same standard or that the Clayton Act is broader and (2) that the analytical framework for exclusive **[**82]** dealing claims under § 1 is the same as that articulated in Tampa Electric. *See, e.g.,* Twin City Sportservice, 676 F.2d at 1301-02 (expressly authorizing use of *Tampa Electric* to analyze exclusive dealing under § 1); United States v. Microsoft Corp., 87 F. Supp 2d 30, 52-53 (D.D.C. 2000), *rev 'd on other grounds by* 253 F.3d (utilizing *Tampa Electric*, or something close to it, in analyzing a § 1 claim); Masimo Corp. v. Tyco Health Care Group, L.P., 2006 U.S. Dist. LEXIS 29977, 2006 WL 1236666, at *4 n.2, *4-*8 (C.D. Cal. 2006) (unpublished) (utilizing *Tampa Electric*, or something close to it, in analyzing a § 1 claim and noting "it is easier to meet the threshold of foreclosure for a [Clayton Act] violation that it is for a § 1 violation" (citing Twin City Sportservice, 676 F.2d at 1304 n.9)).

[27] Section 1 **HN22**[] only covers "contract[s], combination[s] . . ., or conspiracy[ies]." In contrast to the pattern of unilateral conduct that was considered in analyzing the § 2 claim in Count I, agreements between Microsoft and third parties are the only allegedly anticompetitive conduct that may be considered in assessing the anticompetitive harm in Count VI.

[28] Microsoft also argues that the Project Avalanche agreements may not form the basis of Count VI because (1) "[h]ad Novell alleged harm to competition in channels other than the OEM channel, that allegation would have been barred by the statute of limitations because it would not have been based in whole or in part on any matter complained of in the Government case" and (2) Novell did not include such allegations in its Complaint.

As to Microsoft's first argument, a claim arising from the Project Avalanche agreements may still have been tolled because Novell alleges that those agreements caused harm in the PC operating **[**85]** system market. *See* Novell, 505 F.3d at 307 (quoting 15 U.S.C. § 16(i)) ("Section 5(i) of the Clayton Act **HN24**[] provides that government antitrust proceedings toll the statute of limitations for private antitrust actions 'based in whole or in part on any matter complained of' by the government. Novell's Counts I and VI are indeed based on Microsoft's anticompetitive conduct in the PC operating-systems market, which was at issue in the DOJ Complaint."); *see also* Novell, 2005 U.S. Dist. LEXIS 11520, 2005 WL 1398643, at *3 (internal citation omitted) ("The governing test is whether the matters complained of in the private action 'bear a real relation' to a matter complained of in the government suit.").

I also am unpersuaded by Microsoft's second argument. Again, a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Erickson, 551 U.S. at 93 (quoting FED. R. CIV. P. 8(a)(2)). Although "specific facts are not necessary," the Complaint must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id*. (quoting Twombly, 550 U.S. at 555). Novell's Complaint put Microsoft on fair notice that it would bring claims based on **[**86]** agreements in the finished goods channel. The Complaint included a section entitled "Other Distribution Channels," in which Novell alleged "anticompetitive tactics" in "the following channels: independent retailers that sell to individual and small businesses; independent or loosely affiliated resellers that sell to larger organizations . . .; and direct sales to government agencies, large corporations, and other large organizations." (Compl. PP 132-33.) Presumably in an effort to strengthen its argument about the relatedness between Count VI and the government's suit, Novell only highlighted the OEM agreements in opposing the Motion to Dismiss, and accordingly both this Court and the Fourth Circuit focused on the OEM agreements as the crux of Count VI. Nonetheless, the fact that the Complaint itself challenges non-OEM agreements leads me to conclude that I should consider the allegations about the Project Avalanche agreements.

purchase agreements that did not require buyers to commit to buying a seller's products for any specified time period were not "exclusive" because buyers "were free to walk away from the discounts at any time"); *Masimo Corp., 2006 U.S. Dist. LEXIS 29977, 2006 WL 1236666, at 3, *5-6* (holding that, where defendant gave substantially larger discounts to a hospital if it satisfied over 90 percent of its need for "pulse oximetry systems" with purchases from the defendant, the jury reasonably concluded that agreements were exclusive because defendant "in practical **[**84]** effect, offered hospitals their best discount only if they dealt with [defendant] exclusively"); *Microsoft Corp., 87 F. Supp 2d at 52-53*, *rev'd on other grounds by* *253 F.3d 34, 346 U.S. App. D.C. 330* (finding a contract to be exclusive where it imposed "severe shipment quotas and promotional restrictions for third-party [products]"); *see also* *R.J. Reynolds Tobacco Co. v. Phillip Morris Inc., 199 F. Supp. 2d 362, 387 (M.D.N.C. 2002)* ("[Exclusive dealing] arrangements typically involve requirements contracts, non-competition clauses, and agreements giving discounts in exchange for exclusivity.").

Novell has not raised a genuine issue of fact about whether the Project Avalanche agreements with distributors and resellers were exclusive. These agreements were not typical exclusive agreements such as requirements contracts or non-competition agreements. Unlike **[**87]** in *Masimo*, Microsoft did not offer its best discount only if distributors dealt exclusively, or close to exclusively, with Microsoft. Like any discount, the more the distributor purchased the discounted products, the greater it benefited from the discount; but there was no particularly appealing benefit hinging on exclusivity or anything close to it. Nor did these agreements directly penalize distributors and resellers for selling non-Microsoft products. Rather, Microsoft simply offered distributors a modest rebate for increasing their sales and "blended share" of Microsoft products. (*See* Dkt. No. 1952, Exh. 123.) Incentivizing increased sales and share, at least to the extent that these agreements did, hardly has the "practical effect" of exclusivity. In fact, as Microsoft points out, distributors subject to these agreements were also responsible for 48 percent of Novell's sales in 1995. *Cf.* *R.J. Reynolds, 199 F. Supp. 2d at 390* ("Plaintiffs . . . have been successful in securing merchandising contracts with [stores subject to a CMO3 contract with the defendant], which suggest that [the product] sold in CMO3 stores is an inappropriate figure for the foreclosure analysis.").

Although **[**88]** their lack of exclusivity alone may doom their viability as a basis for § 1 liability, *see supra* note 26, the Project Avalanche agreements are also not anticompetitive by any other measure. First, these agreements warrant "less cause for anticompetitive concern" because they were "imposed on distributors rather than end users." *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997)*. "If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution it is unclear whether such restrictions foreclose from competition any part of the relevant market." *Id. Accord* *Microsoft Corp., 87 F. Supp. 2d at 53* (finding exclusive agreements with distributors did not foreclose a substantial share of the market because internet browser developers could always sell browsers directly to end-users). Further, these agreements basically entail price-cutting, which is particularly likely to have procompetitive and pro-consumer benefits.

[*755] In short, because the Project Avalanche agreements were not exclusive or otherwise anticompetitive, they may not form the basis of Novell's § I claim.

c. Agreements with OEMs Did Not Substantially **[**89]** Foreclose Competition

As discussed above, ***HN25***[] to succeed on a § 1 claim under *Tampa Electric*, a plaintiff must prove that the defendant's conduct foreclosed competition in a "substantial" share of the relevant market. *See, e.g.,* *Tampa Elec., 365 U.S. at 327-28*; *R.J. Reynolds, 199 F. Supp. 2d at 387*. Substantial foreclosure depends on many factors--the parties' market strength, the degree of exclusivity, business justifications for the agreement, duration of the agreement, barriers to entry in the market, etc.--but requires that the agreements at issue cover at least 20 percent of the relevant market (and usually significantly more than that). [29] *See* *Tampa Elec., 365 U.S. at 328-29, 334-35*; *Microsoft, 253 F.3d at 70* (noting "the roughly 40% or 50% share usually required in order to establish a § 1 violation"); *Bepco, 106 F. Supp. 2d at 828* (21.5 percent and 18.5 percent "fall short of any value presumed to be substantial and lie on the margin of what is considered to be significant"); *R.J. Reynolds, 199 F. Supp. 2d at 387-*

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[29] "The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals . . ." *Omega Envtl., 127 F.3d at 1162* (quoting 2A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 570b1, at 278).

88, 391-92 (noting that the lowest coverage courts and commentators have found significant is 20 percent and that courts have found agreements covering up to 50 percent **[**90]** of the market to *not* be substantial).

Because the Project Avalanche agreements are not exclusive or otherwise anticompetitive, to survive summary judgment on Count VI Novell must raise a genuine issue about whether the per system and minimum purchase agreements between Microsoft and OEMs resulted in substantial foreclosure. [30] *But cf.* R.J. Reynolds, 199 F. Supp. 2d at 387-88 (holding that Phillip Morris offering retailers discounts in exchange for advantageous advertising space was not exclusive dealing but nonetheless "us [ing] the substantial foreclosure analysis typically used in exclusive dealing cases"). However, Novell has not presented evidence that these agreements covered close to twenty percent of any software applications market, and it has therefore failed to meet its burden. (*See* Dkt. No. 1947, Exh. 45.) In fact, Novell does not seem to contest Microsoft's assertion that the OEM agreements covered at most 10 percent of any relevant market. **[**91]** (*See id*., Exh. 45; Dkt. No. 1952 at 43-45.) Even if 10 percent could ever amount to substantial foreclosure, which I do not believe it could, Novell has failed to point to any market factor significant enough to support a substantial foreclosure finding with such a small segment of the market covered. [31]

[*756] In sum, because Microsoft's agreements with OEMs did not foreclose a substantial share of any software applications market--and the Project Avalanche agreements were not exclusive or otherwise anticompetitive--a § 1 claim here would not survive summary judgment even if the issue was restraining trade in the software applications markets. Furthermore, Novell has not met its burden of providing evidence that Microsoft's conduct created an unreasonable restraint in the PC operating system market, and for that reason alone Count VI would have failed even if Novell had not assigned it to Caldera. [32]

DATE: March 30, 2010

/s/

J. Frederick Motz

United States District Judge

ORDER

For the reasons stated in the accompanying Memorandum, it is, this 30th day of March, 2010

ORDERED

1. Defendant's motion **[**93]** for summary judgment is granted;
2. Plaintiff's cross-motion for summary judgment is denied; and
3. Judgment is entered in favor of defendant against plaintiff.

/s/

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[30] This assumes, without deciding, that these agreements with OEMs would in fact be considered exclusive or anticompetitive.

[31] The § 1 legality of these minimum purchase and per system agreements is distinguishable from the Section 1 legality of Microsoft's minimum purchase, per system, per copy, and per processor agreements with OEMs covered by Judge Jackson's consent order in 1995. In that case, the OEM agreements concerned the distribution of PC operating systems, a market in which OEMs control a substantially greater percentage of the distribution channels than they do in the various software applications markets. *See* United States v. Microsoft, 159 F.R.D. 318, 1995 WL 505998 (D.D.C. 1995); *see also* United States v. Microsoft Corp, 159 F.R.D. 318, 322 n.9 (D.D.C. 1995) ("In the first half of 1994, 80% of Windows units sold by Microsoft were through OEMs."), *rev'd by* 56 F.3d 1448, 312 U.S. App. D.C. 378 (D.C. Cir.). Consequently, **[**92]** anticompetitive or exclusive OEM agreements in the PC operating system market foreclosed a much greater amount of competition.

[32] Microsoft also argues that Novell "abandoned" Count VI because it failed to offer expert evidence of the damages it suffered as a result of the conduct alleged in Count VI. (*See* Dkt. No. 1947 at 44.) Because Count VI may be resolved on other grounds, I did not reach this issue.

J. Frederick Motz

United States District Judge

Winn v. Alamo Title Ins. Co.

United States Court of Appeals for the Fifth Circuit

March 30, 2010, Filed

No. 09-50511

Reporter

372 Fed. Appx. 461 *; 2010 U.S. App. LEXIS 6541 **; 2010-1 Trade Cas. (CCH) P76,968

CHRISTOPHER WINN, on behalf of himself and all others similarly situated; WILLIAM CUMMINGS, on behalf of himself and all others similarly situated; CHRISTOPHER VILLEMARETTE, on behalf of himself and all others similarly situated; NATALIE CUMMINGS, on behalf of himself and all others similarly situated, Plaintiffs - Appellants v. ALAMO TITLE INSURANCE COMPANY; FIDELITY NATIONAL TITLE INSURANCE COMPANY; CHICAGO TITLE INSURANCE COMPANY; TICOR TITLE INSURANCE COMPANY; FIDELITY NATIONAL FINANCE, INC; FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK; UNITED GENERAL TITLE INSURANCE COMPANY; FIRST AMERICAN CORPORATION; COMMONWEALTH LAND TITLE INSURANCE COMPANY; LAWYERS TITLE INSURANCE CORPORATION; LANDAMERICA FINANCIAL GROUP, INC; STEWART TITLE INSURANCE COMPANY; STEWART INFORMATION SERVICES CORPORATION, Defendants - Appellees

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: US Supreme Court certiorari denied by *Winn v. Alamo Title Ins. Co., 2010 U.S. LEXIS 6905 (U.S., Oct. 4, 2010)*

Prior History: **[**1]** Appeal from the United States District Court for the Western District of Texas. USDC No. 1:09-CV-214.

Winn v. Alamo Title Ins. Co., 2009 U.S. Dist. LEXIS 65889 (W.D. Tex., May 13, 2009)

Core Terms

filed-rate, homeowners, rates, district court, antitrust, charging, entities, title insurance company, title insurance, price-fixing, reasons

Counsel: For CHRISTOPHER WINN, on behalf of himself and all others similarly situated, WILLIAM CUMMINGS, on behalf of himself and all others similarly situated, CHRISTOPHER VILLEMARETTE, on behalf of himself and all others similarly situated, NATALIE CUMMINGS, on behalf of himself and all others similarly situated, Plaintiff - Appellants: Loren Kieve, Kieve Law Offices, San Francisco, CA; Louis Fox Burke, New York, NY; William Smythe Shepherd, Jr., Shepherd, Smith & Edwards, L. L. P., Houston, TX; Arun S. Subramanian, Susman Godfrey, L.L.P., New York, NY.

For ALAMO TITLE INSURANCE COMPANY, FIDELITY NATIONAL TITLE INSURANCE CO, CHICAGO TITLE INSURANCE CO., TICOR TITLE INSURANCE CO, FIDELITY NATIONAL FINANCE, INC., LAWYERS TITLE INSURANCE CORPORATION, Defendant - Appellees: Barry R. Ostrager, Kevin J. Arquit, Patrick Timothy Shilling, Simpson, Thacher & Bartlett, L.L.P., New York, NY; Chris A. Blackerby, Germer, Gertz, Beaman & Brown, L.L.P., Austin, TX; Lawrence Louis Germer, Charles W. Goehringer, Jr., Germer Gertz, L.L.P., Beaumont, TX.

For FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, **[**2]** UNITED GENERAL TITLE INSURANCE CO, FIRST AMERICAN CORP, Defendant - Appellees: George Allan Van Fleet, Greenberg Traurig, L.P., Houston, TX; James Ian Serota, Greenberg Traurig, L.L.P., New York, NY.

For COMMONWEALTH LAND TITLE INSURANCE CO, Defendant - Appellee: Barry R. Ostrager, Kevin J. Arquit, Patrick Timothy Shilling, Simpson, Thacher & Bartlett, L.L.P., New York, NY; Chris A. Blackerby, Germer, Gertz, Beaman & Brown, L.L.P., Austin, TX; Charles W. Goehringer, Jr., Germer Gertz, L.L.P., Beaumont, TX.

For LANDAMERICA FINANCIAL GROUP, INC., Defendant - Appellee: Barry R. Ostrager, Simpson, Thacher & Bartlett, L.L.P., New York, NY; Lawrence Louis Germer, Charles W. Goehringer, Jr., Germer Gertz, L.L.P., Beaumont, TX.

For STEWART TITLE INSURANCE COMPANY, STEWART INFORMATION SERVICES CORP., Defendant - Appellees: Layne E. Kruse, Fulbright & Jaworski, L.L.P., Houston, TX; David Marion Foster, Fulbright & Jaworski, L.L.P., Washington, DC; Mark Allen Robertson, Fulbright & Jaworski, L.L.P., New York, NY.

Judges: Before DAVIS, WIENER, and SOUTHWICK, Circuit Judges.

Opinion

[*462] PER CURIAM: *

Plaintiffs are Texas homeowners who purchased title insurance from one or more of the Defendant companies. The homeowners complain that they were charged artificially inflated rates as a result of a price-fixing scheme. In Texas, the rates for title insurance are set by the Commissioner of Insurance. Title insurance companies are required to charge these rates.

On April 3, 2008, the homeowners filed this suit as a class action in the United States District Court for the Eastern District of Texas. The case was later transferred to the Western District. No class certification has apparently issued.

The homeowners insist that the companies' actions constitute a *per se* price-fixing scheme in violation of the Sherman Act. *See* *15 U.S.C. § 1*. They also allege that the companies violated the Texas Deceptive Trade Practices Act and the Texas Free Enterprise and Antitrust Act. They also make certain common law claims.

In August of 2008, the title insurance companies jointly moved to dismiss the complaint for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. Among the allegations was that the federal and state **[**4]** claims were barred by the "filed-rate doctrine," which precludes actions against private entities for charging a rate set by the appropriate regulating authority.

On May 14, 2009, the district court dismissed on the sole basis that the filed-rate doctrine barred each claim. The homeowners timely appealed.

The filed-rate doctrine prevents state-regulated entities from charging rates other than those mandated by the proper **[*463]** authority. *Ark. La. Gas Co. v. Hall, 453 U.S. 571, 577, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)*. The doctrine also prohibits suits by customers against entities charging government-prescribed rates. *Keogh v. Chicago & Nw. Ry., Co, 260 U.S. 156, 162-65, 43 S. Ct. 47, 67 L. Ed. 183 (1922)*.

The homeowners assert three reasons the filed-rate doctrine does not bar their claims: (1) applying the filed-rate doctrine to the companies' alleged antitrust violations is contrary to Texas law; (2) the Texas Insurance

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* Pursuant to ***5TH CIR. R. 47.5***, the court has determined that this opinion should not be published and is not precedent except **[**3]** under the limited circumstances set forth in ***5TH CIR. R. 47.5.4***.

Commissioner's authority is too limited to justify application of the filed-rate doctrine; and (3) the companies' conduct violated federal and state ***antitrust law***, making the filed-rate doctrine inapplicable.

In addition, the homeowners make various constitutional and state law arguments. Finally, they allege that they were improperly **[**5]** denied a right to amend their complaint.

After a review of the record and the briefs filed on appeal, we conclude, largely for the reasons expressed by the district court, that the filed-rate doctrine bars each of the homeowners' claims. None of the arguments that would allow evading that doctrine has merit.

We AFFIRM.

Active Disposal, Inc. v. City of Darien

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

March 31, 2010, Decided; March 31, 2010, Filed

Case No. 09 C 2930

Reporter
2010 U.S. Dist. LEXIS 32687 *; 2010-1 Trade Cas. (CCH) P76,953; 2010 WL 1416461

ACTIVE DISPOSAL, INC; ALL WASTE DISPOSAL APEX INTERIORS, INC.; BOSMAN DISPOSAL; BOXCO, INC.; C.M. ROOF SYSTEMS, INC.; CFS ENTERPRISES, INC; CIRCLE M DUMPSTER SERVICE, INC.; DISPOSAL MANAGEMENT SYSTEMS, INC.; ECONOMY DISPOSAL SERVICES, INC.; FEZE ROOFING, INC.; LAWRENCE E. GUSTAFASON ROOFING, INC.; J.L. ROLL-OFF SERVICE, INC.; K. HOVING RECYCLING & DISPOSAL, INC.; LIBERTY WASTE & RECYCLING SERVICE, INC.; MBL RECYCLING, INC.; MOLENHOUSE ENTERPRISES, INC.; MURPHY ROOFING, INC.; NICHOLAS & ASSOCIATES, INC.; OMNI COMMERCIAL GROUP, INC.; OSTRANDER CONSTRUCTION, INC.; PRAIRIELAND DISPOSAL, INC.; PREMIUM DISPOSAL, INC.; RECYCLING SYSTEMS, INC.; ROLL-ON ROLL-OFF, INC.; TRASH CAN RECYCLING, LLC; WASTEBOX, INC.; and WASTE ONE, LLC, Plaintiffs, vs. CITY OF DARIEN; CITY OF EVANSTON; CITY OF OAK BROOK TERRACE; CITY OF PROSPECT HEIGHTS; VILLAGE OF ADDISON; VILLAGE OF HOFFMAN ESTATES; VILLAGE OF MT. PROSPECT; VILLAGE OF NILES; VILLAGE OF NORTHFIELD; VILLAGE OF WHEELING; and VILLAGE OF WILMETTE, Defendants.

Subsequent History: Count dismissed at *Active Disposal, Inc. v. City of Darien, 2010 U.S. Dist. LEXIS 62111 (N.D. Ill., June 23, 2010)*

Core Terms

ordinances, municipalities, anticompetitive, exemption, contracts, state action, garbage, recyclable, exclusive contract, hauling, ashes, foreseeable, plaintiffs', collection, antitrust liability, containers, disposal, roll, motion to dismiss, state policy, state law, interfere, impaired, effects, challenged ordinance, Sherman Act, regulation, antitrust, hauler

Counsel: **[*1]** For Active Disposal Inc., Plaintiff: David A. Novoselsky, LEAD ATTORNEY, David A. Novoselsky & Associates, Chicago, Il; Brian Albert Schroeder, James J Ayres, Sr., Julie E Fox, Novoselsky Law Offices, Chicago, IL.

For All Waste Disposal, Waste One, LLC, Wastebox, Inc., Trash Can Recycling, LLC, Roll-On Roll-Off Inc., Recycling Systems, Inc., Premium Disposal, Inc., Prairieland Disposal, Inc., Molenhouse Enterprises, Inc., MBL Recycling, Inc., Liberty Waste & Recycling Service, Inc., K. Hoving Recycling & Disposal, Inc., J. L. Roll-Off Service, Inc., Economy Disposal Services, Inc., Disposal Management Systems, Inc., Circle M Dumpster Service, inc., Boxco, Inc., Bosman Disposal, Plaintiffs: David A. Novoselsky, LEAD ATTORNEY, David A. Novoselsky & Associates, Chicago, Il; Brian Albert Schroeder, Julie E Fox, Novoselsky Law Offices, Chicago, IL.

For Apex Enteriors Inc, Showalter Roofing, Inc., Ostrander Construction, Inc., Omni Commercial Group Inc, Nicholas & Associates, Inc., Murphy Roofing, Inc., Lawrence E. Gustafson Roofing, Inc., Feze Roofing, Inc., CFS Enterprises, Inc., C.M. Roof Systems Inc, Plaintiffs: Brian Albert Schroeder, Julie E Fox, Novoselsky Law Offices, Chicago, IL.

For **[*2]** Fred J. Smith Roofing, Plaintiff: Julie E Fox, Novoselsky Law Offices, Chicago, IL.

For City of Darien, The, an Illinois Municipal Corporation, Defendant: John B. Murphey, LEAD ATTORNEY, Rosenthal, Murphey, Coblentz & Donahue, Chicago, IL.

For City of Evanston, The, an Illinois Municipal Corporation, Defendant: Charles E. Harper, Jr., LEAD ATTORNEY, Jacquelyn T. Pinnell, Quarles & Brady LLP, Chicago, IL; Jack M. Siegel, LEAD ATTORNEY, Holland & Knight LLP, Chicago, IL.

For City of Oak Brook Terrace, The, an Illinois Municipal Corporation, Defendant: William W. Kurnik, LEAD ATTORNEY, Kristen Diane Alkire, Knight, Hoppe, Kurnik & Knight LLC, Rosemont, IL.

For City of Prospect Heights, The, an Illinois Municipal Corporation, Defendant: Paul Alan Rettberg, LEAD ATTORNEY, Brandon K Lemley, Christopher Paul Keleher, Querrey & Harrow, Ltd., Chicago, IL; Robert S. OMeara, LEAD ATTORNEY, Casey L Westover, Reed Smith LLP, Chicago, IL.

For Village of Addison, The, an Illinois Municipal Corporation, Village of Wilmette, The, an Illinois Municipal Corporation, Defendants: Paul Alan Rettberg, LEAD ATTORNEY, Brandon K Lemley, Christopher Paul Keleher, Querrey & Harrow, Ltd., Chicago, IL.

For Village of **[*3]** Hoffman Estates, The, an Illinois Municipal Corporation, Defendant: Arthur L. Janura, Jr., LEAD ATTORNEY, Arnstein & Lehr LLP, Hoffman Estates, IL; Charles E. Harper, Jr., LEAD ATTORNEY, Jacquelyn T. Pinnell, Quarles & Brady LLP, Chicago, IL; Hal R. Morris, LEAD ATTORNEY, Jenifer Hitt Caracciolo, Arnstein & Lehr, LLP, Chicago, IL.

For Village of Mt. Prospect, The, an Illinois Corporation, Defendant: Gregory T. Smith, Klein Thorpe and Jenkins Ltd., Chicago, IL.

For Village of Northfield, The, an Illinois Municipal Corporation, Village of Wheeling, The, an Illinois Municipal Corporation, Defendants: John H. Anderson, LEAD ATTORNEY, Seyfarth Shaw LLP, Chicago, IL.

Judges: MATTHEW F. KENNELLY, United States District Judge.

Opinion by: MATTHEW F. KENNELLY

Opinion

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

The plaintiffs in this case are companies that provide hauling and disposal services to customers who use "roll off" containers for waste and recycling, and corporations that would like to use the services of those hauling and disposal companies. The defendants are Illinois municipalities that have adopted ordinances giving exclusive contracts for waste and recycling hauling to waste disposal firms **[*4]** other than the plaintiffs. Plaintiffs allege that defendants' exclusive contracts violate the *Contract* and *Due Process Clauses of the United States Constitution* and interfere with competition in violation of the Sherman Act. Plaintiffs also allege that defendants have tortiously interfered with plaintiffs' contracts and prospective economic advantage and have committed antitrust violations under Illinois law. Defendants have moved to dismiss plaintiffs' claims for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons stated below, the Court grants the motion with regard to all federal law claims and dismisses the state law claims for lack of supplemental jurisdiction.

Background

When considering a motion to dismiss a complaint, the Court accepts the facts stated in the complaint as true and draws reasonable inferences in favor of the plaintiff. *Newell Operating Co. v. Int'l Union of United Auto., Aero., &*

Agric., Implement Workers of Am., 532 F.3d 583, 587 (7th Cir. 2008). The Court takes the following facts from the allegations in plaintiffs' amended complaint.

There are two groups of plaintiffs in this case. The first group (the "hauler **[*5]** plaintiffs") consists of companies in the business of hauling and removing private and commercial waste containers, commonly referred to as "roll off" containers. The second group (the "customer plaintiffs") consists of businesses that have employed one or more of the hauler plaintiffs in the past and wish to retain their services in the future. The defendants are Illinois municipalities that have enacted ordinances that establish exclusive contracts with companies other than the hauler plaintiffs to conduct all of the hauling of roll off containers within their borders. These ordinances prohibit the hauler plaintiffs from removing roll off containers from property within the defendant municipalities and prohibit the customer plaintiffs from hiring any hauler other than the one that holds the exclusive contract for garbage removal in a defendant municipality.

The challenged ordinances were passed pursuant to 65 ILCS 5/11-19-1, which gives municipalities the authority to enter into exclusive contracts for waste disposal. Plaintiffs allege, however, that this statute prohibits exclusive contracts for materials that can be recycled. Because the defendant municipalities' ordinances include **[*6]** recyclable materials, plaintiffs argue, the ordinances are not permitted by the state law.

Plaintiffs allege that the ordinances passed by defendant municipalities interfere with their business operations and impermissibly restrict their rights to enter into contracts. In count 1, they allege that the ordinances violate article I, section 10 of the United States Constitution (the Contract Clause) and interfere with their substantive due process rights under the Constitution's Fourteenth Amendment. In counts 2 and 3, plaintiffs allege that the ordinances tortiously interfere with their existing business relationships and prospective economic advantage, in violation of Illinois common law. In count 4, plaintiffs allege that the ordinance violates section 2 of the Sherman Act, 15 U.S.C. § 2. In count 5, they allege that the ordinances violate the Illinois Antitrust Act, 740 ILCS 10/3.

Discussion

Defendants have moved to dismiss all of plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6). Federal Rule of Civil Procedure 8(a) "requires that a complaint contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614, 618 (7th Cir. 2007) **[*7]** (quoting Fed. R. Civ. P. 8(a)). The statement must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Although the plaintiff is not required to give detailed factual allegations, she must allege facts that "raise a right to relief above the speculative level." *Id.*

A. *Contract Clause* claim (count 1)

The Contract Clause prohibits a state from passing any law "impairing the Obligation of Contracts." U.S. CONST. art. 1 § 10. Plaintiffs allege that the defendants' ordinances granting exclusive franchise contracts for waste hauling preclude plaintiffs from maintaining their businesses in violation of the Contract Clause.

Courts employ a three part test to determine whether a law violates the contract clause. A court must determine whether the ordinance operates as a substantial impairment of existing contractual relationships; whether the municipality has a significant and legitimate purpose justifying the ordinance; and whether the effect of the ordinance on contracts is reasonable and appropriate given the public purpose behind **[*8]** the ordinance. Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732, 736 (7th Cir. 1987), citing Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983).

To satisfy the first element of the test, the contract allegedly impaired must exist at the time the challenged law is enacted. Texaco, Inc. v. Short, 454 U.S. 516, 531, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982). The plaintiffs' complaint identifies no contract of any plaintiff that existed at the time any of the defendant municipalities' ordinances were passed and was thereby impaired. The complaint makes passing reference to "maintaining existing contracts," Compl. P 65, but it says nothing about which (if any) plaintiffs held such contracts, the terms of those contracts, or how they were impaired by the contested ordinances. Though *Rule 8(a)(2)* does not require a complaint to include "detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp., 550 U.S. at 555* (internal quotation marks and citations omitted). The brief non-specific mention of "existing **[*9]** contracts" in the complaint is insufficient to allege a substantial impairment of an existing contract. [1]

B. Substantive due process claim (count 1)

Count 1 of the complaint also includes an allegation that the challenged ordinances "effectively [prohibit] Plaintiffs from enjoying their right to use their property and obtain and maintain a livelihood in violation of the *Fourteenth Amendment*" to the United States Constitution. Compl. P 66. To prevail on the claim that the ordinances interfere with their substantive rights, the plaintiffs must demonstrate "either that the ordinance[s] [interfere] with a fundamental liberty interest, or that the ordinance[s] [are] arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County, Ind., 57 F.3d 505, 514 (7th Cir. 1995)* (internal citations omitted).

All of the plaintiffs in this lawsuit are corporations. Though the fundamental rights guaranteed by the *Fourteenth Amendment* may include the right of an individual **[*10]** to contract, *Board of Regents v. Roth, 408 U.S. 564, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)*, "corporations do not have fundamental rights -- that term describes only personal liberties." *Pro-Eco, 57 F.3d at 514*.

Therefore, to prevail on their substantive due process claim, plaintiffs must demonstrate that the ordinance is arbitrary and unreasonable. *Id.* Each of the challenged ordinances identifies a public health or economic justification for its enactment. This is sufficient to satisfy the highly deferential rational basis test, which defeats the plaintiffs' substantive due process claim. *Id.* ("[G]overnmental action passes the rational basis test if any sound basis may be hypothesized.") (quoting *Northside Sanitary Landfill, Inc. v. City of Indianapolis, 902 F.2d 521, 522 (7th Cir. 1990))*. The Court therefore grants defendants' motion to dismiss the *Fourteenth Amendment* claim in count 1.

C. Sherman Act claim (count 4)

Plaintiffs allege that by enacting the challenged ordinances, the defendants "have engaged in anti-competitive conduct directed at accomplishing the unlawful purpose of creating and maintaining a monopoly in the Roll Off market to bar citizens from availing themselves of the service of Roll Off vendors **[*11]** of their choice." Compl. P 86. Plaintiffs maintain that this constitutes the creation and maintenance of a monopoly in violation of section 2 of the Sherman Act, *15 U.S.C. § 2*.

Defendants assert that they are exempt from antitrust liability under the "state action" exemption to federal ***antitrust law***. In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, the Supreme Court construed the Sherman Act to exempt a state, acting through its legislature, from antitrust liability arising from anticompetitive conduct. *Id. at 350-52*.

A municipality's actions can qualify for the state action exemption if "[its] anticompetitive activities were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service." *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (citing *Lafayette v.*

[1] For this reason, the Court need not address whether plaintiffs have adequately alleged the remaining elements of a viable *Contract Clause* claim.

Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978) (opinion of Brennan, J.)). In *Town of Hallie,* the Supreme Court considered "how clearly a state policy must be articulated to be able to establish that its anticompetitive activity constitutes state action." *Id. at 40*. At issue in *Town of Hallie* was a Wisconsin state law relating to provision of sewer services. The state **[*12]** law authorized Wisconsin cities to provide sewage services and gave the cities the authority to determine the area to be served. *Id. at 42*. Reasoning that "anticompetitive effects logically would result from this broad authority to regulate," the Court held that the anticompetitive effects were pursuant to a state policy and therefore fell within the state action exemption.

In *Town of Hallie,* the Court held that for the state action exemption to apply, a state law need not compel a municipality to act in the allegedly anticompetitive way, nor is it necessary that the state actively supervise the municipality's actions. *Id. at 46*. Rather, a municipality's anti-competitive actions need only be a "foreseeable result" of a state law to qualify for the exemption. *Id.* Foreseeability does not require that a statute or its legislative history expressly state that the legislature intended the delegated action to have an anticompetitive effect. *Id. at 43*. As the Supreme Court cautioned, "requiring such a close examination of a state legislature's intent to determine whether the federal ***antitrust law*** apply would be undesirable . . . because it would embroil the federal courts in the unnecessary **[*13]** interpretation of state statutes." *Id. at 44 n.7*. Rather, a court can infer that the legislature contemplated anticompetitive action if the state statute "clearly articulate[d] and affirmatively express[ed] state policy to displace competition with regulation." *Id. at 44* (internal quotation marks omitted). Provided they were taken "pursuant to a clearly articulated state policy to replace competition . . . with regulation," *id. at 47*, a municipality's anticompetitive actions are subject to the state action exemption from antitrust liability. [2]

The Seventh Circuit has broadly interpreted the concept of foreseeability in applying *Town of Hallie.* In *LaSalle Nat'l Bank v. County of DuPage, 777 F.2d 377 (7th Cir. 1985)*, the court ruled that municipalities **[*14]** were exempt from federal antitrust liability for allegedly anticompetitive acts undertaken in the provision of sewer services. The court held that anticompetitive conduct was foreseeable based on an Illinois state statute that authorized municipalities to "furnish sewerage service to municipal corporations and enter into and perform contracts with any municipality for the furnishing of sewerage service" and a statute that authorized the Illinois Environmental Protection Agency to plan with municipalities how to reduce water pollution. *Id. at 381-82* (internal citations omitted).

In the same case, the court held that municipalities were exempt from antitrust liability arising out of zoning decisions, even those made in alleged collusion with other municipalities, because the Illinois legislature had authorized them to "regulate and restrict the location and use of buildings, structures and land for trade, industry, residents, and other uses." *Id. at 383* (internal citation omitted). In so ruling, the Court inferred foreseeability from the legislature's stated purpose for the law, which included: "the promotion of public health, safety, morals, comfort, and general welfare, conserving the **[*15]** values of property throughout the country, [and] lessening or avoiding congesting in the public streets and highways." *Id.* The court noted that "[t]hese purposes, although not necessarily in conflict with the policies of the antitrust laws, are not necessarily consistent with them either, and to that extent the legislature can be said to have foreseen anticompetitive effects." *Id.*

In *Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987)*, the Seventh Circuit held that the City of Chicago was exempt from antitrust liability for its actions to cap the number of available taxicab licenses, because an Illinois statute authorized it to "license, tax, and regulate hackmen, dragmen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and [to] prescribe their compensation." *Id. at 1184*. The court concluded that "as the anti-competitive effects would logically result from the authority to regulate," the state action exemption applied. *Id.* More recently, in *Justice v. Town of Cicero, 577 F.3d 768, 775 (7th Cir. 2008)*, the court held that an Illinois law that authorized local governments to "make all needful rules and regulations concerning the

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[2] Several of the defendants are home rule municipalities, which are granted broad power to legislate by the Illinois State Constitution. *ILL. CONST. art. VII § 6*. This does not change the antitrust analysis. Home rule municipalities' actions may be exempt from antitrust scrutiny if they constitute municipal action to carry out clearly articulated and affirmatively expressed state policy." *Community Communications Co. v. Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*.

[*16] use of water supplied by the waterworks of the city or village" and to fix and collect water rates "as the corporate authorities may deem necessary or expedient" was sufficient to exempt the town from antitrust liability. *Id.*

The defendants argue that their ordinances fall within the state action exemption. They rely on *65 ILCS 5/11-19-1(a)*, which provides that "[a]ny city, village or incorporated town may make contracts . . . with any person, corporation, or county . . . for more than one year and not exceeding 30 years relating to the collection and final disposition, or relating solely to either the collection or final disposition of garbage, refuse and ashes." The defendants argue that anticompetitive effects are a foreseeable result of the statute's express authorization for municipalities to enter into contracts for garbage collection.

Plaintiffs argue that to the extent the contested ordinances create exclusive contracts for the hauling and removal of materials meant to be recycled, they were not authorized by the Illinois legislature. Plaintiffs cite *section 5* of the statute, which provides:

> Every city, village or incorporated town may provide such method or methods as shall be **[*17]** approved by the corporate authorities for the disposition of garbage, refuse, and ashes. Any municipality may provide by ordinance that such method or methods shall be the exclusive methods for the disposition of garbage, refuse and ashes to be allowed within that municipality. Such ordinance may be enacted notwithstanding the fact that competition may be displaced or that such ordinance may have an anti-competitive effect. . . . *Material that is intended or collected to be recycled is not garbage, refuse, or ashes.*

65 ILCS 5/11-19-5 (emphasis added). Plaintiffs argue that the statutory language italicized in the quotation means that the legislature did not authorize municipalities to enter into exclusive contracts for the collection of recyclable materials. Because the disputed ordinances apply to recyclable materials as well as garbage, plaintiffs argue, they are not permitted by the state statute and are therefore not within the state action exemption.

Defendants contend that *section 5* of the statute, including its narrow definition of "garbage, refuse, and ashes," applies only to ordinances that establish a particular method of waste disposal, such as landfilling or incinerating. **[*18]** They argue that their ordinances were passed not pursuant to *section 5* but under *section 1*, which permits them to enter into contracts with private entities for waste collection. The ordinances establishing exclusive hauling contracts for roll of containers bring them within the state action exemption, defendants argue, because the anticompetitive effect of the ordinances is a foreseeable result of *section 1*. *Section 1* defines "garbage, refuse, and ashes" to include such items as cardboard, glass, paper, and tin cans, all of which are recyclable. *65 ILCS 5/11-19-1(d)* & *5/11-19-2*. Defendants argue that even if the ordinances cover containers that may include recyclable materials, they are still authorized by the statute, because such materials fall within the statutory definition of "refuse" as used in *section 1*.

The plaintiffs concede in their response to the motion to dismiss that *65 ILCS 5/11-19-1(a)* "permits adoption of ordinances providing for the exclusive contracts for the 'collection and final disposition, or relating solely to either the collection or final disposition of garbage, refuse, and ashes.'" Pls.' Resp. to Mem. in Supp. of Mot. to Dismiss at 7. Plaintiffs further state **[*19]** that "the enabling legislation very clearly and very properly permits exclusive contracts when the issue is the disposal and hauling of waste and garbage." *Id.* at 9. They go on to argue, however, that because the only mention of exclusivity is in *section 5*, which more narrowly defines "garbage, refuse and ashes" not to include recyclable materials, the narrower definition should be applied to the disputed ordinances, and the Court should find they are not authorized by the state legislature.

The Court concludes that the disputed ordinances fall within the state action exemption as defined by *Town of Hallie.* *Section 1* of the statute permits municipalities to enter into contracts for the hauling and disposal of garbage, refuse, and ashes, (defined in *Section 2* to include recyclable materials). *65 ILCS 5/11-19-1(a)*. This constitutes the kind of "state policy to displace competition with regulation" that the Supreme Court found sufficient in *Town of Hallie* to bring an otherwise anticompetitive statute to come within the state action exemption. *Town of Hallie, 471 U.S. at 44*. As in *Campbell,* "the **[*20]** anti-competitive effects [of the ordinances] . . . logically result from the authority to regulate." *Campbell, 823 F.2d at 1182*. Because the challenged ordinances are a foreseeable result of the authority granted by the Illinois state legislature in *section 1* of the statute, they fall within the state action exemption. [3] The Court therefore dismisses count 4.

D. Remaining claims

All of the remaining claims in the plaintiffs' complaint are based on Illinois state law. Because the Court has dismissed all of the federal claims contained within the plaintiffs' complaint, the Court declines to exercise supplemental jurisdiction over the remaining state law claims under *28 U.S.C. § 1367(c)*. *Wright v. Associated Ins. Cos., Inc., 29 F.3d 1244, 1251 (7th Cir. 1994)*.

Conclusion

For the foregoing reasons, the Court grants defendants' motion to dismiss as to counts 1 and 4 of the plaintiffs complaint. Because there are no remaining federal law claims, the Court declines to exercise jurisdiction over the remaining state law claims, and dismisses the remaining claims without prejudice. **[*21]** The Court will enter final judgment unless, on or before April 22, 2010, plaintiffs file a proposed amended complaint that states a viable federal claim. The case is set for a status hearing on April 27, 2010 at 9:30 a.m.

/s/ Matthew F. Kennelly

MATTHEW F. KENNELLY

United States District Judge

Date: March 31, 2010

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[3] For this reason, the Court need not resolve the parties' disputes regarding the precise interplay of *sections 1* and *5*.

Bayer Schering Pharma Ag v. Watson Pharms.

United States District Court for the District of Nevada

March 31, 2010, Decided; March 31, 2010, Filed

Case No. 2:07-CV-01472-KJD-GWF

Reporter

2010 U.S. Dist. LEXIS 161986 *

BAYER SCHERING PHARMA AG, et al., Plaintiffs, v. WATSON PHARMACEUTICALS, INC., WATSON LABORATORIES, INC., AND SANDOZ, INC., Defendants.

Core Terms

patent, infringement, monopolization, motion to dismiss, patent holder, certification, counterclaims, brand-name, generic drug, Sherman Act, manufacturer, allegations, antitrust claim, relevant market, Unfair, interchangeability, products, restraint of trade, leave to amend, cross-elasticity, conspiracy, cause of action, ethinylestradiol, substitutes, drugs

Counsel: **[*1]** For Bayer Healthcare Pharmaceuticals Inc., Plaintiff: Jonathan W Fountain, LEAD ATTORNEY, Howard & Howard Attorneys PLLC, Las Vegas, NV USA; Matthew R. Ford, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott, Chicago, IL USA; Lewis Roca Rothgerber Christie LLP, Las Vegas, NV USA, Las Vegas, NV, USA; Peter B. Bensinger, Jr., LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Sundeep K. Addy, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Denver, CO USA; Adam K Mortara, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Clark T. Thiel, Pillsbury Winthrop Shaw Pittman LLP, Four Embarcadero Center, 22nd Floor, San Francisco, CA USA; Jeffrey A Mandell, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Nikkya G. Williams, Lewis and Roca LLP, Las Vegas, NV USA; Paul J Skiermont, PRO HAC VICE, Skiermont Puckett LLP, Dallas, TX USA.

For Bayer Schering Pharma AG, Plaintiff: Adam K Mortara, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Jeffrey A Mandell, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Jonathan W Fountain, **[*2]** LEAD ATTORNEY, Howard & Howard Attorneys PLLC, Las Vegas, NV USA; Matthew R. Ford, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott, Chicago, IL USA; Lewis Roca Rothgerber Christie LLP, Las Vegas, NV USA, Las Vegas, NV USA; Paul J Skiermont, LEAD ATTORNEY, PRO HAC VICE, Skiermont Puckett LLP, Dallas, TX USA; Peter B. Bensinger, Jr., LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Sundeep K. Addy, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Denver, CO USA; Clark T. Thiel, Pillsbury Winthrop Shaw Pittman LLP, Four Embarcadero Center, 22nd Floor, San Francisco, CA USA; Nikkya G. Williams, Lewis and Roca LLP, Las Vegas, NV USA.

For Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Defendants: Cedric C.Y. Tan, LEAD ATTORNEY, PRO HAC VICE, Crowell & Moring LLP, Washington, DC USA; Kristin M Cooklin, LEAD ATTORNEY, Crowell & Moring, Washington, DC USA; Neil M McCarthy, LEAD ATTORNEY, PRO HAC VICE, Neil McCarthy, Esq., PC, Silver Spring, MD USA; Ryan E. Johnson, LEAD ATTORNEY, Watson Rounds, Las Vegas, NV USA; Byron R Chin, PRO HAC VICE, Townsend and Townsend and Crew LLP, Palo Alto, CA USA; Dan C. **[*3]** Bowen, Bowen Hall, Reno, NV USA; David J. Tsai, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA USA; Kenneth E. Jenkins, Townsend and Townsend and Crew LLP, San Diego, CA USA; Mark T. Jansen, PRO HAC VICE, Crowell & Moring LLP, San Francisco, CA USA; Michael D Rounds, Brownstein Hyatt Farber Schreck, LLC, Reno, NV USA.

For Sandoz, Inc., Defendant: Dan C. Bowen, LEAD ATTORNEY, Bowen Hall, Reno, NV USA; Delphine W. Knight Brown, LEAD ATTORNEY, Kelley Drye & Warren LLP, Stamford, CT USA; Joseph A Boyle, LEAD ATTORNEY, PRO HAC VICE, Kelley Drye & Warren LLP, Parsippany, NJ USA; Joseph Hynds, LEAD ATTORNEY, Rothwell Figg Ernst & Manbeck, Washington, DC USA; Lisa Phillips, LEAD ATTORNEY, PRO HAC VICE, Rotwell Figg Ernst & Manbeck, Washington, DC USA; Paul W. Garrity, LEAD ATTORNEY, August T Horvath, Kelley Drye & Warren LLP, New York, NY USA; Steve Lieberman, LEAD ATTORNEY, PRO HAC VICE, Rothwell, Figg, Ernst & Manbech, Washington, DC USA; Steven J Moore, LEAD ATTORNEY, Kelley, Drye & Warren, Stamford, CT USA; Vincent P Rao, II, LEAD ATTORNEY., Parsippany, NJ USA; Kristin M Cooklin, Crowell & Moring, Washington, DC USA; Mark T. Jansen, PRO HAC VICE, Crowell & Moring LLP, San Francisco, **[*4]** CA USA.

For Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Counter Claimants: Cedric C.Y. Tan, LEAD ATTORNEY, PRO HAC VICE, Crowell & Moring LLP, Washington, DC USA; Kristin M Cooklin, LEAD ATTORNEY, Crowell & Moring, Washington, DC USA; Neil M McCarthy, LEAD ATTORNEY, PRO HAC VICE, Neil McCarthy, Esq., PC, Silver Spring, MD USA; Ryan E. Johnson, LEAD ATTORNEY, Watson Rounds, Las Vegas, NV USA; Byron R Chin, PRO HAC VICE, Townsend and Townsend and Crew LLP, Palo Alto, CA USA; David J. Tsai, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA USA; Mark T. Jansen, PRO HAC VICE, Crowell & Moring LLP, San Francisco, CA USA; Michael D Rounds, Brownstein Hyatt Farber Schreck, LLC, Reno, NV USA.

For Bayer Schering Pharma AG, Bayer Schering Pharma AG, Bayer Schering Pharma AG, Counter Defendants: Adam K Mortara, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Jeffrey A Mandell, LEAD ATTORNEY, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Jonathan W Fountain, LEAD ATTORNEY, Howard & Howard Attorneys PLLC, Las Vegas, NV USA; Matthew R. Ford, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott, Chicago, IL USA; Lewis **[*5]** Roca Rothgerber Christie LLP, Las Vegas, NV USA, Las Vegas, NV USA; Paul J Skiermont, LEAD ATTORNEY, PRO HAC VICE, Skiermont Puckett LLP, Dallas, TX USA; Peter B. Bensinger, Jr., LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Sundeep K. Addy, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Denver, CO USA; Clark T. Thiel, Pillsbury Winthrop Shaw Pittman LLP, Four Embarcadero Center, 22nd Floor, San Francisco, CA USA.

For Bayer Healthcare Pharmaceuticals Inc., Bayer Healthcare Pharmaceuticals Inc., Bayer Healthcare Pharmaceuticals Inc., Counter Defendants: Jonathan W Fountain, LEAD ATTORNEY, Howard & Howard Attorneys PLLC, Las Vegas, NV USA; Matthew R. Ford, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott, Chicago, IL USA; Lewis Roca Rothgerber Christie LLP, Las Vegas, NV USA, Las Vegas, NV 89102-, USA; Peter B. Bensinger, Jr., LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Sundeep K. Addy, LEAD ATTORNEY, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Denver, CO USA; Adam K Mortara, PRO HAC VICE, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL **[*6]** USA; Clark T. Thiel, Pillsbury Winthrop Shaw Pittman LLP, Four Embarcadero Center, 22nd Floor, San Francisco, CA USA; Jeffrey A Mandell, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL USA; Paul J Skiermont, PRO HAC VICE, Skiermont Puckett LLP, Dallas, TX USA.

For Watson Pharmaceuticals, Inc., Watson Laboratories, Inc., Counter Claimants: Cedric C.Y. Tan, LEAD ATTORNEY, PRO HAC VICE, Crowell & Moring LLP, Washington, DC USA; David J. Tsai, LEAD ATTORNEY, David J. Tsai, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA USA; Kristin M Cooklin, LEAD ATTORNEY, Crowell & Moring, Washington, DC USA; Neil M McCarthy, LEAD ATTORNEY, PRO HAC VICE, Neil McCarthy, Esq., PC, Silver Spring, MD USA; Ryan E. Johnson, LEAD ATTORNEY, Watson Rounds, Las Vegas, NV USA; Byron R Chin, PRO HAC VICE, Townsend and Townsend and Crew LLP, Palo Alto, CA USA; Kenneth E. Jenkins, Townsend and Townsend and Crew LLP, San Diego, CA USA; Mark T. Jansen, PRO HAC VICE, Crowell & Moring LLP, San Francisco, CA USA; Michael D Rounds, Brownstein Hyatt Farber Schreck, LLC, Reno, NV USA.

For Sandoz, Inc., Counter Claimant: Dan C. Bowen, LEAD ATTORNEY, Bowen Hall, Reno, NV USA; Delphine W. Knight Brown, LEAD ATTORNEY, **[*7]** Kelley Drye & Warren LLP, Stamford, CT USA; Joseph A Boyle, LEAD ATTORNEY, Kelley Drye & Warren LLP, Parsippany, NJ USA; Joseph Hynds, LEAD ATTORNEY, Rothwell Figg Ernst & Manbeck, Washington, DC USA; Lisa Phillips, LEAD ATTORNEY, PRO HAC VICE, Rotwell Figg Ernst & Manbeck, Washington, DC USA; Paul W. Garrity, LEAD ATTORNEY, August T Horvath, Kelley Drye & Warren LLP, New York, NY USA; Steve Lieberman, LEAD ATTORNEY, PRO HAC VICE, Rothwell, Figg, Ernst & Manbech, Washington, DC USA; Steven J Moore, LEAD ATTORNEY, Kelley, Drye & Warren, Stamford, CT USA; Vincent P Rao, II, LEAD ATTORNEY., Parsippany, NJ USA; Kristin M Cooklin, Crowell & Moring, Washington, DC USA; Mark T. Jansen, PRO HAC VICE, Crowell & Moring LLP, San Francisco, CA USA.

Judges: Kent J. Dawson, United States District Judge.

Opinion by: Kent J. Dawson

Opinion

ORDER

Presently before the Court is Plaintiffs' Motion to Dismiss Sandoz's Seventh, Eighth, Ninth and Tenth Counterclaim (#52). Defendant Sandoz filed a response in opposition (#83) to which Plaintiffs replied (#89).

I. Regulatory Background[1]

The Federal Food, Drug, and Cosmetic Act ("FDCA"), *21 U.S.C. §§ 301 et seq.*, governs the sale and manufacture of prescription drugs in the United States. Any entity seeking to distribute **[*8]** a new prescription drug must file a New Drug Application ("NDA") with the Food and Drug Administration ("FDA"). The application must include "full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use." *21 U.S.C. § 355(b)(1)(A)*. Upon approval by the FDA, a drug may be manufactured and sold in the United States. Drugs approved by the FDA under the NDA process are commonly referred to as "brand-name" drugs.

Brand-name drugs are typically protected by patents at the time of their approval by the FDA, and for a number of years thereafter. A patent holder has the exclusive right to make, use and sell the patented invention during the life of the patent. See *35 U.S.C. § 154(a)*. A manufacturer of a brand-name drug protected by a patent is able to sell the drug at monopoly prices.

The Drug Price Competition and Patent Term Restoration Act of 1984 ("Hatch-Waxman Act" or "Hatch-Waxman") was passed to facilitate the approval of generic versions of brand-name drugs. See *21 U.S.C. § 355*. Under Hatch-Waxman, a manufacturer seeking FDA approval of a new brand-name drug must file with its NDA the patent number and expiration date of any patent which claims the drug for which **[*9]** the applicant submitted the application or which claims a method of using such drug and with respect to which a claim of patent infringement could reasonably be asserted if a person not licensed by the owner engaged in the manufacture, use, or sale of the drug. Id. *§ 355(b)(1)*. The brand-name drug and its associate patent or patents are then published in the "Approved Drug Products with Therapeutic Equivalence Evaluations," commonly referred to as the "Orange Book."

Under Hatch-Waxman, a drug manufacturer seeking FDA approval for a generic version of a brand-name drug may file an Abbreviated New Drug Application ("ANDA") showing that its proposed generic drug is the "bioequivalent" of an already approved brand-name drug. Id. *§ 355(j)*. The ANDA shall contain, with respect to patents for the already approved brand-name drug listed in the Orange Book,

> a certification ...
> (I) that such patent information has not been filed,
> (II) that such patent has expired,

[1] The Court adopts the excellent description by Circuit Judge W illiam A. Fletcher of the regulatory process created by the Hatch-W axman Act found in *Kaiser Foundation Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1036-38 (9th Cir. 2009)*.

(III) of the date on which such patent will expire, or
(IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted[.]

Id. *§ 355(j)(2)(A)(vii)*. Such a certification is referred to as a "Paragraph **[*10]** I," "Paragraph II," "Paragraph III," or "Paragraph IV" certification. The first ANDA applicant for approval of a generic version of a particular brand-name drug who makes a Paragraph IV certification is guaranteed a 180-day period of exclusive distribution of the generic drug if that drug is approved by the FDA. The 180-day period begins either on the date the applicant notifies the FDA of its first "commercial marketing" of the generic drug, or on the date of the judicial decision holding the patent invalid or not infringed, whichever is earlier. Id. *§ 355(j)(5)(B)(iv)*.

An ANDA applicant who makes a Paragraph IV certification must notify the patent holder of that certification. Id. *§ 355(j)(2)(B)*. If an ANDA contains a Paragraph IV certification, FDA approval of the proposed generic drug must be "made effective immediately unless ... an action is brought for infringement of the patent that is the subject of the certification" within forty-five days of the patent holder receiving notice of the certification. Id. *§ 355(j)(5)(B)(iii)*. If a patent holder brings suit within forty-five days, FDA approval will not become effective until thirty months after the receipt of the notice, subject to certain exceptions. Id. This thirty-month delay **[*11]** is commonly referred to as the "automatic stay." An exception to the thirty-month automatic stay is a final court decision in the patent holder's infringement suit that the patent is invalid or not infringed. In the event of such a court decision, FDA approval "shall be made effective on the date on which the court enters judgment reflecting the decision" if the court decision is less than thirty months after receipt of the notice. Id. *§ 355(j)(5)(B)(iii)(I)*.

If a patent holder fails to bring an infringement suit within forty-five days of receipt of a Paragraph IV notification, it loses the right to the thirty-month automatic stay of FDA approval of the proposed generic drug. However, the patent holder does not lose the right to bring an infringement suit against the generic drug manufacturer; the patent holder simply loses the right to bring the infringement suit under Hatch-Waxman.

A patent holder who misses the forty-five day deadline for bringing a Hatch-Waxman infringement suit suffers two significant disadvantages. First, the patent holder cannot bring an infringement suit immediately upon the filing of the ANDA; it must wait until the generic drug is sold commercially. See *35 U.S.C. § 271(e)(1)*. See generally, *Merck KGAA v. Integra Lifesciences I, Ltd., 545 U.S. 193, 125 S. Ct. 2372, 162 L. Ed. 2d 160 (2005)*. Second, **[*12]** there is no automatic stay barring the FDA from approving the generic drug. Once approved, its manufacturer may sell the generic drug during the pendency of any infringement suit brought by the patent holder.

II. Background and Procedural History

Plaintiff Bayer Schering Pharma AG ("Bayer") owns U.S. Reissue Patent No. 37, 564 ("the '564 reissue patent") and U.S. Reissue Patent No. 37, 838 ("the '838 reissue patent")(collectively, the "Spona patents"). The Spona patents cover Bayer's oral contraceptive YAZ® ("YAZ") tablets. Defendant Sandoz filed an ANDA with the FDA for permission to market a generic version of YAZ tablets prior to the expiration of the Spona patents and made a paragraph IV certification as to '564 and '838.

Pursuant to Hatch-Waxman, Bayer sued Sandoz for patent infringement. In response Sandoz asserted counterclaims for violations of the Sherman Act and violations of state law. Specifically, Counterclaimant alleges in its seventh cause of action claims for attempted monopolization and monopolization in violation of *Section 2* of the Sherman Act as well as conspiracy to monopolize and conspiracy in restraint of trade in violation of *Section 1* of the Sherman Act. In its eighth cause of **[*13]** action, Sandoz alleged claims for violations of Nevada's Unfair Deceptive Trade Practices Act and Unfair Trade Practices Act. The ninth cause of action seeks damages for tortious interference with prospective economic advantage. Sandoz has agreed to voluntarily dismiss its tenth counterclaim for malicious prosecution.

Bayer has now moved to dismiss the antitrust counterclaims. Bayer asserts that Sandoz's antitrust claims must be dismissed because Sandoz has alleged a relevant product market that is implausibly narrow. For three of its antitrust counterclaims - i.e., monopolization, conspiracy to monopolize, and conspiracy in restraint of trade - Sandoz asserts narrow market definitions based on YAZ's active ingredients. Accordingly, Sandoz's market definitions are effectively based on brand.

Bayer has also moved to dismiss the eighth and ninth causes of action as failing to state a claim under Nevada law.

III. Standard for a Motion to Dismiss

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit Partnership v. Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998)* (citation omitted). Consequently, there is a strong presumption against dismissing **[*14]** an action for failure to state a claim. See *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)* (citation omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Plausibility, in the context of a motion to dismiss, means that the plaintiff has pleaded facts which allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

The Iqbal evaluation illustrates a two prong analysis. First, the Court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations which are legal conclusions, bare assertions, or merely conclusory. *Id. at 1949-51*. Second, the Court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." *Id. at 1951*. If the allegations state plausible claims for relief, such claims survive the motion to dismiss. *Id. at 1950*.

IV. Analysis of Antitrust Claims

A. Relevant Market

For YAZ, Sandoz asserts that the relevant market is "the ethinylestradiol/drospirenone market, including any low-dose of ethinylestradiol/drospirenone submarket, given the unique properties of this contraceptive combination." **[*15]** Sandoz's Counterclaim, Doc. No. 20, ¶ 126, 2:08-cv-00995-KJD-GWF. The unique properties Sandoz alleges that separate YAZ into a separate and solo market are "a unique property allowing for the treatment of premenstrual dysphoric disorder (PMDD) . . . the ONLY birth control proven to treat the physical symptoms of PMDD . . . [and] [i]t may also be used to treat moderate acne in women who are able to and wish to use the pill for birth control . . . [and] its unique progestin/estrogen composition (that is, ethinylestradiol/drospirenone), in conjunction with the fact that its estrogen (ethinylestradiol) is of significantly lower dose due to its clatharation with betadex."

Bayer argues that by limiting the relevant product market to only low-dose ethinylestradiol/drospirenone, Sandoz has pleaded the "strange red-haired, bearded, one-eyed man with a limp[-type]" market, *Belfiore v. The New York Times, Co., 654 F. Supp. 842, 846 (D. Conn. 1986)*(aff'd *826 F.2d 177 (2d. Cir. 1987))*, which are markets so narrow that they cannot sustain an antitrust claim. Bayer argues that Sandoz has not pled sufficient facts addressing potential substitutes, interchangeability of similar products, and cross-elasticity of demand to maintain a claim of a disfavored single-brand or unique market.

In order to state **[*16]** a claim under the Sherman Act, a plaintiff must alleged that the defendant, in this case Bayer, has market power within a "relevant market." Sandoz brings the restraint of trade and antitrust claims under *Section 1* of the Sherman Act, *15 U.S.C. § 1*, and the monopolization and attempted monopolization claims under *Section 2*, *15 U.S.C. § 2*. The "relevant market" requirement applies identically under the two different sections of the Act. *Newcal Indus., Inc. v. Ikon Office Solutions, 513 F.3d 1038, 1044 n.3 (9th Cir. 2008)*. Therefore, there is no need to distinguish between Sandoz's various antitrust claims; its market allegations are either sufficient or insufficient.[2] Id. There is no requirement that the elements of antitrust claims be pled with specificity. *Id. at 1045* (citing *Cost Mgmt. Srvs., Inc. v. Wash. Natural Gas Co., 99 F.3d 937, 950 (9th Cir. 1996))*. Since the validity of the "relevant market" is a factual element rather than a legal element, alleged markets may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or trial, unless the alleged market suffers a fatal legal defect on the face of the complaint. See Id.; cf., *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d. Cir. 1997)*.

The relevant market must be a product market.[3] Id. The market must encompass the product at issue as well as all economic substitutes for the product. Id. (citing *Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. "The outer boundaries of a product market are determined by the reasonable interchangeability **[*17]** of use or the cross-elasticity of demand between the product itself and substitutes[.]" *Brown Shoe, 370 U.S. at 325*. Accordingly, "the relevant market must include the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Newcal, 513 F.3d at 1045* (internal quotes omitted). "[I]t is legally permissible to premise antitrust allegations on a submarket. That is, an antitrust claim may . . . allege restraints of trade within or monopolization of a small part of the general market of suitable products." Id. However, single brand markets are extremely rare and a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own products. See *Apple Inc. v. Psystar Corp., 586 F. Supp.2d 1190, 1198 (N.D. Cal. 2008)*(citing *Green Country Food Market, Inc. v. Bottling Group, 371 F.3d 1275, 1282 (10th Cir. 2004))*.

Here, the crux of Sandoz's argument is that YAZ is an independent market because of its uniqueness. However, Sandoz must plead facts regarding potential substitutes, interchangeability of similar products, and cross-elasticity of demand. See *Apani Sw., Inc. v. Coca-Cola, Enters., 300 F.3d 620, 628 (5th Cir. 2002)*(complaint must reference rule of reasonable interchangeability and cross-elasticity of demand and encompass all interchangeable substitute products); *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d. Cir. 2001)*(alleged product market must plausibly analyze interchangeability of use or cross-elasticity of **[*18]** demand). Merely alleging that a product is unique is insufficient to plead a relevant market. See, e.g., *B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 171 (S.D.N.Y. 1995)*.

Therefore, the Court grants Bayers' motion to dismiss the antitrust claims for monopolization, restraint of trade and conspiracy to monopolize for Sandoz's failure to allege sufficient facts regarding potential substitutes, interchangeability of similar products, and cross-elasticity of demand, but grants leave to amend. Sandoz's counterclaims fail to meet the standard of pleading facts from which the court can determine whether a plausible claim for relief has been alleged.

V. State Law Claims

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[2] Sandoz's counterclaim with respect to its attempted monopolization claim pleads that the relevant U.S. market is the entire U.S. oral contraceptive market. In its opening brief, Bayer argued that this alternative product market is implausible because Bayer only holds an inadequate 50% market share. In response, Sandoz correctly contended that it need not allege an existing dominant market share in order to plead an attempted monopolization claim. See *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1437 (9th Cir. 1995)*. In reply, Bayer abandoned the inadequate market share argument and asserted that Sandoz had failed to adequately plead several other elements. However, the Court will not consider new arguments raised in a reply brief. See *Coos County v. Kempthorne, 531 F.3d 792, 812 (9th Cir. 2008)*. Accordingly, the Court denies the motion to dismiss the attempted monopolization claim.

[3] ***Antitrust law*** requires allegations of both a product and geographic market. Sandoz alleges the United States as the geographic market and Bayer does not challenge that allegation.

A. Claims for Violation of the Nevada Unfair Trade Practices Act

The Nevada Unfair Trade Practices Act ("UTPA") "tracks the provisions of the Sherman Act" and "adopts by reference the case law applicable to the federal antitrust laws[.]" See *Boulware v. Nev. Dep't of Human Res., 960 F.2d 793, 800 (9th Cir. 1992)*; *Nev. Rev. Stat. § 598A.050*. Accordingly, the analysis under the UTPA is the same as the Sherman Act and the Court dismisses the same claims under the UTPA as it did the Sherman Act with leave to amend.

B. Claims for Common Law Unfair Competition

While Nevada does recognize a claim for unfair competition, *Golden Nugget, Inc. v. Am. Stock Exchange, Inc., 828 F.2d 586, 591 (9th Cir. 1987)*, generally plaintiff must allege a traditional act such as appropriation of **[*19]** its property, deception, passing-off, dilution, confusion of goods, or confusion of source. See *Custom Teleconnect, Inc. v. Int'l Tele-Servs., Inc., 254 F. Supp.2d 1173 (D. Nev. 2003)*; *Wells Fargo & Co. v. Wells Fargo Express Co., 358 F. Supp. 1065, 1084 (D. Nev. 1973)*. Unfair competition is "nothing but a convenient name for the doctrine that no one should be allowed to sell his or her goods as those of another." 87 C.J.S. Trade-Marks, Etc., § 19 (2009). Accordingly, the Court grants Bayer's motion to dismiss this claim with leave to amend.

C. Nevada Deceptive Trade Practices Act

The Court finds that Sandoz has sufficiently stated a plausible claim for relief under the Nevada Deceptive Trade Practices Act and declines to dismiss this cause of action.

D. Tortious Interference with Prospective Economic Advantage

In order to establish a claim for interference with prospective economic advantage in Nevada, a plaintiff must establish the following elements: 1) a prospective contractual relationship between the plaintiff and a third party; 2) the defendant's knowledge of this prospective relationship; 3) the intent to harm the plaintiff by preventing this relationship; 4) the absence of privilege or justification by the defendant; and 5) actual harm to the plaintiff as a result. See *Leavitt v. Leisure Sports Inc., 103 Nev. 81, 734 P.2d 1221, 1225 (Nev. 1987)*. Privilege or justification can exist when defendant acts to protect his own interests. **[*20]** *Id. at 1226*. Sandoz has failed to allege a specific prospective contractual relationship between itself and a third party. Accordingly, the Court grants the motion to dismiss this claim with leave to amend.

VI. Conclusion

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion to Dismiss Sandoz's Seventh, Eighth, Ninth and Tenth Counterclaim (#52) is **GRANTED in part and DENIED in part**;

IT IS FURTHER ORDERED that Sandoz's federal and state law claims for monopolization, restraint of trade and conspiracy to monopolize are **DISMISSED with leave to amend**;

IT IS FURTHER ORDERED that Plaintiff's claims for unfair competition and interference with prospective economic advantage are **DISMISSED with leave to amend**;

IT IS FURTHER ORDERED that Plaintiff's claim for malicious prosecution is **DISMISSED**;

IT IS FURTHER ORDERED that Sandoz file its amended counterclaims no later than April 15, 2010.

DATED this 31st day of March 2010.

/s/ Kent J. Dawson

Kent J. Dawson

United States District Judge

Boyd v. J.E. Robert Co.

United States District Court for the Eastern District of New York

March 31, 2010, Decided; March 31, 2010, Filed

05-CV-2455 (KAM) (RER)

Reporter

2010 U.S. Dist. LEXIS 140905 *; 2010 WL 5772892

JOAN GRANT BOYD, et al., Plaintiffs, - against - J.E. ROBERT CO., et al., Defendants.

Subsequent History: Adopted by, Objection denied by, Claim dismissed by *Boyd v. J.E. Robert Co., 2011 U.S. Dist. LEXIS 10099 (E.D.N.Y., Feb. 2, 2011)*

Prior History: *Boyd v. J.E. Robert Co., 2008 U.S. Dist. LEXIS 72959 (E.D.N.Y., Sept. 24, 2008)*

Core Terms

plaintiffs', equitable tolling, defendants', state law claim, consumer, amended complaint, motion to dismiss, allegations, payoff, recommended, practices, notice, tolling, deceptive, statute of limitations, collection, intervene, reasons, Trusts, amend, concealment, misleading, time-barred, diligence, untimely, grounds, courts, newly discovered, communications, pleadings

LexisNexis® Headnotes

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

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > General Overview

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss on statute of limitations grounds is properly viewed as a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted. A plaintiff is required to plead enough facts to state a claim for relief that is plausible on its face. Specific facts are not necessary for a pleading to satisfy the requirements of *Fed. R. Civ. P. 8(a)(2)*; rather, the complaint need only give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

HN2[] **Complaints, Requirements for Complaint**

Bell Atlantic does not require a universal standard of heightened fact pleading, but instead requiring a flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible. Mere formulaic recitation of the elements of a cause of action will not do. Rather, factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true, even if doubtful in fact.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

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

HN3[] **Defenses, Demurrers & Objections, Motions to Dismiss**

When considering a motion to dismiss, courts must assume all allegations asserted in the complaint as true and draw all inferences in favor of the non-moving party. However, the complaint must surpass the threshold of setting forth enough facts to state a claim to relief that is plausible on its face. Although a *Fed. R. Civ. P. 12* motion seeks only to address the sufficiency of the pleadings, courts called upon to determine such a motion may rightfully consider written documents attached to the complaint as well as documents incorporated thereto by reference and those of which plaintiff had knowledge and relied upon in commencing her lawsuit.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN4[] **Heightened Pleading Requirements, Fraud Claims**

Claims of fraud must be pled with particularity. *Fed. R. Civ. P. 9(b)*. To satisfy the particularity requirement of *Rule 9(b)*, a complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Consumer Protection, Fair Debt Collection**

The Fair Debt Collection Practices Act mandates that any action to enforce liability arising under the act be commenced within one year from the date on which the violation occurs. *15 U.S.C.S. § 1692k(d)*. Although no consensus has yet emerged among New York courts as to whether the cause of action accrues on the date the allegedly impermissible communication is sent or received, the courts are unanimous that the latest date upon which the one year period begins to run is the date when a plaintiff receives an allegedly unlawful communication.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN6[] **Consumer Protection, Fair Debt Collection**

The Fair Debt Collection Practices Act, *15 U.S.C.S. § 1692k(d)*, statute of limitations is subject to equitable tolling where appropriate. The doctrine of equitable tolling enables courts in rare and exceptional circumstances to extend a statute of limitations where necessary to avoid inequitable outcomes. To benefit from equitable tolling, a litigant must allege that extraordinary circumstances prevented him from acting in a timely manner. Equitable tolling appropriate where plaintiff prevented in some extraordinary way from exercising his rights. Generally, equitable tolling is appropriate where a defendant has affirmatively engaged in conduct that conceals his wrongdoing, thereby preventing the plaintiff from discovering those facts that would give rise to a claim despite the exercise of reasonable diligence. Equitable tolling requires party to pass with reasonable diligence through period it seeks to have tolled; equitable tolling will stay running of statutory period only so long as the plaintiff has exercised reasonable care and diligence; equitable tolling not satisfied in the absence of affirmative action on the part of a plaintiff to preserve its right.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN7[] **Statute of Limitations, Equitable Estoppel**

A plaintiff who would otherwise be entitled to equitable tolling on the basis of special circumstances can forfeit that right if he fails to exercise due diligence.

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

HN8[] **Motions to Dismiss, Failure to State Claim**

In resolving a motion to dismiss a district court's consideration is limited to the factual allegations in the complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in the plaintiffs' possession or of which the plaintiffs had knowledge and relied on in bringing suit.

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

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

HN9[] **Motions to Dismiss, Failure to State Claim**

When matters outside the pleadings are presented in response to a *Fed. R. Civ. P. 12(b)(6)* motion, a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under *Fed. R. Civ. P. 56* and afford all parties the opportunity to present supporting material.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

Banking Law > Consumer Protection > Fair Debt Collection > Unfair Practices

HN10[] **Fair Debt Collection, Communications With Debtors**

The Fair Debt Collection Practices Act (FDCPA), *15 U.S.C.S. § 1692 et seq.*, was enacted to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors. With that purpose in mind, the FDCPA provides for a general prohibition against the use of false, deceptive, or misleading representations or means in connection with the collection of any debt, *15 U.S.C.S. § 1692e*. That section enumerates a non-exhaustive list of practices deemed violative of its provisions, which includes: the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. *15. U.S.C.S. § 1692e(10)*. In weighing whether a debt collector has run afoul of the FDCPA, courts apply an objective standard measured by how the least sophisticated consumer would interpret the communication. In order to reach this determination, however, the courts must a priori determine whether a given item of correspondence, for example, constitutes a communication within the meaning of the statute.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN11[] **Fair Debt Collection, Communications With Debtors**

Under the Fair Debt Collection Practices Act, a communication is defined as the conveying of information regarding a debt directly or indirectly to any person through any medium. *15 U.S.C.S. § 1692(a)(2)*.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

HN12[] **Fair Debt Collection, Communications With Debtors**

Courts apply the so-called least-sophisticated-consumer standard in order to ensure the protection of all consumers, even the naive and the trusting, against deceptive practices, and (2) protect debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices. No violation of the Fair Debt Collection Practices Act (FDCPA), *15 U.S.C.S. § 1692 et seq.*, occurs where a party alleges that his attorney has been misled to the party's detriment. Where an attorney is interposed as an intermediary between a debt collector and a consumer, the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior.

Banking Law > Consumer Protection > Fair Debt Collection > Communications With Debtors

Banking Law > Consumer Protection > Fair Debt Collection > Unfair Practices

HN13[] **Fair Debt Collection, Communications With Debtors**

The Fair Debt Collection Practices Act (FDCPA), *15 U.S.C.S. § 1692 et seq.*, protections are not triggered by communications initiated by someone other than the debt collector. When a consumer initiates the conversation, many of the policy reasons behind the FDCPA disappear, and, accordingly, debt collector's mere response to a plaintiff's inquiries concerning her outstanding mortgage do to constitute collection activity under the FDCPA.

Civil Procedure > Parties > Intervention > Motions to Intervene

HN14[] **Intervention, Motions to Intervene**

Under *Fed. R. Civ. P. 24(c)* a person desiring to intervene shall serve a motion to intervene upon the parties as provided in *Fed. R. Civ. P. 5*. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. *Fed. R. Civ. P. 24(c)*. However, an intervenor cannot simply rely on the pleadings previously filed by another party.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

HN15[] Statute of Limitations, Equitable Estoppel

Equitable tolling is applicable where the original action is timely filed but dismissed due to the plaintiff's failure to name the proper party as a defendant; equitable tolling is appropriate where the plaintiff timely brought the first action that was thereafter dismissed without prejudice on grounds of improper joinder; equitable tolling is warranted where the plaintiff timely filed the first action in the wrong venue and promptly refiled it in the correct venue after the statute of limitations had run.

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

HN16[] Preclusion of Judgments, Law of the Case

The law of the case doctrine is implicated when a court reconsiders its own ruling in the absence of an intervening ruling on that issue by a higher court. This doctrine requires that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise. Cogent and compelling reasons include an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.

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

HN17[] Deceptive & Unfair Trade Practices, State Regulation

N.Y. Gen. Bus. Law § 349(a) provides that deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful. The language and background of *§ 349* reveal that it is directed at addressing wrongs visited upon the public as consumers. Therefore, as a threshold matter, plaintiffs claiming the benefit of *§ 349* must charge conduct of the defendant that is consumer-oriented. Additionally, a plaintiff must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, for example, are unique to the parties and would not fall within the ambit of the statute.

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

HN18[] Deceptive & Unfair Trade Practices, State Regulation

Where a plaintiff succeeds in demonstrating that a defendant's conduct is directed to consumers, however, the inquiry is not at an end. A prima facie case of violation of *N.Y. Gen. Bus. Law § 349* requires an additional showing that the defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof. And although the statute does not mandate that a plaintiff establish the defendant's intent to defraud or mislead, where proof that the defendant knowingly and willingly violated this section is offered, a court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to $1,000. *N.Y. Gen. Bus. Law § 349(h)*. Similarly, although proof of justifiable reliance on the plaintiff's part is not required, a plaintiff seeking compensatory damages is obligated to show that the defendant's material deceptive act or practice caused the plaintiff actual, though not necessarily pecuniary, harm.

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

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

New York courts have adopted an objective definition of deceptive acts and practices, whether they be representations or omissions. They are those likely to mislead a reasonable consumer acting reasonably under the circumstances. Moreover, where a case involves omissions, *N.Y. Gen. Bus. Law § 349* surely does not require businesses to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation. A different outcome may be warranted, however, where the business alone possesses material information that is relevant to the consumer and fails to provide this information.

Banking Law > ... > National Banks > Interest & Usury > General Overview

Contracts Law > Defenses > Usury

HN20[] **National Banks, Interest & Usury**

The rudimentary element of usury is the existence of a loan or forbearance of money. *N.Y. Gen. Oblig. Law § 5-501*; although the general usury statutes refer to the loan of any money, goods, or things in action, the statutes have been held to be applicable only to the loan or forbearance of money. Where there is no loan, there can be no usury. Payment of a commission of more than six 6 per cent for a loan of government bonds which are subject to market fluctuations and are bought and sold on the market as other securities is not in violation of the New York usury law and does not render a loan usurious, since the terms interest and forbearance, as used in the usury law are applicable only to a loan of money. Although the usury statute speaks of money, goods or other things in action, a necessary element of a statutory cause of action in usury is the existence of a loan of money. the law of usury that it must be founded on a loan or forbearance of money. If neither of these elements exist, there can be no usury, however unconscionable the contract may be.

Counsel: [*1] For Thomas Boyd, Randa Jones, Plaintiffs: Mark Samuel Kaufman, LEAD ATTORNEY, Kaufman & Kahn, LLP, New York, NY; Curtis V. Trinko, Law Offices of Curtis V. Trinko, New York, NY; Paul Grobman, Paul Grobman, New York, NY.

For Joan Grant Boyd, Humberto Meneses, Sybil Taylor, Tonya Warters, on behalf of themselves and all others similarly situated, Plaintiffs: Curtis V. Trinko, Law Offices of Curtis V. Trinko, New York, NY; Mark Samuel Kaufman, Kaufman & Kahn, LLP, New York, NY; Paul Grobman, Paul Grobman, New York, NY.

For J.E. Robert Co., Inc., JER Revenue Services, LLC, Defendants: Jonathan David Elliot, LEAD ATTORNEY, Zeldes, Needle & Cooper, Bridgeport, CT.

For NYCTL 1996-1 Trust, NYCTL 1997-1 Trust, NYCTL 1998-1 Trust, NYCTL 1999-1 Trust, Defendants: Stephen Edward Kitzinger, LEAD ATTORNEY, New York Law Department, New York, NY.

Judges: Ramon E. Reyes, Jr., United States Magistrate Judge.

Opinion by: Ramon E. Reyes, Jr.

Opinion

REPORT & RECOMMENDATION

RAMON E. REYES, JR., Magistrate Judge:

Plaintiffs Joan Grant Boyd ("Boyd"), Randa Jones ("Jones"), Humberto Meneses ("Meneses"), Sybil Taylor ("Taylor"), and Tanja Warters ("Warters"), assert in their Second Amended Complaint ("Second Am. Compl."), individually and on **[*2]** behalf of a class of others similarly situated, five causes of action under the Fair Debt Collection Practices Act ("FDCPA"), *15 U.S.C. §§ 1692 et seq.*, *New York General Business Law § 349* (material deceptive or misleading practices), *New York General Obligations Law § 5-501* (usury), as well as unjust enrichment and breach of contract under New York common law. Plaintiffs' claims all stem from defendants' J.E. Robert Co., Inc. ("J.E. Robert") and JER Revenue Services LLC ("JER") (collectively, "the JER defendants") alleged improper practices of demanding and collecting purported "debt cancellation" and other fees "in connection with the servicing of residential tax liens that the City of New York had assigned to" defendants NYCTL 1996-1 Trust ("1996-1 Trust"), NYCTL 1997-1 Trust ("1997-1 Trust"), NYCTL 1998-1 Trust ("1998-1 Trust"), and NYCTL 1999-1 Trust ("1999-1 Trust") (collectively, the "Trust defendants"). (Docket Entry No. 83 at ¶ 2.)

The JER and Trust defendants have moved separately to dismiss the Second Amended Complaint on a number of grounds, including failure to state a claim, failure to timely assert a claim prior to the expiration of the applicable statute of limitations, **[*3]** and lack of subject matter jurisdiction. (Docket Entry Nos. 113 and 115, respectively.) Defendants also argue that any and all remaining state law claims ought to be dismissed for lack of supplemental jurisdiction. (*Id*.)

For the reasons which follow, I respectfully recommend that defendants' motions be granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts of this case are amply set forth in Magistrate Judge Cheryl L. Pollack's thorough and comprehensive Report and Recommendation ("Report") of March 20, 2008, as well as in Judge Pollack's June 27, 2006 Report and Recommendation in *Binson v. J.E. Robert Co., Inc*., No. 03-CV-3562 (JG) ("Binson R&R"), and need not be repeated here. (Docket Entry No. 63.) In sum, defendants are alleged to have demanded and collected from plaintiffs certain fees in connection with the resolution of outstanding residential liens imposed as a result of plaintiffs' delinquent payment of various real property taxes, water rents, sewer rents, and surcharges owed to the City. Plaintiffs allege that these practices violate federal statutory, and state statutory and common law. Given the somewhat convoluted procedural history of this **[*4]** case, it is beneficial to set forth that history below.

The *Binson* Action

On July 22, 2003, Issac and Miriam Binson ("the "Binsons") commenced a putative class action against the JER defendants, the Bank of New York, Boland & Moskowitz, LLP (the "Boland firm"), and the 1998-1 Trust, alleging unlawful conduct in association with the resolution of outstanding liens for delinquent real property taxes that had been placed on the Binsons' properties. (Binson R&R at 4-5.) In the initial complaint, the Binsons alleged, among other things, that the defendants violated the Truth In Lending Act ("TILA"), *15 U.S.C. §§ 1601 et seq*, by collecting amounts in excess of those permitted by the parties' agreements or law, and by failing to provide adequate disclosure statements as required by the statute. (*Id*. at 5.) The Binsons also alleged that the JER defendants' and the 1998-1 Trust's conduct violated *New York General Business Law § 349* and General Obligations Law *§ 5-501*. (*Id*. at 5.)

On February 15, 2005, the Binsons sought to amend the complaint to join six new plaintiffs, Thomas Boyd and Joan Grant Boyd, Sybil Taylor, Randa Jones, Humberto Meneses, and Tanya Warters (collectively, the "Prospective **[*5]** Plaintiffs"), pursuant to *Rules 15(a)* and 20 of the Federal Rules of Civil Procedure, as well as several new Trust defendants and claims of breach of contract and unjust enrichment under New York common law. (*Binson*, Docket No. 82 (the "2005 Motion.")) The Binson plaintiffs' proposed first amended complaint alleged that the Prospective Plaintiffs were charged debt cancellation or discontinuance fees in violation of *sections 1692e* and f of the FDCPA. (*Id*., Exh. A at ¶¶ 84, 100, 113, 129, 165, 172; Binson R&R at 8.)

On May 26, 2005, the Binsons voluntarily withdrew their claims with prejudice pursuant to *Rule 41(a)(1) of the Federal Rules of Civil Procedure*. See *Fed. R. Civ. P. Rule 41*. The class having not been certified by that point, Judge Pollack concluded that the Binsons' *Rule 41(a)(1)* withdrawal mooted the entire action, and deprived the court of subject matter jurisdiction to consider any other matters, including the pending motion to amend the complaint. (Binson R&R at 20.) Although the Binsons attempted to characterize their motion to add the six Prospective Plaintiffs as a motion to intervene, Judge Pollack rejected that contention. Specifically, Judge Pollack found that apart **[*6]** from the Binsons' motion to amend, no separate motion to intervene had ever been filed by the Prospective Plaintiffs as required by *Federal Rule of Civil Procedure 24*, nor had the plaintiffs in their moving papers ever discussed the issue of intervention. (*Id*. at 21.) Indeed, Judge Pollack found that "there is no question that the *Binsons* filed the then pending motion as a motion to amend pursuant to Rules 15 and 20 of the Federal Rules of Civil Procedure. (Binson R&R at 20.) (emphasis added.) Judge Pollack therefore concluded that no motion to intervene was then pending before the Court, and that even if the plaintiffs' motion could be construed as a motion to intervene, it was nevertheless mooted by the withdrawal of the Binsons' claims. (Binson R&R at 22.) District Judge John Gleeson agreed with the conclusions reached by Judge Pollack, and issued an Order adopting the Binson R&R in its entirety.

The Binson action was thereafter dismissed on January 19, 2007.

This Action

Prior to the dismissal of *Binson*, the plaintiffs commenced this action on May 20, 2005. In the Amended Complaint, plaintiffs asserted a variety of claims against the defendants. Each plaintiff alleged that the JER **[*7]** defendants and the 1997-1 and 1998-1 Trusts violated the FDCPA by attempting to collect a variety of improperly charged fees in connection with the resolution of the outstanding tax liens ("FDCPA claims"). (Docket Entry No. 20 ("Am. Compl.") at ¶¶ 129-144.) The Boyds alleged in separate causes of action that the JER defendants and the 1998-1 Trust violated TILA by (1) collecting amounts in excess of those permitted by the "relevant documents" and by failing to timely refund such amounts, and (2) providing an improperly drafted TILA disclosure statement (collectively, "Boyds' TILA claims"). (*Id*. at ¶¶ 142-144, 145-148.) All plaintiffs asserted claims against all defendants (1) alleging materially deceptive and misleading practices under *New York General Business Law § 349*, and (2) for unjust enrichment and breach of contract under New York common law. (*Id*. at ¶¶ 149-153, 154-160, and 161-163, respectively.) Finally, plaintiffs alleged that the JER defendants and the 1998-1 Trust violated *New York General Obligations Law § 5-501* [1] by charging and collecting in conjunction with the Payment Plan and Forbearance Agreements a rate of interest deemed usurious under the statute. (*Id*. at ¶¶ **[*8]** 164-167.)

In April 2007, the Trust and JER defendants separately moved to dismiss the Amended Complaint for a variety of reasons. (Docket Entry Nos. 31 and 33, respectively.) The JER defendants argued that all of the individual and class claims failed to allege wrongful conduct by J.E. Robert, and therefore should be dismissed for failure to state a claim. (Report at 7.) The JER defendants also contended that plaintiffs' FDCPA and the Boyds' TILA claims were barred by the applicable statutes of limitations, and in any event, that neither JER nor J.E. Robert was a "creditor" as defined by TILA. (*Id*.) The Trust defendants joined in the JER defendants' motion to dismiss the FDCPA and TILA claims as time-barred. The Trust defendants argued additionally that the Court lacked original jurisdiction, and should refuse to exercise supplemental **[*9]** jurisdiction over any state law claims asserted against them.

In her Report, Judge Pollack recommended that defendants' motions be granted in part and denied in part. Specifically, Judge Pollack recommended that J.E. Robert's motion to dismiss all claims against it for failure to allege wrongful conduct be denied. (Report at 9-14.) Judge Pollack further recommended that the federal claims against the 1996-1, 1997-1, and 1999-1 Trusts be dismissed as time-barred. (*Id*. at 24-25.) Judge Pollack also determined that the motions to dismiss the federal claims against the JER defendants ought to be denied, [2] save

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[1] It bears noting that although this claim is asserted on behalf of *all* plaintiffs, the only factual allegations in support of the claim are made by plaintiff Boyd. Boyd alleges that defendants violated this section by charging and collecting, in conjunction with the Payment Plan and Forbearance Agreements, a usurious interest rate. (*Id*. at ¶¶ 164-167.)

the Boyds' TILA claims and Taylor's and Warters's FDCPA claims, as to which she recommended dismissal. (*Id*. at 14-24.)

As for Taylor's FDCPA claims, Judge Pollack found that because Taylor failed to **[*10]** plead that she had acquired title to the property on or before October 1, 2003, she could not properly be considered a putative member of the *Binson* class and, as such, could not avail herself of the tolling doctrine enunciated in *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*. (Report at 27.) According to *American Pipe*, "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe, 414 U.S. at 554*. Judge Pollack also found that because Warters had requested and received the allegedly improper payoff quote in May of 2004, long after the *Binson* class period had ended, and the Amended complaint contained no other allegations of contact between Warters and the defendants prior to that time, Warters could not be considered a putative member of the *Binson* class either. (Report at 27-28.) Judge Pollack further rejected Taylor's and Warters's equitable tolling argument on the ground that plaintiffs were put on notice of their potential FDCPA claims by the filing of *Binson*. (*Id*. at 29-31.) Accordingly, Judge Pollack **[*11]** recommended that both Taylor's and Warters's FDCPA claims be dismissed as time-barred.

Finally, Judge Pollack recommended that the Court retain jurisdiction over all state law claims with the exception of Taylor's *§ 349* claims alleging overcharges of interest and material deceptive and misleading practices, which she found ought to be dismissed. (*Id*. at 31-33.)

On September 24, 2008, United States District Judge Joseph F. Bianco adopted the Report in its entirety, "with the exception of the recommended dismissal of plaintiff Taylor's *Section 349* state law claim . . ." (Docket Entry No. 70 ("September 24th Order") at 2.) Judge Bianco agreed with Judge Pollack's determination that Taylor's FDCPA claims were untimely, but nevertheless granted Taylor "an opportunity to re-plead to more clearly articulate how and when she claims she became the beneficial owner of the property" and thereby possibly invoke *American Pipe* tolling. (September 24th Order at 9.) Similarly, Judge Bianco agreed with Judge Pollack that Warters's FDCPA claims were time-barred, but nevertheless granted Warters leave to amend the complaint a second time to plead sufficient grounds for equitable tolling. (*Id*.) Thus, in **[*12]** the wake of Judge Bianco's adoption of the Report, all that remained of plaintiffs' claims were: (1) the Boyds' and Jones's FDCPA claims against the JER defendants and the 1998-1 Trust; [3] and (2) all of plaintiffs' state common law and statutory claims against all defendants.

On November 12, 2008, plaintiffs filed their Second Amended Complaint. In the Second Amended Complaint, plaintiffs have asserted claims against (1) all defendants for violation of *FDCPA § 1692e* and f; [4] (2) all defendants for violation of *New York General Business Law § 349* (material misleading or deceptive practices); (3) all defendants for unjust enrichment; (4) all defendants for breach of **[*13]** contract; and (5) JER and the 1998-1 Trust for violation of *New York General Obligations Law § 5-501* (usury). [5]

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[2] Specifically, Judge Pollack found that, because the Boyds and Jones alleged that they both owned property and received allegedly improper communications concerning their outstanding debts within one year of the filing of the *Binson* action, they are properly considered putative members of that class such that *American Pipe* tolling would apply to preserve their otherwise untimely claims.

[3] Although the applicable statute of limitations for the Boyds' and Jones's FDCPA claims had run by the time of the filing of the instant action, *American Pipe* tolling operated to save these plaintiffs' otherwise time-barred claims. Specifically, these two plaintiffs have satisfied the eligibility criteria for inclusion in the *Binson* class in that they allege in the Amended Complaint that they had requested and received the purportedly illegal payoff quotes during the *Binson* class period. (Am. Compl. at ¶¶ 53-54, 60, 61, 64.)

[4] Plaintiffs' Second Amended Complaint appears to contain claims asserted against all defendants for violation of the relevant FDCPA provisions, whereas, in plaintiffs' Amended Complaint, the FDCPA claims were brought solely against the JER, 1997-1 and 1998-1 Trust defendants. This issue is explored further in Point III.B.

[5] Plaintiff Meneses has since withdrawn from the case. (Docket Entry No. 153.)

Pursuant to *Federal Rules of Civil Procedure 12(b)(6)* and *9(b)*, J.E. Robert and JER again move to dismiss (1) Sybil Taylor's FDCPA claim and (2) Tanja Warters's FDCPA claim as time-barred. In addition, because plaintiffs Taylor and Warters have allegedly failed to state sufficient claims under the FDCPA, the JER and Trust defendants request that this Court decline to exercise supplemental jurisdiction over their remaining state law claims. Finally, the Trust defendants offer additional arguments in support of their contention that certain of plaintiffs' state law claims ought to be dismissed as being without merit.

DISCUSSION

I. Legal Standard Governing Motions to Dismiss

HN1[] "A motion to **[*14]** dismiss on statute of limitations grounds is properly viewed as a *Rule 12(b)(6)* motion to dismiss for failure to state a claim upon which relief can be granted." *Jowers v. Lakeside Family & Children's Servs., 435 F. Supp. 2d 280, 283 (S.D.N.Y. 2006)*. In *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Supreme Court rejected the time-enduring standard it had articulated in *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, that a complaint ought not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id. at 45-46*. The Court instead chose to alter the existing regime of traditional notice pleading, substituting in lieu of the "no set of facts" language, the requirement that the plaintiff plead enough facts "to state a claim for relief that is plausible on its face." *Bell Atlantic Corp., 550 U.S. at 570*. Indeed, just two weeks after issuing its opinion in *Bell Atlantic*, the Court cited it in support of the proposition that "[s]pecific facts are not necessary [for a pleading to satisfy the requirements of *Rule 8(a)(2) of the Federal Rules of Civil Procedure*]"; rather, the complaint need only "'give **[*15]** the defendant fair notice of what the [...] claim is and the grounds upon which it rests.'" *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (quoting *Bell Atlantic*'s quotation from *Conley, 355 U.S. at 47*).

The Second Circuit interpreted the Supreme Court's holding in ***HN2***[] *Bell Atlantic* as "not requiring a universal standard of heightened fact pleading, but [...] instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)* (emphasis in original). Indeed, courts have recognized that while the Supreme Court did not prescribe a heightened standard of factual pleading in its holding in *Bell Atlantic*, mere "formulaic recitation of the elements of a cause of action will not do. [Rather], [f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Williams v. Berkshire Fin. Grp. Inc., 491 F. Supp. 2d 320, 324 (E.D.N.Y. 2007)* (quoting *Bell Atlantic Corp., 550 U.S. at 545*).

HN3[] When **[*16]** considering a motion to dismiss, courts must assume all allegations asserted in the complaint as true and draw all inferences in favor of the non-moving party. *Somin v. Total Cmty. Mgmt. Corp., 494 F. Supp. 2d 153, 158 (E.D.N.Y. 2007)* (citing *Watts v. Servs. for the Underserved, No. 06-CV-2156 (NGG)(LB), 2007 U.S. Dist. LEXIS 41209, 2007 WL 1651852, at *2 (E.D.N.Y. June 6, 2007))*. As explained above, however, the complaint must surpass the threshold of setting forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp., 550 U.S. at 570*. Although a Rule 12 motion seeks only to address the sufficiency of the pleadings, courts called upon to determine such a motion may "rightfully consider written documents attached to the complaint as well as documents incorporated thereto by reference and those of which plaintiff had knowledge and relied upon in commencing her lawsuit." *Somin, 494 F. Supp. 2d at 158*. *See also* *Brass v. Amer. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993)*.

Finally, ***HN4***[] claims of fraud must be pled with particularity. *See* *Fed. R. Civ. P. 9(b)*. "To satisfy the particularity requirement of *Rule 9(b)*, a complaint must adequately specify the statements it claims **[*17]** were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989)*.

II. Taylor's and Warters's FDCPA Claims

A. *American Pipe* Tolling Cannot Save Taylor's Untimely FDCPA Claims

HN5[] The FDCPA mandates that any action to enforce liability arising under the act be commenced "within one year from the date on which the violation occurs." *15 U.S.C. § 1692k(d)*. Although no consensus has yet emerged among New York courts as to whether the cause of action accrues on the date the allegedly impermissible communication is sent or received, the courts are unanimous that "the latest date upon which the one year period begins to run is the date when a plaintiff receives an allegedly unlawful communication." *Somin, 494 F. Supp. 2d at 158*. *See also* *Bates v. C & S Adjusters, Inc., 980 F.2d 865, 868 n.2 (2d Cir. 1992)* (acknowledging but declining to decide issue as to whether claim under FDCPA accrues upon mailing or receipt of allegedly unlawful communication); *Seabrook v. Onondaga Bureau of Medical Economics, Inc., 705 F. Supp. 81, 83 (N.D.N.Y. 1989)* **[*18]** (recognizing that there are "two possibilities" as to accrual of claims under FDCPA: date on which the allegedly impermissible communication was sent and the date on which it was received). A thorough and well-researched analysis of the origins and further refinement of the Supreme Court's holding in *American Pipe & Construction Co. v. Utah* is contained in Magistrate Judge Pollack's Report of March 20, 2008, to which the reader is directed. (Report at 17-24.) For the purposes of this motion to dismiss, my analysis is limited to an examination of whether Taylor has successfully re-pled facts to establish her membership in the *Binson* class, and thereby benefit from *American Pipe* tolling. I find that she has failed to do so.

The *Binson* class was limited to persons whose claims arose within a year prior to the commencement of that action on July 22, 2003. Therefore, in order to be considered a putative member of the *Binson* FDCPA class, Taylor must have both (i) owned property within New York City between July 23, 2002 and July 22, 2003 and (ii) been told during that same period that they owed fees or charges which defendants had no right to collect. (Report at 27.) Taylor has failed to **[*19]** position herself as a member of the *Binson* class because she has included in the Second Amended Complaint no new allegations that would alter Judge Pollack's analysis of defendants' prior motion to dismiss, which yielded the conclusion that *American Pipe* tolling was unavailable. Specifically, although Taylor included additional allegations in the Second Amended Complaint that she became a "beneficial owner" of the property in question at the time of her husband's death (Second Am. Compl. at ¶¶ 79-80), thereby seemingly establishing one of the two criteria for inclusion in the *Binson* class, [6] she nonetheless continues to lack standing to participate in the class because the misconduct she alleges as the basis of her FDCPA claim occurred *subsequent* to the filing of *Binson* on July 22, 2003. Indeed, the only conduct Taylor complains of that occurred prior to the filing of *Binson* was defendants' having provided her with a payoff quote on or about April 10, 2003. (*Id*. at ¶ 88.) Taylor has not, however, alleged any *misconduct or impropriety* with regard to the April 10, 2003 payoff quote, or that she suffered any injury as a result of the same. (*Id*. at ¶¶ 87-90.) Rather, the first *wrongful* **[*20]** or *improper* quote Taylor alleges she received was in November of 2003, which she subsequently paid in December of the same year. (*Id*. at ¶ 93 ("In characterizing these amounts as due and owing as of December 1, 2003 in the payoff quotes, JER and each of the Trusts violated ¶ 1692e of the FDCPA.")) As such, the prior Court Order ought to govern the disposition of this issue: "[t]o the extent Taylor [...] assert[s] that [she] made the allegedly 'illegal' payment pursuant to defendants' demand after the *Binson* case was filed, those claims cannot benefit from tolling under *American Pipe*." (Order at 7-8.) Quite notably, Taylor does not argue in her opposition brief that *American Pipe* tolling is available to her. Rather, she argues exclusively that her FDCPA claims are subject to *equitable* tolling (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Pls. Mem. Opp.") at 9-26 ("Warters' And Taylors' FDCPA Claims Are Subject to Equitable Tolling")), which Judge Bianco did not grant her leave to assert. Accordingly, Taylor's FDCPA claims against both the JER and Trust defendants are time-barred and should be dismissed.

B. Warters's FDCPA Claims Are Untimely

1. Warters's FDCPA Claims Are Not Subject to Equitable Tolling

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[6] It should not be overlooked that Taylor has failed **[*21]** to cite to any law to establish that her purported "beneficial ownership" of the property satisfies the first criteria for inclusion in the Binson class for the purpose of determining the availability of *American Pipe* tolling.

HN6[] The FDCPA's statute of limitations is subject to equitable tolling where appropriate. The doctrine of equitable tolling enables courts in "rare and exceptional" circumstances to extend a statute of limitations where necessary to avoid inequitable outcomes. *Bertin v. United States, 479 F.2d 489, 494 n.3. (2d Cir. 2007)*; *see also Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir. 2000)* (per curiam); *Bowers v. Transportacion Maritima Mexicana, S.A., 901 F.2d 258, 264 (2d Cir. 1990)*. To benefit from equitable tolling, a litigant must allege that "extraordinary circumstances prevented him from acting in a timely manner." *Somin, 494 F. Supp. 2d at 158*. *See Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996)* (equitable tolling appropriate where plaintiff prevented in some extraordinary way from exercising his rights). Generally, equitable tolling is appropriate where a defendant **[*22]** has affirmatively engaged in conduct that conceals his wrongdoing, thereby preventing the plaintiff from discovering those facts that would give rise to a claim despite the exercise of reasonable diligence. *Coveal v. Consumer Home Mtge. Inc., No. 04-CV-4755, 2005 U.S. Dist. LEXIS 5003, 2005 WL 704835, at *4 (E.D.N.Y. March 29, 2005)*; *see also Chapman v. ChoiceCare Long Island Term Disability Plan, 288 F.3d 506, 512 (2d Cir. 2002)*; *Johnson, 86 F.3d at 12* (equitable tolling requires party to pass with reasonable diligence through period it seeks to have tolled); *Dodds v. Cigna Sec., Inc.., 12 F.3d 346, 350 (2d Cir. 1993)* (equitable tolling will stay running of statutory period "only so long as the plaintiff has exercised reasonable care and diligence" (internal quotations omitted)), *cert. denied*, *511 U.S. 1019, 114 S. Ct. 1401, 128 L. Ed. 2d 74 (1994)*; *Bowers, 901 F.2d at 264* (equitable tolling not satisfied in the absence of "affirmative action on the part of [plaintiff] to preserve its right").

In opposition to the prior motion to dismiss, Warters sought leave to amend the complaint and argued that she could assert additional facts demonstrating the 1997-1 Trust's active concealment, or at the very least the self-concealing nature, of the improper **[*23]** conduct. (September 24th Order at 9.) Judge Bianco granted her leave to do so. Of the twenty-nine paragraphs in the Second Amended Complaint concerning Warters, only nine contain new allegations. [7] Of the nine new paragraphs, two merely allege in conclusory terms that Warters lacked knowledge of defendants' improper conduct (Second Am. Compl., ¶¶ 136-37), and three contain pure conclusions of law:

> ¶142. In sum, Warters' claims against the 1997-1 and 1998-1 Trusts depended on information held internally by the Trusts that was otherwise unavailable to Warters, which information the Trusts did not disclose until well within one year of the filing of this lawsuit.
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> ¶143. As a result, the claims brought by Warters were based on illegal actions by the 1997-1 and 1998-1 Trusts which were self-concealing.
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> ¶144. Since Warters had no actual or inquiry notice of the basis for her FDCPA claims in this action until November 2004 at the earliest, the statute of limitations for her FDCPA claims should be equitably tolled until November 2004.

(Id. at ¶¶ 142-144). The four paragraphs that contain new assertions are listed here:

> ¶138. Indeed, November 12, 2004, when JER provided discovery in the Binson case **[*24]** about instances in which the 1998-1 Trust charged so-called "Debt Cancellation Fees", was the first time that JER and the 1998-1 Trust disclosed to Warters or to her counsel that a "Debt Cancellation Fee" had been assessed by JER and the 1998-1 Trust against Warters' account.
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> ¶139. During depositions in the Binson case on March 24, 2005 and May 3, 2005, JER and the 1998-1 Trust for the first time disclosed that the so-called "Debt Cancellation Fee" charged Warters on May 19, 2004 was for purported "legal services".
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> ¶140 Such alleged "legal services" had not yet even been rendered as of May 19, 2004.
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> ¶141 To this day, the 1997-1 Trust has failed to disclose whether it charged Warters for a so-called Debt Cancellation Fee, or for legal fees for legal services which had not yet been performed, or for any legal fees and costs which the 1997-1 Trust allegedly was entitled to collect.

(*Id*. at ¶¶ 138-41.)

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[7] Most of the factual allegations are identical to those previously asserted. (Compare Am. Compl., ¶¶ 109-128 with ¶¶ Second Am. Compl., ¶¶ 116-135.)

In opposition to the instant motion to dismiss, Warters appears largely to have abandoned her concealment theory, and instead argues that equitable **[*25]** tolling is warranted because she was "justifiably ignorant" and never put on notice of her FDCPA claims (Pls. Mem. Opp. at 9-20.) [8] Relying on *Valdez v. United States, 518 F.3d 173 (2d Cir. 2008)* and *Veltri v. Building Service 32B-J Pension Fund, 393 F.3d 318 (2d Cir. 2004)*, Warters contends that neither concealment nor affirmative misconduct must be alleged in order to invoke the doctrine of equitable tolling. (*Id*. at 10-11). According to Warters, the relevant inquiry is whether and when a reasonable plaintiff in her position would have been aware of the existence of her FDCPA causes of action. (*Id*. at 11.) Warters's argument must be rejected for three reasons.

First, in adopting Judge Pollack's Report in relevant part, Judge Bianco agreed that Warters had failed to plead facts to support equitable tolling. (September 24th Order at 9 ("The Court agrees with the R&R's conclusion that the Amended Complaint does not plead sufficient grounds for equitable tolling.")) In so doing, Judge Bianco rejected **[*26]** the very same arguments, although phrased slightly differently, that Warters makes here — because of defendants' conduct she was not put on notice of her FDCPA claims during the statute of limitations period:

> Moreover, in opposition to the motion to dismiss, Warters not only alleged, but demonstrated through the introduction of evidence, that the 1998-1 Trust did not reveal that it had charged a "debt cancellation fee" to either Warters or Taylor until November 2004, and did not reveal that the 'debt cancellation fee' was charged for work which had not yet been performed until 2005. Indeed, the 1996-1, the 1997-1 and the 1999-1 Trusts still have not disclosed whether they charged Warters, Taylor or other delinquent taxpayers for 'debt cancellation fees' and legal fees and costs for services which have not yet been performed, which is why Taylor and Warters were forced to assert their allegations against these Trusts 'upon information and belief.' . . . Thus, clearly the claims by less sophisticated delinquent taxpayers such as Warters against the 1997-1 Trust cannot be dismissed on statute of limitations grounds until the Court addresses 'the question of *what information was realistically* **[*27]** *available to Plaintiffs and when it was available*.

(Plaintiffs' Objections to the Report and Recommendation Dated March 20, 2008, Docket No. 66 at 12 (emphasis added) ("Pls' R&R Object.").) Nevertheless, Judge Bianco granted Warters's request to amend the complaint to include "*additional* allegations demonstrating concealment" and "the self concealing nature of the wrongful actions of the 1997-1 Trust." (September 24th Order at 9 (emphasis added).) The Second Amended Complaint, however, contains no *new* or *additional* allegations of concealment or self-concealing conduct. Rather, it merely contains a reiteration in separate paragraphs (Second Am. Compl., ¶¶138-41) of what Warters argued in opposition to the prior motion to dismiss (Plaintiffs' Opposition to Defendants' Motion to Dismiss at 17, n. 8-9, Docket No. 36), and when objecting to Judge Pollack's Report (Pls' R&R Object. at 12). Judge Bianco rejected those very same allegations and arguments as a basis for equitable tolling. Having made no new or additional allegations concerning concealment, Warters's attempt to relitigate an issue she has already lost must be rejected.

Second, although both *Valdez* and *Veltri* recognize that fraudulent **[*28]** concealment is not "essential" to invoke the doctrine of equitable tolling, *Valdez, 518 F.3d at 182*, both cases are limited to their facts, were decided on narrow issues, and are therefore inapposite. *Veltri* was a case under the Employee Retirement Income Security Act of 1974 ("ERISA"), *29 U.S.C. §§ 1001-1461*, commenced eleven years after the plaintiff's claim for benefits was denied, and five years beyond the expiration of the applicable statute of limitations. Veltri claimed that he was neither aware of his right to take an administrative appeal of the initial adverse benefits determination, nor of his right to file a federal court action challenging that determination. *Veltri, 393 F.3d at 322*. While the defendants had provided Veltri with a booklet that notified him of his right to appeal, they did not comply with a federal regulation requiring that a notice of adverse determination also include "a statement of the claimant's right to bring a civil action." *29 C.F.R. § 2560.503-1(g)(1)*. The Second Circuit held that the defendants' failure to comply with this regulation established a "special circumstance" warranting equitable tolling, even though the failure to provide such notice **[*29]** would not otherwise "normally be held to mandate equitable tolling." *Veltri, 393 F.3d at 324*.

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[8] Of the fifteen pages in her opposition brief devoted to the equitable tolling issue, only one page directly addresses the issue of concealment. (Pls. Mem. Opp. at 9-24, *see* part C. at 20-21.)

Valdez also involved "special circumstances" that warranted equitable tolling even in the absence of fraudulent concealment. *518 F.3d at 183*. The tolling dispute in *Valdez* arose from the federal government's failure to disclose to patients that certain physicians who provide services in what appear to be private hospitals or clinics, are deemed to be federal employees. Patients receiving such treatment are not aware, because they are never told or put on any notice, that the clinics they attend are government-funded or that doctors treating them are government employees. The Court considered that although such an omission does not rise to the level of fraudulent concealment, it nevertheless creates a potential trap in states such as New York, which provide a longer statute of limitations period for malpractice claims than that of the Federal Tort Claims Act, *28 U.S.C. § 2679*. The Court noted expressly the number of cases in which the United States sought to take advantage of this "trap", suggesting "that it is aware of the consequences of its failure to disclose the material facts of federal **[*30]** employment by doctors who might reasonably be viewed as private practitioners." *Valdez, 518 F.3d at 183*. The Court found the government's conduct "more problematic than the non-disclosure that justified invoking the doctrine of equitable tolling in *Veltri*."

Thus, although acts of fraudulent concealment did not exist in either *Valdez* or *Veltri*, other "special circumstances" were present that warranted equitable tolling. Here, Warters has failed to plead the existence of any such special circumstances sufficient to warrant equitable tolling in the absence of fraudulent concealment. Rather, she relies on a garden variety claim that equitable tolling is warranted because she was "justifiably ignorant" and never put on notice of her FDCPA claims. As discussed above, that argument has already been rejected by Judge Bianco.

Third, Warters has failed to allege any facts whatsoever to demonstrate that she engaged in the type of due diligence necessary to invoke equitable tolling even in the absence of fraudulent concealment. (Second Am. Compl. at ¶¶ 137-144.) In *Veltri*, the Court recognized that ***HN7***[] a plaintiff who would otherwise be entitled to equitable tolling on the basis of "special circumstances" **[*31]** could forfeit that right if he failed to exercise due diligence. *393 F.3d at 326*. Further, none of the cases cited in plaintiffs' opposition brief relieve Warters of her diligence obligation. Rather, plaintiffs appear to argue that because "defendants have not and cannot point to any facts which existed at the time plaintiffs Warters and Taylor paid off the delinquent tax liens which would have given either one of them any indication that they might be the victims of a scheme to recover improper attorneys' fees and costs," plaintiffs were effectively relieved of any such due diligence obligation. In the alternative, plaintiffs appear to argue that, given defendants' alleged failure to provide certain information requested by plaintiffs during the discovery process, even if plaintiffs had acted with the requisite diligence, they inevitably would have been stymied in their efforts to discover their claims. These two arguments must be rejected.

As to Warters's first argument, the Court is inclined to agree with defendants that plaintiffs improperly seek to have applied the legal standard that would govern had plaintiffs alleged fraud. Curiously, however, plaintiffs' pleadings contain no **[*32]** such allegation. (Second Am. Compl. at ¶¶ 77-144) Plaintiffs rely nearly exclusively on *Shah v. Meeker, 435 F.3d 244 (2d Cir. 2006)*, in arguing that they were under no obligation to exercise due diligence to discover their claims as a condition precedent to the application of equitable tolling. *Shah*, however, is distinguishable in that it was a securities fraud case and, as such, allegations of fraud were central to the plaintiffs' theory of liability. *Shah* is, therefore, inapposite. Having failed to allege any fraud by defendants, Warters has done nothing to relieve herself of her diligence obligation.

Warters's second argument belies a clear understanding as to what a court may properly consider in determining a motion to dismiss. ***HN8***[] In resolving a motion to dismiss the district court's "consideration is limited to the factual allegations in [the] complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *See International Longshoremen's Ass'n, 518 F. Supp. 2d 422, 451 (E.D.N.Y. 2007)* **[*33]** (quoting *Brass, 987 F.2d at 150 (2d Cir. 1993))*. Plaintiffs' reference to defendants' alleged refusal to produce information in discovery is, therefore, irrelevant to the Court's analysis of defendants' motion to dismiss.

2. Warters's Reliance on Matters Outside the Pleadings is Misplaced

In order to rescue her untimely FDCPA claims, Warters relies on purportedly "newly discovered" material outside the pleadings: (1) a Verrazano Closing Sheet dated May 19, 2004, indicating that at the closing on the sale of Warters's property $2,500 and $58,000 were placed in escrow to "payoff JER [9]"; (2) an escrow deposit sheet dated May 19, 2004 indicating that these amounts were placed in escrow to "pay to JE Roberts/NYCTL for tax liens"; (3) a history of communications relating to Warters's tax liens indicating JER's transmittal of additional payoff quotes to Verrazano on June 3, 18, and 22, 2004 ("CUBS notes"); (4) a copy of JER's June 22, 2004 payoff quote ("June Payoff Quote"); (5) copies of two checks dated July 2, 2004 by which Verrazano paid the amounts demanded in the June Payoff Quote; and (6) a JER "Check Request Form" indicating an overpayment on a payoff of July 6, 2004 for liens then **[*34]** still attached to the property Warters had sold on May 19, 2004. (Pl. March 19th Letter, Exhs. A, B, C, D, E, F.) Based on this material, Warters contends that her FDCPA claims accrued, at the earliest, in July 2004, well within one year of the May 20, 2005 filing of this action.

While the Court was initially inclined to convert the relevant portions of defendants' motions to dismiss into motions for summary judgment in light of this evidence, after hearing oral argument and reviewing the parties' subsequent submissions, **[*35]** the Court concludes that conversion is inappropriate. *See Friedl v. City of New York, 210 F.3d 79, 83 (2d Cir. 2000)* (***HN9***[] "[W]hen matters outside the pleadings are presented in response to a 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under [*Federal Rule of Civil Procedure] 56* and afford all parties the opportunity to present supporting material.") (internal quotations omitted) (quoting *Fonte v. Bd. of Managers of Cont'l Towers Condo., 848 F.2d 24, 25 (2d Cir. 1988))*; *see generally* 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1366 (3d ed. 2004). In any event, Warters's reliance on the "newly discovered" material is misplaced.

a. The Material is not "Newly Discovered"

It appears that much of the "newly discovered" information was previously known to Warters's counsel. For example, the CUBS notes indicating activity on Warters's account after May 19, 2004, have been in the possession of plaintiffs' counsel since the initial disclosures in this matter. (Defendants' March 19th Letter ("Def. March 19th Letter") at 2.) Similarly, information **[*36]** concerning the purported July 6, 2010 payoff as reflected in the Check Request Form was previously disclosed to plaintiffs' counsel in November 2004 as part of discovery in the *Binson* action. (Def. March 19th Letter, Exh. C.) As defendants further point out, that this information is not newly discovered is confirmed by the fact that plaintiffs' counsel quoted the amount noted in the overpayment log in a January 28, 2005 letter sent to Sarah Latham, Warters's predecessor in interest, [10] seeking to recruit her for the then-yet-to-be filed class action against defendants. (Def. March 19th Letter, Exh. B.) Finally, the two checks dated July 2 and 6, 2004, respectively, which indicate payment to JER on those dates in the amount demanded in the June 2004 Payoff Quote were produced by defendants' counsel during discovery and have since been in plaintiffs' counsel's control and possession. *See* Plaintiffs' January 26, 2010 Letter (Pl. Jan. 26th Letter") at 3.

Additionally, as defendants point out, plaintiffs' own submissions make clear that the facts Warters contends are "newly discovered" were known to her attorneys **[*37]** since the parties' initial discovery productions in this litigation. Indeed, plaintiffs' counsel possessed documents concerning the existence of the escrow arrangement with Verrazano, as well as Verrazano's payoff of the amounts demanded in the June 2004 Payoff Quote, as noted above. (Pl. March 19th Letter, Exhs. A, B, E.) Finally, plaintiffs' answers to interrogatories served May 1, 2009, further confirm plaintiffs' counsel's awareness that there occurred activity relative to Warters's account after May 19, 2004. Indeed, in response to Interrogatory No. 4 concerning the defendants' alleged failure to pay interest on the

[9] As Warters was unable to satisfy the amounts of the outstanding liens at the time payment was demanded, the defendants commenced a foreclosure action against her in New York Supreme Court, Queens County. A buyer was found for Warters's residence, and the closing was set for May 19, 2004. As the seller, Warters was responsible for the satisfaction of any outstanding liens prior to transfer of title to the property. Accordingly, $60,500 of the purchase price was placed in escrow to cover the liens. Verrazano Closing Services ("Verrazano") was the closing company and escrow agent for all parties to the sale. *See* Plaintiffs' March 19, 2010 Letter ("Pl. March 19th Letter") at 2.

[10] Sarah Latham was a relative from whom Warters received the subject property.

refund of any overcharge associated with satisfaction of the outstanding liens, Warters indicated that "Defendants failed to pay interest on $5,210.21 *from July 6, 2004* to September 9, 2004." (Def. March 19 Letter, Exh. E.) Similarly, in her response to Interrogatory No. 5, in which plaintiffs were asked to identify the date and amount of any "incorrect calculation" by defendants of "the final 'Total Due'" in order to satisfy the outstanding liens, Warters indicated that defendants had miscalculated by "at least $5,210.21 *as of July 2, 2004*." (*Id.*)

There being no "newly **[*38]** discovered" evidence to speak of, such having been in Warters's counsel's possession for quite some time, her eleventh-hour attempt to save her otherwise time-barred FDCPA claims must fail. Warters has failed to show good cause why at some earlier point she could not have sought leave to amend her complaint for a third time to assert these "new" allegations.

b. The "Newly Discovered" Material Does Not Salvage Warters's Untimely FDCPA Claims

The newly discovered evidence does not salvage Warters's untimely FDCPA claims. ***HN10***[] The FDCPA was enacted "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." S. Rep. 95-382, at 1696 (1977). With that purpose in mind, the FDCPA provides for a general prohibition against the use of "false, deceptive, or misleading representation[s] or means in connection with the collection of any debt," *15 U.S.C. § 1692e*. That section enumerates a non-exhaustive list of practices deemed violative of its provisions, which includes: "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning **[*39]** a consumer." *15. U.S.C. § 1692e(10)*. In weighing whether a debt collector has run afoul of the FDCPA, courts apply an objective standard measured by how the "least sophisticated consumer" would interpret the communication. *See* *Clomon v. Jackson, 988 F.2d 1314, 1318 (2d Cir. 1993)*. In order to reach this determination, however, the courts must *a priori* determine whether a given item of correspondence, for example, constitutes a "communication" within the meaning of the statute.

HN11[] Under the FDCPA, a "communication" is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." *15 U.S.C. § 1692(a)(2)*. In the case at bar, it is undisputed that the information contained in the June Payoff Quote concerned Warters's outstanding debt, [11] and therefore that the June Payoff Quote is a communication within the meaning of the FDCPA. Defendants argue, however, that the payoff quotes sent after May 19, 2004, were not directed to Warters herself, but to either Verrazano or Warters's attorney at the time, Charles Cipolla. [12] Therefore, defendants contend, these communications are not actionable under the FDCPA. [13]

As noted above, to effectuate the purposes of the FDCPA, ***HN12***[] courts apply the so-called least-sophisticated-consumer standard in order to "ensure [ ] the protection of all consumers, even the naive and the trusting, against deceptive practices, and (2) protect [ ] debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Clomon, 988 F.2d at 1320*. It was on this basis that the Second Circuit determined that no violation of the FDCPA occurs where "a party alleges that his attorney has been misled to the party's detriment." *Kropelnicki v. Siegel, 290 F.3d 118, 127 (2d Cir. 2002)*. Specifically, the *Kropelniki* Court concluded that "[w]here an attorney is interposed as an intermediary between a debt **[*41]** collector and a consumer, we assume the attorney, rather than the FDCPA, will protect the consumer from a debt collector's fraudulent or harassing behavior." *Id. at 128*; *see also* *Tromba v. M.R.S. Assocs., Inc., 323 F. Supp. 2d 424, 427-8 (E.D.N.Y. 2004)* (relying upon *Kropelniki* in holding that fax sent by debt collector solely and directly to debtor's attorney not actionable under FDCPA). Relying on the Court's reasoning in *Kropelniki*, any communications between JER and Warters's counsel are not actionable under the FDCPA, and are therefore insufficient to save her otherwise untimely FDCPA claims. Similar

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[11] Although Warters alleges that **[*40]** Verrazano received payoff quotes from JER on June 3, 18, and 22, 2004, Warters has only submitted the contents of the June Payoff Quote to the Court. *See* Pl. March 19th Letter, Exh. D.

[12] Warters retained Cipolla to represent her in connection with the sale of the subject property. *See* Trusts' March 19, 2010 Letter ("Tr. March 19th Letter") at 2, Exh. A.

[13] Warters does not contend that she had any direct communication with JER Revenue on or after May 19, 2004.

reasoning can be applied to any communications between JER and Verrazano. As a closing company/escrow agent, Verrazano cannot be considered the least-sophisticated consumer, and is interposed between the JER defendants and Warters. Thus, any communications between JER and Verrazanno cannot form the basis for liability under the FDCPA.

The post-May 19, 2004 communications between JER and Verrazano or Cippola are not actionable under the FDCPA for the additional reason that Warters has failed to allege, let alone present any evidence, that the JER defendants initiated any of these communications. **[*42]** If anything, it is beyond contention that the JER defendants were simply responding to inquiries made by Verrazano or Cippola concerning the outstanding amount then due and owing on Warters's account. ***HN13***[] The FDCPA's protections are not triggered by communications initiated by someone other than the debt collector. *See Gorham-Dimaggio v. Countrywide Home Loans, Inc., No. 05-CV-0583, 2005 U.S. Dist. LEXIS 34237, 2005 WL 2098068, at *2 (N.D.N.Y. Aug. 30, 2005)* (concluding that when the consumer initiates the conversation, many of the policy reasons behind the FDCPA disappear, and, accordingly, that defendant debt collector's mere response to plaintiff's inquiries concerning her outstanding mortgage did not constitute collection activity under the FDCPA); *Nichols v. Washington Mutual Bank, No. 07-CV-3216, 2007 U.S. Dist. LEXIS 85936, 2007 WL 4198252, at *4-5 (E.D.N.Y. Nov. 21, 2007)* (FDCPA intended to protect consumers from communications initiated by debt collectors).

Finally, the "newly discovered" evidence has no impact on the timeliness of Warters's claims under *§ 1692f of the FDCPA* — prohibiting "[t]he *collection* of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly **[*43]** authorized by the agreement creating the debt or permitted by law." Simply stated, Warters made the allegedly unlawful *payment* on May 19, 2004 in connection with the sale of her home. For the purposes of *§ 1692f*, the defendants may properly be considered to have "collected" the outstanding debt from Warters on that day — the day the money was deposited in escrow. Indeed, Warters's own submissions confirm that on May 19, 2004, the date of the closing, the amount then due and owing on her account was placed in escrow for the express purpose of paying off JER. *See* Pl. March 19th Letter, Exhs A, B. That Verrazano thereafter requested updates as to the payoff quotes from JER, and paid to JER the amounts quoted therein after the date of the closing is irrelevant to the Court's analysis under *§ 1692f*. These were not individual collection events, as Warters would have the Court believe, but mere ministerial acts associated with the resolution of Warters's liens in order to complete the sale of her home, and therefore gave rise to no new FDCPA violations that would cause the statute of limitatinos to start running anew. Accordingly, Warters's argument that her *FDCPA § 1692f* claims were timely **[*44]** asserted on this basis must be rejected.

C. Equitable Tolling is Unavailable to Taylor and Warters Based on Their Purported Attempt to Intervene in the *Binson* Action

Taylor and Warters contend that their "attempt to intervene" in *Binson* on February 15, 2005, is sufficient to equitably toll the statute of limitations on their FDCPA claims. The argument should be rejected for three reasons.

First, the argument is untimely, and should have been made when opposing defendants' prior motion to dismiss. Once served with the prior motion to dismiss, plaintiffs were on notice that defendants contended that they failed to comply with the FDCPA's one-year statute of limitations. At that time, plaintiffs were also aware of all of the facts necessary to support this particular equitable tolling argument. In opposing that motion, however, plaintiffs made no mention of their purported attempt to intervene in *Binson* as a basis for equitable tolling. Rather, they based their tolling arguments on *American Pipe* and defendants' purported concealment of the improper conduct. When deciding the motion to dismiss, Judge Bianco rejected all of plaintiffs' equitable tolling arguments, but gave them leave to replead **[*45]** additional facts concerning the 1997-1 Trust's active concealment, or at the very least the self-concealing nature, of the improper conduct. He did not give them leave to assert new, independent bases for equitable tolling, and the Court should reject their attempt to reargue the issue now.

Second, even if the argument were timely made, it would not salvage Taylor's untimely FDCPA claims, which arose at the latest in December 2003. Thus, even if she sought to intervene in *Binson* and put defendants on notice of her claims in February 2005, that was still well-beyond the expiration of the FDCPA's one-year statute of limitation.

Third, neither Taylor nor Warters ever filed a motion to intervene in *Binson*. Rather, it was the Binsons who filed the motion. (Binson R&R at 20 ("From the prior proceedings and papers filed in this case, there is no question that *the Binsons* filed this current motion [...]"). Perhaps more importantly, the Binsons' motion sought to amend the complaint and join additional parties pursuant to Rules 15 and 20 of the Federal Rules of Civil Procedure, not intervene pursuant to Rule 24. (*Id*.) Indeed, Judge Pollack explicitly recognized that while the *Binson* plaintiffs **[*46]** attempted to characterize their motion to add the Prospective Plaintiffs (including Taylor and Warters) as a motion to intervene, nowhere in their motion papers did the *Binson* plaintiffs ever discuss the issue of intervention, choosing instead to address the requirements for joinder as set forth in *Federal Rule of Civil Procedure 20*. Judge Pollack noted that the first reference to "intervention" appeared in *defendants*' memoranda in opposition; plaintiffs only thereafter began using the term "intervention" in their reply. (*Id*. at 21.) Even in their reply, the *Binson* plaintiffs failed to invoke Rule 24 or directly address the requirements of *Rule 24(a)(2)* or *24(b)(2)*. (*Id*.) Finally, and perhaps critically, the *Binson* plaintiffs failed to comply with the procedural requirements of Rule 24. (*Id*.) ***HN14***[] Under *Rule 24(c)* "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." *Fed. R. Civ. P. 24(c)*. As the *Binson* Court noted, however, "an intervenor cannot simply rely on the pleadings previously **[*47]** filed by another party." (Binson R&R at 22); *see also* *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.., 782 F. Supp. 870, 874 (S.D.N.Y. 1991)*; 6 James Wm. Moore et al., *Moore's Federal Practice § 24.20*. Judge Pollack noted that, apart from the Binsons' motion to amend, no separate notice of a motion to intervene had been filed by the Prospective Plaintiffs (including Taylor and Warters), nor had there been a separate pleading setting forth the claims of the Prospective Plaintiffs. *See* *Fed. R.Civ. P. 24(c)*. [14]

Having thus failed to properly file a motion to intervene, which may have put defendants on notice of their claims, plaintiffs reliance on *Burnett v. New York Central R.R., 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965)* and its progeny is misplaced. *Burnett* stands **[*49]** for the proposition that a plaintiff that otherwise properly files a timely action in the wrong venue may seek solace in the doctrine of equitable tolling and thereafter file a separate action in the proper venue. While the other cases plaintiffs cite may have extended *Burnett* to other procedural contexts, they all involved situations where the plaintiff properly filed an action, which was defective for some reason other than the filing itself. *See* *Whittaker v. United States., 815 F. Supp. 764 (D. Vt. 1993)* (***HN15***[] equitable tolling applicable where original action timely filed but dismissed due to plaintiff's failure to name proper party as defendant); *In re Randall's Island Family Golf Center, Inc., 288 B.R. 701 (Bankr. S.D.N.Y. 2003)* (equitable tolling appropriate where plaintiff timely brought first action that was thereafter dismissed without prejudice on grounds of improper joinder); *Clymore v. U.S., 217 F.3d 370, 375-76 (5th Cir. 2000)* (equitable tolling warranted where plaintiff timely filed first action in the wrong venue and promptly re-filed it in correct venue after statute of limitations had run). Because neither Taylor nor Warters ever properly filed anything, let alone a proper motion **[*50]** to intervene, their argument in favor of equitable tolling on this basis must be rejected.

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[14] Taylor's and Warters' argument that the Binson plaintiffs "service" of a proposed amended complaint containing the Prospect Plaintiffs' claims in connection with the motion to amend is sufficient to invoke equitable tolling must be rejected. (Pl. Mem. Opp. at 21.) In so arguing, Taylor and Warters seem to imply that the Binson's motion to amend constituted a motion to intervene, and complied with Rule 24's requirement that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." *Fed. R. Civ. P. 24(c)*. Not only did Taylor and Warters not file a motion to intervene, but the Binson's motion to amend fell **[*48]** far short of *Rule 24(c)*'s requirements. Plaintiffs have failed to establish that the proposed amended pleading was ever served on the JER defendants, as would have been required. (Pl. Mem. Opp. at 21) ("Each of the *Trusts* was served with a copy of the proposed Amended Complaint containing Warter's [sic] and plaintiff Taylor's claims." (emphasis added.)) Also, the proposed amended complaint was served on or after February 24, 2005 (date of amended summonses) — nine days after the Binson's motion to amend was filed on February 15, 2005. (Docket No. 117, Declaration of Mark S. Kaufman in Opposition to Defendants' Motion to Dismiss, Exhibit J.) Therefore, the motion was not "*accompanied* by a pleading that sets out the claim . . .." *Fed. R. Civ. P. 24(c)* (emphasis added). Warters and Taylor have simply failed to present any evidence whatsoever that service of the proposed amended complaint was properly effectuated, let alone that it complied with *Rule 24(c)*.

In sum, Taylor's and Warters's FDCPA claims are time-barred, and neither *American Pipe* nor equitable tolling are applicable to save them.

III. Plaintiffs' State Law Claims

Both the JER and Trust Defendants contend that this Court should dismiss plaintiffs' state law claims for several reasons. The JER defendants, joined by the Trust defendants, contend that, should it be determined that plaintiffs' federal claims must be dismissed as time-barred, this Court ought to refuse to exercise supplemental jurisdiction over plaintiffs' remaining state law claims. The Trust defendants have offered additional arguments as to why certain of plaintiffs' state law claims ought to be dismissed as being without merit. Inasmuch as the defendants appear simply to reprise theories offered in support of their prior motions to dismiss, which sought to discourage this Court from retaining jurisdiction over plaintiffs' remaining state law claims, the doctrine of the law of the case mandates that these arguments be rejected.

A. This Court's Prior Determination to Exercise Supplemental Jurisdiction Over Plaintiffs' **[*51]** State Law Claims Was Not in Error and Should Not Be Disturbed

The JER and Trust defendants contend that, where a plaintiff's federal statutory claims fail, and there exists no other independent basis for the exercise of federal jurisdiction over accompanying state law claims, the court may decline to extend jurisdiction over the pending state law claims. (JER Mem. at 21; Trust Mem. at 20-21); *see also* *28 U.S.C. § 1367(c)(3)*. Inasmuch as the JER and the Trust defendants have declined to offer new arguments on this issue, and appear merely to reprise arguments offered in support of prior motions to dismiss that were ultimately rejected by this Court, the doctrine of the law of the case mandates that these arguments be rejected.

HN16[] The law of the case doctrine "is implicated when a court reconsiders its own ruling in the absence of an intervening ruling on that issue by a higher court." *United States v. Quintieri, 306 F.3d 1217, 1225 (2d Cir. 2002)*. This doctrine requires that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case unless cogent and compelling reasons militate otherwise." *Id*. (internal citations **[*52]** and quotation marks omitted). "Cogent" and "compelling" reasons include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *United States v. Tenzer, 213 F.3d 34, 39 (2d Cir. 2000)*.

Applying these principles, it is clear that defendants have offered no such "cogent" and "compelling" reasons. Indeed, defendants appear to simply repeat the same legal arguments offered in their prior motions to dismiss that this Court found unpersuasive. Accordingly, the doctrine of the law of the case dictates that this Court's prior determination that supplemental jurisdiction may properly be exercised over plaintiffs' remaining state law claims shall continue to control.

B. Taylor's State Law Claims Against the 1996-1 and 1999-1 Trust Defendant[15]

The Trust defendants argue that because no federal claims have been asserted against the 1996-1 and 1999-1 Trusts, the Court lacks jurisdiction to hear plaintiffs' state law claims asserted against them. As **[*53]** an initial matter, it bears noting that in their Amended Complaint, plaintiffs asserted FDCPA claims solely against the JER defendants, the 1997-1 Trust and the 1998-1 Trust. (Am. Compl. at 20.) Plaintiffs' most recent complaint, however, has been amended to assert FDCPA claims against all named defendants. (Second Am. Compl. at 22.) To the extent that Taylor has included additional federal statutory claims in the Second Amended Complaint that were not asserted in the prior Amended Complaint, these claims must be dismissed for several reasons.

First, Judge Pollack, in her thorough and well-reasoned Report, concluded that *American Pipe* tolling would be unavailable to toll any of plaintiffs' claims brought against the 1996-1, 1997-1, and 1999-1 Trusts, on grounds that these defendants, unlike the 1998-1 Trust, were never parties to the Binson action. *See* *Arneil v. Ramsey, 550 F.2d*

[15] Taylor is the only plaintiff to have alleged misconduct on the part of the 1996-1 and 1999-1 Trusts. *See* 2nd Am. Compl. at ¶¶ 82, 86, 90, 92, 93, 95, 96-106, 112.

774, 782 n.10 (2d Cir. 1977) (noting that "nothing in *American Pipe* suggests that the statute be suspended from running in favor of a person not named as a defendant in the class suit," and declining to so extend the rule), *overruled on other grounds, In re WorldCom Sec. Litig., 496 F.3d 245 (2d Cir. 2007)*. **[*54]** Indeed, to afford plaintiffs the benefit of *American Pipe* tolling against defendants that had never been placed on notice of the substantive claims asserted against them by being named in the prior class suit would undermine in a fundamental way the very purposes served by statutes of limitations. (Report at 24); *See American Pipe, 414 U.S. at 554-55*. Accordingly, Judge Pollack recommended, and Judge Bianco agreed, that these claims be dismissed as untimely. (Report at 24-25; September 24th Order at 9.)

Moreover, Taylor and Warters were never given leave by this Court to amend their complaint to assert additional federal claims against the 1996-1 and 1999-1 Trust defendants. In his Order, Judge Bianco was very specific: he afforded plaintiff Taylor the opportunity to recraft her pleadings to allege additional facts to invoke *American Pipe* tolling to preserve her otherwise stale FDCPA claims. He also granted Warters leave to amend her pleadings to allege concealment by defendants that would warrant the equitable tolling of her otherwise time-barred claims. (Order at 8-9.) The additional amendment having been made without authorization from this Court, it must be disregarded and the FDCPA **[*55]** claims as pled in plaintiffs' Amended Complaint revived.

Notwithstanding the dismissal of the federal claims, there remain compelling reasons for this Court's continued exercise of jurisdiction over Taylor's state law claims for unjust enrichment and breach of contract brought against these defendants. Indeed, Judge Pollack addressed this issue at length and in great detail in her Report. (Report at 31-33.) Succinctly stated, Judge Pollack concluded, and Judge Bianco agreed, that supplemental jurisdiction is warranted over these state law claims because the claims are closely intertwined with the state and federal claims asserted by the other plaintiffs in this action, and are alleged to have arisen from a common nucleus of operative fact in terms of the conduct and practices of the defendants with respect to the charging of fees in conjunction with the servicing of the then outstanding liens. (Report at 31-32; Order at 6.) In any event, the Trust defendants do not appear to offer any new theories in their moving papers as to why this Court should decline to hear plaintiff Taylor's New York common law claims (Trust Mem. at 18) and, therefore, defendants' recycled jurisdictional arguments **[*56]** may be rejected under the doctrine of the law of the case.

C. Plaintiffs Have Properly Pled Their Claim Under *Section 349 of New York's General Business Law*

HN17[] Section 349(a) of New York's General Business Law provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." The language and background of *section 349* reveal that it is directed at addressing wrongs visited upon the public as consumers. *See* Report of the Committee on New York State ***Antitrust Law*** of the ***Antitrust Law*** Section of the New York State Bar Association: *A Proposed New State Law Making Deceptive Acts or Practices Unlawful*, Bill Jacket, L. 1970, ch. 43, at 21-29; *see also* Letter of New York State Attorney General Louis J. Lefkowitz, dated February 18, 1970, Bill Jacket, L. 1970, ch. 43, at 5-6. Indeed, General Business Law article 22-A, within which *section 349* may be found, is entitled "Consumer Protection from Deceptive Acts and Practices." That the statute provides for the Attorney-General alone to initially exercise enforcement power in the name of the State further attests to its public focus. *See* General **[*57]** Business Law § 349(b). Therefore, as a threshold matter, "plaintiffs claiming the benefit of *section 349* [...] must charge conduct of the defendant that is consumer-oriented." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 25, 647 N.E.2d 741, 623 N.Y.S.2d 529 (N.Y. 1995)*. Additionally, a plaintiff must demonstrate "that the acts or practices have a broader impact on consumers at large." *Id*. Private contract disputes, for example, are "unique to the parties [and] would not fall within the ambit of the statute." *Id.; see also New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 662 N.E.2d 763, 639 N.Y.S.2d 283 (N.Y. 1995)*; *Genesco Entertainment v. Koch, 593 F. Supp. 743, 752 (S.D.N.Y. 1984)* (negotiation for rental of Shea Stadium was a "'single shot transaction,'" not a typical consumer transaction, and therefore not covered by *section 349*).

HN18[] Where a plaintiff succeeds in demonstrating that a defendant's conduct is directed to consumers, however, the inquiry is not at an end. A prima facie case of violation of *section 349* requires an additional showing that the defendant is "engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof." *Varela v. Investors Ins. Holding Corp., 81 N.Y.2d 958, 961, 615 N.E.2d 218, 598 N.Y.S.2d 761 (N.Y. 1993)*. **[*58]** And although the statute does not mandate that a plaintiff establish the defendant's intent to defraud or mislead, where proof that the defendant knowingly and willingly violated this section is offered, "[t]he court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars." General Business Law *§ 349(h)*. Similarly, although proof of justifiable reliance on the plaintiff's part is not required, a plaintiff seeking compensatory damages is obligated to show that the defendant's material deceptive act or practice caused the plaintiff actual, though not necessarily pecuniary, harm. *Oswego, 85 N.Y.2d at 26*.

HN19[] New York courts have adopted an objective definition of deceptive acts and practices, whether they be representations or omissions. They are "those likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id*. Moreover, where a case involves omissions — as does the case at bar — "the statute surely does not require businesses to ascertain consumers' individual needs and guarantee that each consumer has all relevant information specific to its situation." *Id*. A different outcome **[*59]** may be warranted, however, "where the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Id*.

Applying these principles, I find that the plaintiffs' pleadings suffice to establish, as a threshold matter, that the defendants' conduct falls within the "consumer-oriented" ambit of General Business Law *§ 349*. The allegedly improper conduct in which the defendants are alleged to have engaged has impacted a large number of individuals, as evidenced by the fact that plaintiffs here assert class, as well as individual claims. It is plain on the face of the Second Amended Complaint that the conduct in question was not unique to the individual arrangements in place between the defendants and each of the named plaintiffs. Nor is the practice of demanding and collecting allegedly improper fees in association with the resolution of outstanding liens from a large segment of the population private in nature, or a "single shot transaction." *Genesco, 593 F. Supp. at 752*. Thus, plaintiffs have satisfied the threshold test in that the acts of which they complain are consumer-oriented in the sense that they potentially affect similarly **[*60]** situated consumers. Finally, plaintiffs have plead facts sufficient to allege that the conduct in which defendant engaged was of a misleading or deceptive nature, and that plaintiffs were injured therefrom.

Accordingly, plaintiffs have adequately stated a claim for relief under *Section 349 of New York's General Business Law*.

D. *§ 5-501 of New York General Obligations Law* Does Not Apply to Tax Liens[16]

The Trust defendants contend that plaintiff Boyd's claim brought under *New York General Obligations Law § 5-501* must fail as this section does not apply to tax liens. With this conclusion the Court must agree. ***HN20***[] "The rudimentary element of usury is the existence of a *loan* or *forbearance* of money." *Feinberg v. Old Vestal Road Associates, Inc., 157 A.D.2d 1002, 550 N.Y.S.2d 482 (3rd Dep't 1990)* (quoting *Matter of City of Binghamton [Ritter], 133 A.D.2d 988, 989, 521 N.Y.S.2d 140 (3rd Dep't 1987)*; *see also* General Obligations Law *§ 5-501*; 73 NY Jur 2d, Interest and Usury, § 62 ("[a]lthough the general usury statutes refer to the loan of 'any money, goods, **[*61]** or things in action,' the statutes have been held to be applicable only to the loan or forbearance of money [...]"). Indeed, "[w]here there is no loan, there can be no usury." *Oxhandler Structural Enters. v. Billard, 104 Misc. 2d. 38, 39, 427 N.Y.S.2d 569 (N.Y. Spec. Term 1980)*; *see also* *Title Guaranty & Surety Co. v. Klein, 178 F. 689 (3d Cir. 1909)* ("Payment of a commission of more than 6 per cent. for a loan of government bonds which are subject to market fluctuations and are bought and sold on the market as other securities was not in violation of the New York usury law [. . .] and did not render the loan usurious, since the terms "interest" and "forbearance," as used in the usury law [...] are applicable only to a loan of money."); *DeSimon v. Ogden Associates, 88 A.D.2d 472, 454 N.Y.S.2d 721 (2nd Dep't 1982)* (finding that "[a]lthough the usury statute in issue (General Obligations Law, § 5-511, subd. 1) speaks of 'money, goods or other things in action,' a necessary element of the tenants' statutory

[16] Boyd is the only plaintiff to have alleged conduct on the part of certain defendants (JER and the 1998-1 Trust) in violation of *section 5-501 of New York General Obligations Law*.

cause of action in usury is the existence of a loan of money."); *Van Dyk v. Dujardin, 213 A.D. 791, 795, 210 N.Y.S. 737 (1st Dep't 1925)* (concluding that "[u]sury laws are applicable only to a loan of money, and the terms 'interest' **[*62]** and 'forbearance' cannot be predicated of anything other than a loan of money."); *Thomas v. Knickerbocker Operating Co., 202 Misc. 286, 108 N.Y.S.2d 234, 236 (N.Y. Spec. Term 1951)* (quoting *Meaker v. Fiero, 145 N.Y. 165, 170, 39 N.E. 714)* ("it is a fundamental principle governing the law of usury that it must be founded on a loan or forbearance of money. If neither of these elements exist, there can be no usury, however unconscionable the contract may be.").

Plaintiff Boyd argues that the arrangement her husband entered into with the defendants called precisely for forbearance and that, therefore, the charging of an interest rate in conjunction with these agreements that exceeded the permissible statutory limit must be considered usurious under New York law. This argument must be rejected. Boyd has alleged the existence of certain agreements between herself and defendants governing the resolution of the outstanding residential liens on her property that specifically make use of the word "forbearance." Nevertheless, the forbearance called for by these agreements does not appear on the face of the complaint to refer to the type of loan arrangement or forbearance of money to which New York's usury statute has been **[*63]** held to apply exclusively. In the absence of any such loan or forbearance of money, plaintiffs simply cannot, and have not, alleged facts sufficient to state a claim under *section 5-501 of New York's General Obligations Law*. Accordingly, this claim must be dismissed.

CONCLUSION

For the foregoing reasons, I respectfully recommend that the JER and Trust defendants' motions to dismiss be granted in part and denied in part. Specifically, I recommend dismissal of (i) plaintiffs Taylor's and Warters's FDCPA claims brought against the JER and the relevant Trust defendants, and (ii) plaintiff Boyd's usury claim under *New York General Obligations Law § 5-501*. With respect to plaintiffs' state law claims, I recommend that the Court retain jurisdiction over plaintiffs' state law claims for unjust enrichment, breach of contract and misleading and deceptive practices under *New York General Business Law § 349*.

Any objections to this Report and Recommendation ("R&R") must be filed with the Clerk of the Court and the Honorable Kiyo A. Matsumoto within fourteen (14) days of receiving this R&R. Failure to file timely objections may waive the right to appeal the District Court's Order. See *28 U.S.C. § 636(b)(1)*; **[*64]** *Fed. R. Civ. P. 6(a)*, *6(e)*, *72*; *Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)*.

Dated: March 31, 2010

Brooklyn, New York

/s/ Ramon E. Reyes, Jr.

Ramon E. Reyes, Jr.

United States Magistrate Judge

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In re Title Ins. Antitrust Cases

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

March 31, 2010, Decided; March 31, 2010, Filed

CASE NOS. 1:08CV677 AND RELATED CASES

Reporter

702 F. Supp. 2d 840 *; 2010 U.S. Dist. LEXIS 30913 **; 2011-1 Trade Cas. (CCH) P77,374

IN RE TITLE INSURANCE ANTITRUST CASES

Prior History: *In re Title Ins. Antitrust Litig., 702 F. Supp. 2d 840, 2009 U.S. Dist. LEXIS 104539 (N.D. Ohio, Sept. 7, 2009)*

Core Terms

filed rate doctrine, rates, title insurance, Plaintiffs', regulations, insurers, Defendants', insurance business, Valentine Act, filings, antitrust, rating bureau, injunctive relief, Sherman Act, statutory scheme, McCarran-Ferguson Act, carriers, damages, Recommendation, courts, tariff, nonjusticiability, anti trust law, cooperative, nondiscrimination, claim for damages, state law, collaboration, Bulletin, motion to dismiss

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

HN1[] **Magistrates, Standards of Review**

28 U.S.C.S. § 636(b) requires a de novo decision as to those portions of a magistrate judge's report and recommendation to which objection is made.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

HN2[] **Rate Regulation, Approval Process**

Ohio Rev. Code Ann. § 3935.04(A) requires all title insurers to file with the superintendent of insurance every form of a policy, endorsement, rider, manual, minimum class rate, rating schedule, or rating plan, and every other rating rule, and every modification of any of them, which it proposes to use. Insurers may satisfy their obligation to make such filings by subscribing to, or becoming a member of, a licensed rating bureau. *Ohio Rev. Code Ann. § 3935.04(B)*.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Supporting Documentation Requirement

HN3[] Rate Regulation, Approval Process

Where insurers belong to a rating bureau, they may permit the bureau to submit on their behalf proposed rates, along with supporting information, for consideration by the Department of Insurance. Ohio Rev. Code Ann. § 3935.04(A). The superintendant shall review filings as soon as reasonably possible. Ohio Rev. Code Ann. § 3935.04(C). A proposed rate becomes final 30 days after it is filed, unless it is disapproved by the superintendent within the waiting period. Ohio Rev. Code Ann. § 3935.04(D). During the waiting the period, the superintendant may require the insurer, or its bureau, to submit additional information in support of its requested rate. He may also find that the filing does not comply with the Ohio Rev. Code Ann. § 3935.05(B). Once a rate submitted by a bureau has been approved by the Department of Insurance (or has not been disapproved after the expiration of the 30 day waiting period), however, the rate becomes the only legal rate. As such, the insurer members are not permitted to charge a different rate for title insurance, unless the insurer successfully petitions the superintendent for permission to deviate from the filed rate. Ohio Rev. Code Ann. §§ 3935.04(H), 3935.07.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Approval Process

HN4[] Rate Regulation, Approval Process

At no time does the State of Ohio relinquish its right to monitor and control the rates charged for title insurance. At any time after the waiting period has expired, the superintendant may find that the filed rate no longer meets the requirements of Ohio Rev. Code Ann. § 3935.01 to § 3935.17, and he shall, after a hearing and upon due notice, issue a determination that the rate is no longer effective. Ohio Rev. Code Ann. § 3935.05(C). Any person or organization aggrieved by a filed rate may submit a written application requesting a hearing before the superintendant. If (after the hearing) the superintendant finds the application to have merit, he shall issue a decision setting forth his reasons for finding that the rate is no longer effective. Ohio Rev. Code Ann. § 3935.05(D).

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

HN5[] Motions to Dismiss, Failure to State Claim

When reviewing a motion to dismiss for failure to state a claim, a court must construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of law. To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint must contain enough facts to state a claim to relief that is plausible on its face. Although this is a liberal pleading standard, it requires more than the bare assertion of legal conclusions. Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN6[] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine precludes an award of damages under antitrust laws where recovery is premised on payments made under rates approved by a regulatory agency.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN7[] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine does not create an antitrust immunity. A critical distinction remains between an absolute immunity from all antitrust scrutiny and a far more limited nonavailability of the private treble-damages remedy. The filed rate doctrine is merely a judicially created restriction on remedies and standing under which private plaintiffs are barred from suing for a damage recovery. It does not preclude injunctive relief or prohibit the Government from seeking civil or criminal redress.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN8[] Exemptions & Immunities, Filed Rate Doctrine

Two companion principles lie at the core of the filed rate doctrine: first, that legislative bodies design agencies for the specific purpose of setting uniform rates, and second, that courts are not institutionally well suited to engage in retroactive rate setting. Under the first, the "nonjusticiability" principle, the filed rate doctrine preserves the regulating agency's authority to determine the reasonableness of rates. Under the second, the "nondiscrimination" principle, the filed rate doctrine insures that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require. The filed rate doctrine is applied strictly to prevent a plaintiff from bringing a cause of action even in the face of apparent inequities whenever either the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated by the cause of action the plaintiff seeks to pursue.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN9[] Exemptions & Immunities, Filed Rate Doctrine

The nonjusticiability principle preserves an important purpose of the filed rate doctrine: to prohibit courts from second-guessing a regulating agency's determination as to the reasonableness of a given rate. As compared with the expertise of regulating agencies, courts do not approach the same level of institutional competence to ascertain reasonable rates. Courts are simply ill-suited to systematically second guess the regulators' decisions and overlay their own resolution. The doctrine therefore precludes claims for damages where a court would be required to substitute its judgment as to reasonable rates for that of an agency with specialized knowledge of the area.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN10[] Exemptions & Immunities, Filed Rate Doctrine

The filed rate doctrine applies whenever either the nondiscrimination strand or the nonjusticiability strand underlying it is implicated by the cause of action the plaintiff seeks to pursue.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN11[] Exemptions & Immunities, Filed Rate Doctrine

The nondiscrimination principle underlying the filed rate doctrine holds that allowing a court to bind a regulated entity to a rate that was neither filed nor found to be reasonable would undermine legislative schemes premised upon uniform rate regulation. The U.S. Supreme Court has rejected the suggestion that the development of class actions, which might alleviate the concern about nondiscrimination, made the nondiscrimination principle of the filed-rate doctrine inapplicable to a putative class action. The U.S. Court of Appeals for the Ninth Circuit has similarly rejected the argument that the filed-rate doctrine is inapplicable to class actions. The filed rate doctrine serves the purpose of nondiscrimination by prohibiting a court from entering a judgment that would serve to alter the rate paid by a plaintiff. Even if such a challenge does not, in theory, attack the filed rate, an award of damages to the customer-plaintiff would, effectively, change the rate paid by the customer to one below the filed rate paid by other customers. Therefore, no claim can be permitted to go forward that, if successful, would require an award of damages that would have the effect of imposing different rates upon different consumers.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN12[] **Exemptions & Immunities, Filed Rate Doctrine**

The U.S. Supreme Court has rejected the argument that the filed rate doctrine can only be predicated on a minimum level of agency review.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN13[] **Exemptions & Immunities, Filed Rate Doctrine**

It is unnecessary for a rate to undergo a certain "meaningful" level of scrutiny to fall within the gambit of the filed rate doctrine.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN14[] **Exemptions & Immunities, Filed Rate Doctrine**

Defining the contours of an agency's review of a filed rate is an inappropriate area for a court's inquiry. But for a court to consider a rate to be a "filed rate," the statutory scheme must provide the regulatory agency with the authority to deem a rate "filed," that is, to assess the rates' compliance with statutory requirements for filed rates.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN15[] **Exemptions & Immunities, Filed Rate Doctrine**

There is no exception to the filed rate doctrine for fraudulent or wrongful conduct.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Supporting Documentation Requirement

HN16[] **Rate Regulation, Supporting Documentation Requirement**

See *Ohio Rev. Code Ann. § 3935.03(C)(5)*.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Supporting Documentation Requirement

HN17[] **Rate Regulation, Supporting Documentation Requirement**

See *Ohio Rev. Code Ann. § 3935.04(A)*.

Business & Corporate Compliance > ... > Industry Practices > Rate Regulation > Supporting Documentation Requirement

HN18[] **Rate Regulation, Supporting Documentation Requirement**

Ohio Rev. Code Ann. § 3935.04(A) (which is phrased in the conjunctive) allows for the superintendent of insurance to determine that a filing meets the requirements of the code in the absence of the accompanying information. Thus, while Ohio law requires the "consideration" of past and prospective expenses, it does not require any affirmative filing of supporting documentation about those expenses for a filing to be valid, but rather gives the superintendent the right to call for supporting documentation if he or she determines necessary.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN19[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine acts to preclude actions for damages under the Sherman Act regardless of whether the regulating agency is state or federal.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN20[] **Exemptions & Immunities, Filed Rate Doctrine**

The question of whether the filed rate doctrine acts to preclude their state law antitrust claims for damages as to rates filed with a state regulatory agency is a matter of state law.

Governments > Courts > General Overview

HN21[] **Governments, Courts**

Where the state supreme court has not spoken, a federal court's task is to discern, from all available sources, how that court would respond if confronted with the issue.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN22[] **Exemptions & Immunities, Filed Rate Doctrine**

The filed rate doctrine bars damage awards premised on payments made under rates approved by a regulatory agency. Under the doctrine, a private plaintiff may not challenge the reasonableness, or validity, of the filed rate. Simply put, the filed rate is unassailable in judicial proceedings brought by ratepayers. But in addition to acting as an insurmountable bar to damage recoveries by private plaintiffs, the filed rate doctrine mandates, as a corollary, no one may bring a judicial proceeding to enforce any rate other than the rate established by the filed tariff.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN23[] **Exemptions & Immunities, Filed Rate Doctrine**

The Ohio Supreme Court would respond to the question of whether the filed rate doctrine precludes a private plaintiff's claim for damages under the Valentine Act, *Ohio Rev. Code Ann. § 1331.01 et seq.*, where premised on payments made under rates approved by a state regulatory agency in the affirmative.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN24[] **Exemptions & Immunities, Filed Rate Doctrine**

A district court can properly enjoin activity to prevent future conduct where doing so would not affect rates already filed and would not encroach on the agency's authority to determine the reasonableness of a given rate.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine > General Overview

HN25[] **Exemptions & Immunities, Filed Rate Doctrine**

Just as the filed rate doctrine precludes injunctive relief that results in the alteration of a filed rate due to nonjusticiability concerns, so too must the filed rate doctrine preclude injunctive relief where such relief would displace the statutory scheme and authority of the regulating agency to determine the reasonableness of rates.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN26[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN27[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See *15 U.S.C.S. § 1012(a)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN28[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See *15 U.S.C.S. § 1012(b)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN29[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

Federal law provides for reverse preemption in the realm of regulating the insurance business. As such, a federal law that does not directly relate to the business of insurance cannot be construed to "invalidate, impair, or supersede" a state law enacted to regulate the business of insurance. *15 U.S.C.S. § 1012(b)*. The McCarran-Ferguson Act, however, contains an "antitrust exception" to the reverse preemption rule. After setting forth the rule, the Act specifically identifies the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, and states that these laws shall be applicable to the business of insurance to the extent that such business is not regulated by State law. *15 U.S.C.S. § 1012(b)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN30[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

To determine whether the McCarran-Ferguson Act applies, a court generally begins with the threshold question of whether the federal statute at issue specifically relates to the business of insurance. If it does, the Act does not allow for reverse preemption. If not, then the two remaining questions that must be answered in the affirmative if the federal law is reverse preempted by the state statute are: (1) whether the state statute at issue was enacted for the purpose of regulating the business of insurance; and (2) whether the application of the federal law would invalidate, impair, or supersede' the state statute.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN31[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The antitrust exception expressly exempts from Sherman Act liability activity that constitutes the "business of insurance" to the extent it is regulated by state law. A defendant in an antitrust case need not show that the Sherman Act would "invalidate, impair, or supersede" a state's regulation. Instead, the court need only find that the activity of which a plaintiff complains constitutes the business of insurance, regulated by state law, and not a boycott. The language of the McCarran-Ferguson Act distinguishes preclusion analysis where antitrust laws are at issue.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN32[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The U.S. Supreme Court has announced the test for determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by *15 U.S.C.S. § 1012(b)*: first, whether the practice had the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. No one factor is outcome determinative and must be considered along with the whole body of evidence.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN33[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

For the purpose of the McCarran-Ferguson Act, title insurance is "insurance."

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN34[] Exemptions & Immunities, McCarran-Ferguson Act Exemption

The setting of rates for title insurance premiums satisfies the Supreme Court's definition of the "business of insurance," within the meaning of the McCarran-Ferguson Act.

Insurance Law > Industry Practices > Rate Regulation > General Overview

HN35[] Industry Practices, Rate Regulation

See *Ohio Rev. Code Ann. § 3935.06*.

Governments > Legislation > Interpretation

HN36[] Legislation, Interpretation

When there is no state case law construing a state statute, a federal court must predict how the state's highest court would interpret the statute. In Ohio, the essential goal of statutory construction is to give effect to the intent of the General Assembly. The intent may be inferred from the particular wording the General Assembly has chosen to set forth the substantive terms of a statute. Intent may also be revealed in the procedural passage of the legislative act under consideration, when that body passes legislation that enacts, amends, or repeals a statute. Where the lawmaking body declares its own intention in the enactment of a particular law, or defines the sense of the words employed, it is within the exercise of its legislative power, and its own construction of its language should be followed.

Governments > Legislation > Interpretation

HN37[] Legislation, Interpretation

Ohio Rev. Code Ann. § 1.51 provides that if general and special provisions conflict, the specific provision takes precedent as an exception to the general provision unless the legislature provides otherwise.

Governments > Legislation > Interpretation

HN38[] Legislation, Interpretation

See *Ohio Rev. Code Ann. § 1.51*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN39[] **Trade Practices & Unfair Competition, State Regulation**

The Ohio Supreme Court has repeatedly noted that the Valentine Act, *Ohio Rev. Code Ann. § 1331.01 et seq.*, was patterned after the Sherman Act, *15 U.S.C.S. § 1*, and has consistently interpreted the Valentine Act in accordance with federal judicial construction of the federal antitrust laws--without regard to when the federal court announced the case law.

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

HN40[] **Motions to Dismiss, Failure to State Claim**

The dismissal of a complaint for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)* is a judgment on the merits, and is therefore done with prejudice.

Counsel: **[**1]** For Jordan Katz, on behalf of himself and all others similarly situated, Plaintiff: Bruce K. Cohen, Daniel B. Allanoff, LEAD ATTORNEYS, PRO HAC VICE, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Christopher L. Lebsock, Michael P. Lehmann, LEAD ATTORNEYS, Hausfeld, San Francisco, CA; Barbara J. Felt, Vincent J. Esades, Heins, Mills & Olson, Minneapolis, MN; Daniel R. Karon, Goldman, Scarlato & Karon - Cleveland, Cleveland, OH; Jennifer Sarnelli, Joseph J. DePalma, Lite DePalma Greenberg & Rivas, Newark, NJ; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Gaby Hasrouni, Plaintiff in Member Case 5:08cv1289, Plaintiff: Aaron M. McParlan, James S. Reece, Michael E. Jacobs, Richard M. Hagstrom, LEAD ATTORNEYS, PRO HAC VICE, Zelle, Hofmann, Voelbel, Mason & Gette, Minneapolis, MN; Chris T. Nolan, LEAD ATTORNEY, Perantinides & Nolan, Akron, OH; Daniel B. Allanoff , Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Gina Hasrouni, Plaintiff in Member Case 5:08cv1289, Plaintiff: Chris T. Nolan, LEAD ATTORNEY, Perantinides & Nolan, Akron, OH; James S. Reece, Michael E. Jacobs, Richard **[**2]** M. Hagstrom, LEAD ATTORNEYS, PRO HAC VICE, Zelle, Hofmann, Voelbel, Mason & Gette, Minneapolis, MN; Daniel B. Allanoff, PRO HAC VICE, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Craig Mintz, Plaintiff in Member Case 1:08cv678, Plaintiff: Anthony D. Shapiro, Steve W. Berman, LEAD ATTORNEYS, Hagens, Berman Sobol, Shapiro, Seattle, WA; Bruce K. Cohen, Daniel B. Allanoff, LEAD ATTORNEYS, PRO HAC VICE, Steven J. Greenfogel, LEAD ATTORNEY, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Daniel R. Karon, LEAD ATTORNEY, Goldman, Scarlato & Karon - Cleveland, Cleveland, OH; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Sean Nightingale, Plaintiff in Member Case 1:08cv741, Plaintiff: Eugene A. Spector, Jonathan M. Jagher, William G. Caldes, LEAD ATTORNEYS, PRO HAC VICE, Jay S. Cohen, PRO HAC VICE, Spector, Roseman, Kodroff & Willis, Philadelphia, PA; Jeffrey S. Goldenberg, John C. Murdock, LEAD ATTORNEYS, Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH; Daniel B. Allanoff, PRO HAC VICE, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA.

For Micah **[**3]** Watts, Plaintiff in Member Case 1:08cv803, Plaintiff: Andrew L. Mackerer, LEAD ATTORNEY, Mager & Goldstein, Philadelphia, PA; Daniel R. Karon, LEAD ATTORNEY, Goldman, Scarlato & Karon - Cleveland, Cleveland, OH; Jayne A. Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah - Weston, Weston, FL; Lee Albert, LEAD ATTORNEY, Murray, Frank & Sailer, New York, NY; Natalie Finkelman Bennett, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah - Media, Media, PA; Roger J. Bernstein, LEAD ATTORNEY, Bernstein Nackman & Feinberg, New York, NY; Daniel B. Allanoff, PRO HAC VICE, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Carol A. Rhamy, Plaintiff in Member Case 1:08cv750, Plaintiff: Brian P. Kopp, LEAD ATTORNEY, Betras, Maruca, Kopp & Harshman - Canfield, Canfield, OH; Chad A. Carder, Gerald J. Rodos, Jeffrey B. Gittleman, LEAD ATTORNEYS, Barrack, Rodos & Bacine, Philadelphia, PA; Daniel B. Allanoff, PRO HAC VICE, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Katherine A. Wirkus, Plaintiff in Member Case 1:08cv1021, Plaintiff: **[**4]** David R. Scott, LEAD ATTORNEY, Scott & Scott - Colchester, Colchester, CT; Walter W. Noss, LEAD ATTORNEY, Scott & Scott - Chagrin Falls, Cleveland Heights, OH; Daniel B. Allanoff, PRO HAC VICE, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Adam C Falkner, Plaintiff in Member Case 1:08cv1836, Plaintiff: Krishna B. Narine, LEAD ATTORNEY, Huntingdon Valley, PA; Christopher J. Gray, New York, NY; Daniel B. Allanoff, PRO HAC VICE, Meredith Cohen Greenfogel & Skirnick, Philadelphia, PA; Kirk G. Smith, Samuel D. Edwards, Shepherd Smith Edwards & Kantas, Houston, TX; Leslie Wybiral, Louis F. Burke, Law Office of Louis F. Burke, New York, NY; Roger W. Van Deusen, Van Deusen & Wagner, Cleveland, OH; Todd B. Naylor, Murdock, Goldenberg, Schneider & Groh, Cincinnati, OH.

For Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Security Union Title Insurance Company, Ticor Title Insurance Company of Florida, Fidelity National Financial, Inc., Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation, Defendants: Arthur M. Kaufman, Deborah **[**5]** A. Coleman, Robert J. Fogarty, Steven A. Goldfarb, Hahn, Loeser & Parks - Cleveland, Cleveland, OH; Patricia A. Screen, Brouse McDowell - Cleveland, Cleveland, OH.

For First American Title Insurance Company, United General Title Insurance Company, Ohio Bar Title Insurance Company, Port Lawrence Title and Trust Company, T.A. Title Insurance Company, Censtar Title Insurance Company, First American Corporation, Defendants: James I. Serota, Kenneth A. Lapatine, Stephen L. Saxl, LEAD ATTORNEYS, PRO HAC VICE, Greenberg Traurig - New York, New York, NY; Patricia A. Screen, Brouse McDowell - Cleveland, Cleveland, OH.

For Transnation Title Insurance Company, Defendant: Phillip E. Stano, LEAD ATTORNEY, PRO HAC VICE, Sutherland, Asbill & Brennan - Washington, Washington, DC; Tim L. Collins, LEAD ATTORNEY, Brendan R. Doyle, Thomas J. Scanlon, Collins & Scanlon, Cleveland, OH; Arthur M. Kaufman, Deborah A. Coleman, Robert J. Fogarty, Steven A. Goldfarb, Hahn, Loeser & Parks - Cleveland, Cleveland, OH; Patricia A. Screen, Brouse McDowell - Cleveland, Cleveland, OH; Scott Wilson, Collins and Scanlon, Cleveland, OH.

For LandAmerica Financial Group, Inc., Defendant: Phillip E. Stano, LEAD ATTORNEY, PRO **[**6]** HAC VICE, Sutherland, Asbill & Brennan - Washington, Washington, DC; Tim L. Collins, LEAD ATTORNEY, Brendan R. Doyle, Thomas J. Scanlon, Collins & Scanlon, Cleveland, OH; Deborah A. Coleman, Hahn, Loeser & Parks - Cleveland, Cleveland, OH; Patricia A. Screen, Brouse McDowell - Cleveland, Cleveland, OH; Scott Wilson, Collins and Scanlon, Cleveland, OH.

For Stewart Title Guaranty Company, National Land Title Insurance Company, Stewart Information Services Corporation, Defendants: David M Foster, LEAD ATTORNEY, PRO HAC VICE, Fulbright & Jaworski - Washington, Washington, DC; Gerard D. Kelly, LEAD ATTORNEY, PRO HAC VICE, Kevin M. Fee, LEAD ATTORNEY, Sidley Austin - Chicago, Chicago, IL; Kerin L. Kaminski, Giffen & Kaminski, Cleveland, OH; Mark A. Robertson, Fulbright & Jaworski - New York, New York, NY; Patricia A. Screen, Brouse McDowell - Cleveland, Cleveland, OH.

For Old Republic National Title Insurance Company, Old Republic International Corporation, Defendants: David G. Greene, Kevin J. Walsh, LEAD ATTORNEYS, PRO HAC VICE, Locke Lord Bissell & Liddell - New York, New York, NY; Patricia A. Screen, Brouse McDowell - Cleveland, Cleveland, OH; Russell J. Kutell, Frost Brown Todd - Columbus, **[**7]** Columbus, OH.

Judges: HONORABLE SARA LIOI, UNITED STATES DISTRICT JUDGE.

Opinion by: SARA LIOI

Opinion

[*843] MEMORANDUM OPINION

On September 7, 2009, Magistrate Judge Benita Pearson filed a Report and Recommendation (Doc. No. 102) resolving the Defendants' dispositive motions. Both Plaintiffs and Defendants filed timely objections to the Report. (Doc. Nos. 104 and 105, respectively.)

Upon *de novo* review of those portions of the Report to which the parties have made objection, this Court hereby **ADOPTS**, in part, and **REJECTS**, in part, the Report and Recommendation of the Magistrate Judge. As set forth more fully below, Defendants' Joint Motion (Doc. No. 43) and Defendant Old Republic International Corporation's motion to dismiss (Doc. No. 41) are **GRANTED**, and these consolidated cases are **DISMISSED**.

This Court's review of the Magistrate Judge's Report and Recommendation is **[*844]** governed by ***HN1***[] *28 U.S.C. § 636(b)*, which requires a *de novo* decision as to those portions of the document to which objection is made. Because the parties objected only to those portions of the Magistrate Judge's Report and Recommendation relating to the application of the filed rated doctrine and the McCarran-Ferguson Act to the claims in the Consolidated Complaint, **[**8]** as well as the manner in which the claims were to be dismissed, the remainder of the Report -- including its account of the factual and procedural history of the case -- is hereby accepted as written. Thus, the Court will only provide a brief review of the facts and procedural posture sufficient to adequately frame the issues presented by the various objections.

BACKGROUND

The named Plaintiffs in these consolidated cases [1] are individuals who have purchased title insurance from certain Defendants at some time between March 2004 and the present. These Plaintiffs seek to bring a class action on behalf of all individuals who have purchased title insurance in Ohio during the relevant time period. (Case No. 1:08CV677, Doc. No. 36, Consolidated Complaint at P 10(a)-(h).) Defendant insurers are alleged to have sold title insurance in Ohio during the relevant period, either directly or through subsidiaries. (*Id*. at PP 11-19.) Plaintiffs further allege that a number of the Defendant insurers are members of Defendant Ohio Title Insurance Rating Bureau (OTIRB), and that Defendant insurers charge the rates set by the OTIRB for their insurance policies. (*Id*. at PP 11-19, 21, 24; insurers and OTIRB **[**9]** shall be collectively referred to as "Defendants.")

The Ohio Revised Code governs the sale of title insurance in the State of Ohio, and, particularly, those regulations set forth in Title 39. While a review of the relevant regulations appears in the Magistrate's Report, the Court finds it necessary to briefly sketch out the administrative landscape. ***HN2***[] *OHIO REV. CODE § 3935.04(A)* requires all title insurers to file with the superintendent of insurance "every form of a policy, endorsement, **[**10]** rider, manual, minimum class rate, rating schedule, or rating plan, and every other rating rule, and every modification of any of them, which it proposes to use." Insurers may satisfy their obligation to make such filings by subscribing to, or becoming a member of, a licensed rating bureau. *OHIO REV. CODE § 3935.04(B)*. The parties agree that OTIRB is a licensed rating bureau under *§ 3935.04(B)*.

HN3[] Where insurers belong to a rating bureau, they may permit the bureau to submit on their behalf proposed rates, along with supporting information, for consideration by the Department of Insurance. *OHIO REV. CODE §*

[1] There are eight cases in all, with the lead case filed on March 18, 2008. (*See* Case No. 1:08CV677, Doc. No. 1 Class Action Complaint.) The other cases are: 1:08CV678, 1:08CV741, 4:08CV750, 1:08CV803, 1:08CV1021, 5:08CV1289, 1:08CV1836. Originally assigned to the dockets of numerous judges in the Northern District of Ohio, the cases were eventually transferred to the docket of the Hon. David D. Dowd, Jr. The cases were consolidated on July 11, 2008, and Plaintiffs' Consolidated Class Action Complaint was filed on July 31, 2008. Following Judge Dowd's recusal on February 2, 2010, these consolidated cases were reassigned to the undersigned's docket. All docket references are to the lead case: 1:08CV677.

3935.04(A). The superintendant "shall review filings as soon as reasonably possible […]." § 3935.04(C). A proposed rate becomes final thirty (30) days after it is filed, "unless it is disapproved by the superintendent within the waiting period." § 3935.04(D).

During the waiting the period, the superintendant may require the insurer, or its bureau, to submit additional information **[*845]** in support of its requested rate. He may also find that the filing does not comply with the OHIO REVISED CODE. § 3935.05(B). Once a rate submitted by a bureau has been approved by the Department of Insurance **[**11]** (or has not been disapproved after the expiration of the 30 day waiting period), however, the rate becomes the only legal rate. As such, the insurer members are not permitted to charge a different rate for title insurance, unless the insurer successfully petitions the superintendent for permission to deviate from the filed rate. §§ 3935.04(H); 3935.07.

HN4[] At no time does the State of Ohio relinquish its right to monitor and control the rates charged for title insurance. At any time after the waiting period has expired, the superintendant may find that the filed rate no longer meets the requirements of § 3935.01 to § 3935.17, and he shall, after a hearing and upon due notice, issue a determination that the rate is no longer effective. § 3935.05(C).

Any person or organization aggrieved by a filed rate may submit a written application requesting a hearing before the superintendant. If (after the hearing) the superintendant finds the application to have merit, he shall issue a decision setting forth his reasons for finding that the rate is no longer effective. § 3935.05(D).

At the heart of these consolidated actions is the allegation that Defendants have conspired to fix prices for title insurance **[**12]** in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and Ohio's Valentine Act, Ohio Rev. Code § 1331.01 et seq. (Cons. Compl. at PP 49, 58, 66.) According to Plaintiffs, Defendant insurers use the OTIRB to set and charge "supracompetitive" rates. (*Id*. at PP 49-50, 52.) Allegedly hidden within these inflated rates are unlawful kickbacks and other charges unrelated to title insurance or the services provided in connection with title insurance. (*Id*. at PP 49-50.) These allegations form the basis of Plaintiffs' sole causes of action under the Sherman Act ("the federal claims") and the Valentine Act ("the state claims"). Plaintiffs seek damages and injunctive relief for both the federal and state claims.

Defendant Stewart Information Services Corporation (Stewart) filed a motion to dismiss for lack of personal jurisdiction (Doc. No. 40); Defendant Old Republic International Corporation (Old Republic) moved to dismiss for failure to state a claim under the Sherman and Ohio Valentine Acts, and for improper venue and personal jurisdiction (Doc. No. 41); and all Defendants filed a joint motion to dismiss on the grounds that Plaintiffs' claims were barred by the filed rate doctrine and by the **[**13]** McCarran-Ferguson Act (Doc. No. 43). The Court permitted Plaintiffs to conduct limited discovery prior to responding to these dispositive motions.

Once fully briefed, the motions were referred to Magistrate Judge Benita Pearson for the preparation of a Report and Recommendation. The Magistrate Judge conducted a hearing on the motions on May 26, 2009. Thereafter, she issued a Report and Recommendation, wherein she recommended that Defendants' joint motion be granted on the grounds that the federal and state antitrust claims were barred by the filed rate doctrine and/or the McCarran-Ferguson Act, and that Old Republic's motion to dismiss be granted on the ground that Plaintiffs failed to state a claim against it. She also recommended that all corporate parent Defendants be dismissed without prejudice, that both of the claims in the Consolidated Complaint be dismissed without prejudice against the remaining Defendants, and that Stewart's motion be denied as moot. (Report at 56.)

Plaintiffs object to the Magistrate Judge's conclusion that their claims are barred by the filed rate doctrine and/or **[*846]** the McCarran-Ferguson Act. Defendants object to the Magistrate Judge's recommendation that the **[**14]** claims be dismissed without prejudice. The Court heard oral argument on the objections on December 17, 2009. After the hearing, the Court permitted the parties to file supplemental briefs. (Doc. No. 115, Exs. 1, 2.) Now, with the benefit of multiple hearings and the parties' extensive briefing, the Court is prepared to rule.

STANDARD OF REVIEW

Defendants bring their joint motion under Fed. R. Civ. P. 12(b)(6). [2] HN5[] When reviewing a motion to dismiss for failure to state a claim, the Court must construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and determine whether the moving party is entitled to judgment as a matter of law. Commer. Money Ctr., Inc. v. Ill. Union Ins. Co., 508 F.3d 327, 336 (6th Cir. 2007) (citing United States v. Moriarty, 8 F.3d 329, 332 (6th Cir. 1993)). To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "Although this is a liberal pleading standard, it requires more than the bare assertion of legal conclusions. Rather, the complaint must contain **[**15]** either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." First Am. Title Co. v. DeVaugh, 480 F.3d 438, 444 (6th Cir. 2007) (quoting Se. Tex. Inns, Inc. v. Prime Hospitality Corp., 462 F.3d 666, 671-72 (6th Cir. 2006)).

ANALYSIS

I. THE FILED RATE DOCTRINE

HN6[] The filed rate doctrine [3] precludes an award of damages under antitrust laws where recovery is premised on payments made under rates approved by a regulatory agency. In her Report and Recommendation, the Magistrate Judge held the filed rate doctrine applied to preclude both Plaintiffs' federal and state claims for damages, but did not operate to bar Plaintiffs' claim for injunctive relief.

In their objection, Defendants assert that the filed rate doctrine bars Plaintiffs' causes **[**16]** of actions in their entirety, including Plaintiffs' claims for injunctive relief. In their objections, Plaintiffs first claim that the filed rate doctrine is inapplicable to the Ohio title insurance industry. Alternatively, Plaintiffs claim that the filed rate doctrine is inapplicable to this case because Defendants' rate filings do not comply with Ohio's rate filing requirements. Finally, Plaintiffs assert that even if the filed rate doctrine bars their claims for damages, it does not bar their claims for injunctive relief. Each of these arguments is addressed *seriatim*.

Application of The Filed Rate Doctrine to the Ohio Title Insurance Industry is Appropriate

Keogh, Square D, and the Continued Vitality of the Filed Rate Doctrine

The filed rate doctrine made its first substantial appearance in an antitrust context in 1922, in Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). In *Keogh*, the Supreme Court held that a private shipper could not maintain a cause of action **[*847]** against an association of freight carriers that had collectively agreed on shipping rates that had been filed with, and approved by, the Interstate Commerce Commission ("ICC") under authority derived by the Interstate **[**17]** Commerce Act ("ICA"). Id. at 161. The rates were approved by the ICC as reasonable and non-discriminatory, and were therefore legal under the ICA. *Id*. The Court reasoned that once the ICC approved the rate, it became legal -- and a legal rate is not actionable as an antitrust injury, *even if* the rate resulted from an illegal combination of the carriers to fix rates. Id. at 162-3 ("A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the [Sherman] Act. What rates are legal is determined by the [ICA].").

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[2] Stewart brings its motion under Rule 12(b)(2), while Old Republic relies upon Rule 12(b)(2), (3), and (6). Because the Court's ruling is largely guided by its application of Rule 12(b)(6), the Court will not devote space to setting forth the standards for the other relevant provisions of Rule 12.

[3] Interchangeably referred to by courts as the *Keogh* doctrine, or the filed tariff doctrine.

In *Keogh*, the Supreme Court reasoned that if it were to grant relief based on an antitrust violation, the authority of the ICC would be undermined. *Id. at 164* ("The powers conferred upon the Commission are broad. It may investigate and decide whether a rate has been, whether it is, or whether it would be discriminatory."). Moreover, granting relief would require a court to speculate as to what the proper rate should be, a task for which courts are ill-suited. *Id*. Finally, an antitrust remedy in the form of damages would be discriminatory, providing relief to plaintiffs, but not to other consumers, which was contrary to the ICA's **[**18]** goal of uniform rates. *Id. at 163*.

The filed rate doctrine is not without its critics. In *Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986)*, the Supreme Court recognized that, as extensively noted by Judge Friendly in the Second Circuit decision under review, several developments had undermined the reasoning of *Keogh* in the six decades since its pronouncement. For example, the Court acknowledged:

> the development of class actions, which might alleviate the expressed concern about unfair rebates; the emergence of precedents permitting treble-damages remedies even when there is a regulatory remedy available; the greater sophistication in evaluating damages, which might mitigate the expressed fears about the speculative nature of such damages; and the development of procedures in which judicial proceedings can be stayed pending regulatory proceedings.

Square D, 476 U.S. at 423 (citing *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1356 (2d Cir. 1985)* (Friendly, J.)). While the Court praised Judge Friendly's analysis as "characteristically thoughtful and incisive," it declined his invitation to overrule *Keogh* and instead reaffirmed the filed rate doctrine **[**19]** on stare decisis grounds for the sake of stability in the law. "If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court." *Square D, 476 U.S. at 424*. Other courts that have questioned the filed rate doctrine have also adhered to it stare decisis principles. *See, e.g., Security Servs. v. Kmart Corp., 511 U.S. 431, 440, 114 S. Ct. 1702, 128 L. Ed. 2d 433 (1994)* (holding that the filed rate doctrine is "not subject to discretionary enforcement" even though "some may debate in other forums about [its] wisdom"); *Goldwasser v. Ameritech Corp., 222 F.3d 390, 402 (7th Cir. 2000)* (applying filed rate doctrine in a telecommunications act case, noting that "[a]lthough the doctrine had come under some criticism, the Supreme Court reaffirmed it in *Square D* [], and we are bound to follow it."). The Sixth Circuit, in one of its few opinions that addresses the filed rate doctrine, commented on *Square D* as follows:

> **[*848]** We do not read [*Square D's*] deferential language as an adoption of Judge Friendly's rationale, for on its face it is a polite refusal of an invitation. Since the Supreme Court did in fact uphold the ruling in *Keogh* we construe its cited language to be that the *Keogh* rationale, **[**20]** whatever else might be said of it, still commands, in the Supreme Court's view, the support of Congress. Justice Stevens emphasized "*Keogh's* role as an essential element of the settled legal context in which Congress has repeatedly acted in this area." *Square D, 106 S. Ct. at 1930*. Furthermore, we do not believe that either *Keogh* or *Square D* was intended to be limited solely to antitrust damage claims brought by shippers.

Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1452 (6th Cir. 1988). Although free to do so, Congress has not acted to abrogate the filed rate doctrine. [4]

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[4] *Cf. Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*. The Reed-Bulwinkle Act was enacted at least in part in response to *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 (1945)*. In *Pennsylvania R. Co*., the Supreme Court restated *Keogh* and held that, "although Georgia could not maintain a suit under the antitrust laws to obtain damages, it could obtain injunctive relief against the collective ratemaking procedures employed by the railroads." *Square D, 476 U.S. at 418*. The Reed-Bulwinkle Act created an absolute immunity from the antitrust laws for certain specific activities, including the one at issue **[**21]** in *Pennsylvania R. Co*., and thereby superseded that holding. *Square D* rejected the contention that *Keogh* "was implicitly rejected in the Reed-Bulwinkle Act" and rather held that "[p]articularly because the legislative history reveals clear congressional awareness of *Keogh*, far from supporting petitioners' position, the fact that Congress specifically addressed this area and left *Keogh* undisturbed lends powerful support to *Keogh's* continued viability." *Id. at 419*.

Plaintiffs Misapprehend the Nature of the Filed Rate Doctrine

In their opposition, Plaintiffs correctly assert that the filed rate doctrine has never been applied to the Ohio title insurance industry. While Plaintiffs acknowledge that the Supreme Court has applied the filed rate doctrine to areas outside the ICC, *see* *AT &T Co. v. Central Office Tele., Inc., 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998)* (applying the filed rate doctrine to the Communications Act, noting that its provisions "share [the ICC's] goal of preventing unreasonable and discriminatory charges"); *Ark. La. Gas Co. v. Hall, 453 U.S. 571, 101 S. Ct. 2925, 69 L. Ed. 2d 856 (1981)* (applying filed rate doctrine based upon rates filed with the Federal Energy Regulatory Commission), they insist that an extension of the filed **[**22]** rate doctrine to the Ohio title insurance industry is improper because the Supreme Court "has repeatedly held that implied exemptions to antitrust liability are strongly disfavored." (Doc. No. 77 at 17.) Plaintiffs also correctly argue that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank, 374 U.S. 321, 350-51, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*. While Plaintiffs are correct in their general assertion, and courts indeed must be extremely reluctant to imply antitrust immunity, Plaintiffs fundamentally misapprehend the nature of the filed rate doctrine, which is not an immunity at all.

HN7[] The filed rate doctrine does not create an antitrust immunity. *Square D* squarely rejected the proposition, advanced by petitioners in that case, that the filed rate doctrine is properly characterized as an immunity. [5] *Square D, 476 U.S.* ***[*849]*** *at 422* (stating that *Keogh's* holding that an award of damages is not an available remedy claiming that a filed rate was the product of an antitrust violation "is far different from the creation of an antitrust **[**23]** immunity"). "A critical distinction remains between an absolute immunity from *all* antitrust scrutiny and a far more limited nonavailability of the private treble-damages remedy." *Id. at 422 n.28* (emphasis in original). The filed rate doctrine is merely a judicially created restriction on remedies and standing under which private plaintiffs are barred from suing for a damage recovery. It does not preclude injunctive relief [6] or prohibit the Government from seeking civil or criminal redress. Therefore, this Court rejects Plaintiffs' contention that applying the filed rate doctrine to the Ohio title insurance industry would be an impermissible extension of antitrust immunity. [7]

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[5] Thus, the filed rate doctrine is different than the State Action Doctrine, sometimes called the *Parker* State Action Doctrine, which holds that state-mandated or state-directed restraints are exempted from antitrust liability, *see* *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, and the *Noerr-Pennington* Doctrine, which immunizes from antitrust liability those who petition the federal or state government to take actions that may impose restraints on trade. *See, e.g.,* *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*.

[6] Although **[**24]** it may in certain circumstances, as discussed *infra*.

[7] As noted by the Magistrate Judge in her Report and Recommendation (Doc. No. 102 at 18-19), federal courts have long applied the Filed rate doctrine to a wide spectrum of insurance actions. *See, e.g.,* *Rios v. State Farm Fire & Cas. Co., 469 F.Supp.2d 727, 737 (S.D. Iowa 2007)* (applying filed rate doctrine to common law claim seeking return of insurance premiums); *Mullinax v. Radian Guar. Inc., 311 F. Supp. 2d 474, 484 n.6 (M.D.N.C. 2004)* (filing of rate by defendant with state Department of Insurance bars plaintiffs from challenging reasonableness of those rates); *Kirksey v. Am. Bankers Ins. Co., 114 F. Supp. 2d 526, 529 (S.D. Miss. 2000)* (applying filed rate doctrine to common law claim seeking return of insurance premiums); *Stevens v. Union Planters Corp., 2000 U.S. Dist. LEXIS 22630, 2000 WL 33128256, at *3 (E.D. Pa. Aug. 20, 2000)* (allegation of kickbacks in forced hazard insurance scheme barred by filed rate doctrine); *Allen v. State Farm Fire & Cas. Co., 59 F. Supp. 2d 1217, 1229 (S.D. Ala.1999)* (filed rate doctrine barred claim challenging unlawfulness of rate filing by insurance company); *Korte v. Allstate Ins. Co., 48 F. Supp. 2d 647, 651 (E.D. Tex. 1999)* **[**25]** (applying filed rate doctrine to claim asserting insurance rates improper due to submission by defendant of illegal subsidy factor accounts to state insurance regulator because state agency determined reasonable rates pursuant to statutory scheme); *Morales v. Attorney's Title Ins. Fund, Inc., 983 F. Supp. 1418, 1429 (S.D. Fla. 1997)* (dismissing plaintiffs' kickback claim against title insurer pursuant to filed rate doctrine because claim was nothing more than challenge to title insurance rates set by state regulators); *Calico Trailer Mfg. Co., Inc. v. Ins. Co. Of N. Am., 1994 U.S. Dist. LEXIS 20750, 1994 WL 823554 at *6 (E.D. Ark. Oct. 12, 1994)* (filed rate doctrine barred plaintiffs' challenge to insurance rates as inflated as result of conspiracy among defendant insurance companies).

Nonjusticiability and Nondiscrimination: The Policies Underlying the Filed Rate Doctrine Support its Application to the Ohio Title Insurance Industry

HN8[] "[T]wo companion principles lie at the core of the filed rate doctrine: first, that legislative bodies design agencies for the specific purpose of setting uniform rates, and second, that courts are not institutionally well suited to engage in retroactive rate setting." *Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994)*. **[**26]** Under the first, the "nonjusticiability" principle, the filed rate doctrine "preserve[s] the regulating agency's authority to determine the reasonableness of rates," *H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 488 (8th Cir. 1992)*. Under the second, the "nondiscrimination" principle, the filed rate doctrine "insure[s] that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require." *Id.* The filed rate **[*850]** doctrine "is applied strictly to prevent a plaintiff from bringing a cause of action even in the face of apparent inequities whenever *either* the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated by the cause of action the plaintiff seeks to pursue." *Marcus v. AT&T Corp., 138 F.3d 46, 59 (2d Cir. 1998)* (emphasis added). This Court therefore turns to determine whether or not *either* of the principles underlying the filed rate doctrine are implicated here.

a) Nonjusticiability

Defendants maintain that Plaintiffs' asserted request for relief "would inescapably require this Court to make a new determination of what the multitude of different title insurance rates would have been **[**27]** absent Defendants' alleged 'illegal conduct.'" (Doc. No. 115-2 at p. 30.) As to Plaintiffs' request for damages, this Court agrees.

HN9[] The nonjusticiability principle preserves an important purpose of the filed rate doctrine: to prohibit courts from second-guessing a regulating agency's determination as to the reasonableness of a given rate. "As compared with the expertise of regulating agencies, courts do not approach the same level of institutional competence to ascertain reasonable rates." *Wegoland, 27 F.3d at 21*. "Courts are simply ill-suited to systematically second guess the regulators' decisions and overlay their own resolution." *Id*. This doctrine therefore precludes claims for damages where a court would be required to substitute "its judgment as to reasonable rates for that of an agency with specialized knowledge of the area." *County of Suffolk v. Long Island Power Auth., 154 F. Supp. 2d 380, 385 (E.D.N.Y. 2000)*.

Turning to the specifics of this case, Plaintiffs' claim for damages is addressed in paragraph 68 of their complaint:

> During the period of the antitrust violations by defendants and their coconspirators, plaintiffs and each member of the Class they represent, have purchased **[**28]** title insurance and, by reason of the antitrust violations herein alleged, paid more for such than would have been paid in the absence of said antitrust violations. As a result, plaintiffs and each member of the Class they represent, have been injured and damaged in an amount presently undetermined.

(Doc. No. 36 at P 68.) [8] At the December 17, 2009 oral argument, Judge Dowd pointedly asked counsel for Plaintiffs to explain their theory on damages:

> THE COURT: Right. I don't have this question on here, but if [t]he Court were to determine this case could go forward and that eventually plaintiffs would prevail, it would be in a class action structure, the individual plaintiffs would be entitled to some recovery? Play out for me how this case would work out in terms of remedy.
> MR. COHEN: Bruce Cohen, Your Honor.
> THE COURT: Go ahead.

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[8] The Court notes that the Plaintiffs' theory that lower prices would necessarily result absent the asserted 'antitrust violations' is by no means a certainty. *See, e.g*, Scott Harrington, *Competition and Health Insurance*, Wall Street J., Nov. 6, 2009 (analyzing recent Congressional proposals to remove antitrust exemptions in the healthcare insurance industry and suggesting that, **[**31]** contrary to popular belief, prohibiting collaboration between insurers might actually cause premiums to increase rather than fall).

MR. COHEN: It would depend [on] the way the case went forward, Your Honor. If Your Honor were to find that the filed rate doctrine does not apply in Ohio title insurance and if Your Honor found McCarran-Ferguson was not applicable **[*851]** and we went forward on the damage case, at that point--
THE COURT: You still have to show conspiracy.

MR. COHEN: That would be a matter **[**29]** of proof because we alleged an antitrust violation in section 1. So we go forward and should we prevail, then there would be a damage analysis, damage finding.
THE COURT: First off, there would have to be a finding of conspiracy.
MR. COHEN: There are three elements for a Section 1 case. There's a finding of conspiracy, a finding of impact from the conspiracy, and finding of damages.
THE COURT: Right.
MR. COHEN: The class would go forward on that basis. There would be a damage finding if we were successful and --
THE COURT: How would you establish damage?
MR. COHEN: By expert testimony.
THE COURT: What the rates should have been had there been competition?
MR. COHEN: At this point I haven't gotten that far into it.
THE COURT: I'm trying to figure out.

(Doc. No. 114, Transcript from December 17, 2009 oral argument (hereinafter designated as "TR at __") at 82-83.) The Court ordered each side to simultaneously submit post-hearing memorandums, with no page restrictions and no content restrictions. (*Id*. at 101-102.) Plaintiffs offered no additional argument as to how damages might be calculated absent an inquiry into the reasonableness of the rates determined by the Ohio Department of Insurance. **[**30]** Plaintiffs' attempt to avoid this difficult question is telling, and the answer is inescapable. As alleged repeatedly in their complaint, and reiterated multiple times in pleadings and at oral argument, Plaintiffs' theory is that Defendants' illegal conduct caused Plaintiffs to pay higher title insurance rates, instead of what the rate would have been "in the absence of said antitrust violations." The only way to quantify this harm would require this Court, at some point in the future and assuming liability is proven, to make a determination of "what the rate would have been." This quantification is the very relief the filed rate doctrine *expressly forbids*. Therefore, because Plaintiffs' complaint implicates the nonjusticiability principle, the filed rate doctrine applies to preclude their claim for damages.

b) Nondiscrimination

As discussed above, ***HN10***[] the filed rate doctrine applies "whenever either the nondiscrimination strand or the nonjusticiability strand underlying [it] is implicated by the cause of action the plaintiff seeks to pursue." *Dolan v. Fid. Nat'l Title Ins. Co., No. 09-2697-cv, 365 Fed. Appx. 271, 2010 U.S. App. LEXIS 2814 (2d Cir. Feb. 11, 2010)* (citing *Marcus, 138 F.3d at 59*). Therefore, the Court's conclusion that the nonjusticiability principle is implicated by Plaintiffs' complaint is sufficient alone to apply the filed rate doctrine. The Court also finds, however, that nondiscrimination concerns are implicated and will briefly address that principle here.

HN11[] The nondiscrimination principle underlying the filed rate doctrine holds that allowing a court to bind a regulated entity to a rate that was neither filed nor found to be reasonable would undermine legislative schemes premised upon uniform rate regulation. *Ark. La. Gas Co. 453 U.S. at 579*. In *Marcus*, the Second Circuit observed that "the Supreme Court has rejected the suggestion that the development of class **[**32]** actions, which might alleviate the [. . .] concern about nondiscrimination, made the nondiscrimination principle [of the filed-rate doctrine] inapplicable to a putative class action." *138 F.3d at 61* (internal quotation marks & alterations omitted) (citing *Square D, 476 U.S. at 423*). **[*852]** The Ninth Circuit has similarly "reject[ed] the argument that the filed-rate doctrine is inapplicable to class actions." *Enns v. NOS Communs. (In re NOS Communs.), 495 F.3d 1052, 1059 (9th Cir. 2007)*.

The filed rate doctrine serves the purpose of nondiscrimination by prohibiting a court from entering a judgment that would serve to alter the rate paid by a plaintiff. *See* *Hill v. BellSouth Telecomms., Inc., 364 F.3d 1308, 1316 (11th Cir. 2004)*. "Even if such a challenge does not, in theory, attack the filed rate, an award of damages to the customer-plaintiff would, effectively, change the rate paid by the customer to one below the filed rate paid by other customers." *Id*. Therefore, no claim can be permitted to go forward that, "if successful, would require an award of damages that would have the effect of imposing different rates upon different consumers." *Bryan v. BellSouth Comm's., 377 F.3d 424, 430 (4th Cir. 2004)*.

In **[**33]** this case, it is undisputed that Defendants are only permitted to charge the filed rate approved by the Department of Insurance, *OHIO REV. CODE § 3935.04(H)*, such rates having been reviewed by the Department to ensure that the rates "shall not be excessive, inadequate, or unfairly discriminatory." *§ 3935.03(B)*. Examining Plaintiffs' allegations reveals that, if Plaintiffs succeed in their claims for damages, Defendants "would, in essence, be forced to refund to [Plaintiffs] the amount allegedly overcharged." *Taffet v. Southern Co., 967 F.2d 1483, 1491 (11th Cir. 1992)* (*Taffet II*). While this Court recognizes that "concerns for discrimination are substantially alleviated in [a] putative class action," *Wegoland, 27 F.3d at 22*, those concerns, albeit diminished, still exist. *See Marcus and In re NOS Communs., supra.* Therefore, Plaintiffs' complaint also implicates the nondiscrimination principle, and the filed rate doctrine applies to preclude their claim for damages on this independent ground as well.

Plaintiffs' Contentions that the Filed Rate Doctrine is Inapplicable Because the Ohio Department of Insurance Conducts "No Meaningful Review" of Filed Rates and the Ohio Title Insurance ***[**34]*** *Scheme is not a "Pervasive Regulatory Regime" are Without Merit*

Plaintiffs next argue that the filed rate doctrine should not be applied to the Ohio title insurance industry because the Ohio "regulatory regime [is] not sufficiently pervasive to ensure adequate regulatory oversight of those rates" and "there is no attempt by the [Ohio Department of Insurance] to meaningfully regulate title insurance filings." (Doc. No. 77 at p. 19.) The Court disagrees.

c) The Filed Rate Doctrine Applies Regardless of the Level of Agency Review

HN12[] The Supreme Court has rejected the argument that the filed rate doctrine can only be predicated on a minimum level of agency review. In *Square D*, the Supreme Court rejected the petitioner's contention that the filed rate doctrine was inapplicable due to the fact that, unlike *Keogh*, no ICC hearing reviewing the rate had been held. The Court held that the Second Circuit decision "properly concluded that *Keogh* was not susceptible to such a narrow reading," *Square D, 476 U.S. at 417 n.19*, and approvingly cited Judge Friendly's decision: "Rather than limiting its holding to cases where, as in *Keogh*, rates had been investigated and approved by the ICC, the Court said **[**35]** broadly that shippers could not recover treble-damages for overcharges *whenever tariffs have been filed*." *Id*. (quoting *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d 1347, 1351 (2d Cir. 1985))* (emphasis added). Thus, it is the *filing* of the rates with the regulating **[*853]** agency that triggers the filed rate doctrine, not any minimum level of review undertaken by the agency.

Square D's decision to apply the filed rate doctrine irrespective of the level of agency review has been widely followed by other federal courts. In *Goldwasser*, the Seventh Circuit rejected the notion that the filed rate doctrine does not apply because a reviewing agency "rarely exercise[s] [its] muscle and thus give[s] no meaningful review to the rate structure." *Goldwasser, 222 F.3d at 402*. Going even further, the First Circuit explained that "it is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, [. . .] that triggers the filed rate doctrine." *Town of Norwood v. New England Power Co., 202 F.3d 408, 420 (1st Cir. 2000)* (emphasis in original). A district court in this circuit, under the assumption that "rates were never subjected to meaningful agency review," drew **[**36]** on *Square D* and held that "[e]ven so, the filed rate doctrine retains a sound basis. It applies to all duly submitted, lawful rates *regardless of the extent of the regulatory agency's inquiry* into the appropriateness of those rates." *Daleure v. Kentucky, 119 F. Supp. 2d 683, 689 (W.D. Ky. 2000)* (emphasis added). *See also In re Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d 663, 675 (E.D. Pa. 2009)* (holding that where the statutory scheme provides for agency review of title insurance rates, "the filed rate doctrine applies irrespective of the degree of agency inquiry, scrutiny, or exercise of regulatory muscle").

Plaintiffs contend that two Ninth Circuit decisions, *Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332 (9th Cir. 1990)*, and *Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992)* (which relies primarily on *Wileman Bros*.), dictate a different conclusion. In *Wileman Bros*., nectarine and plum producers served as members or employees of administrative committees appointed by the Secretary of Agriculture to issue and enforce standards for marketing nectarines and plums. "The committee members promulgated the regulations themselves rather than making recommendations to **[**37]** the Secretary." *Brown, 982 F.2d at 393* (citing *Wileman Bros., 909 F.2d at 337*). The Ninth Circuit rejected defendants' contention that, under the statutory scheme, "the Secretary tacitly approved the [filed rate] by failing to disapprove them as provided for in the regulations governing the committees." *Wileman Bros., 909 F.2d at 337*. The statute in question, *7 C.F.R. § 917.62*, provided "[e]ach and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time."

The Ninth Circuit held that *Square D* and *Keogh* mandated that "governmental approval was required before there could be any effect from the collective activity and it was such approval that legitimized the allotments and the rates." *Wileman Bros. 909 F.2d at 337-38*. The court continued to hold that "the mere fact of failure to disapprove, however, does not legitimize otherwise anticompetitive conduct [. . .]. [Nondisapproval] does not guarantee any level of review whatsoever." [9] *Id*.

The Ohio title insurance scheme is readily distinguishable from the Agricultural Marketing Agreement and Act of 1937 at issue in *Wileman Bros.* The Ohio title insurance does mandate that proposed rates become final thirty days after being filed "unless disapproved by the superintendent within the waiting period." *OHIO REV. CODE. § 3935.04(H)*. **[*854]** But unlike the statute in *Wileman Bros.*, the Ohio statutory scheme demands an *affirmative duty* of the superintendent. The superintendent "*shall review* filings as soon as reasonably possible." *§ 3935.04(C)* (emphasis added). While the agricultural marketing statute in *Wileman Bros.* gives the Secretary of Agriculture the *right* to review the committee's filings, review of rates submitted by the rating bureaus in Ohio to the Department of Insurance is mandated. While rates become effective "unless disapproved by the superintendent within the waiting period," the superintendent's affirmative duty to review rate filings warrants the conclusion that rates that become effective as a result of *approval* by the Department of Insurance, and not as the **[**39]** result of the "mere fact of failure to disapprove." [10]

Brown v. Ticor Title Insurance involved Arizona and Wisconsin title insurance regulations which permitted the filing of rates by rating bureaus. Relying on *Wileman Bros*. (and failing to even mention *Square D*), the Ninth Circuit held:

> if those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge. The absence of meaningful state review allows the insurers to file any rates they want. Therefore, the act of filing does not legitimize a rate arrived at by improper action.
>
> The regulations of Arizona and Wisconsin require only "non-disapproval" of the rates and do not require compliance with strict guidelines such as those set forth under the ICC regulations. This case falls within the holding of *Wileman*, and we therefore hold the filed tariff doctrine is **[**40]** not applicable under either the Arizona or Wisconsin regulatory schemes.

Brown, 982 F.2d at 394. In the first instance, other than stating the regulations require only "non-disapproval and do not require compliance with strict guidelines" *Brown* offers no meaningful discussion of either the Arizona or Wisconsin regulatory schemes and is nearly devoid of analysis. Given *Brown's* exclusive reliance on *Wileman Bros*. and its conclusion that "this case falls within the holding of *Wileman*," however, one reasonable conclusion is that the Arizona and Wisconsin regulatory schemes at issue do not require any affirmative review by an agency whatsoever. As discussed above, however, the Ohio statutory scheme clearly contemplates more than mere non-

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[9] The court in *Wileman Bros*. also suggested that, although it could not consider it on a motion to dismiss, "evidence of participation [in the **[**38]** non-disapproval process] by representatives of the Secretary" might suffice to apply the Filed rate doctrine.

[10] Indeed, approval by the superintendent is clearly what the statute comprehends: "[. . .] the superintendent may authorize a filing which he has reviewed to become effective before the expiration of the waiting period." *§ 3935.04(D)*.

disapproval by the Department of Insurance. Moreover, the Ohio statutory scheme requires compliance with strict guidelines. *See* OHIO REV. CODE. § 3935.03 (detailing regulations as to how "rates shall be made") and § 3935.04(C) (requiring the superintendent to "review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of sections 3935.01 to 3935.17"). While *Brown* characterized the Arizona **[**41]** and Wisconsin regulatory schemes as lacking meaningful state review, which it interpreted to mean allowing "insurers [to] file any rate they want," the Ohio regulatory scheme would clearly disallow such filings. § 3935.03(B) ("Rates shall not be excessive, inadequate, or unfairly discriminatory."). Finally, to the extent *Brown* even warrants any consideration from this Court, it is clearly an outlier case. McCray v. Fid. Nat'l Title Ins. Co., 636 F. Supp. 2d 322, 329 (D. Del. 2009) ("Other **[*855]** than the Ninth Circuit in *Brown*, no other court has taken such a narrow view of the applicability of the filed rate doctrine.").

Plaintiffs also rely on Blaylock v. First Am. Title Ins. Co., 504 F. Supp. 2d 1091 (W.D. Wash. 2007). In *Blaylock*, the court declined to apply the filed rate doctrine to a challenge to practices by the Washington title insurance industry under state ***antitrust law***. Again, Blaylock is easily distinguishable from this case. In Washington, "title insurance is specifically exempted" from the comprehensive scheme for setting insurance premiums generally, and, "[c]omparatively, title insurance rates are subjected to a relatively superficial system of regulation." Blaylock, 504 F. Supp. 2d at 1095-96. **[**42]** "The most salient difference is that the Code does not require the [Office of the Insurance Commissioner] to review title insurance rates. Although the rates are submitted, and the Commissioner has 15 days in which review could occur before the rates go into effect, *the Code does not actually mandate review*." *Id*. (emphasis added). As discussed above, however, the Ohio title insurance scheme mandates affirmative review by the superintendent.

At most, *Wileman Bros., Brown*, and *Blaylock* stand for the proposition that where no review is mandated by a statutory scheme, the filed rate doctrine may be inapplicable. Even if true, the Ohio title insurance regulatory scheme's mandate of affirmative review of filed rates by the superintendent distinguishes it from the schemes in those cases. The Sixth Circuit has not ruled on whether "meaningful review" is a predicate for applying the filed rate doctrine to a regulatory scheme. This Court believes that the reasoning of cases that opine that ***HN13***[] it is unnecessary for a rate to undergo a certain "meaningful" level of scrutiny to fall within the gambit of the filed rate doctrine very persuasive, believes the Sixth Circuit would so hold, and hereby adopts **[**43]** that view. This view is consistent with the overarching nonjusticiability policy underlying the filed rate doctrine. Just as courts do not have the "same level of institutional competence to ascertain reasonable rates," *see* Wegoland, supra, nor are courts well-suited to make *ex post* inquiries as to whether or not an agency's review of a particular rate was "meaningful." Defining the contours of an agency's review of a filed rate is a task best left to the legislative branch. Therefore, *even assuming* as true Plaintiffs' contention that the Ohio Department of Insurance's level of review, which clearly and unlike Wileman Bros. contemplates more than mere non-disapproval, does not "meaningfully regulate title insurance filings," the filed rate doctrine still applies.

d) The Ohio Statutory Scheme Provides the Department of Insurance With the Authority to Review Rates

HN14[] Defining the contours of an agency's review of a filed rate is an inappropriate area for a court's inquiry. But for a court to consider a rate to be a "filed rate," the statutory scheme must provide the regulatory agency with the authority to deem a rate "filed," that is, to assess the rates' compliance with statutory requirements **[**44]** for filed rates. *See* Tex. Commer. Energy v. TXU Energy, Inc., 413 F.3d 503, 510 (5th Cir. 2005) (applying filed rate doctrine to statutory scheme because the scheme provided agency "oversight over the market [] sufficient to conclude that [the rates in question] are 'filed' within the meaning of the filed rate doctrine"); Town of Norwood, 202 F.3d at 419 (holding market-based rates are still "filed rates" for purposes of the filed rate doctrine because agency "is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review"). *Compare* Williams v. Duke Energy Int'l, Inc., 606 F. Supp. 2d 783, 790-791 (S.D. Ohio 2009) (hypothesizing that if an agency did **[*856]** not have "the authority to determine whether the rates are discriminatory or involve unlawful discounting of charges [. . .] the filed rate doctrine would be inapplicable").

Plaintiffs do not dispute the mechanics of the Ohio title insurance scheme as discussed by the Court, *supra*, but contend that courts refuse to apply the filed rate doctrine to situations where there is "no pervasive regulatory regime." While Plaintiffs never inform the Court what **[**45]** exactly a "pervasive regulatory regime" might entail, Plaintiffs suggest that *Hanson v. Acceleration Life Ins. Co., No. A3-97-152, 1999 U.S. Dist. LEXIS 23298, 1999 WL 33283345 (D.N.D. May 20, 1999)* (unpublished) is informative. In *Hanson*, the court declined to apply the filed rate doctrine to the North Dakota long-term care insurance scheme. The court in *Hanson* noted the uncontroversial principle that the underlying conduct of the defendant "does not control whether the filed rate doctrine applies. Rather the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 489 (8th Cir. 1992)*. The court then determined that, under the North Dakota code, "there is a lack of statutory language requiring approval of rate increases" and "[s]imply put, the North Dakota Insurance Commissioner does not have the authority to establish long term care insurance policy rates." *Hanson, 1999 U.S. Dist. LEXIS 23298, 1999 WL 33283345 at *4*. Against this backdrop, the court in *Hanson's* conclusion that the filed rate doctrine was inapplicable is hardly surprising and is consistent with *Tex. Commer. Energy and Town of Norwood, supra.*

Under **[**46]** the North Dakota statutory scheme, neither of the underlying principles of the filed rate doctrine is implicated. First, long-term care insurance providers were not required to adhere to any rate, but instead could increase rates without the approval of the insurance commissioner. This obviates any concerns surrounding the applicability of the nondiscrimination principle of the filed rate doctrine, which "insure[s] that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require." *H.J., 954 F.2d at 488*. Second, where an agency has no authority to establish rates, there are no nonjusticiability concerns -- a court need not worry about "second-guessing" a regulating agency's reasonableness determination when that agency is not permitted to make the "first guess" at all.

Plaintiffs' attempt to analogize a statute where the "regulating" agency in question need not approve, and does not have the authority to establish, insurance rates to the Ohio title insurance scheme fails, and fails miserably. The Ohio title insurance scheme clearly gives the Department of Insurance the authority to assess rates' compliance with statutory requirements. **[**47]** The superintendent is specifically tasked with determining whether the rates are excessive, inadequate, or unfairly discriminatory. It is this authority that allows this Court to consider an Ohio title insurance rate a "filed rate." *See* *Tex. Commer. Energy, 413 F.3d at 510*. Therefore, this Court rejects Plaintiffs' unsupported contention that application of the filed rate doctrine is inappropriate because the Ohio title insurance scheme is "not sufficiently pervasive."

No "Fraud or Wrongful Act" or "Improperly Filed" Exception Exists to Preclude the Application of the Filed Rate Doctrine to Plaintiffs' Action for Damages

Plaintiffs next argue that the filed rate doctrine should not be applied to the Ohio title insurance regulatory scheme because (1) the rates submitted by the title insurance companies are fraudulent and (2) the **[*857]** rates submitted by the title insurance companies do not comply with Ohio requirements. Neither argument holds merit.

e) No Fraud or Wrongful Act Exception Applies to the Filed Rate Doctrine

Plaintiffs allege that "[d]efendants' design in all of this has been to effectively 'hide' the cost basis for their artificially high and collective title insurance premiums **[**48]** from the regulatory scrutiny that *Ticor* demands." (Am. Compl., Doc. No. 36 at P 50.) Even assuming as true that the rates submitted by the Defendant were fraudulent or the product of unlawful conduct, the filed rate doctrine still applies to bar Plaintiffs' claim for damages.

The Supreme Court has not specifically addressed whether or not a fraudulent conduct or wrongful act exception applies to the filed rate doctrine. *See* *Ark. La. Gas Co., 453 U.S. at 571* ("We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct."). *See also* *Maislin, 497 U.S. at 129* (noting in *dicta* that although "we need not resolve this issue today" the Supreme Court has "never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule"). While no Sixth Circuit case addresses this issue, courts have uniformly rejected the notion that such an exception exists.

In *Wegoland*, the complaint alleged that two companies "gave regulatory agencies and consumers misleading financial information to submit the inflated rates they requested." *27 F.3d at 18*. The court first noted that "every court that has considered the plaintiffs' argument **[**49]** has rejected the notion that there is a fraud exception to the filed rate doctrine." *Id*. The court held "any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two." Such an approach would squarely implicate the nonjusticiability concern underlying the filed rate doctrine and would enmesh courts in the rate-making process. The court also noted that, as a practical matter, "regulators who are intimately familiar with the industry are best situated to discover when regulated entities engage in fraud on the agency and to remedy the wrongdoing when the specter of fraud arises." *Id. at 21*.

In *H.J.*, the Eighth Circuit went so far as to "reject the H.J. class's argument that the filed rate doctrine does not apply in the face of fraudulent conduct" even where the wrongful conduct alleged was the bribery of the very regulatory officials responsible for approving the submitted rates. *H.J., 954 F.2d at 492*. *See also* *Taffet II, 967 F.2d at 1494* ("Given that the [regulatory agency is] equipped to take the **[**50]** defendants' fraud into account in setting future rates, a court's award of damages against a utility for 'fraudulent rate-making' would be unnecessarily disruptive to the state's scheme of utility regulation."); *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp., 805 F. Supp. 1277, 1295 (D.S.C. 1992)* (although plaintiff characterized his injuries as resulting from "acts of fraudulent manipulation" of the regulating agency, "it is clear to the court that Lifschultz is attempting to collaterally attack the lawfulness or reasonableness of the rates. This is exactly what the *Keogh* doctrine was created to prevent. The fact that the rates were allegedly set based on fraudulent information is immaterial.").

This Court holds, in accord with every other court that has confronted this issue, that ***HN15***[] there is no exception to the filed rate doctrine for fraudulent or wrongful conduct. Therefore, Plaintiffs' contention that the title insurance rates submitted by Defendants **[*858]** to the Ohio Department of Insurance were part of a design to "effectively hide the cost basis" of the premiums and resulted in an artificially high rate is irrelevant. The filed rate doctrine still applies.

f) No "Improperly **[**51]** Filed" Exception Applies

Plaintiffs next contend that the filed rate doctrine should not apply to this case because Defendants' "filings are defective and improperly filed." (Doc. No. 104 at 6 n. 3.) Plaintiffs argue that "a filed rate which is 'incomplete' or lacks an 'essential element' does not comply with the rate filing regulatory regime, and therefore does not invoke the filed rate doctrine." (Doc. No. 77 at 26 (citing *Sec. Servs v. Kmart Corp.., 511 U.S. 431, 440, 442, 114 S. Ct. 1702, 128 L. Ed. 2d 433 (1994))*. In the first instance, Plaintiffs have flyspecked language from *Security Services*. The holding of that case was that "rates filed with the Interstate Commerce Commissions *which became 'void as a matter of law'* under that commission's regulations could not be enforced." *See* *Dolan, 365 Fed. Appx. 271, 2010 U.S. App. LEXIS 2814 at *4* (citing *Sec. Servs., 511 U.S. at 437*).

In *Security Services*, the defendant motor carrier filed a rate with the ICC, which received and accepted it. The application made reference to, and relied on, a specific mileage guide, filed by a rating agency to which the defendant belonged. *Sec. Servs., 511 U.S. at 433*. Under ICC regulations, such mileage guides only applied to those carriers who were participants **[**52]** in the rating agencies that issued them. After defendant had filed its rate with the ICC, the rating agency cancelled the defendant's participation in the rating agency for failure to pay fees. *By statute*, once the tariff "is filed or amended to note cancellation of the carrier's participation, the carrier's tariff is *void as a matter of law*." *Id. at 440* (citing *49 C.F.R. § 1312.4(d)*) (emphasis added). Therefore, once cancellation occurs, the tariff becomes "incomplete" and "ceases to satisfy the fundamental purpose of tariffs; to disclose the freight charges due to the carrier." *Id*. Under these circumstances, the filed rate doctrine did not apply, because the shipper "could not determine the carrier's rates, since *under the regulations*, distance tariffs are incomplete once the carrier's participation in the Mileage Guide has been cancelled by the agent's filing." *Id. at 443*. *See also* *Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc., 989 F.2d 281, 284 (8th Cir. 1993)* (holding filed rate doctrine inapplicable where ICC regulation voids tariffs).

Plaintiffs also rely on *TON Servs. v. Qwest Corp., 493 F.3d 1225 (10th Cir. 2007)*. In TON, the court held the filed rate doctrine **[**53]** inapplicable to a situation where plaintiffs sued to enforce a specific "command of the very regulatory statute giving rise to the tariff-filing requirement." *493 F.3d at 1236*. *TON* involved a complex regulatory structure involving Payphone. Relevant (and simplified) here, as it existed in 1996, entities known as local exchange carriers (including defendant in *TON*) owned payphone lines. These payphone lines were used, however, by both the local exchange carriers' own payphone services and by independent payphone service providers (including plaintiffs in *TON). Id. at 1229*. The local carriers "routinely subsidized and discriminated in favor of their own payphone services." *Id*. In 1996, in an effort to increase competition, Congress directed the FCC to put a stop to this practice. The FCC did so by implementing the so-called "New Services Test," which mandated that tariff rates should be based solely on a carrier's overhead costs. *Id*. (citing *47 C.F.R. § 61.49(g)(2)*). The FCC also established the method by which the local carriers would demonstrate their compliance, **[*859]** namely by accompanying tariff filings with "supporting cost data" as provided for by statute. *Id. at 1231*. Further, the **[**54]** local exchange carriers had to certify that its tariff rates were compliant with the New Services Test in order to receive "per-call compensation," which compensated payphone line owners for allowing calls from its payphones to be connected to long distance carriers. *Id*. The effective date for New Services Test compliance was April 15, 1997.

On April 10, 1997, five days before the FCC's orders went into effect, a group of local exchange carriers petitioned the FCC to delay the effective date because they were not prepared to file cost-based rates and other necessary data. *Id. at 1231*. The FCC acquiesced, but with a caveat. If, after the local exchange carriers became fully compliant with the FCC's new orders, the newly calculated compliant rate was lower than the non-compliant rate, the local exchange carriers were ordered to reimburse or credit any independent payphone service providers for the difference (calculated between the April 15, 1997 compliance deadline and the date the local carrier became fully compliant). The defendant in *TON* did not file any new rate or cost-data until 2002. The 2002 rate was substantially lower than the rates that had been charged by defendant since **[**55]** April 1997, and plaintiff sued to recover the difference in rates. As a defense, defendant argued the filed rate doctrine precluded a monetary recovery, because the defendant had filed its previous rates with the appropriate regulatory body. The Tenth Circuit rejected this defense, holding the filed rate doctrine did not apply because plaintiff sought to enforce existing regulatory orders that made damages available to those in the plaintiff's position.

Turning to this case, Plaintiffs broadly allege that Defendants' rate filings do not comply with Ohio's rate filing requirements. Plaintiffs assert that "Ohio law requires that title insurers support their rates with information about past and prospective expenses to aid the ODI [Ohio Department of Insurance] in determining whether or not those rates comply with Ohio law" and claim that Defendants' rate filings lack that data. (Doc. No. 77 at 26-27.) Further, Plaintiffs cite *OHIO REV. CODE § 3953.26*, which prohibits payments to induce title insurance, and claim that Defendants' rate filings "include hidden costs which are largely comprised of kickbacks and other inducements forbidden by Ohio law." (*Id*.) First, *even if* Plaintiffs could **[**56]** prove that Defendants' rate filings incorporated illegal commissions paid to title insurance agents in violation of *§ 3953.26*, the Court is directed to no statute or regulation that would *void* those filed rates. *See* *Dolan, 365 Fed. Appx. 271, 2010 U.S. App. LEXIS 2814, at *5*.

Next, and even more problematic for Plaintiffs, is Plaintiffs' contention that Ohio law "requires that title insurers support their rates with information about past and prospective expenses." (Doc. No. 77 at 26-27.) The section to which Plaintiffs refer, *§ 3935.03(C)(5)*, states that "***HN16***[] [c]onsideration shall be given to [. . .] (5) Past and prospective expenses both countrywide and those specially applicable to this state." *Id*. Plaintiffs' contention that the failure of Defendants' filings to include essential cost data somehow renders those filings invalid or "improper" is flawed -- the statute only states that "consideration" shall be given to such information. Moreover, *§ 3935.04* is illuminative, and expressly contemplates insurers filing rates in the absence of accompanying data:

> ***HN17***[] When a filing is not accompanied by the information upon which the insurer supports the filing, *and* the superintendent does not have sufficient information **[**57]** to determine whether the filing meets the requirements of *sections 3935.01 to 3935.17* **[*860]** of the Revised Code, he shall require the insurer to furnish the information which supports the filing [. . .].

§ 3935.04(A). ***HN18***[] This statute (which is phrased in the conjunctive), therefore, allows for the superintendent to determine that a filing meets the requirements of the code in the absence of the accompanying information. Thus, while Ohio law requires the "consideration" of past and prospective expenses, it does not require any affirmative filing of supporting documentation about those expenses for a filing to be valid, but rather gives the superintendent the right to call for supporting documentation if he or she determines necessary. Therefore, *even if* Defendants' rate filings are not accompanied by supporting documentation regarding past and prospective expenses, that absence does not render the filing deficient, and, again, certainly does not warrant considering the rates "void" so as not to apply the filed rate doctrine.

Moreover, the Ohio statutory scheme expressly provides for the manner in which Defendants submit their rates to the Department of Insurance. It is uncontested that certain **[**58]** Defendants are members of the OTIRB, which files title insurance rates on behalf of its members. *Section 3935.04(B)* allows an insurer to "satisfy its obligation to make such filings" by becoming a member of a rating bureau and authorizing the superintendent to accept filings from the rating bureau on the insurer's behalf. *Id*. Therefore, *even if* an insurer had an obligation to submit supporting expense documentation to the Ohio Department of Insurance alongside rate filings (which it does not, *see supra*), an insurer can "satisfy its obligation" by joining a rating bureau. This is exactly what Defendant insurers have done in this case.

Plaintiffs direct the Court's attention to Ohio Department of Insurance Bulletin 91-1 (hereinafter "Bulletin 91-1"). [11] Bulletin 91-1 "specifies the framework under which rating bureaus and participating insurers in rating bureaus will operate in a loss cost system in the State of Ohio." *Id*. Under the "loss cost system," "each insurer must individually determine and file the rates it will use as a result of its own independent company decision-making process." *Id*. Defendants contend that Bulletin 91-1 applies to only those rating bureaus that submit only **[**59]** "loss cost" information on behalf of their members, and not those rating bureaus such as the OTIRB that files rates on behalf of their members. [12] Plaintiffs, alternatively, insist that Bulletin 91-1 demonstrates that Defendants' rates "have not been properly filed," and that the filed rate doctrine should therefore not apply. (Doc. No. 77 at p. 26.)

This Court holds, however, no matter the scope of its intended application, Bulletin 91-1 cannot be read to render Defendants' rate filings improper so as not to apply the filed rate doctrine. A bulletin issued by the Ohio Department of Insurance can "provide guidance to the reader **[**60]** about the topic covered." *See* Ohio Dep't of Insurance Policy and Legislation, Bulletins, *available at*: *http://www.insurance.ohio.gov/Legal/Bulletins/Pages/BulletinIndex.aspx*.

A bulletin cannot, however, displace the unambiguous text of the Ohio Revised **[*861]** Code. The Code expressly permits rating bureaus to file *rates* on behalf of their members. Bulletin 91-1 cannot ban what the code specifically allows. Moreover, and again, *even if* Bulletin 91-1 does stand to show that Defendants' rates are noncompliant with Ohio law (which it does not), no statute *voids* those filed and approved rates so as to preclude application of the filed rate doctrine under *Security Servs, supra.*

The Filed Rate Doctrine Also Applies to Preclude Plaintiffs' State Law Claims for Damages

In their objection, Plaintiffs argue that even if the filed rate doctrine applies to preclude their claims for damages under the federal Sherman Act, Ohio does not recognize the filed rate doctrine and therefore the filed rate doctrine does not preclude Plaintiffs' state Valentine Act claim for damages. The Court disagrees.

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[11] *Available at http://www.insurance.ohio.gov/Legal/Bulletins/Documents/91-1.pdf*.

[12] This Court granted Plaintiffs' request to conduct limited discovery on October 15, 2008. (Doc. No. 52.) Pursuant to this order, Plaintiffs deposed Maureen Motter, a representative of the Ohio Department of Insurance. (Transcript at Doc. No. 77-2.) While Defendants support this contention with the deposition testimony of Ms. Motter, this Court has not relied in any manner on Ms. Motter's testimony in reaching its consideration of the effect of Bulletin 91-1 on Plaintiffs' claims.

First, it is important to reiterate that, as to the federal claims, it is irrelevant that the regulating agency in **[**61]** this case is a state, and not a federal agency. ***HN19***[] The filed rate doctrine acts to preclude actions for damages under the Sherman Act regardless of whether the regulating agency is state or federal. *See, e.g., Dolan, 365 Fed. Appx. 271, 2010 U.S. App. LEXIS 2814 at *11* (holding "the [filed rate] doctrine applies to any 'filed rate,' including rates filed with state agencies") (internal citations and quotations omitted); *Crumley v. Time Warner Cable, Inc., 556 F.3d 879, 881 (8th Cir. 2009)* ("The filed rate doctrine also applies to rates filed with state agencies."); *H.J., 954 F.2d at 494* (holding there is "no reason to distinguish between rates promulgated by state and federal agencies. We are persuaded that the rationale underlying the filed rate doctrine applies whether the rate in question is approved by a federal or state agency."); *Taffet II, 967 F.2d at 1494* (holding the filed rate doctrine "applies with equal force to preclude recovery [. . .] whether the rate at issue has been set by a state rate-making authority or a federal one.").

Plaintiffs are correct, however, that ***HN20***[] the question of whether the filed rate doctrine acts to preclude their state law antitrust claims for damages as to rates filed with **[**62]** a state regulatory agency is a matter of Ohio law. No Ohio Supreme Court case addresses the issue of whether the filed rate doctrine acts to bar claims for damages to rates filed with the Ohio Department of Insurance. "***HN21***[] Where the state supreme court has not spoken, our task is to discern, from all available sources, how that court would respond if confronted with the issue." *Rector v. Gen. Motors Corp., 963 F.2d 144, 146 (6th Cir. 1992)*; *see also* McClain v. Northwest Cmty. Corr. Ctr. Judicial Corr. Bd., 440 F.3d 320, 328 (6th Cir. 2006) (same). For the following reasons, this Court holds the Ohio Supreme Court would apply the filed rate doctrine to preclude an award of damages under the Valentine Act where premised on payments made under rates approved by a state regulatory agency.

As extensively discussed in the preceding pages, ***HN22***[] the filed rate doctrine bars damage awards premised on payments made under rates approved by a regulatory agency. Under the doctrine, a private plaintiff may not challenge the reasonableness, or validity, of the filed rate. Simply put, the filed rate is "unassailable in judicial proceedings brought by ratepayers." *See* Wegoland, 27 F.3d at 20. But in addition **[**63]** to acting as an insurmountable bar to damage recoveries by private plaintiffs, the filed rate doctrine mandates, "as a corollary, no one may bring a judicial proceeding to enforce any rate other than the rate established by the filed tariff." *Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1170 (9th Cir. 2002)*. *See also* Ark. La., 453 U.S. at 577 **[*862]** (holding the filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed").

While Ohio has not applied the filed rate doctrine to preclude a suit for damages by a private plaintiff, the Ohio Supreme Court has explicitly recognized the corollary principle that regulated entities cannot charge rates other than those properly filed. In *In re Investigation of Nat'l Union Fire Ins. Co., 66 Ohio St. 3d 81, 1993 Ohio 184, 609 N.E.2d 156 (1993)*, an insurer (National Union) was a member of a rating organization (Insurance Services of Ohio) that, pursuant to *OHIO REV. CODE § 3937.03(B)*, made rate filings on National Union's behalf. [13] Effective January 15, 1980, Insurance Services of Ohio "filed a new **[**64]** general liability classification structure and rating procedure applicable to governmental subdivisions with Ohio's superintendent." *Id. at 83*. On December 31, 1984, National Union issued a policy to the city of Brook Park, Ohio, and charged the city the rates set forth in the 1980 rating organization filing. *Id*. One year later, "without submitting any additional documentation to the superintendent" of insurance, National Union increased Brook Park's premiums. *Id*. National Union argued, for various reasons not relevant here, that "filed rates may be modified simply on the basis of underwriting judgment" and were exempt from the filing requirements of *§ 3937.03*.

The Ohio Supreme Court rejected this argument and held that **[**65]** the Ohio statutory scheme plainly required that any rate charged must set forth in a rating plan filed by or on behalf of the insurer, and deviations are not

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[13] Chapter 3937 of the Ohio Code addresses Casualty and Motor Vehicle Insurance. *Section 3937.03(B)* provides that an insurer "may satisfy its obligation to make such filings [to the Department of Insurance] by becoming a member of, or subscriber to, a licensed rating organization [. . .]." *OHIO Rev. Code § 3937.03(B)*. Other than the substitution of the entity name, i.e, "licensed rating *organization*" for "licensed rating *bureau*," *§ 3937.03(B)* is identical to *§ 3935.04(B)*.

permitted without the approval of the Superintendent of Insurance. Id. at 87. As Plaintiffs themselves characterize the holding, "[i]n *Nat'l Union Fire*, however, the Ohio Supreme Court merely held that charging a premium other than the filed rate was impermissible." (Doc. No. 104 at p. 24.) Far from Plaintiffs' "merely held" characterization, Nat'l Union Fire recognizes, and applies, the corollary to the filed rate doctrine, and is consistent with the Court's ultimate conclusion that the Ohio Supreme Court would recognize and apply the filed rate doctrine to this case. *See also* Office of Consumers' Counsel v. Public Utils. Com, 61 Ohio St. 3d 396, 406-07, 575 N.E.2d 157 (1991) (Brown, J., dissenting) (recognizing "the well-established filed rate doctrine" and "one of the primary purposes of the regulation of public utilities is to prevent price discrimination"). *See also* Gary Phillips & Assocs. v. Ameritech Corp., 144 Ohio App. 3d 149, 153, 759 N.E.2d 833 (Ohio Ct. App. 2001) (discussing public utility regulatory scheme, which requires Commission rate approval **[**66]** and mandates utilities charge only rates approved by Commission as "giv[ing] birth to what is known as the 'filed rate doctrine'").

Plaintiffs rely on two unpublished Northern District of Ohio decisions, Chesner v. Stewart Title Guaranty Co., No. 06-cv-476, 2006 U.S. Dist. LEXIS 57356 (N.D. Ohio Aug. 4, 2006) and Barnes v. First Am. Title Ins. Co., No. 06-cv-574, 2006 U.S. Dist. LEXIS 54984 (N.D. Ohio Aug. 4, 2006). In relevant part, in both *Barnes* and *Chesner*, decided on the same day by the same judge using identical language, plaintiffs **[*863]** (purchasers of title insurance) alleged defendants (title insurance companies) committed fraud by "fail[ing] to disclose the potential for a discounted rate." Barnes, 2006 U.S. Dist LEXIS 54984 at *19; Chesner, 2006 U.S. Dist. LEXIS 57356 at *19. Defendants asserted the filed rate doctrine "fulfill[ed] Defendant's duty to disclose as it requires Defendant file its rates with the Ohio Department of Insurance and that such filing creates a presumption of knowledge of the rate and discount rate by the consumer." Barnes, 2006 U.S. Dist LEXIS 54984 at *20; Chesner, 2006 U.S. Dist. LEXIS 57356 at *19-20. The court refused to apply the doctrine, and also **[**67]** noted that defendants had not "provided [Ohio] case law demonstrating the 'filed rate doctrine' applies outside the public utilities or common carrier arenas." Barnes, 2006 U.S. Dist LEXIS 54984 at *20; Chesner, 2006 U.S. Dist. LEXIS 57356 at *20.

The failure of defendants in *Barnes* and *Chesner* to provide Ohio case law applying the filed rate doctrine to the insurance context is understandable -- indeed, as discussed above, no such case law exists. Plaintiffs, in their objection and based on *Barnes* and *Chesner*, argue that because no Ohio case has applied the filed rate doctrine to the title insurance industry, the Filed Rate doctrine does not apply to the title insurance industry under Ohio law. This reasoning suffers from the fallacy of *argumentum ad ignorantiam*, which is "the mistake that is committed whenever it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true." *See* Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250, 1257 (11th Cir. 2007) (citing Irving M. Copi & Carl Cohen, INTRODUCTION TO LOGIC 93 (8th ed. 1990)).

Moreover, a brief examination of the claims presented in **[**68]** Barnes and Chesner quickly distinguish them from Plaintiffs' claims in this case. In Barnes and Chesner, the plaintiffs were title insurance purchasers who refinanced existing mortgages. The plaintiffs claimed that they paid a higher "premium" rate for title insurance, when, due to the fact they were refinancing and already owned an existing title insurance policy, they were entitled to pay a different, discounted rate "as provided by law." *See* Chesner, 2006 U.S. Dist. LEXIS 57356 at *14 ("The Complaint clearly alleges the Plaintiffs purchased title insurance from Defendant and that under applicable Ohio law Plaintiffs were entitled to the discounted rate."). Plaintiffs alleged damages based on the difference between the title insurance rate actually paid, and the separate, discounted rate for which they were eligible based on their status as reissue purchasers, but of which they were unaware. Of significance, both of the rates were "filed rates." The plaintiffs claimed the title insurance companies had a duty to disclose the availability of the second, lower rate, and defendants' failure to disclose amounted to fraud. [14] The plaintiffs *did not* challenge the reasonableness of the rate **[**69]** they paid, but rather alleged there was a separate rate (that was lower) that they would have purchased had they been made aware of its existence.

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[14] The Court notes that in both *Barnes* and *Chesner*, the fraud claims were dismissed because plaintiffs failed to allege fraud with the requisite particularity as required by Rule 9(b).

The claims asserted in *Barnes* and *Chesner* did not implicate the principles underlying the filed rate doctrine. Plaintiffs did not challenge the reasonableness of the rate paid (as determined by the regulating **[*864]** agency), so the court was not required to make the inquiry forbidden by the doctrine (nonjusticiability). Nor did plaintiffs' requested relief seek to alter the rate paid by plaintiffs in a manner that would result in different rates being paid by different customers (nondiscrimination). [15] Compare the claims asserted by Plaintiffs in this case, which directly attack the reasonableness of the rate and would require the alteration of the rate paid that would potentially result in different rates being paid by different customers. *Barnes* and *Chester* are completely inapposite and of no help to Plaintiffs in this case.

Finally, this Court looks to the Sixth Circuit's decision in *Pinney Dock*. There, plaintiffs brought federal and Ohio state antitrust claims against a group of railroad defendants. Relevant here, defendants asserted the filed rate doctrine as a defense against plaintiffs federal and state antitrust claims. After exhaustively considering whether or not the filed rate doctrine applied to the specific factual scenario presented, [16] the Court concluded that the doctrine did apply and that "all rate-related claims made by the plaintiffs, *whether state or federal*, must be dismissed." *Pinney Dock, 838 F.2d at 1482* (emphasis added). The court in *Pinney Dock* specifically applied the filed rate doctrine to the plaintiffs' **[**71]** Valentine Act claims, albeit without elucidation of its reasons in so doing.

For the foregoing reasons, this Court holds, based on all available sources, that ***HN23***[] the Ohio Supreme Court would respond to the question of whether the filed rate doctrine precludes a private plaintiff's claim for damages under the Valentine Act where premised on payments made under rates approved by a state regulatory agency in the affirmative.

The Filed Rate Doctrine Does Not Necessarily Preclude Injunctive Relief Under Either the Sherman Act or the Valentine Act

Defendants object to the Magistrate Judge's recommendation that the filed rate doctrine does not necessarily preclude Plaintiffs' claim for injunctive relief. (Doc. **[**72]** No. 102 at 41-42, 56 (recommending dismissal without prejudice to permit Plaintiffs to amend their complaint to present a claim for injunctive relief, despite finding "[t]he undersigned can divine no way of providing the injunctive relief [requested, due to the filed rate doctrine]").) This Court finds that the filed rate doctrine bars some, but not all, of the injunctive relief sought by Plaintiffs in this case. While the filed rate doctrine would not preclude all injunctive relief sought, however, allowing Plaintiff leave to amend their complaint would be futile, because Plaintiffs' federal claims are exempted from antitrust scrutiny by the McCarran Ferguson Act, *see infra*, and Plaintiffs' state claims complain of conduct specifically allowed and contemplated by the Ohio insurance code, *see infra*. Put more simply, as to Plaintiffs' claims under the Valentine Act, this Court cannot enjoin an **[*865]** alleged "illegal practice" that is, in fact, legal.

As to injunctive relief, Plaintiffs seek broadly that Defendants "be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing maintaining or renewing the aforesaid combination, conspiracy, agreement, understanding **[**73]** or concert of action, adopting or following any practice, plan, program or design having a similar purpose or effect in restraining competition." (Doc. No. 36 at 21.) Viewed in a light most favorable to Plaintiffs, their complaint seeks to enjoin the following activities: (1) collaboration to collectively set title insurance rates at supra-competitive prices, evidenced by the identical rate charged by Defendants, and (2) the inclusion of

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[15] This is an important, and nonobvious, **[**70]** distinction. Success by the *Barnes* and *Chesner* plaintiffs would not have resulted in the alteration of the rate paid by plaintiffs -- the rate would have remained fully intact. Damages would have been calculated by determining the difference between the two *approved* filed rates, but recovery would have been premised on the fraudulent failure to disclose the availability of the separate, lower rate at the time of purchase, and not on some flaw in the establishment of the rate paid.

[16] *Pinney Dock* required the Sixth Circuit to determine whether the Filed rate doctrine applies when the plaintiff is defendant's competitor, rather than customer, an issue over which the Courts of Appeal are not in accord but not implicated by this case. *Cf. Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001)* (doctrine may bar claims by non-purchasing competitors) with *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144 (3d Cir. 1993)* (applying non-purchasing competitor exception).

illegal kickbacks and inducements in the rate submitted to the ODI, which acts to "hide" the true cost basis from regulatory scrutiny.

As discussed above, the Supreme Court has recognized that the filed rate doctrine does not necessarily apply to claims for injunctive relief. Square D, 476 U.S. at 419, 422 & n.28 (explaining that the *Keogh* rule bars damage actions but that rate-related claims remain "subject to governmental and injunctive antitrust actions"); Georgia v. Pa. R.R. Co., 324 U.S. 439, 462, 65 S. Ct. 716, 89 L. Ed. 1051 (1945), *superseded by statute*, Reed-Bulwinkle Act, 49 U.S.C. § 10706(b)(2), *as recognized in* Square D, 476 U.S. at 422-23 (plaintiff could bring antitrust action to enjoin alleged "coercive and collusive influences" in rate-making). Courts have also recognized, **[**74]** however, that some forms of injunctive relief violate the nonjusticiability principle of the doctrine, and have precluded injunctive relief where the effect on the relief would result in altering a filed rate. *See* Town of Norwood, 202 F.3d at 420 (applying filed rate doctrine to deny injunctive relief because it "would require the *alteration* of tariffs" already filed and thus encroach on agency's authority (emphasis in original)). Thus, ***HN24***[] this Court can properly enjoin activity to prevent future conduct where doing so would not affect rates already filed and would not encroach on the agency's authority to determine the reasonableness of a given rate.

As to the first potential ground, prohibiting the collaboration of defendants prospectively would not alter any already-filed rate, but would result only in *future* rates being affected. The filed rate doctrine cannot preclude this relief. *See* In re Pa. Title Ins. Antitrust Litig., 648 F. Supp. 2d at 686; Green v. Peoples Energy Corp., 02-C-4117, 2003 U.S. Dist. LEXIS 4958 at *4 (N.D. Ill. Mar. 28, 2003) ("the critical inquiry is whether granting the injunctive relief will require dismantling the filed tariffs. If horizontal agreement is alleged **[**75]** and therefore the injunctive relief can be enforced without tampering with the filed rates, then [. . .] the filed rate doctrine should not be an absolute bar."). Put simply, this Court could grant injunctive relief that barred any illegal collaboration of insurers, or insurers and rating bureaus, because that relief would not affect either the already-filed rates or encroach on the Department of Insurance' authority in any way.

The second ground presents a different scenario. The essence of Plaintiffs' theory is that Defendants' rate submissions conceal the inclusion of illegal kickbacks by "calculating a single rate that comprises both the premium for the title insurance and the kickbacks" and thereby evade Department of Insurance scrutiny. To be certain, kickbacks, or more formally "payments to induce title insurance business" are illegal under Ohio law. OHIO REV. CODE § 3953.26. But Plaintiffs do not seek to enjoin the kickbacks themselves, [17] but **[*866]** rather the inclusion of the kickbacks in the "single rate" submitted to the Department of Insurance. Were this Court to grant the relief Plaintiffs seek, the regulatory authority of the Ohio Department of Insurance would be seriously undermined. **[**76]** As discussed in the preceding paragraphs, the Ohio statutory scheme mandates that the superintendent "shall review" every rate submission to ensure its compliance with Ohio law and gives the superintendent the right to call for additional documentation if he determines necessary. Were this Court to enjoin Defendants from submitting a "single rate" and require a detailed accounting of how a particular rate was calculated, this Court would, in effect, be substituting its own judgment as to how rate filings should be reviewed for that of the regulating agency's, and by implication, necessarily conclude that the scheme as it exists results in unreasonable rates. This squarely implicates the nonjusticiability principle of the filed rate doctrine. ***HN25***[] Just as the filed rate doctrine precludes injunctive relief that results in the alteration of a filed rate due to nonjusticiability concerns, *see* Town of Norwood, supra, so too must the filed rate doctrine preclude injunctive relief where such relief would displace the statutory scheme and authority of the regulating agency to determine the reasonableness of rates.

Conclusion

For the foregoing reasons, the Court holds that the filed rate doctrine applies to the Ohio title insurance industry and Plaintiffs' claims for damages under both the Sherman Act and the Valentine Act are therefore precluded. The Court

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[17] "Such 'obey the law' injunctions cannot be sustained." EEOC v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566, 576 (6th Cir. 1984) **[**77]** (citing Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 897-98 (5th Cir.)).

therefore **OVERRULES** Plaintiffs' objections in this regard. Moreover, the Court holds that Plaintiffs' claim for injunctive relief as to the allegedly "illegal collaboration" of title insurance companies and rating bureaus is not precluded by the filed rate doctrine and **OVERRULES** Defendants' objections to that extent. Defendants' objection to Plaintiffs' claim for injunctive relief based on the inclusion of kickbacks into the "single rate" submitted to the Ohio Department of Insurance is well-taken and is **SUSTAINED**.

II. MCCARRAN-FERGUSON ACT

The Antitrust Exception

The Magistrate Judge also found that Plaintiffs' Sherman Act claim was barred by the McCarran-Ferguson Act. With respect to this finding, Plaintiffs raise two objections. First, Plaintiffs complain that the Magistrate Judge failed to evaluate whether application of Plaintiffs' federal antitrust claim would **[**78]** "invalidate, impair, or supersede" the relevant Ohio insurance laws. (Plaintiffs' Objections at 21, quoting *Humana v. Forsyth, 525 U.S. 299, 307, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999)* (internal citation omitted)). Defendants insist that such a consideration was not necessary, suggesting that the Magistrate Judge properly limited her analysis to the question of whether the disputed conduct was the business of insurance, regulated by state law, and not a boycott. According to Defendants, because the Sherman Act was specifically identified in the McCarran-Ferguson Act, Congress had already determined that application of the Sherman Act would "invalidate, impair, or supersede" a state's regulation of the business of insurance. The "impairment" clause, Defendants maintain, is reserved for McCarran-Ferguson defenses raised as to laws other than antitrust laws. (Doc. No. 111, Defendants' Responses to Plaintiffs' Objections at 27-29.) To resolve this dispute, **[*867]** the Court turns to the language of the statute. *See Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 210, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)* (***HN26***[] "The starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning **[**79]** of a statute, is the language of the statute itself.")

The McCarran-Ferguson Act provides that ***HN27***[] "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or the taxation of such business." *15 U.S.C. § 1012(a)*. The Act further declares that ***HN28***[] "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purposes of regulating the business of insurance [...]." *15 U.S.C. § 1012(b)*. "***HN29***[] Federal law thus provides for 'reverse preemption' in the realm of regulating the insurance business." *Genord v. Blue Cross & Blue Shield, 440 F.3d 802, 805 (6th Cir. 2006)*. As such, a federal law that does not directly relate to the business of insurance cannot be construed to "invalidate, impair, or supersede" a state law enacted to regulate the business of insurance. *Id*.; *15 U.S.C. § 1012(b)*.

The McCarran-Ferguson Act, however, contains an "antitrust exception" to the reverse preemption rule. After setting forth the rule, the Act specifically identifies the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, and states that these laws "shall be applicable to the **[**80]** business of insurance to the extent that such business is not regulated by State law." *§ 1012(b)*.

HN30[] To determine whether the McCarran-Ferguson Act applies, a court generally begins with the threshold question of whether the federal statute at issue "specifically relates to the business of insurance." If it does, the Act does not allow for reverse preemption. *Genord, 440 F.3d at 805*. If not, then the two remaining questions that must be answered in the affirmative if the federal law is reverse preempted by the state statute are: (1) "whether the state statute at issue was 'enacted [...] for the purpose of regulating the business of insurance;'" and (2) "[w]hether the application of the federal law would 'invalidate, impair, or supersede' the state statute." *Id.* (quoting *§ 1012(b)*). *See Kenty v. Bank One, N.A., 92 F.3d 384, 392 (6th Cir. 1996)*.

Defendants argue that ***HN31***[] the antitrust exception expressly exempts from Sherman Act liability activity that constitutes the "business of insurance" to the extent it is regulated by state law. According to Defendants, a defendant in an antitrust case need not show that the Sherman Act would "invalidate, impair, or supersede" a state's regulation. Instead, **[**81]** the Court need only find that the activity of which a plaintiff complains constitutes the business of insurance, regulated by state law, and not a boycott.

The Court agrees. "[T]he language of the [McCarran-Ferguson A]ct distinguishes preclusion analysis where antitrust laws are at issue." *Sabo v. Metro. Life Ins. Co., 137 F.3d 185, 189 n.1 (3d Cir. 1998)* ("Because the plaintiff's complaint is not grounded in federal antitrust laws, we focus our analysis on the first clause of *section 1012(b)*.") In *Royal Drug*, the Supreme Court restricted its inquiry into whether the McCarran-Ferguson Act barred a Sherman Act antitrust claim challenging state pharmacy agreements to the question of whether the pharmacy agreements were the business of insurance. *440 U.S. at 210* The same limited inquiry was applied to the antitrust claim raised in *Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982)*. *See Highmark, Inc. v. UPMC Health Plan, Inc., 276 F.3d 160, 167,* ***[*868]*** *n.1 (3d Cir. 2001)* (internal citation omitted) ("In [*United States v*.] *Fabe, [508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993)]*, the Court noted that *Pireno* dealt with the McCarran Act's effect on antitrust laws, which the Court found readily distinguishable from **[**82]** other laws. This is because there are two separate clauses in the McCarran Act. According to the Supreme Court, the second clause, which proscribes application of antitrust laws, is more 'narrowly circumscribed' than the first clause, which deals with federal laws in general.").

Because Plaintiffs have raised a claim under the Sherman Act, the antitrust exception controls and the Magistrate Judge properly limited her inquiry to the question of whether Defendants' activities constitute the "business of insurance." The Court, therefore, **OVERRULES** Plaintiffs' objection that the Magistrate Judge erred in not considering whether the Sherman Act would invalidate, impair, or supersede" the state law. [18]

The Business of Insurance

The Court turns to the questions posed by the second clause of *§ 2(b)* of the McCarran-Ferguson Act: namely, "(1) whether the practice of the defendants challenged here falls within the term 'business of insurance' and (2) whether it is 'regulated by state law.'" *McIlhenny v. American Title and Abstract Co. of Pa., 418 F. Supp. 364, 367 (E.D. Pa. 1976)*. Plaintiffs' second objection under the McCarran-Ferguson Act is directly linked to this phase of the analysis. Specifically, Plaintiffs complain that the Magistrate Judge erred in finding that **[**84]** Defendants' conduct constituted the "business of insurance."

In *Pireno*, ***HN32***[] the Supreme Court announced the test for determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by *§ 2(b)*: "*first*, whether the practice had the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Pireno, 458 U.S. at 129* (emphasis in the original). No one factor is outcome determinative and must be considered along with the whole body of evidence. *Id*. The Magistrate Judge found all three elements present, and this Court concurs.

There is little doubt that the setting of rates for insurance policies constitutes the "business of insurance." *Royal Drug, 440 U.S. at 224*; *see also Gilchrist v. State Farm Mut. Auto. Ins. Co., 390 F.3d 1327, 1331 (11th Cir. 2004)* ("Rate-making, of course, is the paradigmatic example of the conduct that Congress intended to protect by the

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[18] Of course, application of the "impairment clause" to the state statutes at issue would not change the result. A federal law does not impair, invalidate, or supersede a state regulation where the "federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a state's administrative regime [...]." *Humana, 525 U.S. at 310*. *See Brown v. Cassens Transport Co., 546 F.3d 347, 362 (6th Cir. 2008)*. **[**83]** To demonstrate impairment, it must be shown that substantive sections of the State regulations will be invalidated, *Kenty, 92 F.3d at 392*, or that it will render the State law ineffective, *Brown, 546 F.3d at 362*. Here, there can be no question that application of the Sherman Act will substantially impair Ohio's regulatory framework governing title insurance by invalidating those portions of the regulations--including *Ohio Rev. Code § 3935.04* and *§ 3935.06*--that permit the submission of filed rates through rating bureaus. Such an application would surely frustrate the declared state policy of permitting such cooperation.

McCarran-Ferguson Act.") Plaintiffs do not **[*869]** suggest otherwise. Instead, Plaintiffs argue that, **[**85]** by its very nature, title insurance is fundamentally different than other forms of insurance, and that it is not, in fact, insurance at all. Suggesting that title insurance is more akin to a warranty or a guarantee, Plaintiffs observe that it merely "warrants that the title insurance company made no mistakes in the title search conducted prior to the closing, and it warrants that there has been no fraud on the part of the title agents." (Plaintiffs' Objections at 29.)

As to the question of whether title insurance constitutes "insurance" for the purpose of the McCarran-Ferguson Act, this Court does not write on a clean slate. Courts that have considered the issue have consistently found, as a matter of law, that ***HN33***[] title insurance is "insurance." *Commander Leasing Co. v. Transamerica Title Insurance Co., 477 F.2d 77, 83 (10th Cir. 1973)*; *Crawford v. American Title Ins. Co., 518 F.2d 217, 219 (5th Cir. 1975)* (plaintiffs "conceding as they must, that title insurance is 'insurance' within the meaning of the McCarran Act.").

For example, in *Mitgang v. Western Title Ins. Co., 1974 U.S. Dist. LEXIS 6258, at *3 (N.D. Cal. Oct. 16, 1974)*, the court, in arriving at the conclusion that title insurance **[**86]** was insurance, explained that "[a]lthough a person receiving title insurance gets a different sort of policy than one receiving life insurance, the same basic relationship--that of policy holder and insurer--would seem to pertain." Similarly, while noting that "[t]itle insurance may be distinct from other insurance agency activities in some respects," the court in *American Land Title Ass'n v. Board of Governors of Federal Reserve Sys., 892 F.2d 1059, 1064, 282 U.S. App. D.C. 125 (D.C. C. 1989)*, concluded that it constituted insurance for purposes of the McCarran-Ferguson Act.

The authority relied upon by Plaintiffs to support a contrary conclusion is not persuasive. In *Ticor Title Ins. Co. v. FTC, 998 F.2d 1129, 1138 (3d Cir. 1993)*, the court was not evaluating the practice of issuing title insurance, but was, instead, concerned with the practice of conducting title searches and examinations. The court found that these distinct and limited tasks did not involve the business of insurance. In so ruling, the court removed title insurance from its analysis, noting that "the title search and examination has nothing to do with the actual performance of the title insurance contract." *Id. at 1136*. Likewise, the court **[**87]** in *United States v. Title Ins. Rating Bureau of Ariz., 700 F.2d 1247 (9th Cir. 1983)*, did not deal with the issuance of title insurance, but, instead, with the practice of title insurance companies providing escrow services to their customers. The Court reasoned that the performance of escrow services, which the court clearly noted was separate and apart from the issuance of title insurance, did not constitute the business of insurance because it did not have the effect of spreading risk among policy holders. [19] *Id. at 1251*.

Plaintiffs argue that the entire business of selling title insurance is largely devoid of the pooling or spreading of risk. Because they view title insurance as nothing more than a limited warranty, Plaintiffs believe that its purpose is merely to protect against "'past activities that have caused defects in title discovered after the purchase;' in stark **[**88]** contrast to traditional insurance which spreads 'risk against future **[*870]** loss for events yet to occur.'" (Plaintiffs' Objections at 26, citing Am. Compl. at P 39.)

Though Plaintiffs contend that the risk is only 3.4% of losses incurred on claims to premiums written, even they must admit that the issuance of title insurance has the effect of spreading some risk. (TR at 56.) Indeed, Plaintiffs concede that title insurance protects against mechanic's liens filed before the commitment letter is signed, and further covers any potential cloud on the title that should have been uncovered at the time the search was performed. (*Id*. at 8, 56.) *See* *FTC v. Ticor Title, 504 U.S. 621, 625-26, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* (title insurance protects against the risk of loss for title problems that were not discovered in the title search, including those defects that could not be discovered); [20] *Schwartz, 374 F. Supp. at 574* ("title insurance companies

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[19] The court gave weight to the government's contention that buying escrow services is separate from buying title insurance because some people who buy escrow services do not buy title insurance, those who buy both have two separate agreements, and searches are performed by agents who keep the entire fee. *Id. at 1252*.

[20] Specifically, the Court found that "[a] title insurance policy insures against certain losses or damages sustained by reason of a defect in title not **[**89]** shown on the policy or title report to which it refers [...]. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous

are liable only for what they do not find, or if they become victims of false affidavits tendered to remove title objections.")

While Plaintiffs dismiss this risk as insignificant, the test in *Pireno* for the "business of insurance" does not quantify any particular amount of risk; it merely calls for a finding of some risk. *See* *Pireno, 458 U.S. at 129*; *see also* *SEC v. Variable Annuity Life Ins. Co. of America, 359 U.S. 65, 71, 79 S. Ct. 618, 3 L. Ed. 2d 640 (1959)* [21] ("the concept of 'insurance' involves *some* investment risk-taking on the part of the company.") (emphasis added). That the title search has the effect of minimizing or obviating some or even most of the risk in advance of the issuance of the title insurance policy does not change the fact that some risk is spread among the policy holders. [22] *See* *Schwartz, 374 F. Supp. at 574* ("The investigation of the risk of loss prior to deciding **[**90]** if to insure that risk is clearly part of the business of insurance.")

It is clear that only some risk spreading is required under the Supreme Court's test. *See* *SEC, 359 U.S. at 71*. By Plaintiffs' own admissions, the issuance of title insurance satisfies that requirement. In the absence of clear and binding authority, the Court is not prepared to read additional requirements into the Supreme **[**91]** Court's test. The Court, therefore, finds that the issuance of title insurance satisfies the first prong under *Pireno.*

The Court is convinced that ***HN34***[] the setting of rates for title insurance premiums satisfies the Supreme Court's definition of the "business of insurance." [23] *See* *Royal **[*871]** Drug, 440 U.S. at 224, n. 32* ("It is clear from the legislative history that the fixing of rates is the 'business of insurance.'") Indeed, it would seem that this type of activity is precisely the kind that the McCarran-Ferguson Act meant to leave to the state legislatures to regulate. Moreover, it is clear that the State of Ohio has undertaken the task of regulating title insurance. The State has set forth a comprehensive regulatory plan governing title insurance, and has sought to subject the issuance of title insurance policies to the same scrutiny to which it subjects other forms of insurance. Though not determinative, it is significant that the regulations governing title insurance appear in the section of the Ohio Revised Code that deals with insurance, as opposed to the section dealing with property. *See* *Mitgang, 1974 U.S. Dist. LEXIS 6258, at *3* (the fact that the regulations covering title insurance **[**92]** were found in the Insurance Code of California was evidence that the State of California intended to treat title insurance as any other type of insurance); *contra* *Brown, 546 F.3d at 360* (the fact that regulations governing worker's compensation appeared in the chapter of the Michigan Complied Laws dealing with labor matters, instead of the Michigan Insurance Code, was further evidence that worker's compensation benefits did not involve insurance).

Plaintiffs do not take **[**93]** issue with the Magistrate Judge's findings as to the second and third elements of the *Pireno* test. The issuance of title insurance by the insurer to the insured is clearly an "integral part of the policy relationship between the insurer and the insured." *Pireno, 458 U.S. at 129*. Further, the activity in question is certainly limited to entities within the insurance industry; namely, the insurer and the insured. *Contra* *Royal Drug*

marriages, impersonation, or confusion in names […]. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee." *Id. at 625-26*.

[21] Plaintiffs erroneously claim that this decision stands for the contrary position that more than minimal risk spreading is required. In *SEC*, the Court found that the issuance of variable annuities did not constitute the business of insurance because it did not involve the spreading of *any* risk. *Id. at 71*.

[22] The process of minimizing or limiting risk by a pre-issuance investigation is not unique to title insurance. Life insurance policies are issued only after the insurer knows, generally by means of a pre-issue physical examination, the risk associated with insuring the prospective insured. If the physical examination reveals that the risk is too great, the policy will not issue. Similarly, if the title search reveals a significant potential cloud on the title, the title insurance policy may not issue.

[23] At oral argument, Plaintiffs attempted to draw the distinction between "rate-setting" and "rate-making." Plaintiffs argued that "rate-making" is the process by which insurers are supposed to share information with the rating bureau (TR at 52-53), whereas "rate-setting" is the process of actually fixing insurance rates. While Plaintiffs admit that pooling statistical information is exempt under the Sherman Act, they claim that when courts speak of the "business of insurance" as an exemption, they are really speaking of what Plaintiffs refer to as rate-making. The Court rejects this distinction because the case law clearly exempts the fixing of insurance rates from the Sherman Act. *See* *Royal Drug, 440 U.S. at 224 n. 32*.

Co., 440 U.S. at 215-16 (insurers' contracts with pharmacies whereby participating pharmacies would supply prescriptions at a set cost were not between insurers and insureds, but involved pharmacies and druggists who were wholly outside the insurance industry.) The Court, therefore, finds that Defendants' conduct constitutes the "business of insurance," and **OVERRULES** Plaintiffs' second objection relating to the McCarran-Ferguson Act.

Though not specifically objected to by Plaintiffs, the Court finds that the Magistrate Judge also properly concluded that Defendants' conduct was regulated by state law. 15 U.S.C. § 1012(b). While Plaintiffs take issue with the level of review, there can be no doubt that the State of Ohio has subjected title insurance to substantial **[**94]** regulation. As a result, the Court concludes that the McCarran-Ferguson Act bars Plaintiffs from challenging the alleged conduct as a violation of the federal antitrust laws. [24]

The Court is sympathetic to Plaintiffs' position that title insurance is different from other types of insurance, and understands that Plaintiffs believe that Ohio's **[*872]** statutory scheme for regulating title insurance may leave open the possibility for abuse. Nonetheless, Congress has determined that federal antitrust laws shall not serve to frustrate a state's regulation of the business of insurance. This Court must honor congressional intent and clear legal precedent that cautions against federal intervention into these state matters.

III. DEFENDANTS' ALLEGED CONDUCT IS PERMITTED BY THE OHIO INSURANCE CODE

Defendants argue that Plaintiffs' claims under the Valentine **[**95]** Act, a general antitrust statute, must be dismissed because the Ohio insurance code expressly and specifically permits the collaboration of which Plaintiffs complain. The Court agrees.

At oral argument, it became clear that the parties disputed the meaning of § 3935.06, which, in relevant part, states:

> **HN35**[] Co-operation among rating bureaus, or among rating bureaus and insurers, in rate making or in other matters covered by sections 3935.01 to 3935.17, inclusive, of the Revised Code, is authorized, provided the filings resulting from such co-operation are subject to all such sections which are applicable to filings generally. The superintendent may review such cooperative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order specifying in what respects such activity or practice is unfair, unreasonable, or otherwise inconsistent, and requiring the discontinuance of such activity or practice.

OHIO REV. CODE § 3935.06. Defendants assert that even if collaboration to set uniform prices of title insurance would otherwise be illegal under the Valentine Act, **[**96]** such collaboration is specifically permitted by the Ohio insurance code section cited above. Plaintiffs insist that this section does not permit "conduct prohibited by the Valentine Act." (TR at 95.)

In List v. Burley Tobacco Growers' Co-op. Ass'n, 114 Ohio St. 361, 4 Ohio Law Abs. 194, 151 N.E. 471 (1926), the Ohio Supreme Court held, "[t]hose acts being declared to be legal by the Ohio Legislature must necessarily constitute a valid exception to the Valentine Act." Id. at 387. In *List*, the court determined that a 1920 Ohio law "makes provision for co-operative associations in the marketing of agricultural products" and, after determining the placement of agricultural interests in "a special class" as to exempt them from antitrust scrutiny was not unreasonable so as to violate the equal protection clause of the fourteenth amendment, held that the specific law permitting cooperative conduct excepted the conduct from the scrutiny of the Valentine Act. Id. at 394 (Jones, J., concurring) ("I concur in the judgment solely because the state co-operative statutes permit such agreement, and to that extent render the Ohio Valentine Act ineffective as to persons coming within the provisions of the co-operative laws.").

[24] Section 3(b) of the McCarran-Ferguson Act also makes clear that the Act should not be read to immunize from federal antitrust liability "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). This provision is inapplicable because Plaintiffs do not allege a cognizable antitrust boycott.

Relevant **[**97]** here, under the Valentine Act, a "trust" is defined as a "combination of capital, skill, or acts by two or more persons for any of the following purposes: [. . .] (4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state; [. . .]." *OHIO REV. CODE § 1331.01(B)*. Plaintiffs allege that "[d]efendants collectively entered into a trust for the purpose of fixing prices in violation of the Ohio Valentine Act." (Doc. No. 36 at P 66.) Assuming Plaintiffs' allegations as true, the Court must answer the following question: is Title 39 of the Ohio insurance code **[*873]** intended to except the cooperative action complained of by Plaintiffs from state antitrust scrutiny under the Valentine Act? The Court answers this question in the affirmative.

Answering this question requires this Court to construe the meaning of the section of the statute which states, "[c]o-operation among rating bureaus, or among rating bureaus and insurers, in rate making or in other matters or in other matters covered by *sections 3935.01 to 3935.17*, **[**98]** inclusive, of the Revised Code, is authorized [. . .]." *§ 3935.06*. "As with any other instance in which we must interpret a state law, ***HN36***[] 'When there is no state [case] law construing a state statute, [we] must predict how the state's highest court would interpret the statute.'" *United States v. Simpson, 520 F.3d 531, 535 (6th Cir. 2000)* (citing *Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999))*. In Ohio, "[t]he essential goal of statutory construction is to give effect to the intent of the General Assembly." *Stevens v. Ackman, 91 Ohio St. 3d 182, 193, 2001 Ohio 249, 743 N.E.2d 901 (2001)*. "The intent may be inferred from the particular wording the General Assembly has chosen to set forth the substantive terms of a statute." *Id.* "Intent may also be revealed in the procedural passage of the legislative act under consideration, when that body passes legislation that enacts, amends, or repeals a statute." *Id.* "Where the lawmaking body declares its own intention in the enactment of a particular law, or defines the sense of the words employed, it is within the exercise of its legislative power, and its own construction of its language should be followed." *State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 412-413, 124 N.E. 232 (1919)*.

Title **[**99]** 39 of the Ohio revised code was enacted on October 1, 1953, when the Ohio general code was replaced by the Ohio revised code. Prior to the 1953 recodification, Ohio's insurance scheme fell under section 9592 of the Ohio general code. Section 9592 contained, within the statute itself, a declaration of the General Assembly's "own intention in the enactment of [the] particular law [. . .]." Specifically, the General Assembly stated: "The purpose of this act [G.C. §§ 9592-1 to 9592-18] is to promote the public welfare by regulating insurance rates to the end they shall not be excessive, inadequate or discriminatory, and *to authorize and regulate cooperative action among insurers in rate making and other matters within the scope of this act*." OHIO GEN. CODE § 9592-1. (Eff. Dec. 31, 1947) (emphasis added). This statement of purpose was not in the recodified statutes. In adopting the Ohio revised code, however, the General Assembly specifically stated in this section that it did "not" intend "to change the law as heretofore expressed by the section or sections of the General Code." *State v. Kotapish, 171 Ohio St. 349, 351, 171 N.E.2d 505 (1960)* (decided under former analogous section); *see also* *Ohio Bank & Sav. Co. v. Tri-County Nat'l Bank, 411 F.2d 801, 804 (6th Cir. 1969)* **[**100]** (*section 1.24* (former analogous section) "makes it clear that a substantive change was not intended").

Thus, the very conduct complained of by the Plaintiffs--cooperative action among insurers to set the rates of title insurance--was specifically contemplated and authorized by the Ohio General Assembly when it enacted the original statute, which was later recodified as it is now constituted. Additionally, *List v. Burley* teaches that a later-in-time law specifically permitting cooperative conduct excepts that conduct from the scrutiny of the general provisions of the Valentine Act.

The Ohio Revised Code's rules of construction also compel this conclusion. Price fixing is a violation of the Valentine **[*874]** Act, which was enacted in 1898. *See* *Rayess v. Lane Drug Co., 138 Ohio St. 401, 405, 35 N.E.2d 447 (1941)*; *OHIO REV. CODE ANN. § 1331.01(B)(4)*. The Valentine Act is a statute of general application, and its price fixing provision broadly encompasses any "article or commodity of merchandise, produce, or commerce intended for sale, barter, use or consumption in this state." *Id*. As discussed in the preceding paragraphs, however, the Ohio insurance statutory scheme, enacted in 1947, specifically permits collaboration **[**101]** between insurers to fix rates of insurance. The two statutes are plainly in conflict. *Section 1.51* of the Revised Code informs this exact situation. [25] "***HN37***[] *OHIO REV. CODE ANN. § 1.51* provides that if general and special provisions conflict, the specific provision takes precedent as an exception to the general provision unless the legislature provides otherwise." *Bucheit Int'l v. Ameritrust Co. Nat'l Ass'n, No. 95-4267, 1997 U.S. App. LEXIS 1026 at *11 (6th Cir. Jan. 17, 1997)*. Here, the "specific provision" of the insurance code "takes precedent as an exception to the general provision" on price fixing as contained in the Valentine Act.

This conclusion is also supported by recalling the context under which the insurance code was enacted. At the **[**102]** time of the 1953 recodification, section 9592 had existed in its current form since December 31, 1947. *See Home Ins. Co. v. Albers Super Markets, Inc., 61 Ohio Law Abs. 62, 103 N.E.2d 17 (Ohio Ct. App. 1950)* (discussing the prior provisions of section 9592 and noting that those sections were repealed effective Dec. 31, 1947). Prior to 1944, the United States Supreme Court had consistently held that the business of insurance was not commerce. *See, e.g., Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1869)* ("Issuing a policy of insurance is not a transaction of commerce."). Until 1944, in fact, the business of insurance, in consequence, was largely immune from federal regulation. *See St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 539, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978)* ("The States enjoyed a virtually exclusive domain over the insurance industry."). Indeed, commentators have noted that state regulatory policy viewed monopolistic insurance rate-fixing prior to 1944 with indifference. Joel B. Dirlam and Irwin M. Stelzer, *A Case Study in the Workability of Regulated Competition*, 107 U. PA. L. REV. 199, 213 (1958-1959). Specific to Ohio, there is evidence that courts did not consider the collaborative actions of insurers to come **[**103]** within the prohibitions of the Valentine Act:

> There may be good reasons why combinations by insurance agents for the purpose of increasing rates of insurance should be prohibited, but that will not justify a court in holding that such combinations are prohibited by a law which prohibits combinations with reference to articles which may be produced, transported and used and which are the subject of barter and sale.
>
> If it is thought wise to extend the provisions of the ***antitrust law*** of Ohio so as to include the business of insurance, labor unions and everything about which a person may be engaged, the legislature can very easily use language which will clearly express that intention, but it is sufficient for the determination of this case to say that such intention does not **[*875]** clearly appear from a consideration of the present law.

State v. Bovee, 6 Ohio N.P. (n.s.) 337, 17 Ohio Dec. 663, 670-71 (Ohio C.P. 1907) (holding business of fire insurance not within the terms "trade," "commerce," or "commodity" as used in the Valentine Act).

In *United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*, however, the Supreme Court held for the first time that an insurance company doing business across state lines **[**104]** engages in interstate commerce, and that the Sherman Act therefore applied to "business of insurance." *Id. at 553, 553-562*. ("No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the *Commerce Clause*. We cannot make an exception of the business of insurance."). *South-Eastern* "was vigorously protested in the insurance field. The insurance companies, relying upon the court's previous rulings, had engaged in practices which were prohibited under the federal antitrust laws but which were permitted under the laws and regulations of the various states." *National Casualty Co. v. Federal Trade Com., 245 F.2d 883, 885 (6th Cir. 1957)*, *aff'd* *FTC v. National Casualty Co., 357 U.S. 560, 78 S. Ct. 1260, 2 L. Ed. 2d 1540 (1958)*.

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[25] In its entirety, *§ 1.51* reads:

> ***HN38***[] If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

OHIO REV. CODE ANN. § 1.51.

Both Houses of Congress characterized *South-Eastern* as "precedent-smashing" and quickly worked to enact a legislative reversal of the effects of the decision. *Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468, 473 (5th Cir. Ala. 1979)* (citing H.R. Rep. No. 143, 79th Cong., 2d Sess. (1945), Reprinted in 1945 U.S. Code Cong. Serv. 670, 671; S.Rep. No. 20, 79th Cong., 1st Sess. 2 (1945)). Out of this concern **[**105]** "that [*South-Eastern Underwriters*] might undermine state efforts to regulate insurance, Congress in 1945 enacted the McCarran-Ferguson Act." *Humana Inc. v. Forsyth, 525 U.S. 299, 306, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999)*. As discussed in *Royal Drug*, the legislative history of the McCarran Ferguson Act reflects "[t]he consistent theme of [. . .] a primary concern that cooperative ratemaking would be protected from the antitrust laws." *Royal Drug, 440 U.S. at 223* (citing Senator Ferguson's floor debate remarks: "What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau."). As discussed above, the McCarran-Ferguson Act exempted the "business of insurance" from federal antitrust scrutiny under the Sherman Act, except to the extent that such business was not regulated by state law. But McCarran-Ferguson also provided for a moratorium, until January 1, 1948, [26] on *any* enforcement of the Sherman Act to "the business of insurance or acts in the conduct thereof." *15 U.S.C § 1013*.

"The purpose of the moratorium was to allow the States three years to take steps to regulate **[**106]** the business of insurance." *Royal Drug, 440 U.S. at 220 n.22*. During the moratorium, the majority of state legislatures, including Ohio's, enacted insurance regulatory legislation, modeled along the lines of a model bill drafted by the National Association of Insurance Commissioners. *See* George K. Gardner, *Insurance and the Anti-Trust Laws*, 61 HARV. L. REV. 246, 247 (1948). These laws "were intended to provide that degree of regulation of the insurance business which would avoid the Scylla of prosecution under the Sherman Act and the Charbydis of oppressive state regulation." *See* Dirlam & Stelzer, 96 U. PA. L. REV. at **[*876]** 224-25. The Ohio statutory scheme was enacted to provide that degree of required regulation to alleviate federal concern about the fixing of rates without statutory authority.

Relevant to Plaintiffs' state law claims here, ***HN39***[] the Ohio Supreme Court has repeatedly noted that the Valentine Act was patterned after the Sherman Act, and has "consistently interpreted the Valentine Act in accordance with federal judicial construction of the federal antitrust laws--without regard to when the federal court announced the case law." *Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 284, 2005 Ohio 4985, 834 N.E.2d 791 (2005)* **[**107]** (collecting cases).

As discussed above, the Ohio statutory scheme was specifically intended to authorize cooperative conduct among insurers to set rates and to regulate such behavior as to place it beyond the reach of the Sherman Act. In light of the construction and interpretation given to the Valentine Act by the Ohio Supreme Court, which tracks the federal statute, then, like the federal scheme, the Ohio statutory scheme places this cooperative conduct beyond the reach of the Valentine Act. To hold that the Ohio General Assembly intended to make collaboration by insurers to set rates illegal for purposes of the Valentine Act when enacting a statutory scheme specifically permitting such conduct would be an anomalous result.

Moreover, and contrary to Plaintiffs' insinuations, the Ohio statutory scheme does not merely "condone price fixing." (Doc. No. 77 at pp. 8-9.) *See* *Allstate Ins. Co. v. Lanier, 242 F. Supp. 73, 88 (E.D.N.C. 1965)* (asking "[i]s the State merely lending the color of authority to what would otherwise be unlawful conduct under the Sherman Act? This the State cannot do," and then examining state law that *required* insurer membership in a rating bureau, and concluding **[**108]** that sufficient safeguards, including the right to file for deviations and the public protest, existed to allow for competition). While the Ohio statutory scheme does not provide for unfettered collaboration between insurers, it does incorporate several procedural safeguards designed to promote competition. [27] First, in the sentences immediately following *§ 3935.06*'s authorization of "[c]o-operation among rating bureaus, and among rating bureaus and insurers," the superintendent is given the power to "review such co-operative activities and

[26] Later amended to June 30, 1948.

[27] Indeed, Plaintiffs themselves cite to an example of an insurance company "not a party to Defendants' price-fixing agreement," Entitle Direct Insurance, **[**109]** that allegedly offers lower prices than Defendants.

practices and if, after a hearing, he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order [. . .] requiring the discontinuance of such activity or practice." *Id*. Moreover, the public has the right to complain to the superintendent: "[a]ny person or organization aggrieved with respect to any filing that is in effect may make written application to the superintendent for a hearing thereon [. . .]." *§ 3935.05(D)*.

Next, insurers are not required to become a member of, or a subscriber to, any rating bureau. *§ 3935.04(B)*. Beyond merely not requiring membership, however, the statute allows for competition by allowing non-members to subscribe to the rating services provided by the rating bureaus, which "shall furnish its rating services without discrimination to its members *and* subscribers." *§ 3935.06* (emphasis added). Finally, the statutory scheme provides that any insurer who has filed a rate through a rating bureau "may make written application to file a deviation from the class rates, schedules, rating plans, or rules respecting any kind **[*877]** of insurance [. . .]." *§ 3935.07*. Indeed, the superintendent "shall issue an order permitting the deviation if he finds it is justified [under the code]" and shall only deny such application for a deviation if "he finds that the resulting premiums would be excessive, inadequate, or unfairly discriminatory." *§ 3935.07*.

Note that the Ohio insurance code is not necessarily intended to *encourage* competition. Indeed, the introductory statute states that the code does "not prohibit or encourage reasonable competition, **[**110]** or prohibit or encourage uniformity in insurance rates [. . .]." *OHIO REV. CODE § 3935.01*; *see also* OHIO GEN. CODE § 9592-1 (substantially same). But, as discussed in the preceding paragraph, the scheme *allows* competition sufficient to exempt Defendants' alleged behavior from scrutiny under the Sherman Act, and therefore by analogy, to the Valentine Act. Plaintiffs insist that that more competition by title insurance companies "is not only possible, but [would] produce the substantial and predictable benefits to consumers one would expect." (Doc. No. 115-1 at 3-4 (citing lower title insurance prices in Iowa).) But "the question before [this Court] is not whether the Ohio method of regulation compares favorably with the regulations of other states, or whether it is an ideal manner in which to regulate the business of insurance." *Ohio AFL-CIO, 451 F.2d at 1183*. Plaintiffs may well be correct that a different statutory scheme would ultimately benefit Ohioans. But this is a determination for the Ohio General Assembly, not this Court.

Because the Court arrives at the same conclusion as the Magistrate Judge as to the viability of Plaintiffs' state antitrust claim, but via different analysis, **[**111]** the Court **ADOPTS** the Magistrate Judge's conclusion but **REJECTS** her analysis. Defendants' motion to dismiss Plaintiffs' claims under the Valentine Act is **GRANTED**.

IV. THE NATURE OF THE DISMISSAL

Defendants also object to the Magistrate Judge's Report to the extent that it recommends that the Consolidated Complaint be dismissed without prejudice. After determining that Plaintiffs' claims were barred by the filed rate doctrine and/or the McCarran-Ferguson Act, the Magistrate Judge suggested that the dismissal be without prejudice to afford Plaintiffs the opportunity to "amend the Complaint to meet the *Twombly/Iqbal* standard, if possible." (Report at 56.) Defendants insist that this result is inconsistent with the Magistrate Judge's determination that Defendants' conduct is exempt from antitrust scrutiny.

HN40[] "The dismissal of a complaint for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)* is a 'judgment on the merits,' and is therefore done with prejudice." *Pratt v. Ventas, Inc., 365 F.3d 514, 522 (6th Cir. 2004)* (citing *Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981))*. While Plaintiffs acknowledge that the Magistrate Judge found that, as a matter of law, the Sherman **[**112]** Act claim was barred by the filed rate doctrine, they underscore the fact that she left open the possibility that a federal claim for injunctive relief may still exist. Plaintiffs forget, however, that the Magistrate Judge also found, and this Court agrees, that the McCarran-Ferguson Act is a complete bar to Plaintiffs' federal antitrust claim. *See, Ohio AFL-CIO, 451 F.2d at 1185* (in affirming the dismissal of a federal antitrust action seeking damages and injunctive relief, the Sixth Circuit observed that: "Concluding, as we do, that the complaint failed to state a claim on which relief could be granted, it would not be proper to remand the action to the district court […].") *See, e.g., Commander Leasing Co.,* 477 F.2d at 86 (dismissal of federal antitrust **[*878]** action seeking damages and injunctive relief as barred by the McCarran-Ferguson Act). It would, therefore, be an exercise in futility to permit Plaintiffs to further amend. *See* Sinay v. The Lamson & Sessions Co., 948 F.2d 1037, 1041 (6th Cir. 1991). Defendants' objection is, therefore, **SUSTAINED**, the Court **REJECTS** the portion of the Report that recommends a dismissal of the federal antitrust claim without prejudice, and the Sherman **[**113]** Act claim is **DISMISSED** with prejudice. [28]

The same logic holds true for Plaintiffs' Valentine Act claim. The focal point of Plaintiffs' Consolidated Complaint is the challenge to the manner in which proposed title insurance rates are brought before the Ohio Department of Insurance. Yet, as this Court has determined, Defendants' activities in arriving at these proposed rates are not unlawful and are permitted under the governing statutes. In fact, **[**114]** this collaborative rate-making was contemplated when the Ohio General Assembly put this regulatory framework into place. Because the conduct which forms the basis of Plaintiffs' case is not unlawful, Plaintiffs could not re-plead in such a way that would state a cause of action under Ohio law. Any such attempt would be futile, and will, for that reason, not be permitted. Plaintiffs' Valentine Act claim will also be **DISMISSED** with prejudice, and the portion of the Report that recommends dismissal of this claim without prejudice is **REJECTED**.

CONCLUSION

For all of the reasons set forth in this Memorandum Opinion, the Magistrate Judge's Report and Recommendation (Doc. No. 102) is **ADOPTED**, in part, and **REJECTED**, in part. Both of the claims in the Consolidated Complaint shall be **DISMISSED**, with prejudice, against all Defendants. Defendants' Joint Motion to Dismiss for failure to state a cause of action (Doc. No. 43) is **GRANTED**, and Defendant Old Republic's Motion to Dismiss (Doc. No. 41) is also **GRANTED**. Defendant Stewart's Motion to Dismiss (Doc. No. 42) is **DENIED** as moot. The Clerk is directed to close the following cases: Case No.1:08CV677, 1:08CV678, 1:08CV741, 4:08CV750, 1:08CV803, 1:08CV1021, **[**115]** 5:08CV1289, and 1:08CV1836.

IT IS SO ORDERED.

Dated: March 31, 2010

/s/ Sara Lioi

HONORABLE SARA LIOI

UNITED STATES DISTRICT JUDGE

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[28] The Court finds that the dismissal of the corporate parent Defendants should also be with prejudice. The Magistrate Judge correctly determined that a corporate parent Defendant could not be liable under the Sherman Act merely for approving or assenting to the actions of its affiliate or subsidiary. *See* Cupp v. Alberto-Culver USA, Inc., 310 F. Supp. 2d 963, 973-74 (W.D. Tenn. 2004). She recommended that these defendants be dismissed, without prejudice, for this additional reason. Because Plaintiffs have not alleged any facts that would suggest that the corporate parent Defendants played a role in any alleged conspiracy, the Court finds that it would be futile to permit Plaintiffs leave to attempt to re-plead a cause of action against them.

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Mun. Revenue Serv., Inc. v. Xspand, Inc.

United States District Court for the Middle District of Pennsylvania

March 31, 2010, Decided; March 31, 2010, Filed

4:05-cv-671

Reporter

700 F. Supp. 2d 692 *; 2010 U.S. Dist. LEXIS 31290 **

MUNICIPAL REVENUE SERVICE, INC., Plaintiff, v. XSPAND, INC. and BEAR STEARNS & CO., INC., Defendants.

Prior History: *Mun. Revenue Servs., Inc. v. Xspand, Inc., 2008 U.S. Dist. LEXIS 32078 (M.D. Pa., Apr. 17, 2008)*

Core Terms

transactions, marketing, school district, literally, falsity, customer, asserts, entities, proceeds, contends, damages, booked, summary judgment motion, government entity, financing, summary judgment, disparagement, declaration, deposition, expert testimony, joint venture, lost profits, defamation, global, petitioning activity, do business, Noerr Pennington Doctrine, municipalities, allegations, borrowing

LexisNexis® Headnotes

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

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

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

HN1[] **Burdens of Proof, Absence of Essential Element**

Summary judgment is appropriate if the record establishes that there is no genuine issue as to any material fact and that a movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. Initially, a moving party bears the burden of demonstrating the absence of a genuine issue of material fact. The movant meets this burden by pointing to an absence of evidence supporting an essential element as to which the non-moving party will bear the burden of proof at trial. Once the moving party meets its burden, the burden then shifts to the non-moving party to show that there is a genuine issue for trial. *Rule 56(e)(2)*. An issue is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a factual dispute is "material" only if it might affect the outcome of the action under the governing law.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

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

HN2[] **Opposing Materials, Accompanying Documentation**

In opposing summary judgment, a non-moving party may not rely merely on allegations of denials in its own pleadings; rather, its response must set out specific facts showing a genuine issue for trial. *Fed. R. Civ. P. 56(e)(2)*. The non-moving party cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial. Arguments made in briefs are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion. However, the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the non-moving party.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences that a fact finder could draw from them. Still, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; there must be a genuine issue of material fact to preclude summary judgment.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr Pennington Doctrine initially immunized private parties against liability for antitrust violations stemming from valid petitioning activities. However, some courts have held that its application extends beyond the realm of ***antitrust law***.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Noerr Pennington Doctrine has its foundations in the right to petition the government for a redress of grievances under *U.S. Const. amend. I*. Accordingly, in order for the doctrine to apply there must be some sort of valid "petitioning activity." In defining the contours of "petitioning activity," the Third Circuit has determined that the concept extends beyond attempts to influence the passage and enforcement of laws and applies equally to efforts to influence administrative agency action, and efforts to access the court system. Nonetheless, the concept of "petitioning activity" as it relates to Noerr Pennington cannot be given a meaning that would provide more extensive protection to petitioning activity than would the *First Amendment*.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN6[] **Noerr-Pennington Doctrine, Sham Exception**

The only restriction placed upon the Noerr Pennington Doctrine is the so-called "sham exception," under which a defendant is not protected if he or she is simply using the petition process as a means of harassment. The sham exception applies when persons use the governmental process-as opposed to the outcome of that process-as an anti-competitive weapon.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN7[] Pleadings, Rule Application & Interpretation

Fed. R. Civ. P. 8 permits parties to plead inconsistent and conflicting theories of recovery.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN8[] Noerr-Pennington Doctrine, Sham Exception

With respect to the sham exception to the Noerr Pennington Doctrine, motive may be relevant if it demonstrates a party acted without a legitimate desire for government action.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Evidence > Burdens of Proof > Allocation

HN9[] False Advertising, Lanham Act

To establish a claim under the Lanham Act, 15 U.S.C.S. § 1051 et seq., based on a false or misleading representation of a product, a plaintiff must show: (i) that the defendant has made false or misleading statements as to his own product (or another's); (ii) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (iii) that the deception is material in that it is likely to influence purchasing decisions; (iv) that the advertised goods traveled in interstate commerce; and (v) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc. To the extent a plaintiff seeks monetary damages pursuant to its Lanham Act false advertising claim, it must adduce evidence of causation, i.e. actual consumer deception, regardless of whether the challenged marketing statement was "literally false."

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

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

HN10[] False Advertising, Lanham Act

The common law cause of action for unfair competition in Pennsylvania mirrors the Lanham Act's § 43(a) cause of action for unfair competition, except that under state law there is no requirement that the goods traveled through interstate commerce.

Evidence > Burdens of Proof > Allocation

Torts > ... > Defamation > Elements > General Overview

Torts > ... > Defamation > Defenses > Truth

Torts > Intentional Torts > Defamation > Procedural Matters

HN11[] **Burdens of Proof, Allocation**

In a defamation case, a plaintiff must prove: (i) the defamatory character of the communication; (ii) its publication by the defendant; (iii) its application to the plaintiff; (iv) the understanding by the recipient of its defamatory meaning; (v) the understanding by the recipient of it as intended to be applied to the plaintiff; (vi) special harm resulting to the plaintiff from its publication; and (vii) abuse of a conditionally privileged occasion. Falsity is an implicit element of a defamation cause of action because truth is an absolute defense. *42 Pa.C.S. § 8343(b)*.

Evidence > Burdens of Proof > Allocation

Torts > Business Torts > Trade Libel > Elements

HN12[] **Burdens of Proof, Allocation**

In Pennsylvania, a claim for commercial disparagement requires proof that: (i) the statement is false; (ii) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (iii) pecuniary loss does in fact result; and (iv) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity.

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN13[] **Expert Witnesses, Helpfulness**

Fed. R. Evid. 702 requires expert testimony when factual matters are outside the ken of lay individuals.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN14[] **False Advertising, Lanham Act**

In analyzing whether an advertisement is literally false for purposes of the Lanham Act, *15 U.S.C.S. § 1051 et seq.*, a court must determine, first, the unambiguous claims made by the advertisement and, second, whether those claims are false.

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

HN15[] **Intentional Interference, Elements**

The requisite elements of a cause of action for interference with prospective contractual relations are as follows: (i) a prospective contractual relationship; (ii) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (iii) the absence of privilege or justification on the part of the defendant; and (iv) the occasioning of actual damage resulting from the defendant's conduct.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > ... > Testimony > Credibility of Witnesses > General Overview

HN16[] **Jury Trials, Province of Court & Jury**

Credibility determinations reside within the exclusive province of the jury.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Evidence > ... > Statements as Evidence > Hearsay > General Overview

HN17[] **Summary Judgment, Evidentiary Considerations**

Hearsay statements that would be inadmissible at trial may not be considered for purposes of summary judgment.

Evidence > ... > Exceptions > State of Mind > General Overview

HN18[] **Exceptions, State of Mind**

See *Fed. R. Evid. 803(3)*.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Evidence > ... > Exceptions > State of Mind > General Overview

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN19[] **False Advertising, Lanham Act**

For purposes of a claim under the Lanham Act, *15 U.S.C.S. § 1051 et seq.*, statements of a customer to an employee are admissible if the customer's motive is relevant to the action. Indeed, hearsay statements of a customer as to his reasons for not dealing with a supplier may be admissible for the limited purpose of proving customer motive. It is only if the statements are used to prove the fact that the customer stopped buying the product from this supplier, bought the product from someone else instead, or stopped buying the product altogether, that they become inadmissible.

Torts > Intentional Torts > Defamation > Defamation Per Se

Torts > Business Torts > Trade Libel > Elements

Torts > Intentional Torts > Defamation > Procedural Matters

HN20[] **Defamation, Defamation Per Se**

To determine whether a statement is capable of a defamatory meaning, courts consider whether the statement tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him. While an action for defamation normally focuses on whether the statement in question tarnishes the reputation of a plaintiff, and an action for commercial disparagement focuses on the statements regarding the plaintiff's goods or services, there are times when impugnation of product quality crosses the line from disparagement of products to defamation of vendors. Where the publication on its face is directed against the goods or product of a corporate vendor or manufacturer, it will not be held libelous per se as to the corporation, unless by fair construction and without the aid of extrinsic evidence it imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct in its business in relation to said goods or product.

Torts > Intentional Torts > Defamation > Procedural Matters

HN21[] Defamation, Procedural Matters

While extrinsic evidence cannot be used when determining whether a statement denigrates the products or vendor, it can be taken into consideration after determining that the statement denigrates the vendor, i.e., only after a court determines that the statement is of a type that could be capable of defamatory meaning. In that case, the context in which the statement is made is important in determining whether the statement is capable of defamatory meaning.

Torts > Business Torts > Trade Libel > General Overview

Torts > Intentional Torts > Defamation > Procedural Matters

HN22[] Business Torts, Trade Libel

For a statement to cross the line from a disparagement of product to defamation of vendor, the statement itself must either expressly or impliedly allege that a plaintiff is dishonest or otherwise disreputable.

Torts > Business Torts > Trade Libel > Elements

HN23[] Trade Libel, Elements

For purposes of a claim of commercial disparagement, "reckless disregard" is defined as the serious indifference to truth or accuracy of a publication.

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

HN24[] Intentional Interference, Elements

For purposes of the tortious interference with prospective contractual relations, a "prospective contractual relationship" is something less than a contractual right, something more than a mere hope, and exists when there is reasonable probability that a contract will arise from the parties' current dealings.

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

HN25[] Intentional Interference, Elements

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor, or not to continue an existing contract terminable at will, does not interfere improperly with the other's relation if: (a) the relation concerns a matter involved in the competition between the actor and the other; and (b) the actor does not employ wrongful means; and (c) his action does not create or continue an unlawful restraint of trade; and (d) his purpose is at least in part to advance his interest in competing with the other. The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

Evidence > Burdens of Proof > Allocation

Torts > ... > Types of Losses > Lost Income > General Overview

HN26[] **Burdens of Proof, Allocation**

Under Pennsylvania law, lost profits may be recovered when: (i) there is evidence to establish the damages with reasonable certainty; (ii) they were the proximate consequence of the alleged wrong; and (iii) they were reasonably foreseeable. While a plaintiff's proof of damages need not be mathematically precise, the evidence must establish the fact of damages "with a fair degree of probability."

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

HN27[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a)(2) requires that a complaint contain a short and plain statement of a claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.

Business & Corporate Law > Joint Ventures > Formation

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN28[] **Joint Ventures, Formation**

The essential elements of a joint venture include: (i) a joint proprietary interest in, and a right to mutual control over, the enterprise; (ii) a contribution by each of the parties of capital, materials, services or knowledge; and (iii) a right to participate in the expected profits. Although the existence or nonexistence of a joint venture involves a determination of intent, where the essential elements of a joint venture are clearly absent, the determination may be made on a motion for summary judgment.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Evidence > Burdens of Proof > Allocation

HN29[] **False Advertising, Lanham Act**

To obtain monetary damages in a § 43(a) Lanham Act false advertising case, a plaintiff seeking such damages must prove actual consumer deception, even if the claim is based on "literal falsity."

Tax Law > Federal Tax Administration & Procedures > Tax Injunction Act

HN30[] **Federal Tax Administration & Procedures, Tax Injunction Act**

See *28 U.S.C.S. § 1341*.

Tax Law > Federal Tax Administration & Procedures > Tax Injunction Act

HN31[] **Federal Tax Administration & Procedures, Tax Injunction Act**

A lien sale is a mode of tax collection; and so an action to enjoin it, or declare it illegal, or rescind it would be barred by the Tax Injunction Act, *28 U.S.C.S. § 1341*, or, in the case of the damages suit, by the free-standing principle of comity.

Tax Law > Federal Tax Administration & Procedures > Tax Injunction Act

HN32[] **Federal Tax Administration & Procedures, Tax Injunction Act**

The legislative history of the Tax Injunction Act, *28 U.S.C.S. § 1341*, shows that, in enacting the statute, Congress focused on taxpayers who sought to avoid paying their state tax bill by pursuing a challenge route other than the one specified by the taxing authority. Accordingly, the Act has been interpreted and applied only in cases Congress wrote the statute to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes.

Counsel: **[**1]** For Municipal Revenue Services, Inc., Plaintiff: John G. Dean, LEAD ATTORNEY, Elliott Greenleaf & Siedzikowski, P.C., Scranton, PA; John M. Elliott, LEAD ATTORNEY, Elliott, Greenleaf & Siedzikowski PC, Blue Bell, PA; John P. Elliott, LEAD ATTORNEY, Elliott Greenleaf & Siedzikowski, P.C., Blue Bell, PA; Mark J. Schwemler, LEAD ATTORNEY, Elliott, Greenleaf & Siedzikowski, PC, Blue Bell, PA; Bruce W. Kauffman, Elliott Greenleaf, Philadelphia, PA.

For Thomas J. Ellis, James R. Matthews, Montgomery County Commissioners, Movants: John P. Gonzales, LEAD ATTORNEY, Marshall, Dennehey, Warner, Coleman & Goggin, King of Prussia, PA; Philip W. Newcomer, LEAD ATTORNEY, Office of the Montgomery County Solicitor's Office, Norristown, PA.

For XSPAND, Inc., Defendant: C. Grainger Bowman, LEAD ATTORNEY, Kirkpatrick & Lockhart Preston Gates Ellis LLP, Harrisburg, PA; David R. Fine, LEAD ATTORNEY, K&L Gates LLP, Harrisburg, PA.

For Bear, Stearns & Co, Inc., Defendant: Craig E. Ziegler, Montgomery, McCracken, Walker & Rhoads, Philadelphia, PA.

For Steven W. Cappelli, Miscellaneous Party: James G. Mann, Rodney A. Corey, LEAD ATTORNEYS, Harrisburg, PA.

For Dominic Pileggi, Senate of the Commonwealth of Pennsylvania, **[**2]** Unknown Party Types: Thomas W. Dymek, LEAD ATTORNEY, Stradley Ronon Stevens & Young, LLP, Philadelphia, PA.

For James R. Matthews, Amicus: Philip W. Newcomer, LEAD ATTORNEY, Office of the Montgomery County Solicitor's Office, Norristown, PA.

For Montgomery County Commissioners, Amicus: Philip W. Newcomer, LEAD ATTORNEY, Office of the Montgomery County Solicitor's Office, Norristown, PA; Robert L. Knupp, Knupp, Kodak & Imblum, P.C., Harrisburg, PA.

For Gregg Melinson, Intervenor: Patrick J. Stapleton, LEAD ATTORNEY, Weber Gallagher Simpson Stapleton Fires & Newby LLP, Philadelphia, PA; Andrew K. Worek, Weber Gallagher Siimpson Stapleton Fires & Newby, LLP, Philadelphia, PA.

For XSPAND, Inc., Counterclaim Plaintiff: David R. Fine, LEAD ATTORNEY, K&L Gates LLP, Harrisburg, PA; C. Grainger Bowman, Kirkpatrick & Lockhart Preston Gates Ellis LLP, Harrisburg, PA.

For Municipal Revenue Services, Inc., Counterclaim Defendant: John P. Elliott, Elliott Greenleaf & Siedzikowski, P.C., Blue Bell, PA.

Judges: Hon. John E. Jones III, United States District Judge.

Opinion by: John E. Jones III

Opinion

[*696] MEMORANDUM and ORDER

Currently pending before the Court are three motions for summary judgment. The first was filed by Defendant Xspand, **[**3]** Inc. ("Xspand"). (Doc. 445). The second is a partial motion for summary judgment filed by Plaintiff Municipal Revenue Service, Inc. ("Plaintiff" or "MRS"). (Doc. 449). The third was filed by Defendant Bear Stearns & Co., Inc. ("Bear"). (Doc. 451). For the reasons that follow, all three motions shall be granted in part and denied in part.

I. PROCEDURAL HISTORY

Plaintiff initiated the instant action on April 1, 2005 by filing a five count complaint against Xspand containing the following claims: (i) violation of the Lanham Act, *15 U.S.C. § 1051, et seq.*; (ii) unfair competition; (iii) defamation; (iv) commercial disparagement; and (v) tortious interference with prospective contractual relations. (*See* Doc. 1). On October 17, 2005, Plaintiff filed an amended complaint that added Bear as a Defendant and asserted against it all five of the above-referenced claims. (*See* Doc. 69). On March 4, 2009, Xspand filed its motion for summary judgment, (Doc. 445) (the "Xspand Motion"), MRS filed its partial summary judgment motion, (Doc. 449) (the "MRS Motion"), and Bear filed its summary judgment motion, (Doc. 451) (the "Bear Motion"). Since all three motions have been fully briefed, they are ripe for **[**4]** disposition.

II. STANDARD OF REVIEW

HN1[] Summary judgment is appropriate if the record establishes "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The movant meets this burden by pointing to an absence of evidence supporting an essential element as to which the non-moving party will bear the burden of proof at trial. *Id. at 325*. Once the moving party meets its burden, the burden then shifts to the non-moving party to show that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)(2)*. An issue is "genuine" only if there is a sufficient evidentiary basis for a reasonable jury to find for the non-moving party, and a factual dispute is "material" only if it might affect the outcome of the action under the governing law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

HN2[] In opposing summary judgment, the non-moving party "may not rely merely on allegations of denials in its own pleadings; rather, its response must … set out specific **[**5]** facts showing a genuine issue **[*697]** for trial." *Fed. R. Civ. P. 56(e)(2)*. The non-moving party "cannot rely on unsupported allegations, but must go beyond pleadings and provide some evidence that would show that there exists a genuine issue for trial." *Jones v. United Parcel Serv., 214 F.3d 402, 407 (3d Cir. 2000)*. Arguments made in briefs "are not evidence and cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion." *Jersey Cent. Power & Light Co. v. Twp. of Lacey, 772 F.2d 1103, 1109-10 (3d Cir. 1985)*. However, the facts and all reasonable inferences drawn therefrom must be viewed in the light most favorable to the non-moving party. *P.N. v. Clementon Bd. of Educ., 442 F.3d 848, 852 (3d Cir. 2006)*.

HN3[] Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences that a fact finder could draw from them. *Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982)*. Still, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; there must be a *genuine* issue of *material* fact to preclude summary judgment." *Anderson, 477 U.S. at 247-48*.

III. [6] FACTUAL BACKGROUND**

The parties and the Court are all too intimately familiar with the facts undergirding this case. Therefore, for the purposes of disposing the various motions, we shall simply make a generalized statement of fact. [1] We shall refer to or address specific facts in our discussion only as they become necessary for the resolution of the pending motions.

At all times pertinent to the instant litigation, MRS was in the business of purchasing delinquent tax liens from municipalities and school districts in the Commonwealth of Pennsylvania. (*See* Compl. PP 7). At all relevant times, Xspand was a competitor of MRS in Pennsylvania. (*Id*. P 10). MRS alleges that Xspand has used false and misleading advertising to unfairly compete against it. (*Id*. P 17). Specifically, MRS claims that Xspand has disseminated misinformation regarding the nature of its services, in that Xspand has, *inter alia*, informed potential MRS customers that MRS-facilitated transactions produced debt, not revenue, for the taxing entity. (*See id*. PP 18-49). MRS **[**7]** alleges that Xspand's conduct has caused it to lose a substantial part of its business in the form of both current and prospective customers. (*See id*. PP 24-25, 32, 43). Plaintiff contends that Bear may be held liable for Xspand's conduct because a joint venture or agency relationship exists between Bear and Xspand, and because the former endorses the conduct of the latter. (*See id*. PP 10-12, 27). These allegations form the basic foundation of the five causes of action asserted by MRS against Xspand and Bear.

IV. DISCUSSION

As stated, all three parties to the instant litigation have filed summary judgment motions. We shall address these motions in turn, beginning with the motions of Defendants Xspand and Bear and concluding with the MRS Motion.

A. The Xspand Motion

The Xspand Motion lodges numerous grounds for dismissal of Plaintiff's claims, including global infirmities afflicting the complaint as a whole and discrete infirmities associated with each count specifically. **[*698]** We shall address these in turn, beginning with the former.

i. Global Infirmities

The first global defect involves the *Noerr Pennington* Doctrine, which Xspand asserts bars each count of the complaint. ***HN4***[] This doctrine, which **[**8]** emanated from the cases *Eastern R.R. Presidents Conference v. Noerr Motor Freight Co., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, initially immunized private parties against liability for antitrust violations stemming from valid petitioning activities. *See A.D. Bedell Wholesale Co., Inc. v. Phillip Morris Inc., 263 F.3d 239, 251 (3d Cir. 2001)*. However, some courts have held that its application extends beyond the realm of ***antitrust law***, *see, e.g., Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119, 128-29 (3d. Cir. 1999)* (construing New Jersey law and extending *Noerr Pennington* immunity to state tort claims); *Brownsville*

[1] Since our factual recitation is merely a broad overview of the basis for the instant litigation, it is generally taken from Plaintiff's amended complaint.

Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3d Cir 1988) (invoking the *Noerr Pennington* Doctrine to uphold dismissal of civil conspiracy and tortious interference with business relations claims); *Caixa Geral de Depositos, S.A. v. Rodrigues, 2005 U.S. Dist. LEXIS 24339, 2005 WL 1541055 * 11 (D.N.J. 2005)* (applying the *Noerr Pennington* Doctrine to defamation claims); *Santana Prods. v. Bobrick Washroom Equipment, Inc., 249 F.Supp.2d 463 (M.D. Pa. 2003)* (Vanaskie, J.) (dismissing Lanham Act claims pursuant to the *Noerr Pennington* Doctrine); [2] *Bristol-Myers Squibb Co. v. Immunex Corp., 84 F. Supp. 2d 574, 578 (D.N.J. 2000)* **[**9]** (invoking the *Noerr Pennington* Doctrine to deny as futile a motion to amend seeking to assert a claim for unfair competition). Accordingly, and as stated, Xspand asserts that the doctrine should be extended to all of Plaintiff's claims and that its application serves to bar the same.

In resolving this issue, it is well to note that ***HN5***[] the *Noerr Pennington* Doctrine has its foundations in the *First Amendment* right to petition the government for a redress of grievances. *See* *Santana Prods. v. Bobrick Washroom Equipment, Inc., 401 F.3d 123, 131 n.13 (3d Cir. 2005)* (citing *U.S. CONST. amend. I*). Accordingly, as intimated above, in order for the doctrine to apply there must be some sort of valid "petitioning activity." *See* *Hill v. Borough of Kutztown, 455 F.3d 225, 243 (3d. Cir. 2006)* **[**10]** ("We further hold that [Defendant] is not entitled to petitioning immunity under the *Noerr-Pennington* doctrine because the conduct with which he is charged cannot be construed as 'petitioning activity' under any reasonable interpretation of that term."); *see also* *Bedell, 263 F.3d at 251* ("[I]f its conduct constitutes valid petitioning, the petitioner is immune from antitrust liability whether or not the injuries are caused by the act of petitioning or are caused by government action which results from the petitioning.").

In defining the contours of "petitioning activity," the Third Circuit has determined that the concept "extends beyond attempts to influence the passage and enforcement of laws and applies equally to efforts to influence administrative agency action, and efforts to access the court system." *Santana Prods., 401 F.3d at 131 n.3* (internal citations omitted). Nonetheless, the concept of "petitioning activity" as it relates to **[*699]** *Noerr Pennington* cannot be given a meaning that would provide more extensive protection to petitioning activity than would the *First Amendment*. *See* *We, Inc. v. City of Philadelphia, 174 F.3d 322, 327 (3d Cir. 1999)*.

In the case at bar, the "petitioning **[**11]** activity" in question involves the distribution of information by Xspand comparing MRS-facilitated transactions to Xspand-facilitated transactions in an apparent attempt to persuade governmental entities to chose Xspand's services over MRS' services. [3] MRS maintains that the information distributed by Xspand misrepresented that MRS-facilitated transactions produce debt, not revenue, for a governmental entity and could have a negative impact on the entity's credit rating. Even if this conduct qualified as "petitioning activity" for purposes of the *Noerr Pennington* Doctrine, a conclusion that we do not expressly reach, application of that doctrine in the case at bar would be precluded by operation of the "sham exception." [4]

HN6[] The only restriction placed upon the *Noerr Pennington* Doctrine is the so-called 'sham exception,' under which a defendant is not protected if he or she is simply using the petition process as a means of harassment." *King v. Twp. of East Lampeter, 17 F.Supp.2d 394, 413 (E.D. Pa. 1998)*. The sham exception applies when "persons use

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[2] Notably, the Third Circuit affirmed our esteemed colleague Judge Thomas I. Vanaskie's dismissal of the Lanham Act claims, but did so on other grounds. *See* *Santana Prods. v. Bobrick Washroom Equipment, Inc., 401 F.3d 123, 131 n.3 (3d Cir. 2005)* ("We will not address at this time the *Noerr Pennington* doctrine's applicability to Lanham Act claims because we conclude that Santana's Lanham Act claim is barred by laches.").

[3] In the main, this alleged misinformation took the form of a March 1, 2005 mail-merged letter (Doc. 465-16, Ex. 54), a document entitled "New Revenue Opportunity for Pennsylvania School Districts: Converting Tax Claims into Revenue; Frequently Asked Questions Regarding the Xspand Program," (Doc. 465-14, Ex. 29) ("FAQ"), and various power point presentations delivered to a number of governmental decision makers, (*see, e.g.*, Doc. 465-15, Ex. 41) (made to representatives **[**12]** of Norristown School District).

[4] Xspand relies heavily on Judge Vanaskie's aforementioned opinion in *Santana Prods. v. Bobrick Washroom Equipment, Inc., 249 F.Supp. 2d 463 (M.D. Pa. 2003)*. While our determination runs counter to the ultimate conclusion in that case, we note that these opinions are not necessarily discordant, since the sham exception was not at issue in *Santana Products*.

the governmental process-as opposed to the outcome of that process-as an anti-competitive weapon." City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). Xspand asserts that throughout the pendency of this case MRS has maintained that Xspand's marketing sought to persuade governmental entities to do business with it. Therefore, Xspand argues that MRS should not now be permitted to argue that Xspand's purpose was aimed at something other than competition, *i.e*. **[**13]** harassment. To the contrary, in the amended complaint, MRS alleges that Xspand's marketing efforts "disparage or otherwise seek to disrupt Plaintiff's business," (Doc. 69 P 15), and that "Defendants' misconduct was not for any legitimate purpose, but to prevent Plaintiff from properly and lawfully promoting marketing, and competing in the marketplace," (*id*. P 35). Consequently, we find Xspand's argument to this effect unavailing. [5]

A review of the evidentiary record reveals the existence of facts from which a reasonable juror could determine that Xspand's marketing effort was designed to harass MRS. This conclusion is based upon the following. In or about November 2004, Clive Corner ("Corner"), a former executive at Commerce Bank, Harrisburg **[*700]** ("Commerce"), the institution MRS used to finance its tax lien purchases, was contacted by James Florio, former Governor of New Jersey and a founder of Xspand ("Gov. Florio"), who expressed concerns regarding the legality **[**14]** of MRS-facilitated transactions. [6] Clive Corner Deposition, November 15, 2005, p. 13. This concern was subsequently relayed to Commerce's counsel, who ultimately determined that there was no legal issue. *See id*. p. 17 ("I believe that Knox Graham and Reed, Smith, Shaw & McClay looked at the deal . . . . [T]he consensus . . . of all the attorneys [was that] there was no legal issue to be concerned about."). To the best of his knowledge, Corner communicated this conclusion to Gov. Florio. *Id*. p. 63. Nonetheless, Xspand proceeded to distribute to governmental entities information indicating that MRS-facilitated transactions produced debt, not revenue, which could have a negative impact on the municipalities credit rating. (*See, e.g*., Doc. 465-14 (Xspand's FAQ document)); Doc. 465-16 (Xspand's mail-merged letter of March 1, 2005)). [7]

Additionally, Xspand has acknowledged that there were least two factual inaccuracies present in the advertisements it distributed. Specifically, Xspand conceded that in the FAQ document it stated that the Harrisburg School District had actually accounted for the funds received from its MRS-facilitated transaction as debt rather than revenue. (Doc. 465-14). It now admits that this assertion was false. (Doc. 479, p. 7 n. 3). Further, in the March 1, 2005 letter, Xspand represented that it had entered into lien-sale contracts with several municipalities, including Allentown, Pennsylvania. (Doc. 465-16). However, Xspand now admits that it never had consummated such a transaction with the City of Allentown. [8]

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[5] Indeed, ***HN7***[] Federal Rule of Civil Procedure 8 permits parties to plead inconsistent and conflicting theories of recovery. *See* Kayea v. Prudential Ins. Co. of America, 2008 U.S. Dist. LEXIS 34482, 2008 WL 1867154 * 1 (D. Del 2008). This is exactly what MRS has done.

[6] This communication could reasonably indicate that Xspand's intent in disseminating information regarding the alleged illegality of MRS-facilitated transactions was to cripple MRS, and not necessarily to acquire business for itself. After all, this communication was not designed to sway customers into choosing Xspand's services; it was arguably meant to stifle **[**15]** MRS' financing so that MRS could not afford to compete with Xspand in the marketplace.

[7] The March 1, 2005 letter was signed by Nancy Cerbus ("Cerbus"), who was identified as Xspand's Vice-President of Business Development. (*See* Doc. 465-16). However, Cerbus testified that she did not compose the letter but rather authorized Xspand to sign her name thereto. Nancy Cerbus Deposition, August 23, 2005, pp. 93-94. Cerbus admittedly knew very little about the subjects addressed in the March 1, 2005 letter. *See id*. 93-119. She asserted that Paul Scura ("Scura"), president and chief executive officer of Plymouth Financial Company, Inc., the parent corporation of Xspand, authored the letter. *Id*. Scura, who is the President of Xspand, testified that he did not have a certified public accountant or a lawyer review the accuracy of the MRS-related allegations contained in the March 1, 2005 letter prior to distributing the same. Paul Scura Deposition, August 24, 2005, pp. 146-47. Scura, who has "over 20 years of experience in structured finance," testified that the MRS-related opinions were rendered based upon the understanding of generally accepted accounting principles he has gained in his over **[**16]** 20 years of experience in the field of municipal finance. *Id*. pp. 135-36.

[8] Moreover, in November 2004, Xspand initially identified a list of 136 prime school districts that it would target. (Doc. 465-14). However, the March 1, 2005 letter was, according to Cerbus, distributed to 250 entities. Cerbus Dep. p. 99. Cerbus testified that

Based upon the foregoing, we believe that a reasonable person could infer that Xspand's conduct was primarily tailored to disrupt MRS' business rather than directly **[*701]** designed to garner favorable government action for itself. Indeed, MRS has proffered evidence from Dr. Marvin E. Goldberg, Professor of Marketing at the Pennsylvania State University, to that effect. (*See* Doc. 444-2 p. 3) (concluding that Xspand's marketing strategy was not "standard" and could have readily poisoned the business atmosphere for MRS) [9] We shall therefore deny the Xspand Motion to this extent.

The second global infirmity complained of by Xspand is the purported inability of MRS to establish that **[**18]** Xspand's marketing statements were false, a necessary element of MRS' Lanham Act, [10] unfair competition, [11] defamation, [12] and commercial disparagement claims. [13] Xspand contends that expert testimony on this point is necessary because its statements to the effect that "MRS-facilitated transactions are borrowings and cannot be budgeted **[*702]** as revenue" were intended to convey the notion that MRS could not *properly* book the proceeds of their tax-lien transactions as revenue. (*See* Doc. 447, pp. 27, 28). Xspand asserts that the testimony of Plaintiff's witness Charles Herron ("Herron") is inadmissable to establish falsity. (Doc. 447, pp. 28-29). [14] MRS, on the other hand, contends that Xspand's statements were meant to convey the notion that MRS customers *did not actually*

Xspand did not intend to follow-up with all of the recipients of the March 1, 2005 letter; instead, only certain entities were identified for follow-ups. **[**17]** *Id*. p. 103.

[9] While there is evidence that Xpsand's marketing campaign was designed to garner favorable government action in the form of increased business, we believe that the foregoing facts cast doubt upon Xpsand's true motive. As the Third Circuit has recognized, ***HN8***[] "Motive may be relevant if it demonstrates the party acted without a legitimate desire for government action. . . ." *Bedell, 263 F.3d at 254 n. 33*. Therefore, we believe that the ultimate applicability of the sham exception is an issue for the jury to decide.

[10] ***HN9***[] "To establish a Lanham Act claim based on a false or misleading representation of a product the plaintiff must show: (i) that the defendant has made *false* or misleading statements as to his **[**19]** own product [or another's]; (ii) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (iii) that the deception is material in that it is likely to influence purchasing decisions; (iv) that the advertised goods traveled in interstate commerce; and (v) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc." *Warner-Lambert v. BreathAsure, Inc., 204 F.3d 87, 91-92 (3d Cir. 2000)* (emphasis added). We note briefly that, as we explain in greater detail in our resolution of the MRS Motion, to the extent MRS seeks monetary damages pursuant to its Lanham Act false advertising claim, it must adduce evidence of causation, *i.e*. actual consumer deception, regardless of whether the challenged marketing statement was "literally false." *See, e.g., Gallup, Inc. v. Talentpoint, Inc., 2001 U.S. Dist. LEXIS 18560, 2001 WL 1450592 *13 (E.D. Pa. 2001)* ("Where plaintiff seeks *injunctive relief*, and shows that a claim is literally false, a court need not consider whether the public is misled. Where, however, a plaintiff seeks *monetary damages*, proof of actual deception is required.").

[11] ***HN10***[] "The common law cause of action for unfair **[**20]** competition in Pennsylvania mirrors the Lanham Act's *section 43(a)* cause of action for unfair competition, except that under state law there is no requirement that the goods traveled through interstate commerce." ***Louis Vuitton Malletier & Oakley, Inc. v. Veit, 211 F.Supp.2d 567, 582 (E.D. Pa. 2002)***.

[12] ***HN11***[] "In a defamation case, a plaintiff must prove: '(i) The defamatory character of the communication; (ii) its publication by the defendant; (iii) its application to the plaintiff; (iv) the understanding by the recipient of its defamatory meaning; (v) the understanding by the recipient of it as intended to be applied to the plaintiff; (vi) special harm resulting to the plaintiff from its publication; and (vii) abuse of a conditionally privileged occasion.'" *Moore v. Cobb-Nettleton, 2005 PA Super 426, 889 A.2d 1262, 1267 (Pa. Super. Ct. 2005)* (quoting *Porter v. Joy Realty, Inc., 2005 PA Super 129, 872 A.2d 846, 849 n. 6 (Pa. Super. Ct. 2005)* (quoting *42 Pa.C.S. § 8343(a)*)). Falsity is an implicit element of a defamation cause of action because truth is an absolute defense. *See 42 Pa.C.S. § 8343(b)*.

[13] ***HN12***[] "In Pennsylvania, a claim for commercial disparagement requires proof that: (i) the statement is *false*; (ii) the publisher either **[**21]** intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (iii) pecuniary loss does in fact result; and (iv) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity." *McNulty v. Citadel Broadcasting Co., 58 Fed. Appx. 556, 567 (3d Cir. 2003)* (emphasis added) (citing *Neurotron Inc. v. Medical Serv. Ass'n of Pa., 254 F.3d 444 (3d Cir. 2001))*.

[14] Xspand has filed a currently pending motion in limine to this extent. (Doc. 441).

book the proceeds of MRS-facilitated transactions as revenue. (*See* Doc. 468, p. 14). Consequently, MRS asserts that since the Xspand statements are "literally false," there is no need for expert testimony on the issue of falsity. (*Id*.).

In effect, MRS suggests that Xspand's marketing statements were literally false because MRS customers did in fact book the proceeds of MRS-facilitated transactions as revenue. [15] We find this reasoning unpersuasive for the following reasons. First, it is circular in nature, as it essentially posits that the proceeds from MRS-facilitated transactions were revenue because the MRS customers said they were revenue. Unfortunately for Plaintiff, something does not become true merely because one says it is true. Second, in order for MRS' proposition to be true, Xspand's marketing statements must be interpreted to assert that proceeds from MRS-facilitated **[**22]** transactions cannot *physically* be booked as revenue. We do not believe that any reasonable person would interpret Xpsand's marketing statement in this manner, since it is, after all, *physically possible* for an MRS customer to record the proceeds of an MRS-facilitated transaction in any way it wishes. Therefore, interpreting the marketing statement in the way suggested by MRS is, in our estimation, nonsensical and illogical. This conclusion is buttressed by the fact that MRS fails to point us to any evidence indicating that any recipient of the marketing statement ascribed that meaning to it. Accordingly, we believe that any reasonable person would interpret Xspand's marketing statement to address how the proceeds from MRS-facilitated transactions *should have been properly* booked. Therefore, it is axiomatic that to prove the falsity of this statement, MRS must proffer expert testimony. *See* ***HN13***[] *Fed. R. Evid. 702*. [16] (requiring expert testimony when **[*703]** factual matters are outside the ken of lay individuals).

Although Herron, a certified public accountant with significant experience in governmental accounting, was not deposed as an expert, he did provide testimony to the effect that, based on his experience and knowledge, the statements in the Xspand marketing materials were false in that MRS-facilitated transactions are properly booked as revenue, not debt. [17] Subsequent to Herron's depositions, Xspand filed a motion in limine seeking to exclude his testimony because it was unreliable. [18] During a hearing regarding Defendants' motion to exclude Herron's expert testimony, MRS indicated that it would only be calling Herron as an expert in the event that Defendants' expert, Professor Peter H. Knutson ("Knutson"), was permitted to testify. In such an event, MRS agreed to make Herron available for an "expert" deposition at which Defendants could **[**25]** more fully explore the foundation of his opinions involving the accounting issues present in this case. Since we have determined that Knutson's expert opinion is admissible, (Doc. 510), we can only assume that MRS shall be offering Herron as an expert either in its

[15] Insofar as MRS' literal falsity argument involves Xspand's representation regarding a business relationship with the city of Allentown, we note that Xspand has already admitted the falsity **[**23]** of this statement. However, MRS has not adduced any evidence indicating that this statement induced anyone to abandon a potential business relationship with MRS in favor of one with Xspand. Accordingly, as is evident from our causation analysis, *infra*, this averment cannot support any of the claims in the complaint because MRS cannot establish causation as to it. Consequently, we need not further address it in the instant context.

[16] Expert testimony would be required even if a reasonable person could interpret Xspand's statement in the manner suggested by MRS because, even in that event, the statement would not be "literally false." ***HN14***[] "In analyzing whether an advertisement . . . is literally false, a court must determine, first, the unambiguous claims made by the advertisement . . . and, second, whether those claims are false." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3d Cir. 2002)*. Accordingly, since Xspand's marketing statement is reasonably susceptible to the interpretation suggested by Xspand, in which case the statement would not be false if MRS customers improperly booked proceeds from MRS-facilitated transactions as revenue, **[**24]** the statement is not "unambiguous" and cannot therefore be literally false for Lanham Act purposes. *See id.; see also Schering-Plough Healthcare Prods. v. Neutrogena Corp., __ F. Supp. 2d __, 2010 U.S. Dist. LEXIS 24511, 2010 WL 960635 * 3 (D. Del. 2010)*. As we state in our discussion of the MRS Motion, *infra*, most of Xspand's statements are not "literally false" for this reason.

[17] When asked what the basis for this conclusion was, Herron responded, "The blue book, Governmental Accounting and Auditing-what do you call it? **[**26]** The blue book." Herron Dep., November 15, 2005, 24:4-25:13.

[18] Herron's testimony is uniquely vital to MRS' claims because we do not perceive that it has provided testimony from any other individual as to the actual falsity of Xspand's statements.

case in chief or to rebut the testimony provided by Knutson. Accordingly, an "expert" deposition of Herron will now be necessary. The parties agreed that this deposition would occur after the resolution of the pending summary judgment motions, [19] meaning that the motion in limine seeking to exclude Herron's opinion would likewise be tabled until that time. (*See* Docs. 511, 515). [20] Since we can foresee a circumstance in which Herron provides admissible expert testimony related to the falsity of Xspand's marketing statements, we shall deny the Xspand Motion to this extent. [21] As indicated above, Herron's testimony is vital because if it is inadmissible, MRS may not be able to prove its case, as it will very likely be unable to establish the falsity of Xspand's marketing statements.

With regard to Xspand's third and final global argument in favor of dismissal, it asserts that MRS has failed to produce evidence as to causation, an element critical **[*704]** to all five causes of action. [22] Specifically, Xspand contends that Herron, as principal of Xspand, was the only witness offered to prove causation and that his testimony cannot defeat summary judgment. For the following reasons, we do not agree.

Consider Herron's deposition testimony to the following effect:

> Q: [W]hat client or potential client . . . have you met with where you believe there's evidence that that client is any less likely to do business with MRS because of Xspand's March 1, 2005 letter?
> A: Everywhere I've met and the business director or the superintendent or the tax claim bureau director has pulled the letter out and wanted to discuss it.
> * * * *
> Q: . . . Is that the only evidence that you have that the letter is in any way affecting their thinking about whether they'll do business with MRS?
> * * * *
> A: No, they mention it in phone calls when we're trying to set up appointments and things.
> * * * *
>
> Q: Okay. And what about those communications suggests to you that the letter **[**29]** has made them any less likely to do business with . . . MRS?
> A: Many of them were more agreeable to setting up meetings and move very quickly to meet some budget deadlines they have. And now they are moving very slowly and are putting it on the back burner until they are able to slowly, methodically get appropriate responses to the letter.

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[19] Xspand's decision to table the expert deposition of Herron was rendered on the apparent assumption that the expert opinion of Herron was not implicated in the resolution of the pending summary judgment motions because MRS did not rely on it in opposing said motions. (*See* Doc. 511). However, in resolving a motion for summary judgment, the Court is not constrained to consider only those arguments interposed by counsel. MRS' failure to argue the impact of Herron's testimony does not preclude us from considering the same. Herron's testimony regarding the falsity of Xspand's statements is clearly relevant to the proper resolution of the pending motions.

[20] Since the motion in limine seeking to exclude Herron as an expert cannot be resolved before the taking of his "expert" deposition, and indeed since that deposition may or may not obviate the need for the motion, we believe that the better course is to deny the pending motion (Doc. 441) with express **[**27]** leave to re-file within 30 days of receiving the transcript from Herron's expert deposition.

[21] We do not believe that this procedure prejudices Xspand because, as its motion in limine seeking the exclusion of Herron's testimony indicates, it recognized the importance of Herron's testimony but elected instead to have us decide the instant motions without deciding the motion in limine first.

[22] The elements of the causes of action in Count I-IV were articulated above. As is evident, each of them requires proof of causation. The fifth cause of action, contained in Count V of the amended complaint, is tortious interference with prospective contractual relations. ***HN15***[] "The requisite elements of a cause of action for interference with prospective contractual relations are as follows: (i) a **[**28]** prospective contractual relationship; (ii) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (iii) the absence of privilege or justification on the part of the defendant; and (iv) the occasioning of actual damage resulting from the defendant's conduct." *Phillips v. Selig, 2008 PA Super 244, 959 A.2d 420, 428 (Pa. Super. Ct. 2008)* (citations omitted). Accordingly, it is clear that this cause of action also requires proof of causation.

> Q: . . . [H]ave any of the school districts actually said to you words to the effect of we're putting our discussion with MRS on the back burner until we get responses and information with respect to Xspand's March 1, 2005 letter?
> A: There's been a couple. I don't recall which ones.

Herron Deposition, June 1, 2005 pp. 216-218. Herron further testified as follows:

> Q: Has anyone from any school district, municipality, county or other taxing entity ever told you that [the March 1, 2005 mail-merged letter from Xspand] persuaded them not to do business with MRS?
> A: I believe East Stroudsburg and Norristown.

Id. 214:22-215:1.

This testimony could clearly lead a reasonable juror to conclude that Xspand's March 1, 2005 letter caused harm to MRS. [23] Xspand contends that there is record **[*705]** evidence indicating that conclusions such as this are based solely on Herron's **[**30]** speculation. To the extent such testimony exists, it clearly conflicts with the above-quoted testimony in which Herron unequivocally states that certain individuals informed him that Xspand's March 1, 2005 letter persuaded them to either put an MRS-facilitated transaction on the "back burner" or forego such a transaction altogether. Consequently, ***HN16***[] a credibility issue arises, and such determinations reside within the exclusive province of the jury.

Xspand also contends that the above-quoted testimony, and testimony like it, cannot defeat a summary judgment motion because it is inadmissible hearsay. *See* *Smith v. City of Allentown, 589 F.3d 684, 693 (3d Cir. 2008)* (***HN17***[] "Hearsay statements that would be inadmissible at trial may not be considered for purposes of summary judgment.") (citations omitted). MRS responds that testimony like the afore-quoted is admissible because, pursuant to *Federal Rule of Evidence 803*, it is not hearsay. This rule states:

> ***HN18***[] The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> * * * *
>
> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed **[**32]** unless it relates to the execution, revocation, identification, or terms of declarant's will.

Fed. R. Evid. 803(3) ("*Rule 803(3)*").

The Third Circuit Court of Appeals has noted that ***HN19***[] statements of a customer to an employee are admissible if the customer's motive is relevant to the action. *See* *J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 n.11 (3d Cir. 1990)*; *see also* WEINSTEIN'S FEDERAL EVIDENCE § 803.05 (2007). Indeed, "hearsay statements of a customer as to his reasons for not dealing with a supplier may be admissible for the limited purpose of proving customer motive. It is only if the statements are used to prove the fact that the customer stopped buying the product from this supplier, bought the product from someone else instead, or stopped buying the product altogether, that they become inadmissible." *New L&N Sales & Mktg., Inc. v. Menaged, 1998 U.S. Dist. LEXIS 14008, 1998 WL 575270 * 5 (E.D. Pa. 1998)* (citing *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267,*

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[23] Further, other portions of Mr. Herron's testimony indicate that he was in the midst of a process involving the release of information from various tax claim bureaus, a process that in his experience rapidly culminated in a sale, with seven to ten schools districts when the March 1, 2005 letter was distributed. *See* Herron Dep. June 1, 2005, 231:23-232:11. After the receipt of the letter, a number of those districts "slowed down" their discussions with MRS. *See id*. 232:11-233:15. Although Herron's testimony does not explicitly indicate that the March 1, 2005 letter caused the "slow downs," given the numerosity and timing of the alleged "slow downs," we believe that a jury could reasonably infer that they were engendered by Xspand's marketing **[**31]** letter. Further, to the extent that these districts elected not to contract with MRS, we believe that, given the historical progression of the process that the March 1, 2005 interrupted, the afore-referenced testimony could lead a reasonable jury to conclude that MRS was harmed by Xspand's marketing statements.

1274 (3d Cir. 1995)). Here, the government entities' motives are relevant in establishing whether or not Xspand's marketing strategy caused harm to MRS, and are only being offered to establish why the government entities **[**33]** chose not to employ MRS' services.

Xspand argues that *Rule 803(3)* cannot save statements such as the afore-quoted because it relates solely to the *declarant's* then-existing state of mind. Xspand contends **[*706]** that Herron's testimony involves a declarant who testifies about a particular *school board's* then-existing state of mind. After all, Xspands asserts, the ultimate decision about whether to do business with MRS rested not with a single individual but with a group of individuals statutorily charged with making such decisions. [24] Although innovative, we find Xspand's argument unavailing. Since *Rule 803(3)* clearly applies to statements made by individual customers, we fail to see why it would not apply to an individual who is an official representative of a corporate or governmental customer. After all, most decisions made by these entities are made by a board comprised of multiple individuals. If Xspand's construction of *Rule 803(3)* held true, out-of-court statements by persons with authority at these entities as to the motives underlying their board's decisions would be inadmissible under *803(3)*, but out-of-court statements by a sole-proprietor as to the motives behind the decisions regarding **[**34]** his business would be admissible. We do not believe that the Federal Rules of Evidence were intended to produce such an odd and inequitable result. Accordingly, we believe that the declarants in question in the case *sub judice*, as representatives of their respective school districts, can render out-of-court statements admissible under *Rule 803(3)* as to the motives underlying the business decisions of the entities that they represent. Consequently, statements such as the afore-quoted are admissible under *803(3)*. [25] Since such statements reasonably establish causation, we shall deny the Xspand Motion to this extent.

This concludes our discussion of the "global" issues raised by Xspand. We now turn our attention to its more discrete arguments.

ii. Discrete Infirmities

a. Defamation Claim

As we stated above, "In a defamation case, a plaintiff must prove: (i) the defamatory character of the communication; (ii) its publication by the defendant; (iii) its application to the plaintiff; (iv) the understanding by the recipient of its defamatory meaning; (v) the understanding by the recipient of it as intended to be applied to the plaintiff; (vi) special harm resulting to the plaintiff from its publication; and (vii) abuse of a conditionally privileged occasion." *Moore v. Cobb-Nettleton, 889 A.2d at 1267* (citations omitted) (internal quotations omitted). Xspand asserts that MRS cannot prove that its marketing statements were of a defamatory character.

HN20[] To determine whether a statement is capable of a defamatory meaning, courts consider whether "the statement tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing **[**36]** with him." *Tucker v. Phila. Daily News, 577 Pa. 598, 848 A.2d 113, 124 (Pa. 2004)*. While an action for defamation normally focuses on whether the statement in question tarnishes the reputation of the plaintiff, and an action for commercial disparagement focuses on **[*707]** the statements regarding the plaintiff's goods or services, there are times when impugnation of product quality crosses the line from disparagement of products to defamation of vendors. *See U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 923-24 (3d Cir. 1990)* (citations omitted). To that end, the Third Circuit Court of Appeals has noted:

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[24] Xspand offers no legal authority to support this conclusion, nor can we locate any.

[25] At this time, we note that to the extent that Xspand contends that the afore-quoted statement is inadmissible because Herron cannot identify the declarant, such a proposition is incorrect. *See Callahan v. A.E. V., Inc., 182 F.3d 237 (3d Cir. 1999)* ("We do not think that the admissibility of their statements under the *Rule 803(3)* hearsay exception depends on their being identified. Knowing the specific identity of the declarant will not make the statements more trustworthy evidence of the **[**35]** declarant's descriptions of their states of mind, the primary concern in interpreting hearsay exceptions.").

> [W]here the publication on its face is directed against the goods or product of a corporate vendor or manufacturer, it will not be held libelous per se as to the corporation, unless by fair construction and without the aid *of extrinsic evidence* it imputes to the corporation fraud, deceit, dishonesty, or reprehensible conduct in its business in relation to said goods or product.

Id. (citations omitted) (emphasis added). [26]

With regard to Xspand's March 1, 2005 mail-merged letter, this document explicitly stated that MRS-facilitated transactions were not true sales but were, instead, borrowings. Neither this statement, nor any of Xspand's marketing statements, indicate that MRS advertises itself as facilitating transactions that produce revenue, not debt, to the taxing entity. Thus, in order for Xspand's marketing statements regarding the quality of MRS' services to impugn MRS' integrity, the recipient of Xspand's marketing statement would have had to receive a communication **[**39]** from MRS in which MRS describes its services. Such extrinsic evidence is proscribed when determining whether a statement denigrates products or the vendor. [27] Accordingly, since Xspand's marketing statements do not in themselves call into question MRS' integrity without the use of extrinsic evidence, we believe that they are in fact incapable of a defamatory meaning. [28] As a result, **[*708]** we shall grant the Xspand Motion to the extent it involves MRS' defamation claim.

b. Commercial Disparagement Claim

As stated above, to sustain a claim for commercial disparagement in Pennsylvania, a plaintiff must prove that: "(i) the statement is false; (ii) the publisher either intends the publication to cause pecuniary loss or reasonably **[**40]** should recognize that publication will result in pecuniary loss; (iii) pecuniary loss does in fact result; and (iv) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity." McNulty v. Citadel Broad. Co., 58 Fed. Appx. 556, 567 (3d Cir. 2003) (citing Neurotron Inc. v. Medical Serv. Ass'n of Pa.., 254 F.3d 444 (3d Cir. 2001)). In addition to the arguments relating to falsity and causation, which we addressed above, Xspand also contends that MRS cannot maintain its commercial disparagement claim because there is no evidence that Xspand knew any of its statements were false or that it acted with reckless disregard for the truth or falsity of the statements.

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[26] The proscription against use of extrinsic evidence in determining whether a statement crosses the line from disparagement into defamation seems to be at odds **[**37]** with the general notion that in determining whether a statement is capable of defamatory meaning, courts are to "consider the likely interpretation of the statement by the intended audience," Baker v. Lafayette College, 350 Pa. Super. 68, 504 A.2d 247 (Pa. Super. Ct. 1986), as well as the context in which the statement is made, Beckman v. Dunn, 276 Pa. Super. 527, 419 A.2d 583, 586 (Pa. Super Ct. 1981). However, we believe that these rules can be synthesized in the following manner. **HN21**[] While extrinsic evidence cannot be used when determining whether a statement denigrates the products or vendor, it can be taken into consideration *after* determining that the statement denigrates the vendor, *i.e*., only after the court determines that the statement is of a type that *could be* capable of defamatory meaning. In that case, the context in which the statement is made is important in determining whether the statement *is* capable of defamatory meaning. This conclusion is buttressed by our recognition that all the cases cited by MRS for the proposition that "any communications by a competitor that imputes a want of integrity in business dealings are certainly capable of a defamatory meaning" involve situations where the communication, in **[**38]** isolation, give rise to the inference of dishonesty. *See, e.g.,* Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3d Cir. 1980) (the denigrating television broadcast itself contained statements that readily questioned the honesty of plaintiff's advertising); Tucker v. Phila. Daily News, 848 A.2d at 124 (*inherent* implausibility of the ideas communicated by the statements at issue were capable of making the plaintiffs look insincere, excessively litigious, avaricious, and perhaps unstable); Cosgrove Studio & Camera Shop v. Pane, 408 Pa. 314, 182 A.2d 751 (Pa.1962) ("no extrinsic proof was necessary to indicate the injurious character of the communication").

[27] Indeed, we read *U.S. Healthcare* to hold that in order **HN22**[] for a statement to cross the line from a disparagement of product to defamation of vendor, the statement itself must either expressly or impliedly allege that the plaintiff is dishonest or otherwise disreputable.

[28] Notwithstanding our conclusion, and as such set forth in the section that follows, these statements may denigrate product quality and could therefore be used to support a commercial disparagement claim.

To this end, Xspand notes that Paul Scura, Xspand's president, was the individual who oversaw the drafting of Xspand's March 1, 2005 letter. Scura Dep., Aug. 24, 2005 pp.81-82. Before disseminating the letter, Scura, who has extensive experience in municipal finance, Scura Declaration PP 2-8, obtained and reviewed a copy of the purchase and sales agreement used in MRS-facilitated transactions, Scura Dep., Aug. 24, 2005, p. 83. According to Xspand, this level of precaution precludes **[**41]** its conduct from being categorized as "reckless."

HN23[] For our purposes, "reckless disregard" is defined as the "serious indifference to truth or accuracy of a publication." BLACK'S LAW DICTIONARY (8th ed. 2004). As we have already stated, there is evidence from which a reasonable jury could infer that Xspand was aware that attorneys at two prominent law firms examined the structure of MRS-facilitated transactions and concluded that it was legal. Further, Scura himself testified that he did not consult any lawyers or certified public accountants regarding the truth of the statements made in the March 1, 2005 letter before distributing the same. Scura Deposition, August 24, 2005, pp. 146-47. In spite of the 20 years of structured finance experience that led him to believe consultation with a lawyer or accountant was unnecessary, given the purported knowledge Xspand possessed about the legality of the MRS-facilitated transactions, we believe that the reasonableness and/or level of indifference, if any, of Scura's actions is for a jury to decide. Therefore, we shall deny the Xspand Motion in this regard.

c. Tortious Interference Claim

As stated above, the requisite elements for a tortious interference **[**42]** with prospective contractual relations claim are as follows: "(i) a prospective contractual relationship; [29] (ii) the purpose or intent to harm the plaintiff by preventing the relation from occurring; (iii) the absence of privilege or justification on the part of the defendant; and (iv) the occasioning of actual damage resulting from the defendant's conduct." *Phillips v. Selig, 2008 PA Super 244, 959 A.2d 420, **[*709]** 428 (Pa. Super. Ct. 2008)* (citations omitted). Xspand asserts that MRS' tortious interference claim suffers from the following flaws: (i) there is no evidence indicating any "reasonable probability" that MRS would have entered into any lien-transactions if it were not for the marketing efforts of Xspand; and (ii) Xspand's conduct is protected by the "competitor's privilege." We address these arguments in turn.

Xspand asserts that the first contention relates particularly to **[**43]** the East Stroudsburg School District. (Doc. 447, p. 41). While Xspand cites no record evidence for this proposition, there is record evidence to the contrary. Consider the deposition testimony of Herron:

> Q: Has anyone from any school district, municipality, county or other taxing entity ever told you that [the March 1, 2005 mail-merged letter from Xspand] persuaded them not to do business with MRS?
> A: I believe East Stroudsburg and Norristown.

Herron Deposition, June 1, 2005, 214:22-215:1; *see also id*. 231:11-244:4 (for the same proposition). This is record evidence from which a reasonable jury could infer that MRS had a "reasonable probability" of obtaining the business of the East Stroudsburg and Norristown school districts were it not for the marketing activities of Xspand. [30] To the extent that there is record evidence contradicting the afore-quoted testimony, a credibility determination

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[29] ***HN24***[] A "prospective contractual relationship" is "something less than a contractual right, something more than a mere hope" and exists when there is "reasonable probability that a contract will arise from the parties' current dealings." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1015 (3d Cir. 1994)* (citations omitted).

[30] Additionally, as indicated in our hearsay discussion, *supra*, Mr. Herron's testimony indicates that he was in the midst of a process involving the release of information from various tax claim bureaus, a sequence that historically proceeds rapidly and culminates in a sale, with seven to ten schools districts when the March 1, 2005 letter was distributed. *See* Herron Dep. June 1, 2005, 231:23-232:11. After the receipt of the letter, a number of those districts "slowed down" their discussions with MRS. *See id*. 232:11-233:15. Although Herron's testimony does not explicitly indicate that the March 1, 2005 letter caused the "slow downs," given the numerosity and timing of alleged "slow downs," we believe that a jury could reasonably infer that they were engendered by Xspand's marketing letter. Further, given the historical progression of the process that the March 1, 2005 interrupted, we believe that the afore-referenced testimony could lead a reasonable jury to determine that MRS had "reasonable expectations" of entering into a contractual **[**45]** relationship with those seven to ten school districts. To the extent that these

would arise. Since such decisions are the exclusive province of the jury, we shall deny the Xspand Motion insofar as it rests on the above-referenced argument. *See* Nanton v. People of the Virgin Islands, 2009 V.I. Supreme LEXIS 49, 2009 WL 5449226 *26 (V.I. 2009) (citing United States v. Boone, 279 F.3d 163, 189 (3d Cir. 2002)) **[**44]** (for the proposition that to the extent a witness provides conflicting testimony, such conflicts implicate credibility determinations for the jury).

With regard to the "competitor's privilege," Xspand notes that Pennsylvania follows the rendition memorialized in the Second Restatement of Torts. *See* Acumed LLC v. Advanced Surgical Servs., Inc., 561 F.3d 199, 215. (3d Cir. 2009) (citations omitted). This provision states as follows:

> ***HN25***[] (i) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor, or not to continue an existing contract terminable at will, does not interfere improperly with the other's relation if:
>
> (a) the relation concerns a matter involved in the competition between the actor and the other, and
>
> **[*710]** (b) the actor does not employ wrongful means, and
> (c) his action does not create or continue an unlawful restraint of trade, and
> (d) his purpose is at least in part to advance his interest in competing with the other.
>
> (ii) The fact that one is a competitor of another for the business of a third **[**46]** person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

RESTATEMENT (SECOND) OF TORTS § 768.

As we have already concluded, assuming MRS can adduce testimony from Herron as to the falsity of Xspand's marketing statements, MRS can maintain a claim of commercial disparagement. In such a case, Xspand would have utilized "wrongful means," meaning that its "competitor's privilege" would be eviscerated. *See* Patient Transfer Sys. v. Patient Handling Solutions, Inc., 1999 U.S. Dist. LEXIS 19296, 1999 WL 1212189 (E.D. Pa. 1999). Accordingly, we shall deny the Xspand Motion to this extent, noting however as we do, that here again Herron's potential but not yet authorized expert testimony is the lynchpin of MRS' claim.

d. Claims Relating to Commerce Bank

Xspand contends that the alleged contact between Gov. Florio and Commerce bank did not cause Commerce to modify its business relationship with MRS and therefore did not harm MRS. In support of this assertion, and as aforementioned, Xspand cites the deposition testimony of Clive Corner, a former executive at Commerce who allegedly received phone call from Gov. Florio regarding **[**47]** the illegality of MRS-facilitated transactions. After acknowledging that Commerce consulted its lawyers to review the legality of MRS-structured transactions, Corner testified as follows:

> A: Apparently, the consensus of opinion of all the attorneys [was that there] was no legal issue to be concerned about. The transactions closed and there have been transactions since.
> * * * *
> Q: Would it be fair for me to understand, Mr. Corner, from your testimony that whatever concerns Mr. Florio passed along to Commerce did not cause Commerce to change its business practices with regard to MRS?
> A: That's correct.

Clive Corner Dep., Nov. 14, 2005, 17:16-18:4.

However, in contravention to this, we also have the deposition testimony of Herron to the following effect:

> Q: Did Mr. Corner tell you that Commerce Bank was going to in any way change its business dealings with MRS in response to any communication from Governor Florio?

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school districts ultimately decided not to contract with MRS, we believe a reasonable jury could determine that MRS suffered harm, meaning MRS has a cognizable tortious interference claim.

> A: They did change their business dealings in fact from the original experience with Commerce to the time they agreed to do transactions.

Herron Dep., Nov. 15, 2005, 17:6-12. Herron proceeded to describe how Commerce, Commerce Bank, New Jersey, [31] and MRS had settled on the rate, terms, **[**48]** and structure **[*711]** of the school transactions prior to receiving Gov. Florio's phone call. *Id*. 17:14-18:13. After the phone call, Herron testified that MRS was forced to restructure the contemplated transactions with less favorable terms from Commerce after Commerce New Jersey was non-responsive to MRS' attempted communications. [32] *Id*. When asked whether Corner informed him that Commerce New Jersey changed its approach to MRS because of any communications by Gov. Florio, Herron responded, "He (Corner) didn't volunteer it, and I didn't ask him." *See id*. 18:14-19.

For our purposes then, it appears that Herron was not explicitly told that the Xspand letter caused the need to restructure the transactions at a less favorable rate with Commerce. Herron's conclusion **[**49]** that Gov. Florio's call adversely affected MRS' financing is based purely upon the sequence of events recounted above. Indeed, MRS reasons that since Gov. Florio's call occurred at a moment in time between the points at which Commerce New Jersey agreed to participate in the financing of MRS-facilitated transactions and its subsequent change of course in that regard, the temporal sequence implies that MRS' financing was adversely affected by Gov. Florio's phone call. Quite simply, such a conclusion is based upon pure speculation. There is no evidence linking Gov. Florio's phone call with any delay in MRS receiving financing or experiencing a change in financing terms. [33] Accordingly, we will grant the Xspand Motion to this extent.

e. Lost Profits Remedy

HN26[] Under Pennsylvania law, lost profits may be recovered when: (i) there is evidence to establish the damages with reasonable certainty; (ii) they were the proximate consequence of the alleged wrong; and (iii) they were reasonably foreseeable. *See* *Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 680 (3d Cir. 1991)*; *see also* *Delahanty v. First Pennsylvania Bank, N.A., 318 Pa. Super. 90, 464 A.2d 1243, 1258 (Pa. Super. Ct. 1983)*. **[**51]** While a plaintiff's proof of damages need not be mathematically precise, the evidence must establish the fact of damages "with a fair degree of probability." *Advent, 925 F.2d at 680* (citations omitted). Xspand particularly notes that Pennsylvania courts have been skeptical of claims for lost profits by a "new and untried business." *Exton Drive-In, Inc. v. Home Indemnity Com., 436 Pa. 480, 261 A.2d 319, 324 (Pa. 1969)*.

We begin by noting that Xspand has not cited authority for the proposition that MRS is in fact a "new and untried business." **[*712]** In fact, MRS has been operating in Pennsylvania since 2004. The court in *J&M Turner, Inc. v. Applied Bolting Tech., Prods., Inc., 1998 U.S. Dist. LEXIS 1158 *36-37 (E.D. Pa. 1998)*, allowed the issue of lost profits to reach the jury when, *inter alia*, the plaintiff had been in business four months before the injury. As already

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31 Commerce, Harrisburg, which we have been referring to as "Commerce," and Commerce Bank, New Jersey ("Commerce New Jersey") are separate organizations, however, the former is a franchise of the latter. Corner Dep., 6:11-24. Corner is a former executive with Commerce. *Id*.

32 Commerce New Jersey was involved in the initial transaction because it had an appreciably larger lending capacity than Commerce. *See* Herron Dep., Nov. 15, 2005, 17:20-24.

33 This determination is not inconsistent with our conclusion involving causation. There, we were faced with a situation where a multitude of school districts, which embarked upon a course that historically concluded with the rapid consummation of a contract, decided to slow down, and in some cases, abandon, the contract formation process after receiving Xspand's March 1, 2005 letter. In that instance, we concluded that the numerosity and timing of the school **[**50]** board's decisions, which contravened historical patterns, could reasonably lead a jury to infer that the March 1, 2005 letter caused the change in the school boards' actions. Here, we lack the numerosity and historical pattern upon which our causation determination was predicated. Further, unlike the situation implicated in our causation analysis, the present determination does not involve direct testimony establishing a causal link between Xspand's marketing conduct and the alleged harm suffered by MRS. Quite simply, the fact that the single Event A (Florio phone call) occurred before Event B (Commerce New Jersey's change of course) *in and of itself does* not mean that Event A caused Event B. Such reasoning exemplifies the *post hoc ergopropter hoc* logical fallacy.

noted, in November 2004 Xspand initially identified a list of 136 prime school districts that it would target, three of which were crossed-out because they had entered into contracts with MRS. (Doc. 465-14). Since MRS was obviously already in business in November 2004, the harm it claims to have suffered from Xspand's March 1, 2005 letter occurred **[**52]** after it had been in business for in excess of four months. Accordingly, we see no reason to treat MRS' request for lost profits with heightened skepticism.

Further, Herron has supplied testimony as to the financial performance of MRS over time and MRS has produced its tax returns and profit/loss statements for a number of years. (*See* Doc. 465, App. II, Ex. 8, pp. 225-33). MRS has also supplied a sample of how its damages from lost business opportunities were calculated, which contains figures derived from a percentage of the volume of tax liens which it could have purchased and collected. (*Id.*, App. II, Ex. 94). Xspand does not question the reliability, accuracy, or specificity of these calculations, and so we see no need to do the same. Accordingly, we believe that lost profits can be established to a reasonable degree of certainty. Since we have already determined that a reasonable jury could determine that lost profits were a consequence of the alleged wrongful conduct of Xspand, and because Xspand does not challenge the foreseeability of those damages, we believe that MRS has adduced evidence to defeat summary judgment as to its request for lost profits. Therefore, we will deny **[**53]** the Xspand Motion to this extent.

This concludes our resolution of the Xspand Motion. We shall now proceed to address the merits of the Bear Motion.

B. The Bear Motion

At the outset, we note that in its motion to dismiss, Bear asserts that MRS is attempting to hold it liable for certain "unpleaded claims." [34] MRS counters that while the amended complaint does not expressly mention illegal campaign contributions, the same is a facet of its unfair competition cause of action and may therefore be properly pursued. We do not agree.

HN27[] *Federal Rule of Civil Procedure 8(a)(2)* requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. In the case at bar, Plaintiff's amended complaint **[**54]** is utterly bereft of any reference to "illegal campaign contributions" or "Rule G-37 of the MASRB." Accordingly, the amended complaint would not put Defendants on fair notice that Plaintiff's case in any way involved allegations of illegal campaign contributions. [35] **[*713]** Therefore, Plaintiff cannot either maintain a claim for an alleged violation of Rule G-37 or support its unfair competition claim with this theory of liability. [36] To the extent Plaintiff attempts to do so, the Bear Motion is granted.

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[34] Specifically, Bear contends that throughout the discovery process MRS has maintained a belief that Bear can be held liable for illegal campaign contributions, in violation Rule G-37 of the Municipal Securities Rulemaking Board ("MSRB"). (Doc. 454 p. 12).

[35] The closest Plaintiff comes to properly pleading its Rule G-37 allegations are the statements contained in paragraph 15 of its amended complaint. That paragraph states, in part, "Defendant . . . uses former Governor Florio's political connections to generate business from taxing entities. In addition to utilizing such contacts to 'open doors' to allow Xspand access to government taxing entities . . . Florio also uses his political contacts to disparage . . . Plaintiff's business." **[**55]** Amend Compl. P 15. However, this paragraph, even if construed liberally, cannot reasonably be said to put Defendants on notice that Plaintiff's case involves, in part, an allegation of illegal campaign contributions.

[36] If Plaintiff learned of the alleged Rule G-37 violations through the discovery process, it was free to seek inclusion of such allegations in its amended complaint through a properly filed motion to amend that pleading pursuant to *Federal Rule of Civil Procedure 15*. Unfortunately for Plaintiff, it did not do so. Accordingly, it shall be precluded from lodging these allegations at this late stage of litigation.

In addition to the aforementioned argument, the Bear Motion also seeks dismissal of the entire amended complaint against Bear on the basis that MRS lacks grounds upon which to hold it liable. MRS responds that Bear can be properly held liable because it was either in a joint venture or agency relationship with Xspand. We address these contentions in sequence.

i. Joint Venture

"The Third Circuit has indicated that ***HN28***[] the essential elements of a joint venture include: (i) a joint proprietary interest in, and a right to mutual control over, the enterprise; (ii) a contribution **[**56]** by each of the parties of capital, materials, services or knowledge; and (iii) a right to participate in the expected profits." *Stecyk v. Bell Helicopter Textron, Inc., 1997 U.S. Dist. LEXIS 17888, 1997 WL701312 (E.D. Pa. 1997)* (citing *Richardson v. Walsh Constr. Co.., 334 F.2d 334, 336 (3d Cir. 1964))*. "Although the existence or nonexistence of a joint venture . . . involves a determination of intent, where the essential elements of a joint venture . . . are clearly absent, the determination may be made on a motion for summary judgment. *Combustion Sys. Servs. v. Schuylkill Energy Resources, Inc., 1993 U.S. Dist. LEXIS 17714, 1993 WL 514496 *3 (E.D. Pa. 1993)* (citing *McFadden v. Baltimore Contractors, Inc., 609 F.Supp. 1102 (E.D. Pa. 1985))*.

In order to resolve this issue, a brief summary of the organizational structure of Bear may be helpful. Bear is a subsidiary of the Bear Stearns Companies, Inc. ("TBSC"). Declaration of John Garzone P 3. [37] In 2003, Bear contemplated entering into a "strategic alliance" with Plymouth Financial Company, Inc. ("Plymouth Financial") whereby Bear would agree to provide funding to Plymouth Financial who, through its subsidiary, Xspand, would source and service municipal tax liens secured by residential and commercial **[**57]** real estate. *Id*. The terms of the strategic alliance were set forth in a document entitled, "Plymouth Park Tax Services, LLC, Summary of Terms and Conditions, August 12, 2003" (the "Term Sheet"), which called for the creation of an entity, "Plymouth Park Tax Services, LLC" ("Plymouth Park"), which would purchase tax liens and provide financing to Plymouth Financial. *Id*. P 4. The Term Sheet also contemplated that Bear and Plymouth Financial would share joint ownership of Plymouth Park. *Id*. However, as Garzone states, the Term Sheet was never **[*714]** implemented. *Id*. 5. [38]

Garzone avers that, instead, TBSC created Plymouth Park as a wholly owned subsidiary, meaning that Bear and Plymouth Park were sister corporations. *Id*. Accordingly, the financing that Plymouth Financial was to receive from Bear under the Term Sheet was now provided by Plymouth Park through an arms-length agreement. *See id*. [39] Plymouth Financial used the financing provided by Plymouth Park to purchase tax liens that were serviced by Xspand. *Id*. P 6. Plymouth Park also purchased tax liens from Plymouth Financial, which were then serviced by Xspand. *Id*. Garzone averred that Plymouth Financial and Plymouth Park maintained separate and independent control over their own expenditures and operations and that Bear never had any ownership interest in Plymouth Park. *Id*. P 7. Finally, Garzone represented that in January 2006 Plymouth Park purchased a significant number of Plymouth Financial's assets, which included some assets of Xspand. *Id*. [40] Although Plymouth Park did not purchase Xspand stock, it acquired the right to use Xspand's name in marketing. *Id*.

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[37] John Garzone ("Garzone") is the former senior managing director of Bear. Garzone Decl. P 1.

[38] A provision of the Term Sheet specifically establishes:

> Except with the confidentiality provision contained herein, *this Summary of Terms is not intended to constitute a legally binding agreement* . . . and does not contain all of the detailed terms which will be included in the definitive agreements. *A binding obligation will come into existence only upon the execution of the definitive agreements*.

(Doc. 454, Ex. 1, at Ex. A, p. 19) (emphasis added). Accordingly, since the Term Sheet was never implemented, by its own language it did **[**58]** not create binding obligations between Bear and Plymouth Financial.

[39] Although Bear indicates that the agreement between Plymouth Park and **[**59]** Plymouth Financial as Exhibit B to Exhibit 1 of document 454, that document unfortunately is absent.

[40] Documents supplementing the asset purchase agreement indicate that Garzone was the President of Plymouth Park. (Doc. 454-2, pp. 36-40).

At first glance, Garzone's declaration seems to belie MRS' assertion that there was a joint venture between Xspand and Bear because it indicates that in light of the failure to implement the Term Sheet, Bear did not possess any ownership interest in Xspand or had a right to share in Xspand's profits. MRS contests this conclusion and asserts that there is ample record evidence to support a reasonable inference that Bear shared an ownership interest in Xspand and thus in its profits. In support of this, MRS asserts that Bear "jointly marketed" itself with Xspand by placing its logo and name throughout Xspand's marketing materials, (*see e.g.*, Doc. 465 App. II, Exs. 23, 57, 58). MRS contends that Bear received a substantial portion of its tax liens from Xspand, which resulted in a large profit for Bear. Further, MRS points to evidence indicating that Garzone attended marketing meetings with prospective clients where Bear's name and logo were prominently **[**60]** displayed along side the names and logos of both Plymouth Financial and Xspand. (*See id*. App. II, Exs. 58-63). Garzone was also included on emails that contained regular updates of Xspand's marketing efforts. (*See id*. App. II., Exs. 60-63). Further, Scura testified as follows:

> Q: . . . what would Mr. Garzone have to do with Miss Cerbus' compensation?
>
> A: Well, nothing directly. However, we have an agreement, a *joint venture* agreement, with Bear Stearns whereby outside consulting expenses are deducted from the profitability of a transaction. So to the **[*715]** extent that she functioned as a consultant on a specific transaction, the amount of money that we paid her would have a direct impact on the profitability of that transaction and, therefore, he should have input into the decision.

Scura Dep. 5:20-6:7 (emphasis added). Despite the structure of, and transactions involving, Bear outlined hereinabove, we believe that the evidence cited in this paragraph could reasonably lead a jury to conclude that Bear was involved in a joint venture with Xspand and is therefore jointly and severally liable for Xspand's marketing statements. *See* *Sleasman v. Brooks, 32 Pa. D. & C.3d 187, 1984 WL 2248 *3-4 (Pa. Com. Pl. 1984)* ("Partners **[**61]** and members of a joint enterprise or joint venture are jointly and severally liable in tort."). Vigorously as Bear may argue otherwise, it is possible that it did not fully remove itself from Xspand's operation despite the structural machinations as noted. Accordingly, we will deny the Bear Motion to this extent. Having resolved the Bear Motion in its entirety, we shall proceed to address the MRS Motion.

C. The MRS Motion

The MRS Motion is premised on two arguments. First, MRS contends that it is entitled to summary judgment to the extent that certain aspects in Xspand's March 1, 2005 letter and in its FAQ were "literally false." Second, MRS argues that the Tax Injunction Act ("TIA"), *28 U.S.C. § 1341*, prevents Xspand from asking this Court to find that the school districts that engaged in MRS-facilitated transactions and booked the proceeds therefrom as revenue were, as a matter of fact, wrong in doing so. We address these issues *ad seriatim*.

i. Literal Falsity Argument

As we already stated in our discussion of the Xspand Motion, the statements related to MRS contained in Xspand's March 1, 2005 letter were incapable of being "literally false" because they were ambiguous. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.., 290 F.3d 578, 586 (3d Cir. 2002)*; **[**62]** *see also* *Schering-Plough Healthcare Prods. v. Neutrogena Corp., F. Supp. 2d , 2010 U.S. Dist. LEXIS 24511, 2010 WL 960635 * 3 (D. Del. 2010)*. Accordingly, we will deny the MRS Motion to this extent. [41] Since we have not previously addressed literal falsity as it pertains to the FAQ, we shall do so now.

Paragraph 18 of the FAQ states as follows:

> **18. Is the XSPAND program the same program that the Harrisburg School District is participating in**

[41] Here again, we note that while Xspand's representation regarding a business relationship with the city of Allentown was literally false, the same cannot support any of the claims in the complaint because MRS has not established causation as to it. Accordingly, we need not address it any further in the present context.

> The Harrisburg School District is currently participating in a borrowing plan associated with a loan from Commerce Bank. [42] This plan has recourse to the Harrisburg School District if the liens are not sufficient to repay the borrowing. *The liability appears on the balance sheet of the Harrisburg School District*, and the advance of the borrowed funds is not revenue for budgeting purposes. The debt 'does' affect the School Districts credit rating, and may **[**63]** be limited by any debt limitation tests in bond indentures.

[*716] (Doc. 465-10, Ex. 5) (emphasis added). We believe that the above-emphasized language is unambiguous; a reasonable person could only read it to mean that the Harrisburg School District *actually booked* the MRS-facilitated transaction as a borrowing that created debt, not revenue. Contrary to that statement, the Harrisburg School District *actually booked* the proceeds of the MRS-facilitated transaction as revenue, not debt. In its opposition to the MRS Motion, Xspand admits that the above-emphasized statement is incorrect but asserts that it is a mere "typographical error" [43] that is of "no moment."

In support of this contention, Xspand states that ***HN29***[] to obtain monetary damages in a *§ 43(a)* Lanham Act false advertising case, a plaintiff seeking such damages must prove actual consumer deception, even if the claim is based on "literal falsity." [44] We believe that this is an accurate statement of the law. *See Gallup, Inc. v. Talentpoint, Inc., 2001 U.S. Dist. LEXIS 18560, 2001 WL 1450592 *13 (E.D. Pa. 2001)* (emphasis added) ("Where plaintiff seeks *injunctive relief*, and shows that a claim is literally false, a court need not consider whether the public is misled. Where, however, a plaintiff seeks *monetary damages*, proof of actual deception is required. This does not mean that plaintiff bears the burden of detailing individualized loss of sales; however, plaintiff must show some customer reliance on the false advertising."); *see also Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 941-43 (3d Cir. 1993)* (affirming trial court decision to grant injunctive relief but deny monetary relief in spite of finding literal falsity); *Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 649 (3d Cir. 1958)* ("In cases of injunction **[**65]** . . . there seems to be no requirement that purchasers actually be deceived, but only that the false advertisements have a tendency to deceive. . . . While it would be going too far to read the requirement of customer reliance out of this section so far as damages are concerned, we believe that this is a recognition that, as with most equitable relief by way of injunction, *Section 43(a)* may be asserted upon a showing of likelihood of damage without awaiting the actuality."); *Bracco Diagnostics, Inc. v. Amersham Health, Inc., 627 F.Supp. 2d 384, 482 (D.N.J. 2009)* (for the proposition that "literal falsity, without more, is insufficient to support an award of money damages to compensate for marketplace injury;" *Synygy, Inc. v. Scott-Levin, Inc., 51 F.Supp. 2d 570, 575 (E.D. Pa. 1999)* ("Thus, a plaintiff seeking monetary rather than injunctive relief must show actual damages rather than a mere tendency to be damaged."). [45] **[*717]** Xspand contends that since MRS cannot establish actual consumer deception, the misstatement contained in the FAQ is of no moment.

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[42] This statement indicates that the transaction in question was facilitated by MRS, as it used Commerce Bank to finance its transaction with the Harrisburg School District.

[43] Xspand asserts that the statement was intended to read "The liability *should* appear on the balance sheet . . ." (Doc. 472 p. 12). This supposed "typographical error" does not implicate a misspelling or a transposition of words; it involves the complete omission of a word that substantially changes the meaning of the declaration. Given the allegations made by MRS, **[**64]** we believe that the jury is entitled to determine the nature of the error contained in the FAQ.

[44] Xspand asserts that MRS can only seek money damages because Xspand has stopped circulating the advertisements in question, meaning there **[**66]** is no basis for an injunction. MRS, on the other hand, asserts that even if Xspand has stopped misrepresenting the nature of MRS-facilitated transactions, that does not moot the need for injunctive relief. It contends that since the effect of Xspand's marketing statements lasted for years, it is entitled to a court-ordered state-wide retraction of Xspand's false statements, even at this late date, which is approximately 5 years after Xspand's marketing campaign commenced. Neither party has cited any authority regarding the appropriateness, or lack thereof, of the contemplated injunctive relief, and Xspand has not explicitly requested summary judgment on this issue. It is accordingly unnecessary to discourse further about it within our analysis.

[45] MRS challenges this statement of law on several fronts. First, it cites *Facenda v. NFL Films, Inc., 542 F.3d 1007 (3d Cir. 2008)*, and *Santana Prods., 401 F.3d at 136*, for the proposition that proof of actual deception is not necessary in a *§ 43(a)(1)(B)* Lanham Act false advertising claim when plaintiff proves literal falsity. However, this statement in *Facenda* arose in *dicta*, as that

On the point of actual deception, we note that Marie Guidry, a representative from the East Stroudsburg School District, testified:

> Q: Based on [paragraph 18 of the FAQ] . . . is Xspand leading you to believe that the MRS transaction does not produce revenue for budgeting purposes?
> A: Correct.
> Q: And is Xspand leading you to believe that the debt incurred as a result of the MRS transaction would affect the school district's credit rating?
> A: Yes.
> Q: An is Xspand also leading you to believe that any affect on such credit rating may be limited by any debt limitation test in bond indentures?
> A: Yes.
>
> Q: And does this **[**69]** paragraph echo the concerns you had about the affect on the school district's bond rating?
> A: Yes.

Marie S. Guidry Dep., January 4, 2006, 64:17-65:3. Based on this testimony, we believe that a reasonable jury could determine that the literally false statement in Xspand's FAQ document actually deceived Guidry. However, this does not conclusively establish MRS' right to relief, as MRS must also establish causation. On this point we note that while Herron testified that representatives from East Stroudsburg confirmed that Xspand's marketing materials caused that school district not to do business with MRS, Guidry's deposition testimony provides reasons to believe that the Xspand marketing materials had no effect on East Stroudsburg's **[*718]** decision not to contract with MRS. Indeed, Guidry claimed that Xspand's FAQ document "echoed" concerns she *already harbored* regarding the effect that tax lien sales to private entities would have on the school district's financial statements and bond rating. *See* Guidry Dep. 43:5-44:1, 64:17-65:3. Accordingly, we believe that a reasonable jury could determine that the Xspand marketing materials did not play a causal role in East Stroudburg's decision not to **[**70]** contract with MRS. Consequently, we are of the opinion that the issue of causation is a determination to be made by the jury. Therefore, we will grant the MRS Motion insofar as it requests a declaration that Xspand's representation regarding its business relationship with the city of Allentown and Xspand's statement in the FAQ document to the effect that the Harrisburg School District booked the proceeds of MRS-facilitated transactions as debt are literally false. However, we will deny the MRS Motion to the extent it seeks to impose liability based on either of these literal falsities, and to the additional extent that it seeks a determination that any other Xspand marketing statements were literally false. We now proceed to the TIA argument.

ii. TIA Argument

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case actually involved a *§ 43(a)(1)(A)* Lanham Act false-endorsement **[**67]** claim. Indeed, the Third Circuit admitted that the standards governing *§ 43(a)(1)(B)* and *§ 43(a)(1)(A)* are often different. *See* *Facenda, 542 F.3d at 1021*. Further, the relevant portion of *Facenda* quotes *Fisons Horticulture, Inc. v. Vigoro Indus.., 30 F.3d 466, 472 n.8 (3d Cir. 1994)*. In footnote 8, the *Fisions* Court cited to *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc., 19 F.3d 125 (3d Cir. 1994)*, and *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222 (3d Cir. 1990)*, both of which involved injunctions. Additionally, the proposition as it is found in *Santana Products* is accompanied by a citation to *Johnson & Johnson*. Accordingly, MRS' citation to *Facenda* and *Santana Products* does not alter our opinion that it must establish actual deception to succeed on its *§ 43(a)(1)(B)* Lanham Act false advertising claim.

Second, MRS cites various cases from foreign jurisdictions for the proposition that where there is willfully false advertising, as is purportedly the situation in the case at bar, there is a presumption of damages. *See* *Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1336 (8th Cir. 1997)*; *Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 2008 WL 4261040 *20 (N.D. Ga. 2008)*; **[**68]** *Heidi Ott A.G. v. Target Corp., 153 F.Supp. 2d 1055, 1072 (D. Minn. 2001)*. Notably, MRS has failed to cite any authority in our Circuit for this proposition. Further, to the extent that this proposition is interposed as an attempt to establish that proof of actual customer deception occurred, such a contention squarely conflicts with the above-cited Third Circuit authority establishing that plaintiffs must prove actual customer confusion/deception in order to recover money damages for a Lanham Act false advertising claim. Therefore, we find Plaintiff's argument on this point unavailing.

The TIA states, ***HN30***[] "The district court shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under state law where a plain, speedy, and efficient remedy can be had in the courts of such state." *28 U.S.C. § 1341*. In this regard, MRS notes, ***HN31***[] "A lien sale is a mode of tax collection; and so an action to enjoin it, or declare it illegal, or rescind it . . . would be barred by the [TIA] or, in the case of **[**71]** the damages suit, by the free-standing principle of comity." *Wright v. Pappas, 256 F.3d 635, 637 (7th Cir. 2001)* (citing *Simon v. Cebrick, 53 F.3d 17, 22 (3d Cir. 1995))*. MRS contends that the TIA is applicable in the case at bar because Xspand is asking the Court to second guess the decisions of local elected officials as to what has been treated as revenue since the moment the liens were sold. Essentially, then, MRS claims that Xspand requests us to act as a "super auditor" over state and local governmental entities in a way that would usurp the powers of the Pennsylvania Department of Community and Economic Development (the "DCED") and the Pennsylvania Auditor General. Further, MRS asserts that Xspand had state remedies for challenging whether it improperly classified a transaction as a sale instead of a borrowing. *See* *53 Pa.C.S. § 8211(d)* (cited for the proposition that the DCED has exclusive jurisdiction to determine all procedural and substantive matters arising out of transactions engaged in by local government unites which create debt for those entities).

While exceedingly novel, we find Plaintiff's argument unpersuasive. The United States Supreme Court has stated, ***HN32***[] "The TIA's **[**72]** legislative history shows that, in enacting the statute, Congress focused on taxpayers who sought to avoid paying their state tax bill by pursuing a challenge route other than the one specified by the taxing authority." *Hibbs v. Winn, 542 U.S. 88, 89, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004)*. Accordingly, the Court proceeded to state that it "has interpreted and applied the TIA only in cases Congress wrote the statute to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id. at 89*. Indeed, the case cited by MRS in support of its position is consistent with this construction of the TIA in that *Wright* involved a plaintiff who bought tax liens from Cook County, Illinois and later sued the treasurer on the theory that the treasurer overstated the value of the liens based on plaintiff's race. Wright **[*719]** challenged the collection of taxes and requested a refund from the county, thereby attempting to avoid the payment of taxes. These circumstances quite obviously differ greatly from the facts present in the case *sub judice*.

Unlike the plaintiff in *Wright*, no party in the case at bar is requesting the government to take any action. Xspand is merely attempting to establish **[**73]** that certain government entities erroneously booked the proceeds of MRS-facilitated transactions as revenue instead of properly booking them as debt. While this involves the government in a tangential way, Xspand is not attempting to force the government to retroactively alter its accounting books. Further, even if a jury finds Xspand's argument persuasive, the government entities that booked MRS-facilitated proceeds as revenue will not be compelled to adjust their books to reflect that the MRS-facilitated transaction produced debt. Indeed, it appears that any decision made by this Court will not affect the balance sheets or budgets of any of the local government entities implicated in this case. No transfer of funds from the local government entities to MRS or from MRS to the local government entities that was not contemplated by the terms of the MRS-government contract will occur as a result of any decision that may be rendered in this case. At most, a decision adverse to MRS will merely indicate that the government entities booking the proceeds of MRS-facilitated transactions as revenue may have committed an error in book keeping; it will not change the capital at the governmental **[**74]** entity's disposal. Accordingly, we do not believe that the TIA is applicable to this case because we cannot perceive how any activity in this case will "enjoin, suspend, or restrain the assessment, levy, or collection" of any state tax. Therefore, we will deny the MRS Motion to this extent.

V. CONCLUSION

For the foregoing reasons, and to the extent reflected above, we shall deny in part and grant in part the Xspand Motion, the Bear Motion, and the MRS Motion. We shall also deny Xspand's motion in limine seeking the exclusion of Herron's expert testimony with leave to re-file the same within 30 days of receipt of the transcript from Herron's "expert" deposition.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Xspand's motion in limine seeking the exclusion of Herron's expert testimony (Doc. 441) is **DENIED** without prejudice to re-file within 30 days of receipt of the transcript from Herron's "expert" deposition.

2. Xspand's Motion for Summary Judgment (Doc. 445) is **GRANTED IN PART** and **DENIED IN PART** to the following extent:

a. The Motion is **DENIED** insofar as it involves the following:

i. Xspand's global *Noerr-Pennington* argument;
ii. Xspand's global falsity argument;

iii. Xspand's global causation **[**75]** argument;
iv. MRS' commercial disparagement claim;
v. MRS' tortious interference claim; and
vi. MRS' request for lost profits.

b. The Motion is **GRANTED** insofar as it involves MRS' defamation claim and MRS' Commerce Bank argument.

3. MRS' Motion for Partial Summary Judgment (Doc. 449) is **GRANTED IN PART** and **DENIED IN PART** to the following extent:

[*720] a. The Motion is **GRANTED** insofar as it requests a declaration that the following statements are literally false: (i) Xspand's representation regarding its business relationship with the city of Allentown; and (ii) Xspand's statement in the FAQ document to the effect that the Harrisburg School District booked the proceeds of MRS-facilitated transactions as debt.

b. The Motion is **DENIED** insofar as MRS requests a judgment of liability based on the aforementioned literal falsities.

c. The Motion is **DENIED** insofar as it requests a declaration that any additional Xspand marketing statements were literally false.

4. Bear's Motion for Summary Judgment (Doc. 451) is **GRANTED IN PART** and **DENIED IN PART** to the following extent:

a. The Motion is **GRANTED** insofar as it involves MRS' unpleaded Rule G-37 averments.

b. The Motion is DENIED insofar as it involves Bear's **[**76]** liability for Xspand's marketing activities.

/s/ John E. Jones III

John E. Jones III

United States District Judge

[Univac Dental Co. v. Dentsply Int'l, Inc.]

United States District Court for the Middle District of Pennsylvania

March 31, 2010, Decided; March 31, 2010, Filed

CIVIL ACTION NO. 1:07-CV-0493

Reporter

702 F. Supp. 2d 465 *; 2010 U.S. Dist. LEXIS 31615 **

UNIVAC DENTAL COMPANY, and LACTONA CORPORATION, Plaintiffs v. DENTSPLY INTERNATIONAL, INC., Defendant

Prior History: *Univac Dental Co. v. Dentsply Int'l, Inc., 2009 U.S. Dist. LEXIS 126961 (M.D. Pa., Dec. 30, 2009)*

Core Terms

dealers, plaintiffs', summary judgment, recommended, magistrate judge, competitors, teeth, damages, proposed findings, instant case, practices, antitrust, parties, anticompetitive, lines, tooth, issue of causation, defendant argues, litigated, collateral estoppel, limitations period, clear error, portions, mislead, agrees, dental, report and recommendation, antitrust violation, competing product, issue preclusion

LexisNexis® Headnotes

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Through summary adjudication the court may dispose of those claims that do not present a "genuine issue as to any material fact" and for which a jury trial would be an empty and unnecessary formality. *Fed. R. Civ. P. 56(c)*. The burden of proof is upon the non-moving party to come forth with affirmative evidence, beyond the allegations of the pleadings, in support of its right to relief. This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the nonmoving party on the claims. *Fed. R. Civ. P. 56(c)*, *(e)*. Only if this threshold is met may the cause of action proceed.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

HN2[] **Entitlement as Matter of Law, Appropriateness**

Cross-motions for summary judgment are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist. Each movant must show that no genuine issue of material fact exists; if both parties fail to carry their respective burdens, the court must deny the motions. When reviewing each motion, the court is bound to view the evidence in the light most favorable to the nonmovant. *Fed. R. Civ. P. 56*.

Civil Procedure > Judicial Officers > Magistrates > Standards of Review

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

Where objections to a magistrate judge's report and recommendation are filed, the court must perform a de novo review of the contested portions of the report. *28 U.S.C.S. § 636(b)(1)(C)*). In this regard, M.D. Pa. Civ. R. 72.3 requires written objections which specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for those objections.

Civil Procedure > Judicial Officers > Magistrates > Objections

HN4[] **Magistrates, Objections**

Where parties have not filed objections to a magistrate judge's report and recommendation, the Federal Magistrates Act does not require a district court to review the report before accepting it. As a matter of good practice, however, the United States Court of Appeals for the Third Circuit expects courts to afford some level of review to dispositive legal issues raised by the report. The advisory committee notes to *Fed. R. Civ. P. 72(b)* indicate that when no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation. The court's review is limited to ascertaining whether there is "clear error on the face of the record.

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

HN5[] **Sherman Act, Scope**

In order to establish that a defendant violated *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must show that the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] **Scope, Monopolization Offenses**

A showing that the challenged practices bar a substantial number of rivals or severely restrict the market's ambit is required to demonstrate a *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, antitrust violation affecting competition generally. However, the court is aware of no legal authority requiring an individual competitor to make the same showing with respect to its own individual access to the market. Of course, a plaintiff must show that the defendant's conduct injured or damaged it, but this burden does not require a plaintiff to show that defendant has foreclosed a significant portion of the market to it.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] **Scope, Monopolization Offenses**

A monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take and the government's prior antitrust litigation against defendant has already established that its policies--specifically, violated *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Counsel: **[**1]** For Univac Dental Company, Plaintiff: Gregory J. McDonald, Paul R. Braunsdorf, Rayne Hammond Benz, LEAD ATTORNEYS, Harris Beach PLLC, Pittsford, NY; Melissa H. Maxman, LEAD ATTORNEY, Cozen O'Connor, Washington, DC; Robert M. Stengel, LEAD ATTORNEY, Robert M. Stengel, P.C., Doylestown, PA; Bart D. Cohen, Berger & Montague, Philadelphia, PA.

For Lactona Corporation, Consol Plaintiff: Bart D. Cohen, LEAD ATTORNEY, Berger & Montague, Philadelphia, PA; H. L. Montague, Jr., LEAD ATTORNEY, Berger & Montague, P.C., Philadelphia, PA; Melissa H. Maxman, LEAD ATTORNEY, Cozen O'Connor, Washington, DC; Robert J. Nolan, LEAD ATTORNEY, Yardley, PA.

For Dentsply International, Inc., Defendant, Consol Defendant, Cross Claimant, Counterclaim Plaintiff: Melissa H. Maxman, LEAD ATTORNEY, Cozen O'Connor, Washington, DC; Ronald F. Wick, LEAD ATTORNEY, PRO HAC VICE, Cozen O'Connor, Washington, DC.

For Lactona Corporation, Cross Defendant: Melissa H. Maxman, LEAD ATTORNEY, Cozen O'Connor, Washington, DC; Bart D. Cohen, Berger & Montague, Philadelphia, PA.

For Univac Dental Company, Cross Defendant, Counterclaim Defendant: Gregory J. McDonald, Paul R. Braunsdorf, Rayne Hammond Benz, LEAD ATTORNEYS, Harris Beach **[**2]** PLLC, Pittsford, NY; Melissa H. Maxman, LEAD ATTORNEY, Cozen O'Connor, Washington, DC; Robert M. Stengel, LEAD ATTORNEY, Robert M. Stengel, P.C., Doylestown, PA.

Judges: Judge CHRISTOPHER C. CONNER, United States District Judge.

Opinion by: CHRISTOPHER C. CONNER

Opinion

[*467] **MEMORANDUM**

Presently before the court are two motions for summary judgment (Docs. 63, 64) and the magistrate judge's report (Doc. 106) recommending that both motions be granted in part and denied in part. Plaintiffs Univac Dental Company ("Univac") and Lactona Corporation ("Lactona"), and defendant Dentsply International, Inc. ("Dentsply"), have filed objections to the magistrate judge's report and recommendation ("R&R"). For the reasons set forth below, the court will adopt the R&R.

I. Factual Background & Procedural History

Plaintiffs are two dental supply manufacturers. They complain that defendant--the dominant manufacturer and supplier in the market for artificial teeth, used in dentures--has engaged in anti-competitive practices, in violation of, *inter alia*, *§ 2* of the Sherman Act. Plaintiffs contend that defendant's alleged antitrust violations have harmed them--or, more directly, harmed Universal Dental Company ("Universal"), plaintiffs' predecessor **[**3]** and one of defendant's competitors. The complained-of practices include Dentsply's adoption and enforcement of a policy **[*468]** ("Dealer Criterion 6") that prohibited dental product dealers from adding competitors' artificial teeth to their product lines. Dealer Criterion 6 restricted dealers from expanding their offerings of competitive lines of teeth, but it did not completely preclude them from selling competing products. To the extent that dealers carried competing products before Dealer Criterion 6 was adopted, continued sales of those products were permitted.

The above-captioned case is not the first legal proceeding challenging Dentsply's business practices and policies. They were also challenged by the antitrust division of the United States Department of Justice in 1999. (Doc. 106 at

5-6); see *United States v. Dentsply Int'l, Inc., 277 F. Supp. 2d 387 (D. Del. 2003)*, *United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005)*. The basis of plaintiffs' motion for partial summary judgment is that the prior litigation has conclusively resolved some of the issues presented in the instant case. Defendant has also moved for summary judgment, based on the alleged insufficiency of plaintiffs' **[**4]** evidence.

The magistrate judge recommends that defendant's motion (Doc. 64) for summary judgment be granted with respect to plaintiff's state law claims and denied with respect to plaintiffs' federal antitrust claims. He also recommends that plaintiffs' motion (Doc. 63) for partial summary judgment be granted to the extent that it precludes defendant from re-litigating issues concerning the anti-competitive nature of its business practices but denied to the extent that plaintiffs seek to avoid litigating the questions of damages and causation.

II. Standard of Review

A. Standard of Review for Cross-Motions for Summary Judgment

HN1[] Through summary adjudication the court may dispose of those claims that do not present a "genuine issue as to any material fact" and for which a jury trial would be an empty and unnecessary formality. See *FED. R. CIV. P. 56(c)*. The burden of proof is upon the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. *Pappas v. City of Lebanon, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004)*; *FED. R. CIV. P. 56(e)*; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. This evidence must **[**5]** be adequate, as a matter of law, to sustain a judgment in favor of the nonmoving party on the claims. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; see also *FED. R. CIV. P. 56(c)*, *(e)*. Only if this threshold is met may the cause of action proceed. *Pappas, 331 F. Supp. 2d at 315*.

In the instant matter, the parties have filed cross-motions for summary judgment. According to the Third Circuit:

> ***HN2***[] Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist.

Lawrence v. City of Phila., 527 F.3d 299, 310 (3d Cir. 2008) (quoting *Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968))*. Each movant must show that no genuine issue of material fact exists; if both parties fail to carry their respective burdens, the court must deny the motions. See *Facenda v. N.F.L. Films, Inc., 542 F.3d 1007, 1023 (3d Cir. 2008)*. **[**6]** When reviewing each motion, the court is bound to **[*469]** view the evidence in the light most favorable to the nonmovant. *FED. R. CIV. P. 56*; *United States v. Hall, 730 F. Supp. 646, 648 (M.D. Pa. 1980)*.

B. Standard of Review for a Magistrate Judge's Recommendation

HN3[] Where objections to a magistrate judge's report and recommendation are filed, the court must perform a *de novo* review of the contested portions of the report. *Supinski v. United Parcel Serv., Civ. A. No. 06-0793, 2009 U.S. Dist. LEXIS 3143, 2009 WL 113796, at *3 (M.D. Pa. Jan. 16, 2009)* (citing *Sample v. Diecks, 885 F.2d 1099, 1106 n. 3 (3d Cir. 1989)*; *28 U.S.C. § 636(b)(1)(C)*). "In this regard, Local Rule of Court 72.3 requires 'written objections which . . . specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for those objections.'" Id. (citing *Shields v. Astrue, Civ. A. No. 07-417, 2008 U.S. Dist. LEXIS 74519, 2008 WL 4186951, at *6 (M.D. Pa. Sept. 8, 2008))*.

HN4[] Where parties have not filed objections to a magistrate judge's report and recommendation, the Federal Magistrates Act does not require a district court to review the report before accepting it. *Thomas v. Arn, 474 U.S. 140, 149, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*. As a matter of good **[**7]** practice, however, the Third Circuit expects courts to "afford some level of review to dispositive legal issues raised by the report." *Henderson v.*

Carlson, 812 F.2d 874, 878 (3d Cir. 1987). The advisory committee notes to *Rule 72(b) of the Federal Rules of Civil Procedure* indicate that "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *FED. R. CIV. P. 72(b)*, advisory committee notes; see also *Tice v. Wilson, 425 F. Supp. 2d 676, 680 (W.D. Pa. 2006)* (holding that the court's review is conducted under the "plain error" standard); *Cruz v. Chater, 990 F. Supp. 375, 378 (M.D. Pa. 1998)* (holding that the court's review is limited to ascertaining whether there is "clear error on the face of the record"); *Oldrati v. Apfel, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998)* (holding that the court will review the report and recommendation for "clear error").

III. Discussion

Plaintiffs' objections (Doc. 118) to the R&R include the following arguments: (1) that the court should give preclusive effect to the Third Circuit's determination that defendant's actions injured Universal; and (2) that **[**8]** the court should adopt additional proposed findings. Defendant's objections (Doc. 119) to the R&R are as follows: (1) that there are no genuine issues concerning the application of the statute of limitations to plaintiffs' claims; (2) that there are no genuine issues regarding whether Dentsply's conduct injured plaintiffs; (3) that plaintiffs have failed to create a triable issue of fact with regard to the allegation that Dentsply's tooth swaps and exclusivity rebates violated antitrust laws; and (4) that the court should decline to adopt certain findings recommended by the magistrate judge. The court will address each of these arguments in turn. The court will also review the remaining portions of the R&R for clear error.

A. Has Damage to Plaintiffs Been Conclusively Established?

Plaintiffs argue that, in *United States v. Dentsply Int'l, Inc., 399 F.3d at 181*, the Third Circuit "made it clear that Dentsply's actions harmed all of its competitors[,]" including Universal, plaintiffs' predecessor. (Doc. 118 at 8). In other words, plaintiffs object to the magistrate judge's recommendation that the parties should present to the factfinder the issues of causation and damages. Although defendant **[**9]** does not dispute that the Third **[*470]** Circuit referenced harm suffered by "competitors," defendant asserts that the Third Circuit never held that the harm affected all competitors or plaintiffs specifically. (Doc. 125 at 5-6). Defendant maintains that the court should require plaintiffs to prove damages, because the prerequisites for issue preclusion are not satisfied.

Plaintiffs assert that the magistrate judge improperly relied on *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.., 458 F.3d 244 (3d Cir. 2006)*, in reaching its conclusion that collateral estoppel does not operate to resolve the issues of causation and damages in the instant case. (See Doc. 118 at 11-15; Doc. 106 at 34-35). In Jean Alexander, the court expressed concern that applying issue preclusion principles--specifically, non-mutual offensive collateral estoppel--too freely would create a general incentive for plaintiffs to "wait and see" if another plaintiff obtains a favorable judgment in an earlier action, rather than promptly asserting their own claims. To dismiss this concern as it relates to the instant case, plaintiffs aver that "the Clayton Act specifically contemplates and encourages such a 'wait and see' by **[**10]** private plaintiffs when the United States has brought an action." (Doc. 118 at 11). Notably, the Clayton Act explicitly permits the application of collateral estoppel, and it tolls the statute of limitations for private antitrust lawsuits during any government action and for one year thereafter. (Id. at 11-13.) Thus, plaintiffs seek to distinguish Jean Alexander, a trademark case, from the instant case, in which a violation of the Clayton Act is alleged. (Doc. 127 at 10).

Plaintiffs arguments on these issues are unavailing. Although it is true that the magistrate judge relied on Jean Alexander and discussed the risk of encouraging plaintiffs to "wait and see," the recommendation that the parties litigate the issues of causation and damages in the instant case is not solely attributable to these considerations. Significantly, the magistrate judge also concluded that "the issues of causation and damages for these particular plaintiffs were not fully litigated in the prior action" and that "it cannot be said that 'the determination [of these issues . . . was] essential to the prior judgment[.]'" (Doc. 106 at 42). Accordingly, the prerequisites for collateral estoppel were not satisfied. **[**11]** (See id. at 39, 42). The court agrees with these conclusions of the magistrate judge. Applying issue preclusion in the manner requested by plaintiff would therefore be improper. The parties must litigate both causation and damages.

Plaintiffs also argue that the magistrate judge conflated the issues of causation and damages. According to plaintiffs, his report failed to differentiate the "fact of damage" from the amount of damage. (Doc. 118 at 16). Ostensibly, plaintiffs posit that, through the operation of collateral estoppel, the Third Circuit's "repeated statements that Dentsply's violation had harmed its competitors, one of which was Universal[,]" (Doc. 118 at 18), establish the "fact of damage." Defendant argues that the Third Circuit's statements have no such effect. (Doc. 125 at 10, n.1). The court is not persuaded that collateral estoppel should apply to the statements to which plaintiff refers. As discussed above, the court agrees with the magistrate judge's conclusions that the prerequisites for issue preclusion are not satisfied with respect to the issues of causation and damages. Nor can the court conclude that the relatively narrow issue of the "fact of damage"--that is, **[**12]** the fact that Universal was damaged--was "fully litigated in the prior action" or was "essential to the prior judgment[.]" (See Doc. 106 at 42). Hence, collateral estoppel does not operate to establish the fact of damage, and plaintiffs must prove damage in the instant case.

[*471] B. Should the Court Adopt Additional Findings?

The magistrate judge recommended that four of plaintiff's proposed findings not be adopted: findings 11, 25, 27, and 29. Plaintiff asks the court to give preclusive effect to these findings, but defendant argues that the magistrate properly declined to adopt them. The court will address these findings *seriatim*.

Proposed finding 11 states that "Dentsply had in place a policy precluding its dealers from carrying competitive lines of teeth." The parties agree that proposed finding 11 is inaccurate, insofar as Dentsply's policy merely prevented dealers from *adding* competitive lines of teeth; it did not prevent dealers who already carried competitive lines of teeth from continuing to carry them. See supra Part I. Defendant also argues that its enforcement of the policy in 1988 is irrelevant to the pending case, because it occurred outside the limitations period. However, plaintiffs **[**13]** urge the court to adopt a re-worded version of proposed finding 11, and the court finds it advisable to do so. The court will therefore adopt the following finding: "No later than December 31, 1988, Dentsply's policy directives precluded dealers from adding competitive lines of teeth to their product lines. However, dealers who already carried competing products were permitted to continue doing so."

Plaintiffs admit that "[p]roposed finding 25 and 27 . . . both tie in to the causation issue[,]" and they simply note that "the language used in these Proposed Findings is almost identical to that used by the Third Circuit." (Doc. 118 at 18). Although the doctrine of issue preclusion permits the court to make *some* findings from the Third Circuit's holdings in prior litigation, it does not apply to all of the Third Circuit's language. Based on the court's conclusion that the issue of causation was "not fully litigated in the prior action" and was not "essential to the prior judgment[,]" see supra Part III.A, the court agrees with the magistrate judge's recommendation that the language at issue should not be adopted as a finding in the instant case.

Proposed finding 29 states that "Dentsply's **[**14]** alleged justification was pretextual and did not excuse its exclusionary practices." It further provides that Dentsply's purported justification was inconsistent with evidence on various other points. The magistrate judge recommended that, instead of adopting proposed finding 29, the court should adopt a finding that "Dentsply's alleged business justification did not excuse its exclusionary practices." (Doc. 106 at 50-51). The magistrate judge stated that proposed finding 29 would be redundant in light of the other recommended findings and that "its use of the term pretextual could cause confusion and prejudice." (Doc. 106 at 51 n.6). The court agrees with the magistrate judge's rationale for declining to adopt proposed finding 29. Plaintiffs' objections on this issue are therefore rejected.

C. Does the Statute of Limitations Bar Plaintiffs' Claims?

Defendant asserts that plaintiffs have failed to come forward with sufficient evidence to meet their burden of showing that, *during the limitations period*, defendant took action that was both anticompetitive and injurious to plaintiffs. Plaintiffs have evidence that, during the relevant period, Dentsply engaged in "tooth swaps" with dental **[**15]** product dealers, which means that Dentsply exchanged the dealer's inventory of teeth supplied by Universal for teeth supplied by Dentsply. Plaintiffs' evidence also indicates that Dentsply maintained and enforced Dealer Criterion 6 during the relevant period. Viewing the evidence in the light most favorable to **[*472]** plaintiffs, the court cannot agree with defendant's argument that it is inadequate to meet plaintiffs' burden. Although the evidence does not *conclusively* show that defendant engaged in anticompetitive conduct during the limitations period and thereby harmed plaintiffs, it is sufficient to present the issue to the finder of fact. Therefore, plaintiffs are entitled to proceed to trial. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (quoting *First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-89, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968))*.

Defendant also contends that the magistrate judge's statement that "the Court should not only consider evidence regarding Dentsply's actions directed toward Plaintiffs' specifically, but also the actions that infringed competition in the relevant market generally" is erroneous. (Doc. 119 at 8; see also Doc. 106 at 14). The magistrate judge cited *LePage's, Inc.* **[**16]** *v. 3M, 324 F.3d 141 (3d Cir. 2003)*, for its finding that exclusionary conduct "is not only injurious to the potential competitor [whom it targets] but also to competition in general." *Id. at 159*; (see Doc. 106 at 14). Defendant observes that injury to "competition in general" is not an issue in the instant case, as it was in LePage's and in the government's prior antitrust litigation against it. According to defendant, neither LePage's nor any other precedent "holds that injury to 'competition in general' is sufficient for a jury to infer injury to *each competitor*." (Doc. 119 at 9 (emphasis in the original)). While this distinction between *LePage's* and the instant case may be correct, it does not persuade the court that the magistrate judge erred. To the contrary, the court agrees with the magistrate judge's conclusion that evidence of injury to competition in general is worthy of the court's consideration. Such evidence could support a finding that an individual competitor was injured, particularly where, as here, the evidence must be viewed in the light most favorable to the party opposing summary judgment.

In addition, defendant argues that the court should determine that plaintiffs **[**17]** may not recover for acts committed by defendant prior to January 5, 1995, because no reasonable jury could find that defendant engaged in a continuing violation. The court does not agree. Rather, the court is persuaded by the magistrate judge's reasoning and finding that "there exists evidence to support a finding that the continuing violations [doctrine] . . . may have application in this case[.]" (Doc. 106 at 15). Therefore, the court rejects this argument.

D. Have Plaintiffs Presented Sufficient Evidence of Damage?

Defendant argues that plaintiffs' evidence is inadequate to show that defendant's conduct was anticompetitive and caused plaintiffs any injury. For the reasons discussed supra, Part III.C, the court does not agree. However, defendant has raised one additional argument on the issue of whether plaintiffs have failed to prove injury (not in the context of its statute of limitations argument), and the court will address that argument presently.

Both parties agree that, ***HN5***[] in order to establish that defendant violated *§ 2* of the Sherman Act, plaintiffs must show that "the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." (See Doc. **[**18]** 126 at 13-14, Doc. 129 at 11). Defendant argues that plaintiffs cannot show its actions foreclosed a sufficiently significant portion of the market to Universal. Rather, according to defendant, Universal was able to maintain access to a number of dental supply dealers through the grandfather exception to Dealer Criterion 6--the provision which **[*473]** permitted dealers who carried competing products before Dealer Criterion 6 was adopted to continue doing so. Thus, defendant contends that its conduct did not cause antitrust injury to plaintiffs.

Implicit in defendant's argument is a confusion of plaintiffs' burden to demonstrate an antitrust violation with plaintiffs' burden to show that they suffered some "measurable damage" as a result of the antitrust violation. See *Deaktor v. Fox Grocery Co., 475 F.2d 1112, 1116 (3d Cir. 1973)*; see also *Pitchford v. PEPI, Inc., 531 F.2d 92, 98 (3d Cir. 1975)* ("A plaintiff . . . must demonstrate both that the antitrust laws were violated and that it has suffered 'fact of damage' in consequence of that violation . . . ."). ***HN6***[] A showing that "the challenged practices bar a substantial number of rivals or severely restrict the market's ambit" is required to demonstrate **[**19]** a *§ 2* antitrust violation affecting competition generally. However, the court is aware of no legal authority requiring an individual competitor to make the same showing with respect to its own individual access to the market. Of course, a plaintiff must show that the defendant's conduct injured or damaged it, but this burden does not require a plaintiff to show that defendant has foreclosed a significant portion of the market to it. As the court concluded supra, Part III.C, plaintiffs' evidence of injury is sufficient to survive summary judgment.

E. Could a Factfinder Conclude that Defendant's Tooth Swaps or Rebate Offer Violated *Antitrust Law*?

According to defendant, there is no basis from which a jury could find that either its tooth swaps or its offer of a rebate for exclusive Dentsply dealers violated *§ 2* of the Sherman Act. The court disagrees. The Third Circuit has held that ***HN7***[] "a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take," *LePage's, 324 F.3d at 151-52*, and the government's prior antitrust litigation against defendant has already established that its policies--specifically, Dealer Criterion 6--violated *§ 2* **[**20]** of the Sherman Act, see *Dentsply, 399 F.3d at 196*. Viewing the evidence in the light most favorable to the parties opposing summary judgment, the court finds that a reasonable jury could indeed conclude that a monopolist such as the defendant violated *§ 2* by participating in tooth swaps, or by offering a loyalty discount for exclusive Dentsply dealers, or both.

F. Should the Court Reject Recommended Findings?

Defendant objects to recommended findings 6, 15, 19, 21, and 22, on the basis that they are inapplicable or misleading. The court will examine defendant's objections to these findings in turn.

Defendant objects to the statement in finding 6 that it "block[ed] access to the key dealers[,]" and defendant asserts that Universal continued to have access to most dealers, thanks to the grandfather provision in Dealer Criterion 6. The court is not persuaded that finding 6 is inaccurate on this basis, because finding 6 is articulated with reference to "most manufacturers" and "competitors," not with specific reference to Universal. Furthermore, any potential for finding 6 to mislead a jury can be alleviated by the defendant's evidence and argument concerning the extent to which Universal **[**21]** benefitted from the grandfather provision.

Defendant argues that finding 15's statement that "Dentsply enforced Dealer Criterion 6 against a dealer who attempted to switch to a competitor's teeth" would mislead the jury. Defendant avers that the competitor referenced was not Universal, and therefore, this finding is immaterial to **[*474]** the pending action and would mislead the jury. The court concludes, to the contrary, that finding 15 is material, insofar as it demonstrates defendant's anticompetitive conduct; obviously, a key part of plaintiffs' case is demonstrating an antitrust violation. The fact that finding 15 refers to a competitor other than Universal does not render it misleading.

Defendant also contends that finding 19 is inaccurate with respect to Universal, because the grandfather provision of Dealer Criterion 6 gave Universal far more than a "small sliver" of the market. Like finding 6, however, finding 19 refers to "competitors," not specifically to Universal, and therefore it is not inaccurate. Defendant is free to show that Universal had access to a significant portion of the market, unlike the "competitors" referenced in finding 19, but defendant has failed to persuade the **[**22]** court that finding 19 is inaccurate.

With respect to finding 21, which states that "[o]n several occasions, Denstply has required dealers to drop some, or all, competing tooth brands in order to obtain [its] tooth line[,]" defendant argues that the finding is immaterial to the instant action and would mislead the jury. Defendant asserts that it did not require a dealer to drop Universal teeth on any of these occasions. Furthermore, defendant insists that most of the events to which this finding refers occurred outside the applicable limitations period. As noted, plaintiffs' evidence may be sufficient to establish that the continuing violations doctrine applies to the instant case. Accordingly, the court will not reject finding 21 on the basis of its reference to events occurring outside the limitations period. Nor will the court reject this finding on the basis of its reference to tooth brands other than Universal. Finally, the court notes that its rationale for adopting finding 15 applies with equal force to finding 21.

Defendant raises a similar argument regarding finding 22, which refers to ten incidents "in which Dentsply required agreement by new as well as long-standing dealers **[**23]** not to handle competitors' teeth[.]" Defendant states that nine of these ten incidents did not involve an agreement to forego an inventory of Universal teeth, and the tenth incident occurred outside the limitations period which applies to the instant case. For the reasons stated above, the court rejects these arguments.

G. Do the Remaining Portions of the R&R Contain Clear Error?

The court has reviewed the magistrate judge's entire R&R, including those portions to which the parties have filed no objections. In accordance with the Third Circuit's directive, the court has examined those portions of the R&R for clear error, and it has found none.

IV. Conclusion

The court agrees with the magistrate judge's conclusion that plaintiffs' motion (Doc. 63) for partial summary judgment should be granted to the extent that it precludes defendant from re-litigating issues concerning the anti-competitive nature of its business practices but denied to the extent that plaintiffs seek to avoid litigating the questions of damages and causation. The magistrate judge also properly concluded that defendant's motion (Doc. 64) for summary judgment should be granted with respect to plaintiff's state law claims **[**24]** and denied with respect to plaintiffs' federal antitrust claims. The court will also adopt the findings recommended by the magistrate judge, and it will adopt one additional finding.

An appropriate order will issue.

/s/ Christopher C. Conner

CHRISTOPHER C. CONNER

United States District Judge

Dated: March 31, 2010

[*475] ORDER

AND NOW, this 31st day of March, 2010, upon consideration of the report of the magistrate judge (Doc. 106), recommending that the motions (Docs. 63, 64) for summary judgment be granted in part and denied in part, and upon further consideration of the parties' objections (Docs. 118, 119) to the magistrate judge's report and recommendation, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The report of the magistrate judge (Doc. 106) is ADOPTED.
2. Defendant's motion (Doc. 64) for summary judgment is GRANTED in part and DENIED in part as follows:
    a. Summary judgment is GRANTED with respect to plaintiffs' state law claims.
    b. Summary judgment is DENIED with respect to plaintiffs' federal antitrust claims.
3. Plaintiffs' motion (Doc. 63) for summary judgment is GRANTED in part and DENIED in part as follows:
    a. Defendant shall not re-litigate **[**25]** issues concerning the general anticompetitive nature of its practices.
    b. Plaintiffs shall be required to prove causation--specifically, a causal relationship between defendant's anticompetitive practices and plaintiffs' injury--and damages--including the fact of injury and the amount of damages.
4. In addition to adopting the findings recommended by the magistrate judge, the court will adopt the following finding: "No later than December 31, 1988, Dentsply's policy directives precluded dealers from adding competitive lines of teeth to their product lines. However, dealers who already carried competing products were permitted to continue doing so."
5. The Clerk of Court is directed to defer the entry of judgment on the claims described in Paragraph 2(a) until the resolution of all claims.

/s/ Christopher C. Conner

CHRISTOPHER C. CONNER

United States District Judge

Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.

United States District Court for the District of New Jersey

April 1, 2010, Decided; April 1, 2010, Filed

Civ. No. 05-4376 (GEB)

Reporter
702 F. Supp. 2d 320 *; 2010 U.S. Dist. LEXIS 35243 **; 2010-1 Trade Cas. (CCH) P76,981

ANIMAL SCIENCE PRODUCTS, INC., et al., Plaintiffs, v. CHINA NATIONAL METALS & MINERALS IMPORT & EXPORT CORPORATION, et al., Defendants.

Subsequent History: Vacated by, Remanded by *Animal Sci. Prods. v. China Minmetals Corp., 2011 U.S. App. LEXIS 17046 (3d Cir. N.J., Aug. 17, 2011)*

Prior History: *Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 2008 U.S. Dist. LEXIS 107311 (D.N.J., 2008)*

Core Terms

export, Plaintiffs', magnesite, import, Defendants', minimum price, regulations, prices, docket entry, products, compulsion, exhibits, amended complaint, quota, commerce, appears, entity, asserting, abstention, purposes, coordination, prescripts, licensing, Measures, allegations, Sherman Act, variables, magnesium oxide, Vitamin, comity

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN1[] **Jurisdiction, Subject Matter Jurisdiction**

Each court has a continuing obligation to sua sponte raise the issue of subject matter jurisdiction. A federal court will raise lack of subject-matter jurisdiction on its own motion.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN2[] **Jurisdiction, Subject Matter Jurisdiction**

The burden to establish subject matter jurisdiction falls squarely on the plaintiffs since the plaintiffs invoke the court's jurisdiction by bringing an action. A federal court shall presume lack of jurisdiction, and the party seeking to invoke the court's jurisdiction bears the burden of proving that subject matter jurisdiction exists.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] **Jurisdiction, Subject Matter Jurisdiction**

Deficiencies as to the subject matter jurisdiction may be either "facial" or "factual." The distinction between factual and facial assessments is rather dramatic. In a facial attack (that is, addressing a challenge based on the assertions made in the plaintiff's pleadings), the trial court must accept the complaint's allegations as true, i.e., the court merely requires the plaintiff to articulate the factual premise of his/her contentions, without providing the court with any actual evidence underlying the plaintiff's factual assertions. In contrast, a trial court considering a factual attack accords plaintiff's allegations no presumption of truth, and requires production of actual evidence upon which the plaintiff bases his/her factual contentions. Consequently, when assessing a factual -- rather than facial -- deficiency, the court can look beyond the pleadings to decide factual matters relating to jurisdiction. A factual inquiry into the district court's jurisdiction under *Fed. R. Civ. P. 12(b)(1)* is not confined to the allegations in the complaint.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN4[] **Jurisdiction, Subject Matter Jurisdiction**

There is no procedural limitation as to the point in litigation in which a factual inquiry as to the subject matter jurisdiction may be undertaken.

Antitrust & Trade Law > Sherman Act > Claims

HN5[] **Sherman Act, Claims**

To establish a violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted action was illegal; and (4) that the plaintiff was actually injured as a proximate result of the concerted action.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN6[] **International Aspects, Foreign Trade Antitrust Improvements Act**

To avoid the Foreign Trade Antitrust Improvements Act (FTAIA) jurisdictional bar, the plaintiff must show either that: (a) the defendants are importers of goods/services in the United States, *15 U.S.C.S. § 6a* (stating the notoriously inelegant introduction that the Sherman Act shall not apply to conduct involving trade or commerce other than import trade or import commerce; or, in alternative, (b) show that the defendants are exporters whose conduct had/has a direct, substantial and reasonably foreseeable effect on the United States domestic trade or commence. *15 U.S.C.S. § 6a(1)*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN7[] **International Aspects, Foreign Trade Antitrust Improvements Act**

If a restraint is per se illegal, no examination of the practice's impact on the market is necessary for finding of anti-competitive effects within relevant product and geographic markets, which means, in turn, that no aspect even vaguely resembling the direct, substantial and reasonably foreseeable effect of the Foreign Trade Antitrust Improvements Act (FTAIA) can possibly arise.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN8[] Defenses, Demurrers & Objections, Motions to Dismiss

It is long established that a court should accept as true all of the factual allegations in the complaint and reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff. Nonetheless, the United States Court of Appeals for the Third Circuit has noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint. Therefore, legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness.

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

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

HN9[] Motions to Dismiss, Failure to State Claim

While a complaint does not need detailed factual allegations, a plaintiffs obligation is to provide the "grounds" of his entitlement to relief. The threshold requirement of *Fed. R. Civ. P. 8(a)(2)* is that the plain statement must possess enough heft to show that the pleader is entitled to relief. Hence factual allegations must be enough to raise a right to relief above the speculative level.

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

HN10[] Complaints, Requirements for Complaint

In any civil action, the pleading standard demands more than an unadorned "the-defendant-unlawfully-harmed-me" accusation. A pleading that offers "labels and conclusions" or a formulaic recitation of the elements of a cause of action will not do. Moreover, the plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions or to threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, i.e., by legal conclusions couched as a factual allegation. Courts do not reject the bald allegations on the ground that they are unrealistic or nonsensical. It is the conclusory nature of the allegations that disentitles them to the presumption of truth.

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

HN11[] Complaints, Requirements for Complaint

The question of sufficiency of pleadings does not turn on the discovery process. A plaintiff is not entitled to discovery where the complaint asserts some wrongs generally, i.e., as a conclusory allegation since *Fed. R. Civ. P. 8* does not allow pleading the bare elements of the cause of action and affixing the label "general allegation" in hope of developing actual facts through discovery.

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

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

HN12[] **Motions to Dismiss, Failure to State Claim**

The United States Court of Appeals for the Third Circuit has instructed district courts to conduct, with regard to *Fed. R. Civ. P. 8* allegations, a two-part analysis when the district courts are presented with a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss: First, the factual and legal elements of a claim should be separated. A district court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a district court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief in light of the definition of "plausibility." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "shown"-that the pleader is entitled to relief. This "plausibility" determination will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

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

HN13[] **Federal & State Interrelationships, Abstention**

The United States Supreme Court has long rejected the rigid proposition that abstention is a technical rule of equity procedure. Rather, the Supreme Court holds that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief. However, the parties seeking abstention bears the burden of showing that abstention is the appropriate course. The doctrine of abstention, under which a district court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it.

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

HN14[] **Sherman Act, Scope**

The Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN15[] **International Aspects, Foreign Trade Antitrust Improvements Act**

In no ambiguous terms, the Foreign Trade Antitrust Improvements Act (FTAIA) has clarified the Sherman Act by making it explicit that, in foreign trade cases, the Sherman Act has application only to conduct having a direct, substantial and reasonably foreseeable effect on domestic commerce. Specifically, the FTAIA provides that the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless --(1) such conduct has a direct, substantial, and reasonably foreseeable effect --(A) on United States import trade or import commerce with foreign nations; and (2) such effect gives rise to a claim under the Sherman Act. *15 U.S.C.S. § 6a*.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN16[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act (FTAIA) test neither reverses nor even dilutes the "intent-to-affect-and-effect-in-fact" common law principle established in Alcoa/Hartford Fire. Statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar principles, except when the statutory purpose to the contrary is evident. Rather, the FTAIA spelled out additional -- perhaps already implied but not articulated in Alcoa -- elements.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

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

HN17[] International Aspects, Foreign Trade Antitrust Improvements Act

Sherman Act claims if they are based on defendants' export practices but fail to state facts showing that these practices caused a direct, substantial, and reasonably foreseeable effect on United States commerce effectively plead a plaintiff out of court or -- to put it another way -- in order to survive dismissal under the Foreign Trade Antitrust Improvements Act (FTAIA) jurisdictional bar, the plaintiff must show that: (i) the defendants' export practices were "direct" (in the sense that the defendants' conduct actually caused such immediate consequence) with regard to United States domestic commerce; (ii) the defendants' conduct actually was "substantial" (in the sense that the defendants' conduct was actually "intended/consciously meant") to produce a consequence in the United States; and (iii) that consequence was a foreseeable result of the defendants' action rather than a mere incidental occurrence.

Civil Procedure > ... > Pleadings > Complaints > General Overview

Civil Procedure > Parties > Pro Se Litigants > Pleading Standards

HN18[] Pleadings, Complaints

District judges have no obligation to act as counsel or paralegal even to pro se litigants and, a fortiori, have no obligation seek out evidence supporting the claims asserted by a represented litigant.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN19[] Motions to Dismiss, Failure to State Claim

With regard to a motion to dismiss, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions or to threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, i.e., by legal conclusions couched as a factual allegation.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN20[] Defenses, Demurrers & Objections, Motions to Dismiss

With regard to a motion to dismiss, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions couched as a factual allegation.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN21[] Testimony, Expert Witnesses

Fed. R. Evid. 702 is unambiguous in the sense that it provides that an expert should base the expert's opinion on the litigant-provided facts rather than providing the expert's opinion as a "fact" supporting litigant's claim.

Civil Procedure > ... > Default & Default Judgments > Default Judgments > Entry of Default Judgments

HN22[] Default Judgments, Entry of Default Judgments

A plaintiff may seek the court's entry of default judgment under either subpart of *Fed. R. Civ. P. 55(b)*. However, default judgment necessarily ensues from a party's failure to plead or otherwise defend against the allegations of his/her opponent. Although the second step of default allows the court to exercise its discretion in order to establish the truth of any allegation by evidence, *Fed. R. Civ. P. 55(b)(2)(C)*, an entry of default does not obligate the court to conduct a facial -- moreover factual -- review. Hence, while for the purposes of a litigant's default application, the litigant's expert may be warranted in his/her submission of the expert's opinion based on facts as they are pled by the litigant seeking default, it is indeed questionable at best whether the same is warranted for the purposes of a factual review under *Fed. R. Civ. P. 12*.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN23[] Jurisdiction, Subject Matter Jurisdiction

In its assessment of a factual deficiency, the district court must weigh all available evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings.

Evidence > Admissibility > Expert Witnesses

HN24[] Admissibility, Expert Witnesses

Fed. R. Evid. 702 admits expert testimony if it will assist the trier of fact to understand the evidence or a fact in issue and the court has no obligation to decipher an expert's cryptic message.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN25[] Testimony, Expert Witnesses

Under *Fed. R. Evid. 702* -- expert testimony cannot be misleading. An expert's report must be amenable to understanding by a layperson not only with respect to the words composing the end-conclusion but also with regard to the rationale and the steps of the processes employed. Indeed, construing *Rule 702* otherwise would invite experts to "create" facts by simply ushering floods of technical terminology on the judiciary stripped of an actual opportunity to analyze the testimony.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN26[] **Defenses, Demurrers & Objections, Motions to Dismiss**

The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions or to threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, i.e., by legal conclusions couched as a factual allegation.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN27[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations. *15 U.S.C.S. § 6a*. Hence, in perhaps ineloquent but nonetheless unambiguous terms, *§ 6a* provides that the Foreign Trade Antitrust Improvements Act (FTAIA)-based jurisdictional bar is wholly inapplicable to pleadings alleging that the wrongful conduct was undertaken by defendants as importers (rather than as exporters).

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN28[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act (FTAIA) asks whether the defendants were involved in import trade or import commerce. If all that the defendants were doing was actually bringing goods or services into the United States, then the FTAIA is not even triggered, i.e., the claim against the defendants squarely falls within the scope of the Sherman Act. While the FTAIA does not define the term "import," the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad. However, if the defendants did not directly bring items or services into the United States, they cannot be labeled "importers," nor could it be said that the defendants have engaged in import trade or commerce. In other words, even if a certain importer purchased or otherwise obtained the defendants' product in a foreign market (be it the defendants' national market or any other market) and brought the defendants' product into the United States, the fact that the product eventually found its way into the United States does not transform the defendant into an "importer" and, hence, an antitrust claim against the defendants must pass muster under the FTAIA's substantial, direct and reasonably foreseeable exception before the Sherman Act claim can be entertained.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN29[] **International Aspects, Foreign Trade Antitrust Improvements Act**

With regard to the Foreign Trade Antitrust Improvements Act (FTAIA), the fact that some of the goods purchased in a foreign market may ultimately have been imported by individuals into the United States' is immaterial to determining if the defendants are involved in import trade or import commerce since the defendants' own actions do not directly increase or reduce imports into the United States.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN30[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Courts have uniformly concluded that the Foreign Trade Antitrust Improvements Act (FTAIA) exception for conduct involving import trade applies to claims by domestic importers arising from direct purchases of price-fixed goods. The FTAIA applies to antitrust plaintiffs' claims with the exception of claims brought by domestic importers. The FTAIA makes clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN31[] **International Aspects, Foreign Trade Antitrust Improvements Act**

Although cases applying the Foreign Trade Antitrust Improvements Act (FTAIA) are few, its "inelegant" language has been interpreted to mean that with the exception of claims brought by domestic importers, the Sherman Act will not apply to conduct affecting foreign markets, consumers or producers unless there is also a direct, substantial, and reasonably foreseeable effect on the domestic market.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN32[] **International Aspects, Foreign Trade Antitrust Improvements Act**

The Foreign Trade Antitrust Improvements Act's (FTAIA's) exemption from the Sherman Act focuses on the latter's application to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations. The implication that the Sherman Act provisions apply to import trade and import commerce is unmistakable. The proper inquiry is whether the alleged conduct by the defendants "involved" import trade or commerce, not on whether the plaintiff's conduct, which is not being challenged as violative of the Sherman Act, "involved" import trade or commerce.

Contracts Law > Contract Interpretation > General Overview

HN33[] **Contracts Law, Contract Interpretation**

A classic maxim of contract construction dictates that the substance of the parties' transaction governs how their relationship is defined rather than the label or form used. The substance of the agreement, rather than its form, is the material issue.

Governments > Legislation > Interpretation

HN34[] **Legislation, Interpretation**

Courts assume that the legislative purpose of a statute is expressed by the ordinary meaning of the words used.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN35[] International Aspects, Foreign Trade Antitrust Improvements Act

A plaintiff who is asserting that a purely foreign seller is, effectively, not a "real" exporter but a de facto importer "bringing" the goods into the United States within the meaning of the introductory clause of the Foreign Trade Antitrust Improvements Act (FTAIA) has to show that the seller's activities were "direct" in a degree higher that required under 15 U.S.C.S. § 6a(1)(A), with regard to exporters: the "directness" under the introductory clause should yield such substantial contacts between the seller and the United States that it establishes a nexus roughly corresponding, in its magnitude, to the nexus needed to show the "directness" sufficient to remove the Foreign Sovereign Immunities Act (FSIA)-based presumptive immunity under the "commercial activity" exception set forth in 28 U.S.C.S. § 1605(a)(2): a conclusion otherwise would invite the danger of putting form over substance.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

HN36[] International Aspects, Foreign Trade Antitrust Improvements Act

The "directness" of the seller's contacts with the United States required under the introductory clause of the Foreign Trade Antitrust Improvements Act (FTAIA) should roughly correspond, in the magnitude of the nexus it produces between the seller and the United States, to the cumulative nexus produced by the direct, substantial and reasonably foreseeable elements of 15 U.S.C.S. § 6a(1)(A): then, the defendant will be subject to the jurisdiction of United States courts regardless of the plaintiff's or defendant's exercises in semantics, i.e., the mere terms "exporter" and "importer" would not invite a risk of inconsistent legal results as to the very same set of facts.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN37[] Amendment of Pleadings, Leave of Court

Ordinarily, the plaintiff may be granted leave to amend, when justice so requires. Indeed, the federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. However, allowing leave to amend where there is a stark absence of any suggestion by the plaintiffs that they have developed any facts since the action was commenced, which would, if true, cure the defects in the pleadings would frustrate Congress's objective in enacting this statute of providing a filter at the earliest stage (the pleading stage) to screen out lawsuits that have no factual basis.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN38[] Amendment of Pleadings, Leave of Court

Fed. R. Civ. P. 15(a) provides that, where a party may amend its pleading only by leave of court, such leave shall be freely given when justice so requires. Correspondingly, the United States Supreme Court has identified several factors to be considered when applying Rule 15(a): If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN39[] Amendment of Pleadings, Leave of Court

While *Fed. R. Civ. P. 15(a)* gives the court extensive discretion to decide whether to grant leave to amend after the time for amendment as of right has passed, the *Rule 15(a)* generous standard is tempered by the necessary power of a district court to manage a case in light of the factors listed in Foman v. Davis. The Foman list of factors, however, appears to be non-exhaustive, i.e., leaving it for the district court to consider, on a case-by-case basis, whether consideration of additional factors would be appropriate in order to assure that plaintiff is granted leave "when justice so requires." *Fed. R. Civ. P. 15(a)*.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN40[] Relief From Judgments, Altering & Amending Judgments

Fed. R. Civ. P. 59(e) permits motions to amend or alter a judgment and may be granted to submit new, previously undiscovered evidence or to correct a clear error of law or prevent manifest injustice. Relief under *Rule 59(e)* is also appropriate when there has been an intervening change in the controlling law. *Rule 59(e)* and D.N.J., Civ. R. 7.1(i).

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN41[] Relief From Judgments, Altering & Amending Judgments

With regard to *Fed. R. Civ. P. 59(e)*, an entry of a binding precedent, which: (a) is issued while the matter is still pending; and (b) clarifies -- rather than alters the existing legal regime -- cannot qualify as an intervening change in the law.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN42[] Amendment of Pleadings, Leave of Court

Leave to amend is not warranted where the plaintiffs have had ample opportunities to research and plead their claims, but failed to produce sufficient pleadings.

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

HN43[] Federal & State Interrelationships, Abstention

The general rule is that abstention factors should be deemed relevant only if the court determines that subject matter jurisdiction exists in the first place and, thus, a decision as to abstention grounds prior to resolution of the subject matter jurisdiction issue might yield a wasteful, if not facially premature, ruling.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Burdens of Proof

HN44[] Foreign Sovereign Immunities Act, Burdens of Proof

For the purposes of the Foreign Sovereign Immunities Act (FSIA), a defendant has to establish a prima facie case of immunity, and only if the defendant succeeds at that, does the burden shift to the plaintiff to rebut the presumption.

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

HN45[] Federal & State Interrelationships, Abstention

The prevalent practice of federal courts facing abstention issues has been to focus on the factual proof presented by the abstention-advocating litigant rather than on conclusions and assertions of the litigant unsupported by evidentiary proof.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

HN46[] Foreign Sovereign Immunities Act, Construction & Interpretation

The Foreign Sovereign Immunities Act (FSIA) defines the term "foreign state" broadly, including in the definition political subdivisions of a foreign state, as well as the state's "agencies and instrumentalities." *28 U.S.C.S. § 1603(a)*. The latter means an entity that is a separate juridical person (corporate or otherwise) and, in addition, is an organ of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or its political subdivision. However, the United States Supreme Court holds that a subsidiary of an "instrumentality" (or an entity otherwise owned by "instrumentality") is not itself an "instrumentality" for the purposes of the FSIA, since the exponential-level connection between such subsidiary and the state renders the entity too removed to qualify.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

HN47[] Foreign Sovereign Immunities Act, Construction & Interpretation

For the purposes of the Foreign Sovereign Immunities Act (FSIA), an "agency or instrumentality of a foreign state" is not the same legal entity as the foreign state itself.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > Construction & Interpretation

HN48[] Foreign Sovereign Immunities Act, Construction & Interpretation

With regard to the Foreign Sovereign Immunities Act (FSIA), the United States Court of Appeals for the Third Circuit holds that the "agency or instrumentality" nature is determined under the seven-factor test: (1) the circumstances surrounding the entity's creation; (2) the purposes of the entity's activities; (3) the degree of supervision by the government; (4) the level of governmental financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; (6) the entity's obligations and privileges under the foreign state's laws; (7) the ownership structure of the entity.

International Law > ... > Exceptions > Commercial Activities > General Overview

HN49[] Exceptions, Commercial Activities

Once the defendant's status as a "foreign state" is established, the Foreign Sovereign Immunities Act (FSIA) presumes the defendant's immunity to be the rule, not an exception even though the FSIA includes a number of exceptions, one of which is based on the defendant's commercial activity carried on in the United States. *28 U.S.C.S. § 1605(a)(2)*. For purposes of the exception, the commercial character of the activity is determined by examination of the nature of defendant's conduct rather than of its purpose, *28 U.S.C.S. § 1603(d)*, with recognition that: (a) the term "commercial activity" was legislatively intended to include a broad spectrum of endeavors, such as extraction of minerals, commute of passengers, trade, etc.; and (b) if an activity is customarily carried on for profit, then its commercial nature can readily be assumed. In sum, the gist of the commercial exception inquiry is whether the particular actions, regardless of the motive behind them, were of the type in which a private party would engage for the purposes of commerce. For instance, the United States Supreme Court has clarified that when a foreign government acts not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" for the purposes of the FSIA.

International Law > ... > Exceptions > Commercial Activities > General Overview

HN50[] Exceptions, Commercial Activities

With regard to the Foreign Sovereign Immunities Act (FSIA), in enacting the commercial-activity exception, Congress sought to make it difficult for foreign defendants engaged in commercial activity to invoke sovereign immunity with regard to commercial wrongs.

International Law > Dispute Resolution > Act of State Doctrine

HN51[] Dispute Resolution, Act of State Doctrine

While the act of state doctrine, being judicially created, is more flexible than the Foreign Sovereign Immunities Act (FSIA) --and, hence, might perhaps warrant abstention even where the FSIA does not strip the court of jurisdiction over a certain case. The key features of the act of state doctrine and the FSIA are somewhat similar, since the doctrine prompts United States courts to refrain from judging the validity of a foreign state's governmental acts as to matters within that state's borders, building on the premise that the most fundamental aspect of foreign relations is the recognition of foreign governments. However, while being more flexible than the statute, the doctrine has evolved from a generic expression of international law into an relatively narrow inquiry into "a consequence of domestic separation of powers." Thus, the doctrine could be summarized as a merely strong belief of the judiciary that engaging in the task of passing on the validity of foreign acts of state could hinder rather than further the conduct of foreign relations. Consequently, the doctrine knows numerous exceptions which include, inter alia, non-abstention in matters challenging: (a) the acts performed outside the sovereign territory of a foreign government.

International Law > Dispute Resolution > Act of State Doctrine

HN52[] Dispute Resolution, Act of State Doctrine

A defendant successfully establishes the act-of-state defense if the "commercial activity" exception does not remove the reasons for abstention.

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN53[] Dispute Resolution, Comity Doctrine

Comity is the name given to the general principle that encourages the recognition in one country of the judicial acts of another. Its basis is not simply respect for other nations, but convenience and necessity, recognizing the need to facilitate inter-jurisdictional transactions.

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN54[] Dispute Resolution, Comity Doctrine

The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticized, no satisfactory substitute has been suggested. "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. The fluid concept, in turn: (a) indirectly provided theoretical support to areas of law related to international interactions, e.g., by supplying jurisprudential solutions for conflict of law problems, or bases for enforcement of foreign judgments or for resolutions of forum non conveniens challenges; and, in addition; (b) mushroomed into a panoply of legal doctrines, all bearing the name the doctrine of comity, even though each of these doctrines eventually developed its own distinct set of considerations ensuring application of the umbrella concept of comity to the particular issue tackled by the doctrine. Comity has been construed by the United States Supreme Court to mean a number of different things.

International Law > Dispute Resolution > Comity Doctrine > General Overview

HN55[] Dispute Resolution, Comity Doctrine

In the United States, the foundation of private international law is the concept of international comity. Roughly speaking, courts, according to this concept, should apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty. Since international comity requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns, scholars and courts have characterized international comity inconsistently as a choice-of-law principle, a synonym for private international law a rule of public international law or an element of international legal order, a moral obligation, or diplomacy. In its direct manifestations, the concept of international comity yielded comity as a discretionary doctrine that empowered courts to decide when to defer to foreign cases and to the broader concept of comity as a rule and a justification for deference encompasses a wider constellation of interrelated doctrines -- like the foreign-act-of-state doctrine -- which, though analytically distinct, nonetheless share certain methods, values, and justificatory rhetoric.

International Law > Foreign & International Immunity > General Overview

International Law > Individuals & Sovereign States > General Overview

HN56[] International Law, Foreign & International Immunity

The government compulsion doctrine shields from liability the acts of the defendant that were carried out in obedience to the mandate of a foreign government and so, in order to successfully invoke the doctrine, the defendants must show that the act challenged as a violation of United States law was compelled by the foreign government through a compulsion that was "basic and fundamental" to the defendants' acts (rather than served as a mere peripheral aspect). A defendant invoking government compulsion must show that: (a) a certain entity in the defendant's nation qualifies as an arm of the state by enjoying governmental or quasi-governmental powers that are either uniquely peculiar to sovereigns or of essentially sovereign nature; (b) there is a direct link between the entity's powers and the defendant, which enables the entity to compel the defendant to act in accordance with the entity's prescripts as a result of the entity's ability to subject the defendant to a significant negative repercussion for failure to comply with the entity's prescripts; and (c) the entity, in fact, compels the defendant to act in accordance with a certain prescript, and such compulsion is the fundamental force causing the defendant's act challenged as a violation of United States law.

Evidence > Judicial Notice > General Overview

HN57[] **Evidence, Judicial Notice**

At common law and under the federal rules, most proof is presented by means of testimonial evidence or by the offering of documentary evidence. One an exception to the requirement that a party who relies on a certain proposition must prove it is judicial notice. *Fed. R. Evid. 201* governs judicial notice, providing that facts noticed cannot be subject to reasonable dispute and specifying certain procedural requirements that must be followed. *Rule 201(b)* permits a district court to take judicial notice of facts that are not subject to reasonable dispute in that they are either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Evidence > Judicial Notice > General Overview

HN58[] **Evidence, Judicial Notice**

Judicial notice could be properly taken with respect to three different categories of documents which include: (1) documents relied upon in the complaint; (2) documents filed with a United States law enforcement agency; and (3) undisputable data, e.g., purely informational opinion-free data compiled by a very widely quoted and, thus, deemed reliable, news service. A court may take judicial notice of public records and of admissions in pleadings and other documents in the public record filed by a party to the instant matter in other judicial proceedings that contradict the party's factual assertions in the instant action, and the court may do so even without converting the motion to dismiss into one for summary judgment. In addition, since the court may take judicial notice of a fact capable of accurate and ready determination by resort to sources which accuracy cannot reasonably be questioned, *Fed. R. Evid. 201(b)*, the court may take judicial notice of records and reports of administrative bodies, such as notices and opinion letters.

Evidence > Judicial Notice > General Overview

HN59[] **Evidence, Judicial Notice**

Judicial notice is improper if a question exists as to the legitimacy of the source of the information. Therefore, contentions made by the parties are not subject to judicial notice, since judicial notice applies only to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities.

Evidence > Judicial Notice > General Overview

Governments > Courts > Judicial Precedent

HN60[] **Evidence, Judicial Notice**

The tool of judicial notice is qualitatively different from the concept of legal precedent, since a legal conclusion reached by another tribunal (or a particular court during its prior ruling) is assessed not under the requirements of *Fed. R. Evid. 201(b)* but under the common law doctrine of stare decisis. Judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy. Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et non quieta movere -- to stand by and adhere to decisions and not disturb what is settled.

Governments > Courts > Judicial Precedent

HN61[] **Courts, Judicial Precedent**

It has become axiomatic that the doctrine of stare decisis has two applications, vertical and horizontal. Vertical stare decisis could be summarized as a principle that a controlling precedent by a superior court is binding upon the lower courts. In contrast, horizontal stare decisis merely implies a court's discretional consideration of non-binding decisions, which that court can -- and, perhaps, is even obligated to -- ignore if it finds that the rationale of these decisions is insufficiently persuasive or outright unsound, or that the legal issues and/or the facts addressed in these decisions are too removed from the legal issues and facts at hand to have a meaningful impact on the court's judicial analysis. Our system of precedent or stare decisis is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone. This distinguishes the American system of precedent, sometimes called "rule stare decisis," from the English system, which historically has been limited to following the results or disposition based on the facts of a case and thus referred to as "result stare decisis."

Governments > Courts > Judicial Precedent

HN62[] **Courts, Judicial Precedent**

The following factors must be present before a prior decision has stare decisis effect: (a) the decision must be from the same court or from a court which the court applying stare decisis owes obedience; (b) an issue was actually determined by the decision; (c) the decision must constitute a holding of the majority of the court and, if a particular result is adopted by a clear majority of the court, it has absolute precedential effect; (d) the decision must involve an issue of law; and (e) the decision was rendered in substantially identical legal and factual circumstances.

International Trade Law > ... > Exports & Imports > Antidumping > General Overview

HN63[] **Exports & Imports, Antidumping**

In general terms of economics, the practice of "dumping" means sale at "predatory pricing," i.e., sale of the product so cheaply that the seller's competitors are eventually forced out of business. In the more specific terms of international trade, "dumping" means that a seller from one country is exporting its product to another country at a predatory price, e.g., at the price which is below the price the seller charges for its goods in its home market (such low price is referred to as "less than fair value" price or (LTFV)): since the seller's predatory practices might endanger the well-being and even the very existence of the industry producing the seller's types of goods in the importing country, the law of the importing country might be crafted to alleviate some of the harsher consequences of this controversial reality of free trade; such remedy is usually a penalty (i.e., an import duty) aiming to either economically force the seller to raise its export price or to dissuade the seller from a future LTFV export practice. Correspondingly, both United States law and the World Trade Organization condemn dumping if the practice causes (or threatens to cause) material injury to the domestic industry of the importing country. *19 U.S.C.S. § 1673*.

International Trade Law > ... > Exports & Imports > Antidumping > General Overview

HN64[] **Exports & Imports, Antidumping**

The concept of countervailing is analogous, in its gist, to that of antidumping, although it introduces a third player into the equation, i.e., the state of the exporting seller. Similar to antidumping duties, countervailing duties (CVDs) are imposed to neutralize the negative effects of predatory pricing if it has been determined that the seller's state subsidized the seller's exports through certain governmental measures, and these subsidies enabled the seller to charge predatory prices causing or threatening to cause an injury to the producers of the seller's types of goods in the importing state. In the United States, investigations of countervailing activities and determinations as to the propriety and magnitude of CVDs imposed, is performed by the International Trade Administration (ITA).

Evidence > Judicial Notice > General Overview

HN65[] **Evidence, Judicial Notice**

Matters of which judicial notice may be taken must include facts capable of verification by resort to sources. Sources of a judicially-noticed fact must necessarily exist and be known to the court to enable even the very consideration of whether the fact is amenable to judicial notice.

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN66[] **Adjudicative Facts, Public Records**

The court may take judicial notice of admissions in pleadings and other documents in the public record filed by a party in other judicial proceedings that contradict the party's factual assertions in the instant action.

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

HN67[] **Baseless Filings, Frivolous Lawsuits**

The first prong of the test to determine if *Fed. R. Civ. P. 11* sanctions should be imposed is met if the complaint is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith. The pleader must have an objective good faith belief in the merit of the pleader's legal argument.

International Law > ... > Exceptions > Commercial Activities > General Overview

HN68[] **Exceptions, Commercial Activities**

With regard to the Foreign Sovereign Immunities Act (FSIA), the most commonly invoked form of the "commercial activity" exception is based on the claim that the activities at issue were carried on in the United States. 28 U.S.C.S. § 1605(a)(2). However, § 1605(a)(2) (i.e., the subsection dealing with various forms of "commercial activity" restoring federal jurisdiction by invalidating the presumption of immunity) sets also two other forms of "commercial activity" removing immunity. Specifically, under these two additional options, the grant of immunity is also unwarranted if the action is based upon: (a) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (b) upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

International Law > ... > Sovereign Immunity > Foreign Sovereign Immunities Act > General Overview

HN69[] Sovereign Immunity, Foreign Sovereign Immunities Act

With regard to the Foreign Sovereign Immunities Act (FSIA), a court's jurisdiction over an exporter cannot depend on whether an American purchaser (be it an intermediary or a purported end-consumer) elects to actually bring the exporter's goods into the United States or "diverts" these goods to another country: the reach of the United States jurisdiction cannot depend on the whim of the purchaser who is free to create his own injury by first deciding whether the purchased goods cross -- or get consumed after crossing -- a particular meridian, and then filing a suit against the exporter who has no meaningful control over the purchaser's business elections (or over the purchaser's choice not to act in accordance with its contractually non-binding representations that might have been made to the exporter at the time of the exporter's sale of goods). And, indeed, one's entry into a "conspiracy" or one's "sitting on a committee" cannot qualify as one's "commercial activity" of the type in which a private party engages for the purposes of "trade and traffic or commerce," this is so regardless of how broadly the term "commercial activity" is defined by the FSIA legislative history and case law.

International Law > ... > Foreign Sovereign Immunities Act > Jurisdiction > General Overview

HN70[] Foreign Sovereign Immunities Act, Jurisdiction

The language of the Foreign Sovereign Immunities Act (FSIA) does envision jurisdiction based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere if that act causes a direct effect in the United States. 28 U.S.C.S. § 1605(a)(2).

International Law > ... > Foreign Sovereign Immunities Act > Jurisdiction > General Overview

HN71[] Foreign Sovereign Immunities Act, Jurisdiction

With regard to the Foreign Sovereign Immunities Act (FSIA), the meaning of "directness" under 28 U.S.C.S. § 1605(a)(2) was clarified by the United States Supreme Court and this "directness" is, seemingly, of the same nature (although, perhaps, of different magnitude) as that referred to in 15 U.S.C.S. § 6a(1)(A).

International Law > Dispute Resolution > Act of State Doctrine

International Law > ... > Exceptions > Commercial Activities > General Overview

HN72[] Dispute Resolution, Act of State Doctrine

The Act of State doctrine is, effectively, an inquiry into a consequence of domestic separation of powers and it directs the court to dismiss the suit if its resolution would require the court to declare invalid an official act of a foreign sovereign. Although the law is unsettled as to whether the doctrine is amenable to the Foreign Sovereign Immunities Act's (FSIA's) expansive definition of the term of "foreign state" (i.e., whether "instrumentalities," such as 100 percent state-owned entities, might be deemed a "foreign sovereign" for the purposes of the doctrine), it is well settled that the doctrine envisions a "commercial activity" exception, pursuant to which abstention is unwarranted as to the acts committed by foreign sovereigns in course of commercial operations. Hence, in no ambiguous terms, the doctrine mandates the defendant to make a direct connection between its sovereign status and the uniquely sovereign qualities of its activity being challenged, and allows no cross-matching.

International Law > Foreign & International Immunity > General Overview

International Law > Individuals & Sovereign States > General Overview

HN73[] **International Law, Foreign & International Immunity**

A defendant can successfully invoke the doctrine of government compulsion, if he shows that a reasonable entity standing in the defendant's shoes (that is, having a similar-to-defendant's understanding of the local legal, economic, political and cultural peculiarities, as well as being exposed to similar antecedent circumstances and current relation to the entity seeking to extract consent) would feel compelled to consent by the totality of these conditions. Conversely, it appears wholly illogical to factor in this concept: (a) the socio-political and cultural perceptions of a foreigner; or (b) the concerns of an entity which is in notably different circumstances; or (c) the degree of bravery common only to bold risk takers. In other words, it appears unreasonable to obligate the defendant to either ignore the realities of his/her world or to take an excessive risk.

International Law > Dispute Resolution > Conflict of Law > General Overview

HN74[] **Dispute Resolution, Conflict of Law**

Fed. R. Civ. P. 44.1 governs the judicial determination of foreign law. The rule states that, in deciding issues of foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law. Moreover, the rule provides courts with broad authority -- and, perhaps, even with an obligation -- to conduct their own independent research in order to determine the meaning of foreign law. Moreover, the courts may extract from foreign legal material and may even consider material that would be inadmissible at trial. The ordinary rules of evidence are often inapposite to the problem of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination. Even if not admissible under the Federal Rules of Evidence, evidence of foreign law is properly considered, since the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules. Hence, differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact for the purposes of the court's review and final ruling.

International Law > Dispute Resolution > Conflict of Law > General Overview

HN75[] **Dispute Resolution, Conflict of Law**

Translations of foreign provisions, be they actually provided by the parties or obtained by the court from other sources, may be used by the court in its determinations of foreign law.

International Law > Dispute Resolution > Conflict of Law > General Overview

HN76[] Dispute Resolution, Conflict of Law

A foreign sovereign's admission of legal compulsion of its subjects might warrant a high -- often, nearly binding -- degree of deference, even if the admitted compulsion was based on what might be deemed, in American jurisprudence, a form of "unwritten law."

International Law > Foreign & International Immunity > General Overview

International Law > Individuals & Sovereign States > General Overview

HN77[] International Law, Foreign & International Immunity

The availability of the doctrine of government compulsion cannot depend on the presence or absence of any collusion: had it been otherwise, the doctrinal abstention would be limited only to antitrust, racketeering and similar matters that require proof of collusion. Consequently, for the purposes of the government compulsion doctrine, it would be a logical error to ask whether Defendants reached an agreement to comply with the minimum price requirement. Rather, where the doctrine is applicable, such "agreement" aspect should be automatically supplied by the defendant's obedience of his/her/its sovereign's law: so, if there is an alleged hub-and-spokes agreement, then the foreign sovereign should be viewed as the "hub."

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN78[] Procedural Due Process, Scope of Protection

The Supreme Court of the United States has invariably recognized that a license to practice a certain trade should be treated similarly to a property right and an injury to this right invokes protections of the Due Process Clause.

Governments > Legislation > General Overview

HN79[] Governments, Legislation

Codification contemplates, implies and produces continuity of existing law in clarified form rather than its interruption.

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

HN80[] Federal & State Interrelationships, Abstention

Abstention is a case-dispositive measure that shall not be imposed lightly.

Administrative Law > Judicial Review > Standards of Review > General Overview

International Law > Dispute Resolution > General Overview

HN81[] **Judicial Review, Standards of Review**

Courts should be particularly reluctant to second-guess agency choices involving technical matters that are in the agency's province of expertise, and they are certainly not in the position to render on or guess the considerations falling within the expertise of a foreign agency.

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

HN82[] **Complaints, Requirements for Complaint**

The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Counsel: **[**1]** For **KRAMER LEVIN NAFTALIS & FRANKEL LLP, Movant: LEDA DUNN WETTRE,** ROBINSON, WETTRE & MILLER LLC, NEWARK, NJ.

FAHEEM NAJM, Movant, Pro se, NEW YORK, NY.

JONATHAN LEE RICHES, Movant, Pro se, LEXINGTON, KY.

JASON TROWBRIDGE, Movant, Pro se, NEW YORK, NY.

For **ANIMAL SCIENCE PRODUCTS, INC., Plaintiff: DAVID S. STONE, ROBERT A. MAGNANINI,** *LEAD ATTORNEYS,* Stone & Magnanini LLP, SHORT HILLS, NJ; **RICHARD E. DONOVAN,** KELLEY DRYE & WARREN LLP, PARSIPPANY, NJ.

For **RESCO PRODUCTS, INC., Plaintiff: DAVID S. STONE, ROBERT A. MAGNANINI,** *LEAD ATTORNEYS,* Stone & Magnanini LLP, SHORT HILLS, NJ.

For **CHINA NATIONAL METALS & MINERALS IMPORT & EXPORT CORPORATION, CHINA NATIONAL MINERALS IMPORT & EXPORT CORPORATION, Defendants: ROBERT J. DEL TUFO, SHEPARD GOLDFEIN,** *LEAD ATTORNEYS,* SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, NEW YORK, NY.

For **MINMETALS, INC., Defendant: GREGORY KARL MUELLER,** *LEAD ATTORNEY,* LAW OFFICES OF GREGORY K. MUELLER, PC, TENAFLY, NJ.

For **SINOSTEEL CORPORATION, SINOSTEEL TRADING COMPANY, LIAONING JIAYI METALS & MINERALS CO., LTD., HAICHENG HOUYING CORP. LTD., HAICHENG HUAYU GROUP IMPORT & EXPORT CO. LTD. (HUAZIYU), Defendants: LEDA DUNN WETTRE,** *LEAD ATTORNEY,* ROBINSON, WETTRE & MILLER LLC, NEWARK, **[**2]** NJ.

Judges: Garrett E. Brown, Jr., Chief Judge, United States District Judge.

Opinion by: Garrett E. Brown, Jr.

Opinion

[*325] TABLE OF CONTENTS

[*327]

BROWN, [3]** Chief Judge:

I. <u>INTRODUCTION</u>

This matter comes before the Court upon Plaintiffs' filing of an amended complaint ("Amended Complaint" or "Am. Compl."), <u>see</u> Docket Entry No. 77, and upon submission of two motions to dismiss the Amended Complaint; these submissions were made by two groups of Defendants, i.e., by: (1) China Minmetals Corp. and China National Minerals Co., Ltd. (collectively, "Minmetals Defendants"); and (2) Sinosteel Corp., Sinosteel Trading Co. and Liaoning Jiayi Metals & Minerals Co., Ltd. (collectively, "Sinosteel Defendants"). See Docket Entry No. 98 ("Sinosteel's Motion" or "S/Mot.") and Docket Entry No. 99 ("Minmetals' Motion" or "M/Mot."). Plaintiffs duly filed their opposition to Sinosteel and Minmetals' Motions, see Docket Entry No. 105 ("Plaintiffs' Opposition" or "Opp."), to which the aforesaid two groups of Defendants duly replied. See Docket Entry No. 109 ("Minmetals' Reply" or "M/Reply") and Docket Entry No. 110 ("Sinosteel's Reply" or "S/Reply"). For the reasons stated below, Sinosteel and Minmetals' Motions will be granted, and the Amended Complaint will be dismissed as to the Minmetals and Sinosteel Defendants. [2] This dismissal, however, will be, in part, **[**4]** without prejudice, and Plaintiffs will be allowed to amend their pleadings and to provide the Court with factual proof establishing that Defendants were acting as 'importers" during the putative Class Period.

II. PROCEDURAL BACKGROUND

Being initiated almost half a decade ago, this matter has accrued a rather substantial procedural history. However, the bulk of these developments is largely irrelevant to the issues at hand and, hence, it should suffice to merely note that, on September 7, 2005, Plaintiffs Animal Science Products, Inc. ("Animal Science") and Resco Products, **[**5]** Inc. ("Resco") filed a civil complaint ("Original Complaint") on behalf of a putative class and named seventeen Chinese business entities as Defendants.

The issues related to service of process dominated the next two years of litigation. See, e.g., Docket Entries Nos. 3-50; see also Docket Entry No. 73 ("December Opinion" or "Dec. Op."), at 3-4 (detailing these procedural developments). Eventually, Plaintiffs moved for a default judgment, **[*328]** which triggered Defendants' motion for dismissal of the Original Complaint. See Sep. Op. at 3-4. These key revolutions were accompanied by: (a) an extensive litigation on the issue of whether this matter should be resolved by arbitration instead of being litigated; and (b) a panoply of peripheral claims and challenges based on a multitude of substantive and procedural issues. See id.; see also Docket Entries Nos. 3-63.

On September 15, 2008, this matter was reassigned to the undersigned and, on October 6, 2008, this Court held oral arguments as to the constellation of the then-pending motions. On December 30, 2008, this Court issued its December Opinion and accompanying order. See Docket Entries Nos. 73 and 74. The order dismissed the Original Complaint **[**6]** without prejudice, and disposed of the then-pending Plaintiffs and Defendants' motions on various grounds.

The accompanying December Opinion ended with a guidance as to motion practice:

> Thus far, the Court has been presented with a multitude of motions (in addition to those addressed in [the December] Opinion). Since these motions, as well as peripheral challenge[s] embedded in the [m]otions [to dismiss] resolved by this discussion, raise a panoply of issues, the Court finds it prudent to provide the parties with a roadmap to the future litigation in the event: (a) Plaintiffs' elect to take advantage of the leave to file an amended complaint; and (b) Defendants elect to renew some or all of the challenges extended in Defendants' motions and/or scattered in Defendants' oppositions to Plaintiffs' [m]otion [for default judgment]. Hence, in the event Plaintiffs file an amended complaint, Plaintiffs must incorporate in their submission evidentiary proof allowing the Court to conduct a factual determination (in contrast with the facial analysis conducted herein) and to conclusively satisfy itself as to presence of lack of subject matter jurisdiction over this action. In the event Defendants **[**7]** wish to extend challenges to the Court's subject matter jurisdiction and/or to assert that the

[2] The instant decision shall not be construed as having any direct, that is, immediately dispositive, effect on Plaintiffs' claims raised against all Defendants that did *not* file the Motions at bar ("Residual Defendants"). The Court, however, reserves any determination as to indirect applicability of the instant decision to Plaintiffs' claims against the Residual Defendants; for instance, the Court reserves its decision as to whether Plaintiffs' claims against the Residual Defendants -- or certain aspects of such Plaintiffs' claims -- might be barred from enforcement by the operation of the doctrine of collateral estoppel.

> Court shall abstain from resolving the instant matter on the grounds involving any provision, judicially-create[d] doctrine or public policy related to a foreign sovereign's action or to Chinese regulatory or legal regime, Defendants should do so at their first opportunity to respond to the amended complaint. If, and only if, the Court: (a) determines that it has proper subject matter jurisdiction over this action; and (b) finds that it shall not abstain from resolving it, Defendants may, if they so desire, renew their currently extended challenges in the following order:
> (1) Defendants shall first raise their challenges based on the alleged lack of personal jurisdiction, insufficient service of process and improper venue;
> (2) only in the event Defendants elect not to raise such challenges, of if the Court determines that in personam jurisdiction was duly obtained and, in addition, establishes that the instant matter is properly before the Court, Defendants may, if they wish, re-raise their argument that the Court shall compel arbitration of this action; and
>
> (3) if, and only if, Defendants elect **[**8]** not to raise such challenge or the Court denies Defendants' request to compel arbitration, Defendants may, if they so desire, renew their challenges asserting Plaintiffs' lack of **[*329]** standing and failure to state a claim upon which relief can be granted.

Dec. Op. at 59-60.

The parties duly complied with the aforesaid guidance. Plaintiffs filed their Amended Complaint naming, in addition to the Minmetals and Sinosteel Defendants, the following entities as Defendants in this matter: Xiyang Group; Xiyang (Pacific) Import & Export Ltd. Co.; Xiyang Refractory Materials Ltd. Co.; Xiyang Fireproof Material Co. Ltd.; Liaoning Foreign Trade General Co.; Dalian Golden Sun Import & Export Co.; Haicheng Houying Co. Ltd.; Haicheng Huayu Group Import & Export Co. Ltd. (Huaziyu); Haicheng Pailou Magnesite Ore Co. Ltd. and Yingkou Huachen Co. Ltd. See Docket Entry No. 77, at 1-3. In response, Defendants filed the Motions at hand, challenging the Amended Complaint on the grounds of subject matter jurisdiction and failure to meet the pleading requirements and, in addition, setting forth numerous arguments advocating abstention.

III. FACTUAL BACKGROUND

Since the allegations raised in the Amended Complaint -- **[**9]** and corresponding challenges raised in the Minmetals and Sinosteel's Motions -- fall into two broad categories, one addressing a multitude of aspects related to abstention and/or Defendants' immunity from suit, and another related to this Court's subject matter jurisdiction and Plaintiffs' compliance with the pleading requirements -- a detailed recital of all allegations and challenges currently before the Court might be unnecessarily overwhelming, while a short summary of the same could cause the parties an undue concern that the Court's omission of certain aspects from such summary might be a sign that these aspects have escaped the Court's attention. Consequently, it appears useful to detail the relevant assertions and challenges in connection with discussion of each individual group of legal issues and, at the instant juncture, it should be sufficient to simply outline the key background points.

Here, Plaintiffs are United States enterprises that consume, for the purpose of conducting their respective businesses, magnesite-based products. See Am. Compl. §§ 10, 11. All Defendants named in the Amended Complaint are Chinese business entities involved in the sale of magnesite-based **[**10]** products. See id. §§ 12-27. Plaintiffs assert that each of the named Defendants either "directly sold magnesite products to the U.S. companies and shipped magnesite products to the United States" or "engage[d] in metal and minerals trading among other things, including export of magnesite to the United States." Id. Plaintiffs further assert that the overall prices charged for Chinese magnesite were artificially inflated because: (a) "[e]ach of these Defendants and its co-conspirators has colluded with each other to restrain competition by, among other things, setting artificial prices pursuant to illegal horizontal agreements among [themselves]," id. § 29; and (b) "[t]hese horizontal practices were designed to, and in fact did, have a substantial and adverse impact in the United States." Id. § 30. In light of the foregoing, Plaintiffs claim that Defendants' actions violated Section 1 of the Sherman Act, *15 U.S.C. § 1*. [3]

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[3] No allegations made in the Amended Complaint suggest that Plaintiffs made any effort to buy, specifically, magnesite of Chinese origin (or to avoid buying Chinese magnesite); rather, it appears that Plaintiffs were: (a) buying magnesite regardless of

[*330] Defendants challenge the Amended Complaint asserting that: (1) Plaintiffs' allegations fail to meet the applicable pleading requirements; (2) Plaintiffs' allegations depict a picture which -- under the Foreign Trade Antitrust Improvements Act ("FTAIA") and the Foreign Sovereign Immunities Act ("FSIA") -- strips this Court of subject matter jurisdiction over this matter; and/or (3) considerations of comity and the tenets of the "act of state" and "government compulsion" doctrines warrant abstention. See generally, M/Mot, S/Mot, M/Reply **[**12]** and S/Reply. To the degree this panoply of issues allows, the Court will address these challenges seriatim.

IV. DISTINCTION BETWEEN THE RELEVANT TESTS AND BURDENS

Since there appears to be confusion among the parties as to the applicable tests, the allocation of burdens and the procedural propriety of related inquiries, the Court finds it prudent to clarify these matters at the outset of this discussion.

For instance, Plaintiffs seem to assert that they need not address factual subject matter jurisdictional challenges since the Minmetals' Motion raises only facial jurisdictional challenges, and the Sinosteel's Motion "purports to raise factual challenges but the majority of its arguments concern purported deficiencies in Plaintiffs['] allegations." Opp., at 26. In addition, Plaintiffs maintain that the resolution of the subject matter jurisdictional aspect "should be postponed until summary judgment or a trial on the merits" because a decision as to subject matter jurisdiction would have a dispositive effect on the merits of Plaintiffs' Sherman Act claims. See id.

Defendants, on their part, make no distinction between the facial and factual standards and paraphrase their arguments with **[**13]** regard to the Court's subject matter jurisdiction in terms applicable to a facial review. See, e.g., M/Mot., at 10-11 (discussing Rule 8 *facial* pleading requirements for the purposes of Defendants' *factual* analysis of the Court's subject matter jurisdiction). Moreover, Defendants seem to maintain that the Court must abstain from resolving this matter because *Plaintiffs* make insufficient assertions as to why this Court should not abstain from resolving it. See, generally, id. at 11-19, S/Reply at 19-23.

A. Standard and Burden Associated with Jurisdictional Inquiry

Contrary to what appears to be Plaintiffs' impression, the subject matter jurisdiction inquiry initiated in this case was not a result of the challenges raised by the Minmetals Defendants or by the Sinosteel Defendants (or by any other Defendant); rather, the issue was raised by this Court sua sponte in light of the jurisdictional uncertainties presented by the case at bar. The Court's decision to look into the jurisdictional aspect ensued from the Court of Appeals' guidance that ***HN1***[] each "[c]ourt has a continuing obligation to sua sponte raise the issue of subject matter jurisdiction." *Bracken v. Matgouranis, 296 F.3d 160, 162 (3d Cir. 2002)*; **[**14]** see also *Morel v. INS, 144 F.3d 248, 251 n.3 (3d Cir. 1998)* (quoting *Ins. Corp. of Ireland, Ltd. v. Compagnie* ***[*331]*** *des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)*, as to the observation that "[a] federal court . . . will raise lack of subject-matter jurisdiction on its own motion").

Next, ***HN2***[] the burden to establish subject matter jurisdiction falls squarely on Plaintiffs since Plaintiffs invoked the Court's jurisdiction by bringing this action. See *Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (clarifying that a federal court shall presume lack of jurisdiction, and the party seeking to invoke the court's jurisdiction bears the burden of proving that subject matter jurisdiction exists). Consequently, any potential shortcomings of -- or any potential errors in -- Defendants' subject matter jurisdictional challenges cannot have any effect on Plaintiffs' burden, except with regard to the issues discussed in "The FSIA" section of this Opinion, infra.

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the product's origin: **[**11]** and (b) driven only by their interest in obtaining the particular magnesite-based products Plaintiffs needed at the cheapest price these products were available. See generally, Am. Compl. The voluminous attachments to Plaintiffs' Amended Complaint indicate that Chinese magnesite-based products were indeed the cheapest in the world market, and Plaintiffs never asserted otherwise. See Docket Entry No. 77. Rather, the financial point of Plaintiffs' legal claims could be reduced to the statement that the Chinese magnesite-base products were not as cheap as they could have been had Defendants not entered into the alleged collusive agreement(s). See id. § 29.

As this Court already pointed out in its December Opinion, *HN3*[] deficiencies as to the "subject matter jurisdiction may be either 'facial' or 'factual.'" *Turicentro. S.A. v. Am. Airlines. Inc., 303 F.3d 293, 300, n. 4 (3d Cir. 2002)*. The distinction **[**15]** between factual and facial assessments is rather dramatic. In a facial attack (that is, addressing a challenge based on the assertions made in the plaintiff's pleadings), the trial court must accept the complaint's allegations as true, i.e., the court merely requires the plaintiff to articulate the factual premise of his/her contentions, without providing the court with any actual evidence underlying the plaintiff's factual assertions. "In contrast, a trial court considering a factual attack accords plaintiff's allegations no presumption of truth," and requires production of actual evidence upon which the plaintiff bases his/her factual contentions. *Turicentro, 303 F.3d at 299, n.4*. Consequently, when assessing a factual -- rather than facial -- deficiency, the court "can look beyond the pleadings to decide factual matters relating to jurisdiction." *Cestonaro v. United States, 211 F.3d 749, 752 (3d Cir. 2000)*; see also *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)* (a factual inquiry into the district court's jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)* is not confined to the allegations in the complaint).

Furthermore,*HN4*[] there is no procedural **[**16]** limitation as to the point in litigation in which a factual inquiry as to the subject matter jurisdiction may be undertaken. While it is true that, "in the Sherman Act context, jurisdictional facts are often closely intertwined with the merits of the claim," *Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 73 (3d Cir. 2000)*, the court in *CNA v. United States, 535 F.3d 132, 145 (3d Cir. 2008)*, which is the case relied upon by Plaintiffs, never held that the subject matter jurisdictional inquiry must be postponed until summary judgment, or until trial. Rather, the CNA court merely directed the district courts to "ensure that defendants [were] not allowed to use *Rule 12(b)(1)* to resolve the *merits* [of plaintiffs' claim] too early in litigation." Id. (emphasis supplied).

Here, the threshold subject matter jurisdictional inquiry is whether the FTAIA applies to this matter, thereby removing this Court's jurisdiction to address the merits of Plaintiffs' Sherman Act claims. While the intricacies of the FTAIA are discussed infra (and the Sherman Act test would be addressed only if subject matter jurisdiction over this matter is established), the Court presumes the parties' familiarity **[**17]** with the basic proposition that, *HN5*[] "[t]o establish a violation of Section 1, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; **[*332]** (3) that the concerted action [was] illegal; and (4) that [the plaintiff was actually] injured as a proximate result of the concerted action." [4] *Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)* (citations omitted), cert. denied, *547 U.S. 1092, 126 S. Ct. 1777, 164 L. Ed. 2d 557 (2006)*. In contrast, *HN6*[] to avoid the FTAIA jurisdictional bar, the plaintiff must show either that: (a) the defendants are importers of goods/services in the United States, see *15 U.S.C. § 6a* (stating the notoriously inelegant introduction that "[the Sherman Act] shall not apply to conduct involving trade or commerce [] other than import trade or import commerce []"); accord *Carpet Group, 227 F.3d 62 at 72*; *Turicentro, 303 F.3d at 302*; or, in alternative, (b) show that the defendants are exporters whose conduct "[had/]has a direct, substantial and reasonably foreseeable effect" on the United States domestic trade or commence. See *15 U.S.C. § 6a(1)*; accord *Turicentro, 303 F.3d at 302*; *Kruman v. Christie's Intern. PLC, 284 F.3d 384, 395 (2d Cir. 2002)*, **[**18]** overruled on other grounds. *F. Hoffmann-LaRoche, Ltd. v. Empagran, SA, 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*.

Even a purely mechanical comparison of the elements comprising the Sherman Act standard with the elements of the FTAIA test reveals that these two tests, while perhaps peripherally related, have so little in common that a resolution of the threshold FTAIA aspect cannot be deemed substantively dispositive for purposes of the merits of the underlying Sherman Act claims. Therefore, the caution articulated by the *CNA* court appears virtually inapplicable to a FTAIA-based scenario, since -- without engaging in undue overreaching -- a judicial decision disposing of a FTAIA challenge does not prematurely resolve the merits of the underlying Sherman Act claims.

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[4] Notably,*HN7*[] if a restraint is per se illegal, no examination of the practice's impact on the market is necessary for finding of anti-competitive effects within relevant product and geographic markets, see *Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 123 (3d Cir. 2000)*, which means, in turn, that no aspect even vaguely resembling the "direct, substantial and reasonably foreseeable effect" of the FTAIA can possibly arise.

B. Standard [19] Associated with Pleading Underlying Claims**

Since Plaintiffs' Original Complaint asserted fraudulent conduct by Defendants, Plaintiffs' prior pleadings were examined under the requirements of *Rule 9*. However, the Amended Complaint no longer makes these assertions. Therefore, for the purposes of their Sherman Act claims, Plaintiffs' new set of allegations is subject to review under *Rule 8*.

HN8[] It is long established that a court should "accept as true all of the [factual] allegations in the complaint and reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." *Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997)*. Nonetheless, the Third Circuit has noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint. See *In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997)*. Therefore, legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. See *Nice Sys., Ltd. Sec. Litig., 135 F. Supp. 2d 551, 565 (D.N.J. 2001)*.

Addressing the clarifications as to the litigant's pleading requirement stated by the United **[**20]** States Supreme Court in *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Court of Appeals for the Third Circuit **[*333]** provided the district courts with guidance as to what pleadings are sufficient to pass muster under *Rule 8*. See *Phillips v. County of Allegheny, 515 F.3d 224, 230-34 (3d Cir. 2008)*. Specifically, the Court of Appeals observed as follows:

> ***HN9***[] "While a complaint . . . does not need detailed factual allegations, a plaintiffs obligation [is] to provide the 'grounds' of his 'entitle[ment] to relief . . . ." *Twombly, 127 S. Ct. at 1964-65* . . ."[T]he threshold requirement of *Rule 8(a)(2)* [is] that the 'plain statement [must] possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id. at 1966*. [Hence] "factual allegations must be enough to raise a right to relief above the speculative level." *Id. at 1965* & n.3.

Id. at 230-34 (original brackets removed). This pleading standard was further refined by the United States Supreme Court in its recent decision *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, where the Supreme Court clarified as follows:

> ***HN10***[] [In any civil action, t]he pleading standard . . . demands more than an unadorned ["]the-defendant-unlawfully-harmed-me["] accusation. **[**21]** *[Twombly, 550 U.S.] at 555* . . . . A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *[Id.] at 555*. [Moreover,] the plausibility standard… asks for more than a sheer possibility that a defendant has acted unlawfully. Id. [Indeed, even w]here a complaint pleads facts that are "merely consistent with" a defendant's liability, [the so-alleging complaint still] "stops short of [showing] plausibility of 'entitlement to relief.'" *Id. at 557* (brackets omitted). [A fortiori,] the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions [or to t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements [, i.e., by] legal conclusion[s] couched as a factual allegation [e.g.,] the plaintiffs' assertion of an unlawful agreement [or] that [defendants] adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." . . . . [W]e do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of [these] allegations . **[**22]** . . that disentitles them to the presumption of truth. . . . [Finally,] ***HN11***[] the question [of sufficiency of] pleadings does not turn [on] the discovery process. *Twombly, 550 U.S.] at 559* . . . . [The plaintiff] is not entitled to discovery [where the complaint asserts some wrongs] "generally," [i.e., as] a conclusory allegation [since] *Rule 8* does not [allow] pleading the bare elements of [the] cause of action [and] affix[ing] the label "general allegation" [in hope of developing actual facts through discovery].

Iqbal, 129 S. Ct. at 1949-54.

The Third Circuit observed that Iqbal hammered the "final nail-in-the-coffin" for the "no set of facts" standard set forth in *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, [5] which was applied to federal complaints before **[*334]** Twombly. See *Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009)*. Since Iqbal, ***HN12***[] the Third Circuit has instructed district courts to conduct, with regard to Rule 8 allegations, a two-part analysis when the district courts are presented with a *Rule 12(b)(6)* motion to dismiss:

> First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard **[**23]** any legal conclusions. [See *Iqbal, 129 S. Ct. at 1949-50*]. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief [in light of the definition of "plausibility" provided in Iqbal.] In other words, a complaint must do *more than allege the plaintiff's entitlement to relief.* A complaint has to "show" such an entitlement with its facts. See *Phillips, 515 F.3d at 234-35*. As the Supreme Court instructed in Iqbal, "[w]here the well-pleaded facts do not permit the court to infer more than the *mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'"* Iqbal, [*129 S. Ct. at 1949-50* (emphasis supplied)]. This "plausibility" determination will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id.

Fowler, 578 F.3d at 210-11 (emphasis supplied). [6]

C. Burden Associated with Asserting Abstention

HN13[] The Supreme Court has long rejected the rigid proposition that abstention is a technical rule of equity procedure. See *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 718, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996)*. Rather, the Court held that "the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief." *Id. at 718*. However, as the parties seeking abstention, Defendants bear the burden of showing that abstention is the appropriate course. Cf. *Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a **[**26]** controversy properly before it"); *Sheerbonnet v. American Express Bank, Ltd., 17 F.3d 46, 49 (2d Cir. 1994)* (given "the virtually unflagging obligation of the federal courts" to exercise jurisdiction where warranted, a defendant seeking abstention **[*335]** faces a heavy burden). Consequently, any potential shortcomings of -- or any potential errors in -- Plaintiffs' position advocating against abstention cannot reduce or otherwise affect Defendants' burden of establishing that this Court should refrain from resolving this matter.

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[5] The Conley court held that a district court was permitted to dismiss a complaint for failure to state a claim only if "it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which **[**24]** would entitle him to relief." *Conley v. Gibson, 355 U.S. at 45-46*. Under this "no set of facts" standard, a complaint could effectively survive a motion to dismiss so long as it contained a bare recitation of the claim's legal elements.

[6] This Court is not aware of any legal decision addressing the effect of Iqbal on the standard applicable to the *factual* Rule 12 challenges, as they are defined in *Turicentro*. However, it appears logical for the Supreme Court's guidance in *Iqbal* to have at least a ripple effect on the standard applicable to factual challenges. Since the Supreme Court in Iqbal expressly guided that a plaintiff cannot obtain discovery with regard to his/her claims unless the plaintiff actually spells out the facts underlying these claims, the same guidance -- if applied to factual rather than facial review -- must yield the rule that a plaintiff cannot obtain discovery with regard to evidence verifying jurisdiction. Indeed, concluding otherwise invites a scenario where the plaintiff, being charged with the duty to actually produce jurisdictional evidence, is nonetheless permitted to flatly admit that (s)he has no such evidence and that all (s)he can do is to speculate in **[**25]** his/her pleadings that such evidence might be discovered. In other words, allowing the plaintiff to conduct discovery for the purposes of factual challenge would result in an anomalous rule granting the plaintiff a broader pleading latitude for the purposes of the test under which the plaintiff's pleadings are not even granted presumption of truth.

V. THE FTAIA ASPECT

A. Subject Matter Jurisdiction under the Export Exception to the FTAIA Bar

1. Interplay Between the Sherman Act, FTAIA and *Hartford Fire*

As with the above-discussed issues of applicable standards and burdens, there appears to be a certain confusion among the parties as to the relationship between the governing statutory provision and relevant common law precedents addressing the issue of federal jurisdiction over the claims alleging collusive agreements within the context of international trade. See, e.g., S/Mot., at 7 (suggesting the presence of *two different* tests by stating: "Plaintiffs' . . . allegations are insufficient to establish that Defendants' **[**27]** alleged conspiracy involved United States "import commerce" or had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by the . . . FTAIA . . . *or* that [Defendants' conduct] involved 'import commerce' or trade that had 'substantial effect[s]' on U.S. domestic commerce, as required by Hartford Fire Ins[.] Co. v. California").

HN14[] The Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. Federal courts have struggled for decades to determine their jurisdiction over allegations of foreign restraints of trade. See, e.g., Areeda & Hovenkamp, ***Antitrust Law***, P 272 (2d ed. 2000); see also *Den Norske Stats Olieselskap As v. Heere-Mac v.o.f., 241 F.3d 420, 423-24 (5th Cir. 2001)* ("The history of this body of case law is confusing and unsettled").

Prior to the passage of the FTAIA, the courts applied various tests in order to determine when foreign conduct fell within the purview of the Sherman Act. The most widely used standard was the "effects test," which was developed by the Second Circuit in *United States v. Aluminum Co. of Am. ("Alcoa"), 148 F.2d 416, 444 (2d Cir. 1945)* **[**28]** . The Alcoa court considered whether Congress intended the Sherman Act to impose liability for conduct outside the United States and under which circumstances the Constitution allowed Congress to do so. See id. Judge Hand rejected the idea that Congress meant "to punish all whom [United States] courts can catch." *Id. at 443*. Instead, the Alcoa court held that the Sherman Act was meant to reach foreign conduct only if that conduct was *intended to affect* (and did, in fact, affect) United States commerce. See id. Accordingly, in Hartford Fire Ins. Co. v. California, the Supreme Court focused on the "intent-to-affect" language of Alcoa and summarized the effects test by stating that "it is well established by now that the Sherman Act applies to foreign conduct that was *meant to produce* and did in fact produce some substantial effect in the United States." *509 U.S. 764, 796, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)* (citing Alcoa, emphasis supplied).

Application of the *Alcoa* effects test, however, proved difficult, causing the precise extraterritorial reach of the Sherman Act to remain less than crystal clear. In response to that difficulty, Congress enacted the FTAIA in **[**29]** 1982 -- because the "courts differ[ed] in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists," H.R. Rep. No. **[*336]** 97-686 (1982), reprinted in, U.S.C.C.A.N. 2487, 2487 (1982) -- the statute, hence, built on the common law principle established in Alcoa and embraced in Hartford Fire. ***HN15***[] In no ambiguous terms, the FTAIA "clarif[ied] the Sherman Act [by] mak[ing it] explicit [that, in foreign trade cases, the Sherman Act had] application only to conduct having a 'direct, substantial and reasonably foreseeable effect' on domestic commerce." Id. Specifically, the FTAIA provided that:

> [The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless --
>
> (1) such conduct has a *direct, substantial, and reasonably foreseeable effect* --
> (A) . . . on [United States] import trade or import commerce with foreign nations . . .
> and
> (2) such effect gives rise to a claim under the [Sherman Act].

15 U.S.C. § 6a (emphasis supplied).

Although *subsection (1)* created an exception to the FTAIA's jurisdictional bar with regard to those claims that were raised **[**30]** against foreign *exporters,* the language of this exception did not clarify the meaning of the phrase "direct, substantial, and reasonably foreseeable effect," and federal courts' lack of interest in the FTAIA for the first decade after its enactment created an interpretative void opening the door to a debate as to whether the FTAIA established a new jurisdictional standard or merely codified the very same test that was articulated in Alcoa and Hartford Fire. [7] The gap was filled by the Ninth Circuit, which reasoned as follows:

> Our task when interpreting legislation is to give meaning to the words used by Congress; we strive to avoid constructions that render words meaningless. See *United States v. Fiorillo, 186 F.3d 1136, 1153 (9th Cir. 1999)*. The FTAIA states that the Sherman Act shall not apply to foreign conduct unless it has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. [See] *15 U.S.C. § 6a(1)*. [In contrast,] the Supreme Court [explained that] the Alcoa test . . . confer[s] jurisdiction so long as the conduct creates "some substantial effect in the United States." *Hartford Fire, 509 U.S. at 796*. Unlike the FTAIA, the Alcoa test does not require **[**31]** the effect to be "direct." [Hence, a]dopting the [reading of the FTAIA equivalent to that of] applying the Alcoa test would render meaningless the word "direct" in the FTAIA. We are not willing to rewrite a statute under the pretense of interpreting it. Moreover, applying Alcoa instead of the FTAIA would contravene the FTAIA's purpose. The FTAIA created its jurisdictional test because the "enactment of a single, objective test -- the 'direct, substantial, and reasonably foreseeable effect' test -- will serve as a simple and straightforward clarification of existing American law." [H.R.] at 2487-88. The [H.R.] goes on to state: "The specific **[*337]** purpose of the Sherman Act modification is: to more clearly establish when antitrust liability attaches to international business activities." Id. at 2492. It would be a serious departure from the goal of achieving clarity for us to conclude that Congress meant only "some substantial effect," *Hartford Fire, 509 U.S. at 796*, when it said "direct, substantial, and reasonably foreseeable effect." Clarity is not achieved by employing three modifiers ("direct," "substantial," and "reasonably foreseeable") as the standard for the required effect of the **[**32]** challenged conduct and then telling businesses that only one modifier ([e.g.,] "substantial") is relevant to Sherman Act liability. [8]
>
> . . .
>
> [W]e [now] must consider what Congress meant by "direct." A dictionary published contemporaneously with the enactment of the FTAIA defined "direct" as "proceeding from one point to another in time or space without deviation or interruption." Webster's Third New Int'l Dict. 640 (1982). Further, our efforts at understanding the meaning of "direct" are aided by the Supreme Court's interpretation of a nearly identical term in the . . . FSIA. The FSIA states that immunity does not extend to commercial conduct "outside the territory of the United States . . . that [] causes a direct effect in the United States." *28 U.S.C. § 1605(a)(2)*. After the lower federal courts struggled for years to define "direct effect," the Supreme Court unanimously declared that an effect is

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[7] Several courts noted this question without answering it, e.g., **[**33]** the Supreme Court did so in Hartford Fire, noting that the effects test is well established, see, *509 U.S. at 796*, and observing -- in a footnote -- that the facts of Hartford Fire did not require the Court to address the question of "whether the [FTAIA's] 'direct, substantial, and reasonably foreseeable effect' standard amends existing law or merely codifies it." *Id. at 796 n.23*. After so concluding, the Court quickly turned to the issue of whether principles of international comity should have prevented the exercise of jurisdiction, see *id. at 797*; the swiftness of the Court's transition perhaps made the value of Hartford Fire less obvious for the purposes of the FTAIA.

[8] ***HN16***[] The FTAIA test neither reversed nor even diluted the "intent-to-affect-and-effect-in-fact" common law principle established in Alcoa/Hartford Fire. Cf. *United States v. Texas, 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L. Ed. 2d 245 (1993)* ("[S]tatutes which invade the common law [are] to be read with a presumption favoring the retention of long-established and familiar principles, except when the statutory purpose to the contrary is evident"). Rather, the FTAIA spelled out additional -- perhaps already implied but not articulated in Alcoa -- elements. **[**34]** See *Biotechnologies, 379 F.3d at 680, n.6* ("the dissent does not argue that the effects need not be direct, but rather that the 'meant to affect' requirement has always been part of the 'effects test' [of Alcoa]. Thus, the panel agrees on the standard; we merely disagree about its source. We say it is the FTAIA, while the dissent says the common law. We all recognize that conduct related to international trade is exempt from the Sherman Act unless it has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce").

> "direct" if it follows as an immediate consequence of the defendant's activity. [See] *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)*.

United States v. LSL Biotechnologies, 379 F.3d 672, 679 (9th Cir. 2004). [9]

This Court finds the reasoning in *Biotechnologies* well founded and persuasive. Thus, ***HN17***[] Sherman Act claims (if they are based on defendants' *export* practices but fail to state facts showing that these practices caused a direct, substantial, and reasonably foreseeable effect on United States commerce) effectively plead the plaintiff out of court or -- **[**35]** to put it another way -- in order to survive dismissal under the FTAIA jurisdictional bar, the plaintiff must show that:

(i) defendants' export practices were "direct" (in the sense that defendants' conduct actually caused such immediate consequence) with regard to United States domestic commerce, see *id.*;

[*338] (ii) defendants' conduct actually was "substantial" (in the sense that defendants' conduct was actually "intended/consciously meant") to produce a consequence in the United States; [10] see *Hartford Fire, 509 U.S. at 796*; *Alcoa, 148 F.2d at 444*;

(iii) that consequence was a foreseeable result of defendants' action rather than a mere incidental occurrence. See *id.*

Being mindful of the *cumulative* effect created by all three qualifiers of the FTAIA exception (i.e., by the "direct, substantial, and reasonably foreseeable" elements, as they are read in light of guidance provided in Alcoa/Hartford Fire), the Court followed, in its December Opinion, the case law which -- while addressing various "throughout-the-world-with-the-United-States-included" foreign trade scenarios -- found allegations asserting indiscriminating worldwide trade activities lacking focus on the United States commerce insufficient to invoke the FTAIA exception. See Docket Entry No. 73, at 28-34.

Specifically, this Court:

(i) relied on the observation made in *Dee-K Enters. v. Heveafil Sdn. Bhd., 299 F.3d 281, 294-96 (4th Cir. 2002)*, and Dee-K's utilization of Hartford Fire, which noted that

> a court should consider whether the [defendants'] *acts, targets, and effects* . . . are *primarily* foreign or *primarily* domestic. **[**37]** This inquiry will best accommodate the cases with mixed fact patterns, defying ready categorization as "foreign" or "domestic" conduct, which our increasingly global economy will undoubtedly produce. We cannot begin to foresee the scope or complexity of future transactions. To adopt simplistic rules . . . might well yield unintended and unfortunate results. . . . We note that this approach echoes that of the Third Circuit in Carpet Group and finds support in several of the treatises [11];

and

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[9] The Biotechnologies court also observed that the process of "[a]pplying Alcoa [in lieu of the FTAIA] might also ignore the words 'reasonably foreseeable,' although we recognize that foreseeability might be a concept inherent in any scheme that seeks to impose liability." *Biotechnologies, 379 F.3d at 679, n.4*.

[10] The Court is mindful that the "intended/meant-to-affect" aspect retained by the FTAIA from Alcoa/Hartford Fire does not have immediate lingual correspondence to the word "substantial," which is an element of the exception language provided in subsection (1)(A). Indeed, it appears that the word "direct" might be of better use to convey the sense of intent to affect. However, the Court finds it improper to switch the meanings of the terms "direct" and "substantial" as they were articulated by the Supreme Court in *Alcoa/Hartford Fire* **[**36]** and in *Republic of Argentina v. Weltover.* Therefore, the Court retains the Supreme Court's meaning of these terms and, with an eye on clarity of its decisions, utilizes the words "substantiality" and "directness" as references to the tests offered by the Supreme Court.

[11] See infra note 57 for a detailed discussion of Dee-K Enters. and its particular relevance to certain aspects of the claims at bar.

(ii) observed that the FTAIA plaintiff challenging foreign exportation practices must show that defendant-exporters' conduct was, in some way, "focused" on the United States domestic market (since no defendant can unknowingly intend or mean to affect the American market), and a mere showing that defendants' exportation practices indiscriminately targeted "a global market, [and the] links to the United States [were] mere drops in the sea of conduct that occurred . . . around the world" would fail to establish that the defendants' activities resulted in the "direct, substantial and reasonably foreseeable effect" on the United States trade needed to remove the FTAIA jurisdictional bar. Docket Entry No. **[**38]** 73, at 33-34 (quoting *Dee-K Enters., 299 F.3d at 295*, which cited *In re Uranium Antitrust Litig., 617 F.2d 1248, 1254 (7th Cir. 1980)*, the case relying, in turn, on Alcoa).

[*339] 2. Plaintiffs Fail to Provide Factual Proof Meeting the FTAIA Exception

Seemingly relying on *§ 6a (1)(A)*, Plaintiffs summarize their factual proof as follows:

> Defendants' conspiracy ha[d] "the purpose and effect of fixing prices of magnesite . . . products exported to and purchased in the United States." [Am. Compl.] P 1. Defendants' [trading activities] ha[d] "affected hundreds of millions of dollars of commerce in products that are used in American manufacturing facilities" and "severely burdened consumers in the United States." Id. P 3; see also [i]d. P 29. . . . Defendants' . . . pricing ha[d] directly affected U.S. commerce by increasing the price of Chinese magnesite purchased . . . for use in the United States. [See Am. Compl.] PP 1, 51, 55, 65, 72 and 75. This effect has been substantial, leading to average overcharges of more than 21% on each sale of magnesite made . . . during **[**39]** the four year period from 2004 to 2008. [See Am. Compl.] P 65. . . . In 2007, Defendants and [entities associated with Defendants] had an 83% share of [a certain type of magnesite product that was exported from all over the world] to the United States and 87% share of [another type of magnesite product that was exported from all over the world] to the United States. [See] id. P 47. The value of the . . . magnesite from China [that was brought to the United States] exceeded $ 160 million in 2008. [See] id. P 49. Accordingly, Defendants' [trade] activities have affected . . . U.S. commerce . . . .

Opp. at 17-18. [12] Each of the paragraphs cited in the Opposition, i.e., Paragraphs 1, 3, 29, 47-51, 55, 65, 72 and 75 of the Amended Complaint, warrants an individual discussion. [13]

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[12] Since Plaintiffs in this matter are not pro se litigants but rather are represented by counsel, the Court need not examine the Amended Complaint for statements vaguely indicating assertions of facts, compare *Royce v. Hahn, 151 F.3d 116, 118 (3d Cir. 1998)* (guiding that pro se pleadings "must be construed liberally and with a measure of tolerance"), and presumes that Plaintiffs' Opposition correctly directed the **[**40]** Court's attention to the statements in the Amended Complaint which Plaintiffs deem support their position under *subsection (1)(A)*.

[13] Granted that Plaintiffs' Amended Complaint systemically utilizes the term "Cartel" and, moreover, keeps referring to such "Cartel" as a single and continuously existing entity, the Court finds it useful to trace the history of this "Cartel," as painted by Plaintiffs. The following discussion, however, shall not be construed as expressing the Court's position that an actual -- or a single and continuing cartel (or even a numbers of cartels) -- existed; this issue is expressly reserved to be resolved in the event the Court has to address Plaintiffs' Sherman Act claims. First, relying on certain sources, Plaintiffs assert that, on April 9, 2000, Xiyang Refractory Materials, Yingkou Huachen, Dalian Golden Sun and Liaoning Foreign Trade, plus nine unspecified entities, established first "sub-Cartel" named "Jiyuan Magnesite Group," while Defendants Liaoning Liayi and Haicheng Huayu, plus non-defendant Shenyang Metals, established another "sub-Cartel" named "Huaxia Magnesite Group." See Am. Compl. PP 52-53. Then, without stating their factual source, Plaintiffs **[**41]** assert that "[o]n February 19, 2001, the Jiyuan and Huaxia Magnesite Groups formally established a single, unified group under the name 'Chinese Magnesite Export Association' ('Cartel'). . . . The [resulting joint] Cartel comprised 23 exporting companies, including [eighteen unspecified entities and] Haicheng Pailou [not listed as a member of either "sub-Cartel"], Yingkou Huachen, Xiyang Group [not listed in either "sub-Cartel"], Haicheng Houying [not listed in either "sub-Cartel"] and Haicheng Huayu." Id. P 57. Then Plaintiffs allege, without specifying their source, that "[o]n March 22, 2003, at least 19 exporting companies [that is, the amount of companies less than the 23 companies comprising the alleged unified Cartel], including Liaoning Jiayi [resurrected from the second 'sub-Cartel'], Haycheng Houyin[g], Yingkou Huachen[], Dailan Golden Sun [resurrected from the first 'sub-Cartel'], China Minmetals [not included in the previous versions of 'Cartel' or in any 'sub-Cartel'], China Minerals [not included in the previous versions of 'Cartel' or in any 'sub-Cartel'], Sinosteel

a. *Paragraph One*

Paragraph One alleges as follows:

> This case arises out of a conspiracy among all Defendants and their [unspecified] **[*340]** co-conspirators [14] that has the purpose and effect of fixing prices of magnesite and magnesite products exported to and purchased in the United States. Defendants have also committed other unlawful practices designed to inflate the prices of magnesite and magnesite products sold to Plaintiffs and other purchasers **[**44]** in the United States and elsewhere.

Am. Compl. P 1.

This Paragraph provides the Court with no factual proof of any kind, preventing **[*341]** the Court from utilizing this Paragraph for its factual analysis, as defined in *Turicentro*. Moreover, being comprised of conclusory, self-serving sentences, this Paragraph fails to assert facts even in accordance with the lenient pleading requirements articulated in *Twombly* and *Iqbal*. Consequently, the content of this Paragraph will be disregarded for failure to support Plaintiffs' position that the Court has jurisdiction to hear their claims under *15 U.S.C. § 6a (1)(A)*.

b. *Paragraph Three*

Paragraph Three asserts:

> The conspiracy has existed from at least April 2000 to date, and increased its effectiveness through new agreements to fix prices and limit supply entered in 2003. Defendants' illegal cartel [at an unspecified stage of its existence and, hence, of unspecified **[**46]** composition] has deliberately targeted and severely burdened

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Trading [not included in the previous versions of 'Cartel' or in any 'sub-Cartel'], Xiyang Pacific [not **[**42]** included in the previous versions of 'Cartel' or in any 'sub-Cartel'] and Haicheng Huayu met in Shenyang, China[,] to discuss and forecast price trend for the year 2003." Id. P 59. Plaintiffs then allege that "[t]he members of the [presumably, this "discussion/ forecasting group"] agreed . . . to have [a new version of] the Cartel establish[ed] . . . under the name the 'China Magnetic Forum.'" Id. Next, citing certain sources, Plaintiffs maintain that, "[o]n February 1, 2004, [unspecified] members of the [presumably, the latest version of] the Cartel [that] includ[ed] Defendants Sinosteel Trading, Xiyang Group [resurrected from the original version of the Cartel], Haicheng Huaya, Haicheng Houying [resurrected from the original version of the Cartel] and Jiachen Group [not included in either version of the Cartel or in any 'sub-Cartel'] met under yet another name calling themselves the 'China Magnesite Self-Disciplined Association." Id. P 62. After so stating, Plaintiffs claim that unspecified members of an unspecified transformation of this ever-changing Cartel "reached [an agreement sometime] in November 2006, to increase the price of exported [magnesite-based products]." Id. P 63. **[**43]** Finally, citing no sources, Plaintiffs state that, "[o]ver the weekend of December 9-10, 2006, [unspecified number of the members of this ever-changing] Cartel, including Xiyang Group, Haicheng Huaya, Haicheng Houying and Jiachen Group met and agreed to increase prices" on magnesite-based products. Id. Citing an Internet article, Plaintiffs conclude the foregoing discussion with the statement that, sometime "[i]n February 2007, [unspecified] members of [this ever-changing] Cartel met to discuss a possible agreement to increase the export price." Id. P 64. Although Plaintiffs assert that the "Cartel" is still operative, see id., P 3, they do not describe any post-February-2007 memberships, meetings or activities of the "Cartel." See also note 146, infra.

[14] While the Amended Complaint states that "Defendants' co-conspirators include[d] Rongyuan Magnesite Corporation of China, subsequently renamed Shangawa Rongyuan Refractories Co., Ltd, Yingkou Sanhua Refractory Material Co., Ltd., subsequently renamed Yingkou Wonjin Refractory Material Co., Ltd., Shenyang Metals and Minerals, and CITIC Trading," the Amended Complaint does not explain why these entities are not named as Defendants, same as it does not clarify whether any other entity exporting Chinese magnesite might be included in the list of such non-liable "co-conspirators." See Am. Compl. P 28. On the contrary, the Amended Complaint makes passim reference to unspecified "co-conspirators" (hence suggesting that such references are unrelated to the entities listed in Paragraph Twenty Eight). Plaintiffs' systemic reference to unspecified co-conspirators of Defendants, especially if assessed in light of the ever-changing composition of the alleged "Cartel," leaves the list of "co-conspirators" to the Court's imagination and necessarily invites a possibility that *all* Chinese exporters of magnesite products -- regardless of whether or **[**45]** not they were identified in the Amended Complaint -- could be such "co-conspirators"; this possibility, in turn, lends support to Defendants' assertion that *all* Chinese exporters of magnesite-based products were subject to compulsory price regulations governing export of Chinese magnesite-based products, as discussed infra, note 139 of this Opinion.

> consumers in the United States. Th[is unspecified in its stage-of-existence and composition] cartel has affected hundreds of millions of dollars of commerce in products that are used in American manufacturing facilities and households.

Id. P 3.

The three sentences comprising this Paragraph suffer of the deficiencies identical to those plaguing Paragraph One, i.e., the statements made in Paragraph Three are not cognizable even for the purposes of facial review, as defined in *Twombly* and *Iqbal*. A fortiori, these statements cannot qualify as factual proof for the purposes of factual review, as defined in *Turicentro*. Therefore, the content of Paragraph Three will similarly be disregarded by the Court without reaching the issue of whether this Paragraph could even be relevant to the "direct, substantial, and reasonably foreseeable" elements of the FTAIA exception stated in *subsection (1)(A)*.

c. *Paragraph Twenty-Nine*

The following paragraph in Plaintiffs' list, i.e., Paragraph Twenty-Nine, states:

> Each of these Defendants and its [unspecified] co-conspirators has colluded with each other to restrain competition by, among other things, **[**47]** setting artificial prices pursuant to illegal horizontal agreements among these competitors. These horizontal practices were designed to, and in fact did, have a substantial and adverse impact in the United States.

Id. P 29.

The shortcomings of this Paragraph are similar to those plaguing Paragraphs One and Three, discussed supra, i.e., Plaintiffs offer the Court not a single factual proof, but only a "fusion" of: (a) legal conclusions applicable to any garden-variety Sherman Act scenario; and (b) a FTAIA/Sherman Act element. Therefore, the Court will analogously disregard the factless content of this Paragraph without reaching the issue of whether it might even be relevant to the "direct, substantial, and reasonably foreseeable" elements of the FTAIA exception.

d. *Paragraph Forty-Seven*

The next paragraph referred to by Plaintiffs, that is, Paragraph Forty-Seven, alleges:

> During the period described in this [Amended] Complaint, the international market for magnesite and magnesite products was dominated by Defendants and their [unspecified] co-conspirators, including producers of magnesite and magnesite products and trading companies in China exporting magnesite and magnesite products. China **[**48]** is the most significant foreign supplier of magnesite to the United States with an 83 percent **[*342]** share of. . . magnesite imports [in one type of magnesite product] and an 87 percent share of . . . magnesia imports [in another type of magnesite product] in 2007.

Id. P 47. The Court gathers that this Paragraph aims to provide the Court with a showing that Defendants' export activities fell within the meaning of the exception in *subsection (1)(A)*.

The Paragraph refers the Court, through footnote 5, to "2007 Yearbook Table 6," that is, to a table in the document attached to the Amended Complaint as Plaintiffs' Exhibit 4. The table, produced by the United States Census Bureau, shows that, in comparison with results of the year 2006, United States importation of Chinese magnesite-based products in the year 2007 slightly decreased in quantity and in value with regard to a certain magnesium oxide product but slightly increased in quantity and in value with regard to another magnesium oxide product. See Docket Entry No. 77-1, at 27; see also infra note 17 of this Opinion (explaining the distinction between crude magnesite and types of magnesium oxide). With regard to the first product, the table **[**49]** shows that United States import of this product was comprised of 85.4% (rather than 87% asserted by Plaintiffs) volume of goods of Chinese origin, and it's relevant value was 74.1% of United States overall 2007 importation of that product. See id. With regard to the second product, the table shows 83.3% volume and 67.3% value as to the relevant United States importation in 2007. See id. The table -- presenting, by definition, a snapshot of United States importation only in

2007 (and also verifying that Chinese magnesite products were the cheapest among all other goods of these types imported by the United States) -- is entirely silent as to *Defendants'* individual (or even collective) share, be it volume-wise and/or value-wise, thus leaving it to the Court's imagination whether Defendants' goods comprised the entire batch of Chinese magnesium oxide imported by the United States in 2007, or none of it, or any amount in between. See id.

Since, without resolving this ambiguity, the Court cannot assess the validity of Plaintiffs' claims made against *Defendants* (rather than against the entire Chinese magnesite industry), the Court examined the Amended Complaint for any statement that may **[**50]** shed light on the relation between individual Defendants and the entire Chinese industry producing magnesite-based goods. The detected statements in the Amended Complaint (that appear relevant to the Court's inquiry) do not assist Plaintiffs' position; on the contrary, they render Plaintiffs' claims unwarranted. For instance, Paragraph Fifty-Four of the Amended Complaint states: "[t]he members of the two Jiyuan and Huaxia Magnesite Groups [i.e., the two initial 'sub-Cartels'] collectively represented more than 70 percent of the export volume of magnesite in China" during unspecified year(s). Am. Compl. P 54. (Notably, Paragraph Fifty-Four does not provide the Court with any source of Plaintiffs' conclusion as to this percentile, hence rendering it of no use for the purposes of factual analysis, as defined in *Turicentro*. The Court, however, ignores this shortcoming, for the purposes of this Opinion only, to address Plaintiffs' claim as a whole.)

If the Court were to entertain this 70% figure and, also, to take a leap of logic in Plaintiffs' favor by presuming that the ever-changing "Cartel" and the sum of Jiyuan and Huaxia Magnesite "sub-Cartels" were, somehow, the same thing, but see **[**51]** supra note 13 of this Opinion (prompting a conclusion otherwise), Plaintiffs' allegations would merely suggest that Defendants **[*343]** (perhaps, jointly with their specified and unspecified co-conspirators) had a 70 percent share of Chinese magnesite-based export. [15] Further examining Plaintiffs' Amended Complaint, the Court finds this 70% figure relevant to Plaintiffs' claim that "[t]he United States consumes about 25 percent of China's magnesite exports." Id. P 50. In support of that proposition, Plaintiffs rely on their Exhibit 2. See id. at 12, n. 7. However, Plaintiffs' Exhibit 2 states:

> About 2.0 million metric tons of magnesium oxide were exported from China in 2006 . . . . In 2006, 590 thousand metric tons, 500 thousand metric tons, 300 thousand metric tons, and 640 thousand metric tons of magnesium oxide were exported from China to Japan, Europe, the United States, and Other Asia, respectively. [16]

Docket Entry No. 77-1, at 9. [17]

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[15] The Court is mindful of a possibility that this factlessly asserted 70 percent, if real, might be a "high-tide" scenario, since Plaintiffs concede that Chinese world-wide export of magnesite-based products differed rather significantly over the years relevant **[**52]** to Plaintiffs' claims. See Am. Compl. P 46 (relying on United States surveys for assertion that "China's share of annual world production has increased from 32 percent in 2001 to 45 percent in 2007," i.e., grew 13%). If the overall volume of Chinese magnesite-based export varied by more than 50%, the Court has no reason to presume that the exportation share of Defendants (and their specified and unspecified co-conspirators, if any) did not fluctuate in the same fashion or even more dramatically.

[16] Defendants correctly point out the mathematical error in Plaintiffs' calculation of what share of 2 million tons of Chinese overall exportation in 2006 was represented by 300 thousand tons imported during that year by the United States: while Plaintiffs assert that 300,000 is a quarter of 2 million, Defendants correctly observe that it is only 15%.

[17] The Court reads Plaintiffs' reliance on their Exhibit 2 as an assertion that Defendants were exporters not of crude magnesite but rather of magnesium oxide. Magnesium oxide is a product qualitatively different from magnesite; this is so because *"magnesite"* is a layperson's term for magnesium *carbonate,* the composition having chemical symbol "MgCO[3]," **[**53]** while the layperson's term "magnesia" designates what is technically known as *"magnesium oxide,"* the composition having chemical formula "MgO." Magnesium oxide can be obtained from magnesium carbonate by heating magnesite to 700 [degrees] C to 1000 [degrees] C, which causes decomposition of magnesite into magnesium oxide and carbon dioxide (alternatively, magnesium oxide can be obtained, upon introduction of calcined dolime and heat, through a chain of chemical reactions processing seawater and brine containing magnesium chloride.) See, e.g., <<*http://www.magnesia* specialties.com/students.htm>>. The report of Plaintiffs' expert, see Docket Entry No. 28-6, relied upon by Plaintiffs in Paragraph Sixty-Five, discussed infra, similarly suggests that Defendants were exporters of magnesium oxide rather than of crude magnesite, since the report takes pains to

Read jointly with Exhibit 2, Plaintiffs' Paragraph Forty-Seven stands for the propositions that the alleged "Cartel" a/k/a the sum of "Jiyuan and Huaxia Magnesite Groups" was the source of a mere 10.5% (i.e., 70% of these 15%) of the Chinese-origined magnesium oxide destined for export, and that is only if the Court generously presumes a pro-rate spread of export destinations among all Chinese exporters (since a non-pro-rata hypothesis would allow to presume that no Defendants' goods whatsoever -- or mere droplets of Defendants' export -- ended in the United States, and that these 15% of all Chinese magnesium oxide that ended in the United States **[*344]** came from the 30% share of goods exported by Chinese entities that were not members of the alleged "Cartel"). This 10.5% figure cannot possibly be read as factual proof showing that Defendants intended/meant to affect *United States* commerce: if anything, it suggests that Defendants' focus was domestic Chinese sale and exportation to countries other than the United States. Consequently, the content of Paragraph Forty-Seven (asserting the percentile **[**55]** of United States importation of Chinese-originated magnesite in 2007) fails to meet the requirements of factual review, as defined in *Turicentro*, and -- even under the standard of facial review -- fails to indicate that the Court has jurisdiction to hear Plaintiffs' Sherman Act claims. If anything, this Paragraph merely verifies the interest of United States importers in buying Chinese magnesite-based products, perhaps because these products have consistently been the cheapest on the global market.

e. *Paragraph Forty-Eight*

The following paragraph, i.e., Paragraph Forty-Eight, alleges as follows:

> During the period relevant to this Complaint, the conduct of Defendants and their [unspecified] co-conspirators has taken place in and affected the interstate commerce of the United States. Hundreds of thousands of metric tons of magnesite are imported into the United States each year from China. Data from the U.S. International Trade Commission confirms that imports from China into the U.S. of magnesite exceeded 500,000 metric tons in each year from 2000 to 2006.

Am. Compl. P 48. The Paragraph also includes the following table:

***5*United States Magnesite (Magnesite)**
***5*Imports**
***5*Source: U.S. International Trade**
***5*Commission**

inform the Court that "[h]eating magnesite to a temperature between 700 [degrees] C and 1000 [degrees] C [produces] caustic calcined magnesia," while "[f]urther heating [to] temperatures between 1500 [degrees] C and 2000 [degrees] C produces . . . [so-]called dead-burned magnesia," and "electro-fused magnesia . . . is created by heating **[**54]** magnesite [to] about 2,800 [degrees] C for several continuous hours." Docket Entry No. 28-6, at 5.

***5*(Units in Metric Tons)**

	***2*Focused and *2*Dead-Burned *2*Magnesia**		***2*Caustic *2*Calcined *2*Magnesia**	
Year	**China**	**All Countries**	**China**	**All Countries**
2000	345,018	500,673	88,488	136,241
2001	244,957	363,060	77,380	129,859
2002	286,348	394,222	88,737	147,610
2003	310,051	379,370	92,670	150,026
2004	340,933	418,013	96,432	157,398
2005	389,828	477,638	96,342	152,193
2006	359,777	433,131	127,340	162,785
Total	2,276,909	2,966,107	667,389	1,036,112

***5*United States Magnesite (Magnesite)**

***5*Imports**

***5*Source: U.S. International Trade**

***5*Commission *5*(Units in Metric Tons)**				
	***2*Natural and *2*Other *2*Magnesite**	***2*Total**		
Year				
	China	**All Countries**	**China**	**All Countries**
2000	6,282	33,476	439,786	670,390
2001	5,098	28,631	327,435	521,560
2002	8,915	29,180	384,000	571,012
2003	17,257	35,382	419,978	564,778
2004	9,259	31,568	446,625	606,979
2005	7,998	33,282	494,168	663,113
2006	9,813	34,193	496,930	663,109
Total	64,522	225,715	3,008,921	4,227,931

Although **[**56]** the Amended Complaint provides the Court with no citation allowing the Court to verify the authenticity of the table, the Court presumes, for the purposes of this Opinion only, that the table is true and correct. [18] Since the above-replicated table indicates that China was the origin of the lion's share of magnesite-based products imported by the United States during the period from 2000 to 2006, the prices on Chinese-originated magnesite-based goods could have a "direct" effect on the prices charged in the United States.

However, the table -- providing, again, data only as to magnesite-based goods of **[*345]** Chinese origin imported by the United States -- is wholly silent as to the share of magnesium oxide exported by *Defendants,* **[**57]** rather than by China as a country, same as the table sheds no light on Defendants' domestic Chinese sales and export to countries other than the United States. <u>See id.</u> In other words, it appears that Plaintiffs invite the Court to equate *all* Chinese magnesite-based export with Defendants' magnesium oxide export. This the Court cannot do, [19] since

[18] Contrary to the claim asserted in Paragraph Forty-Eight, the table verifies that the share of Chinese magnesite (even if assessed collectively with regard to all types of magnesite-based products) in the magnesite-based goods imported by the United States during any given year from 2000 to 2006 *never reached,* and certainly *never exceeded,* 500,000 metric tons. It appears that Plaintiffs failed to distinguish between the columns titled "All Countries" and "China."

[19] The Court notes the practical anomaly of the legal position advocated **[**58]** by Plaintiffs. The bulk of evidence submitted in this matter suggests, rather unambiguously, that magnesite-based products of Chinese origin have been consistently the cheapest on the global market. This fact, apparently, has been prompting United States importers to buy predominantly the

Plaintiffs' facts just as comfortably allow for an inference that *Defendants'* share in Chinese exportation of magnesium oxide caused no effect whatsoever. Cf. *Fowler, 578 F.3d at 210-11* ("[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief") (quoting *Iqbal, 129 S. Ct. at 1949-50*). If Plaintiffs' allegations fail even facial review, these allegations cannot operate as a proof for the purposes of the Court's factual review, as it is defined in *Turicentro*. Consequently, the content of Paragraph Forty-Eight will be disregarded for failure to provide factual proof as to the Court's subject matter jurisdiction over Plaintiffs' claims.

f. *Paragraph Forty-Nine*

The next paragraph relied upon by Plaintiffs, i.e., Paragraph Forty-Nine, states as follows:

> The value of U.S. imports of magnesite and magnesite products from China exceeded $ 50 million in 2000 and exceeded $ 160 million in 2008.

See id. P 49 (referring the Court to footnote **[**59]** 6 which, in turn, directs the Court's attention to: (a) a table in Plaintiffs' Exhibit 5; and (b) a reference to a web page <<*http://dataweb.usitc.gov/>>*).

The table included in Plaintiffs' Exhibit 5 shows that, during the year 2000, various magnesite-based products of Chinese origin were imported by the United States in the amount of $ 553,116,000. See Docket Entry No. 77-1, at 37. The web reference to <<*http://dataweb.usitc.gov*>> brings the Court to the homepage of the United States International Trade Commission, where no drop-down menu, no direct link, no search directory and no advance search of terms "China Chinese Magnesite 2008" allowed the Court to locate a particular statement with regard to United States importation of Chinese magnesite-based products in 2000 or 2008; in other words, this piece of Plaintiffs' "factual proof" was effectively nothing but Plaintiffs' directive to the Court to find evidence supporting Plaintiffs' claim. See <<*http://dataweb.usitc.gov*>>. Such "proof," by definition, fails to support Plaintiffs' position: ***HN18***[] "[d]istrict judges have no obligation to act as counsel or paralegal [even] to pro se litigants," *Pliler v. Ford, 542 U.S. 225, 231-32, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004)*, **[**60]** and, a fortiori, have no obligation **[*346]** seek out evidence supporting the claims asserted by a represented litigant.

However, the crucial error with Plaintiffs' Paragraph Forty-Nine is not the dead-end result of Plaintiffs' citations. Rather, the shortcomings of Plaintiffs' statement and Exhibit 5 are substantively identical to those plaguing the above-discussed Paragraph Forty-Eight, i.e., Plaintiffs try to equate the *entire Chinese export* of magnesite-based products with *Defendants'* export of magnesium oxide. As explained in the preceding subsection of this Opinion, the Court declines Plaintiffs' invitation to so equate since Plaintiffs' data, even if true, fails to establish proof that Defendants were meaning/intending to affect United States commerce. Therefore, the Court will disregard the content of Paragraph Forty-Nine for failure to provide factual proof.

g. *Paragraph Fifty*

The following paragraph referred to by Plaintiffs, i.e., Paragraph Fifty, asserts:

> The United States consumes about 25 percent of China's magnesite exports. The steel industry in the United States is the primary consumer of magnesite products, with 390 thousand metric tons consumed by steel refractories in the United **[**61]** States during 2006. Cement refractories are the second leading consumer of magnesia in the United States.

Am. Compl. P 50 (referring the Court to footnotes 7 and 8, which -- in turn -- refer the Court to Plaintiffs' Exhibit 2 already examined by the Court in the subsection "Paragraph Forty-Seven," supra).

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goods of Chinese origin. That predominant purchasing election, in turn, caused the predominance of Chinese goods in United States overall importation of magnesite-based products, even though it occurred with what seems to be complete neutrality of Chinese exporters who, it appears, were willing to sell their magnesite-based product to any buyer, regardless of whether such buyer was domestic or foreign, or of a particular foreign origin. Yet, Plaintiffs invite this Court to find that *the purchasing elections made by United States importers* somehow show that *Chinese sellers meant to affect* United States commerce.

The content of this Paragraph warrants little discussion, since the issue of which particular industry among United States industries is the leading -- or second leading -- consumer of magnesite-based products is wholly irrelevant to the subject matter jurisdictional inquiry at bar. That leaves the Court only with Plaintiffs' erroneously calculated claim that the United States consumes 25% of Chinese magnesite. See supra note 16 of this Opinion (pointing out the error in Plaintiffs' mathematics as to 25%, which should actually be 15%). As the Court already explained in its discussion of the shortcomings of Plaintiffs' Paragraph Forty-Seven, this 15% reference lends no support to Plaintiffs' claim that Defendants' activities fall within the language of *subsection (1)(A)*: Defendants' export of, presumably, 10.5% of Defendants' goods to the United States cannot show that Defendants intended/meant **[**62]** to affect American domestic commerce. Therefore, the content of Paragraph Fifty will similarly be disregarded for the purposes of the Court's review, since it fails to provide factual proof of Plaintiffs' position.

h. *Paragraph Fifty-One*

Plaintiffs' next paragraph, that is, Paragraph Fifty-One, alleges:

> The conduct of Defendants and their [unspecified] co-conspirators has directly, substantially and foreseeably restrained trade and commerce in the United States. Members of the conspiracy, including Defendants Sinosteel Trading, Liaoning Jiayi, Haicheng Houying, Haicheng Huayu, Yongkou Huachen, China Minerals, and Minmetals directly have sold and continue to sell magnesite and magnesite products to U.S. companies and in U.S. commerce at prices artificially increased by the Cartels [in unexplained plural].

Am. Compl. P 51.

The deficiencies of this Paragraph are identical to those of Paragraphs One, Three and Twenty-Nine, i.e., the content of this Paragraph fails to present any evidential support for Plaintiffs' position for purposes of factual review, as it is defined in *Turicentro*. Moreover, this Paragraph expressly includes the error disqualifying its content even for the purposes of facial **[**63]** review, since it "asserts" a mere mechanical repetition of the elements of the **[*347]** FTAIA exception. See *Iqbal, 129 S. Ct. at 1949-51* ("[A fortiori,]***HN19***[] the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions [or to t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements [, i.e., by] legal conclusion[s] couched as a factual allegation [e.g.,] the plaintiffs' assertion of an unlawful agreement [or] that [defendants] adopted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" (quoting *Twombly, 550 U.S. at 555*, and *Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979))*. Therefore, the Court will disregard Plaintiffs' self-serving assertions set forth in Paragraph Fifty-One. [20]

i. *Paragraph Fifty-Five*

The following paragraph, that is, Paragraph Fifty-Five, maintains:

> As a result of these agreements, despite slumping demand, the price of magnesite products imported from China to the United States increased during 2000. According to statistics available from the United States International Trade Commission, the customs value of [dead-burned magnesium oxide] imported from China into the United States rose from $ 104 per metric ton in the fourth quarter of 1999 to $ 158 per metric ton by the fourth quarter of 2000.

Am. Compl. P 55.

The Paragraph is referring the Court to footnote 11, which -- in turn -- refers the Court to the discussed supra homepage of the United States International Trade Commission, where, as stated supra, no drop-down menu, no direct link, no search directory and no advance search of terms allowed the Court to locate the statement referred

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[20] The Court also notes, in passing, that an alleged fact of sale of goods to an importer who might bring the goods into the United States in no way shows the seller's intent to affect the United States commerce unless there are facts showing that the seller actually sought to sell to (i.e., discriminated in favor of sales to) the buyers bringing the goods into **[**64]** the United States. See *Fowler, 578 F.3d at 210-11* ("[w]here the well-pleaded facts do not permit the court to infer more than the *mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief")* (quoting *Iqbal, 129 S. Ct. at 1949-50*) (emphasis supplied).

[65]** to by Plaintiffs, i.e., Plaintiffs' "factual proof," once again, is nothing but Plaintiffs' directive to the Court to find evidence supporting Plaintiffs' claim. See <<*http://dataweb.usitc.gov*>>. Moreover, Plaintiffs' first sentence, i.e., "[a]s a result of [Defendants' collusive] agreements, despite slumping demand, the price of magnesite products imported from China to the United States increased during 2000" appears factually questionable [21] and, even if factually correct, merely paraphrases Plaintiffs' self-serving economic conclusion (that a drop in demand for certain goods must necessarily result in a drop or stagnation of price charged for these goods) [22] into a factless statement **[*348]** sounding like a fact. See *Iqbal, 129 S. Ct. at 1953* (***HN20***[]) "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions . . . couched as a factual allegation").

The second sentence of Plaintiffs' Paragraph Fifty-Five similarly fails to support Plaintiffs' position. That sentence cites the homepage of the United States International Trade Commission in order to assert that "the customs value of [dead-burned magnesium oxide] imported from China into the United States rose from $ 104 per metric ton in the fourth quarter of 1999 to $ 158 per metric ton by the fourth quarter of 2000." Am. Compl. P 55. This statement appears also factually questionable, since a United States Government Survey indicates that the per-metric-ton price on Chinese dead-burned magnesium oxide was $ 126.90 in 1999, and $ 129.27 in 2000. See <<*http://minerals.usgs.gov/minerals/pubs/commodity/magnesium/401400.pdf>>*, **[**69]** at 8. If so, a simple mathematical calculation reveals that the per-ton price rose by $ 2.37, that is, by less than 2% (rather than by $ 54.00 per ton asserted by Plaintiffs in Paragraph Fifty-Five); such rise in price is so trivial in comparison with the

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[21] See December Opinion at 50 (quoting a United States government survey, see <<*http://minerals.usgs.gov/minerals/pubs/commodity/magnesium/mgcmyb2001.pdf>>*, showing that the decline of 2001 followed *the spike in importation that took place in 2000,* and explaining the reasons for a **[**66]** significant *increase* in United States demand for imported magnesite-based goods in 2000).

[22] The Court already addressed this issue in its December Opinion detailing to Plaintiffs the operation of economic functions as follows:

> The "supply and demand" economic model describes the operations of market mechanism. It is graphically represented through two curved functions which, if read jointly, reflect the understanding that, in a competitive market, price will function to equalize supply and demand. The model neither requires all producers to sell comparable goods at the same price nor implies that a decline in demand would force all producers to lower their prices: the leeway available to sellers depends on price elasticity of their goods. Thus, if demand for certain goods begins to decline, the sellers offering their goods at the upper-bracket prices would be forced to lower them (or go out of business if competitive prices become so low to render their businesses unprofitable), while the sellers offering their goods at lower-bracket prices do not have to change their pricing policies -- and may even legitimately increase their prices -- until the demand drops to such a point that there **[**67]** is not enough market even for the goods they sell. To illustrate, if tomato growers who previously sold their crop for $ 1.00 to $ 2.00 per pound are faced with a market decline, the growers who were selling at $ 2.00 per pound would have to lower their prices in order to compete for the shrunk market (or to leave the business if they cannot afford reduction in price), while the growers who were selling at $ 1.00 per pound would still be in the position to keep increasing their prices until the decline in demand becomes such that even these growers cannot sell their entire crop (at which point, these growers would have to either compete with each other by lowering their sale prices or reduce their production). Hence, Plaintiffs' argument that the gradual increase in the prices of Processed Magnesite imported from China during the Relevant Period was in contradiction to the rules of supply and demand is based on an incorrect reading of economic theories.

Docket Entry No. 73, at 49-50. In addition to the foregoing, the hike in price might be unavoidable to a seller that finds itself suddenly burdened with rising cost of overhead, soaring fixed costs and variable costs unrelated to payroll **[**68]** (e.g., rise in utilities charges), higher taxes, etc. -- such developments might cause the seller to shift the increase in cost of operation to the buyer regardless of demand, since the seller's failure to so shift the burden might simply result in a speedy bankruptcy. Accord id. at 42-46 (detailing to Plaintiffs the interplay between relevant economics and accounting concepts, and providing data showing dramatic increase in the labor-related, fixed and variable costs in Chinese magnesite industry).

base price of $ 126.90-per-ton that it would be unlikely to signify any non-nominal effect on United States commerce. [23]

[*349] However, the key shortcoming of Plaintiffs' position is not rooted in the uncertainty of Plaintiffs' figures. Rather, it ensues from the fact that these figures show only the price trend with regard to all Chinese dead-burned magnesium oxide imported into the United States during 2000. Even if the Court were to ignore the "snap-shot" quality of this figure (since it cannot be imported into Plaintiffs' allegations with regard to 2001, 2002, 2003, 2004, 2005, 2006, 2007 and thereafter, apparently), the overall rise in Chinese prices charged with regard to United States import cannot show an "intent-to-affect" even by the entire Chinese magnesite industry unless Plaintiffs provide facts showing that Chinese domestic purchases and all foreign non-American purchasers were charged lower prices. Plaintiffs, however, do not even assert these facts and certainly offer no proof of them. Since Plaintiffs' figures do not establish that the entire Chinese magnesite industry was intending to affect United States commerce, the Court has no reason to deduce from this stark absence of facts that *Defendants* undertook actions that were meant to affect United States commerce. **[**73]** In light of the foregoing, the Court will disregard the content of Paragraph Fifty-Five, since it fails to provides the Court with any relevant factual proof.

j. *Paragraph Sixty-Five*

Next paragraph, i.e., Paragraph Sixty-Five, provides the Court with the following statement:

> Due to the efforts to increase prices at the end of 2003, the Cartel achieved significant price increases in the U.S., stabilized U.S. prices, and avoided major price cutting despite low levels of demand. An overcharge analysis from a regression model by Plaintiffs' expert economist Dr. Russell Lamb of Econ One shows that, between 2000 and 2003, the Cartel overcharged U.S. buyers of magnesite by an average of 4 percent, **[*350]** while between 2004 and 2008, as a direct result of the Cartel's activities, U.S. magnesite purchasers were overcharged more than 21 percent.

Am. Compl. P 65.

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[23] The Court notes that Plaintiffs attached to their Opposition an exhibit containing a copy of the document upon which Plaintiffs seemed to rely for the purposes of their $ 158 figure. The document contains a table showing that, basing their numbers on tariff and trade data from the United States Department of Commerce and the United States International Trade Commission, the unidentified-by-the-document entity compiling the table determined that prices of Chinese magnesium oxide were $ 0.1 per kilogram during the first quarter of 2000, $ 0.111 per kilogram during the second quarter, $ 0.136 during the third, and $ 0.158 during the fourth quarter. See Docket Entry No. 105-36, at 2. Since Plaintiffs assert that the price at the end of 1999 was $ 104 per ton, the Court gathers that Plaintiffs' position is that the **[**70]** price dropped from $ 0.104 to $ 0.1 during the first quarter of 2000 but then began climbing. Plaintiffs' Opposition addresses this climb as follows: "The Government Survey provided *yearly* total import volumes and *yearly average* prices[, while the United States International Trade Commission's] quarterly data demonstrates [a price increase] consistent with Plaintiffs' allegation that the initial two export cartels were formed in April of 2000 and succeeded in raising the price of magnesite exported to the United States." Docket Entry No. 105. Plaintiffs' figures, if averaged, appear to be similar to the Survey's figure of $ 129.27 per ton (since the average of Plaintiffs' numbers results in $ 126.25 per ton, and the $ 3.02 difference might be a result of a heavier export during the third and fourth quarters, although the Court cannot determine the same with any degree of certainty since Plaintiffs' exhibit does not provide quarterly import volume). However, the Court is not entirely clear as to Plaintiffs' point that the rise in the price of Chinese magnesium oxide in 2000 must be viewed as a proof of the "Cartel's" formation and initial activities. According to Plaintiffs' version **[**71]** of the "Cartel's" history, the initial "sub-Cartels" solidified into a unified "Cartel" in February of 2001, muscling the largest membership during the entire "Cartel's" history, see supra note 13, which -- pursuant to Plaintiffs' logic -- should have resulted in further intensification of "Cartel's" activities and further increase in import prices of Chinese magnesium oxide, but the United States Government Survey indicates that the 2001 price for Chinese magnesium oxide was $ 148.75 per metric ton (if calculated on the grounds of the total tonnage and total value stated in the Survey). See <<*http://minerals.usgs.gov/minerals/pubs/commodity/* magnesium/mgcmyb2001.pdf>>. Thus -- if the Court were to adopt Plaintiffs' position that this $ 148.75 price is not the year-end price but merely a yearly average -- the increase of the alleged "Cartel" in size and in collusive activities should not have resulted in a progressive *drop* of prices during 2001 (since, if the price at the end of 2000's fourth quarter was $ 158 per ton, as Plaintiffs' exhibit alleges, than the price had to drop by the end of 2001 by 12.34%, i.e., down to *$ 139.50* per ton, in order to yield the yearly average of $ 148.75 **[**72]** reflected in the Survey).

This Paragraph refers the Court to footnote 20, reading, "Expert Report of Dr. Russell Lamb [("Lamb")], dated September 27, 2007, filed in Support of Plaintiffs' Motion for a Default Judgment" ("Report"). See id. at 20. Although this reference states no docket entry number, the Court, given the above-designated date of execution, the authorship **[**74]** and the purpose of submission of the report, presumes that Plaintiffs' footnote 20 was intended to make a reference to Docket Entry No. 28-6.

Plaintiffs' reliance on the conclusions drawn by Plaintiffs' expert -- rather than on facts and evidentiary proof of such facts -- is necessarily concerning for the purposes of factual review for two reasons. First, ***HN21***[] *Federal Rule of Evidence 702*, amended to codify the Supreme Court's decisions in *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, *GE v. Joiner, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*, and *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*, is unambiguous in the sense that it provides that an expert should base the expert's opinion on the litigant-provided facts rather than providing the expert's opinion as a "fact" supporting litigant's claim. See *Fed. R. Evid. 702*; accord *Daubert, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469*. Second, since the factual review at hand is a process qualitatively different in its premises and goals from a default judgment process, the Report -- even if it were, hypothetically, proper for the purposes of Plaintiffs' then-pending-and-since-dismissed motion for default judgment -- appears questionably relevant to the Rule 12 inquiry currently conducted. **[**75]** [24]

However, in **[**76]** light of the Court of Appeals' guidance as to the breadth of proof the district court should consider while conducting its factual review under *Rule 12*, see *Turicentro, 303 F.3d at 300, n. 4* (explaining that, ***HN23***[] in its assessment of a factual deficiency, the district court "must weigh [all available] evidence relating to jurisdiction, with discretion to allow affidavits, documents, and even limited evidentiary hearings," and citing *Garcia v. Copenhaver, Bell & Assocs., 104 F.3d 1256, 1260-61 (11th Cir. 1997)*; *Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990)*; and *Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981))*, this Court concludes that it would be an error to disregard the content of the Report merely on the grounds that it is an expert opinion and, thus, will assess the content of the Report on its merits.

That content of the Report is as follows:

[*351] (i) The Report opens with Lamb's statement detailing his employ and studies. See Docket Entry No. 28-6, at 3.

(ii) Then, in no ambiguous terms, Lamb states that he "assume[d] that the allegations contained in the [Original] Complaint [were] in fact true." [25] Id. at 3-4.

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[24] ***HN22***[] "[T]he plaintiff may seek the Court's entry of default judgment under either [subpart of] *Rule 55(b)*." *Doug Brady, Inc. v. N.J. Bldg. Laborers Statewide Funds, 250 F.R.D. 171, 2008 U.S. Dist. LEXIS 28324, at * 19 (D.N.J. April 7, 2008)* (citing *Nationwide Mutual Ins. Co. v. Starlight Ballroom Dance Club, Inc., 175 Fed. App'x 519, 521, n.1 (3d Cir. 2006)*. However, default judgment necessarily ensues from a party's failure "to plead or otherwise defend" against the allegations of his/her opponent. *Id. at * 18-19* (detailing the first step of default procedure under *Fed. R. Civ. P. 55(a)*). Although the second step of default allows the court to exercise its discretion in order to "establish the truth of any allegation by evidence," see *Fed. R. Civ. P. 55(b)(2)(C)*, an entry of default does not obligate the court to conduct a facial -- moreover factual -- review. Hence, while for the purposes of a litigant's default application, the litigant's expert may be warranted in his/her submission of the expert's opinion based on facts as they are pled by the litigant seeking default, it is indeed questionable at best whether the same is warranted for the purposes of a factual review under *Rule 12*.

[25] This statement renders the applicability of the Report to the *Amended* Complaint questionable at best not only because Lamb fails to base his Report on *independent* facts but also because the Report unambiguously declares that it takes, as true, the facts stated in the *Original* Complaint, that is, in the set of pleadings which: (a) was dismissed by the Court for insufficiency of these very pleadings; and, even more importantly, (b) differed, and rather dramatically, from the Amended Complaint as to the factual assertions made therein. However, the Court ignores the anomaly of Plaintiffs' reliance on the Report based on different and dismissed facts in order to focus on the even more troubling deficiencies of Plaintiffs' utilization of Lamb's Report.

(iii) Following this introduction, the Report **[**77]** proceeds to an observation that various forms of magnesium oxide are obtained, inter alia from extensive heating of magnesite. See id. at 5 (relying on a document designated as Stefan Schlag, Jim Glauser and Kenji Fujita, Magnesium Oxide and Other Magnesium Chemicals, Chemical Economics Handbook, SRI Consulting, 2007" ("CEH")). [26] The Report then informs the Court that "[t]he steel industry is a primary source of magnesia demand" and "[c]ement refractories are the second leading consumer of magnesia." Docket Entry No. 28-6, at 6 (relying on CEH and referring, seemingly, to American industrial landscape).

(iv) Then, switching to Chinese production of magnesium oxide, the Report informs the Court that "[a]bundant magnesite deposits and inexpensive processing have provided Chinese producers with a competitive price advantage relative to other exporters of magnesite products." Id. at 7 (relying exclusively on CEH for this sweeping economic conclusion). This statement is followed by a conclusion that "[d]emand for Chinese magnesia has been driven by China's domestic steel manufacturing industry." Id.

(v) With that, the Report repeats, in a purely conclusory fashion, that "the injury to [P]laintiffs **[**78]** arises because they purchased Chinese magnesite at prices higher than they would have paid but for the [D]efendants' misconduct," and proceeds to "[t]he calculation of [Plaintiffs'] damages arising from [Defendants'] conspiracy to fix prices." Id. at 8.

(vi) Lamb begins such calculation by stating that the base damages (that is, prior to trebling) are equal to "[t]he difference between the actual . . . prices [paid to unspecified Chinese sellers of magnesium oxide by unspecified buyers of the same] and the prices that would have prevailed [presumably, in the entire market of Chinese domestic and exported **[*352]** magnesium oxide] but for [Defendants'] misconduct"; he calls such difference "overcharge." Id.

(vii) Then, the Report states that, "[t]o calculate the overcharge in this matter, [Lamb] use[d] the method known as a benchmark." [27] Id. at 9. Specifically, Lamb asserted that he used data related to sale of Chinese magnesite (which, the Court trusts, was data reflecting Chinese sales of magnesium oxide rather than crude magnesite) during the period from 1995 to 2000 in order to compare that data to -- presumably corresponding -- data as to the sale of Chinese magnesium oxide during the period **[**79]** from 2000 to the date of execution of the Report (that is, September 27, 2007). [28] See id. at 9, 18.

(viii) Next, the Report acknowledges that "[p]rices on [magnesium oxide] depend on many factors [and,] if any of these market factors also vary between the [after-2000] and the [1995-to-2000] period[s], then movements of these

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[26] CEH appears to be the key basis for Lamb's deducements. See Docket Entry No. 28-6 (citing CEH in 18 out of Report's 34 footnotes). **[**83]** However, no reproduction of CEH is attached to the Report, and the Court's efforts to locate CEH in a printed version yielded no success. The Court, however, located a website stating that it is a "product review" titled "Magnesium Oxide and Other Magnesium Chemicals"; it is, apparently, authored by "Stefan Schlag and Kenji Fujita and James Glauser" of SRI Consulting. See <<*http://www.sriconsulting.com/CEH/Public/Reports/747.2000/>>*. The Court, therefore, presumes that Lamb referred to this online source as CEH. The CEH located by the Court online has the table of contents which, while listing 237 sections and subsections, omits such features as "list of sources" and/or "bibliography," thus leaving the Court to wonder whether CEH was based on data that could be deemed reliable for the purposes of legal proceedings.

[27] Although Lamb's reference to "a benchmark" does not provide the Court with any clarification as to the actual methodology intended to be employed by Lamb (i.e., the Report only asserts that "[t]he benchmark methodology is an accepted method for calculating damages in the field of antitrust economies" and cites a 1967 article by Robert B. Bergstrom titled "The Role of the **[**84]** Expert in Proving and Disproving Damages in Antitrust Claims"), the Court presumes that the Report intended to use econometric benchmark analysis, a tool common in business management which is effectively a comparison of two or more sets of corresponding data. See, e.g., Robert C. Camp, Benchmarking: The Search for Industry Best Practices That Lead to Superior Performance (2006) (detailing the methodology and applications of the tool).

[28] Lamb, apparently, used the year 2000 as a breakpoint because -- relying on the Original Complaint -- he took it as a fact that pre-2000 sales of Chinese magnesium oxide were necessarily unaffected by Defendants' collusive activities but these sales became necessarily affected by Defendants' alleged conspiracy in 2000.

other factors should be taken into account when determining the overcharge," id. at 10, i.e., that data must be adjusted.

(ix) Lamb states that, in order to perform such adjustment, he "employed a statistical technique known as multiple regression analysis." [29] Id. at 10. Since Lamb's conclusions are based on multiple regression analysis, his Report cannot be intelligibly discussed without at least a brief clarification as to the gist of the statistical tool he employed. [30] The **[*353]** premise underlying regression analysis is a recognition that there are many situations in life where one quantity (called the "independent variable") might have an effect on another quantity (called the "dependent variable"); to illustrate, there might be a relation between disposable personal income and consumption spending. [31] If the relationship between these two variables is figured out, **[**80]** then the changes of the dependent variable can be predicted if the changes of the independent variable are known or can be predicted. In order to start the analysis, pools of known observations of the quantities at issue have to be collected: in the aforesaid example, it would be the population's disposable income and its spending, e.g., for each year during the period 1989-2009. Once these pools of data are collected, they are usually presented in a visually meaningful form on an *xy* diagram (so presented, the data looks like a cloud of scattered points in *xy* axes, called a "scatterplot"), where all dependant variable data (in this example, spending) is *y* values, and all independent variable data (disposable income) is *x* values: so each year is reflected on the diagram by a point having its own *x* and *y* values. The overall "trend" of the scatterplot is the trend in the income/spending relationship during 1989-2009; this "trend" can be expressed by a straight line which best represents all the points in the graph. This line, in turn, is called the "regression line," and this type of analysis is called regression analysis. Since, geometrically, the regression line can be defined in terms **[**81]** of its slope "m" and its vertical intercept "b" (where the line crosses the *y* axis), the mathematical equation of the line can be written as *y* = m*x* + b, [32] although both "m" and "b" typically carry caret symbol ("") and, thus, are referred to as "m-hat" and "b-hat." The caret symbol stresses that both "m" and "b" are merely estimated, and that any regression model comes with an important warning that "the mere fact that there is a strong association between two variables does not indicate there is a cause and effect relationship between them." Easy Statistics at 270-72 (providing detailed examples, diagrams and calculations illustrating the same). These principles equally

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[29] Usually, benchmark analysis is used as an alternative to -- rather than in conjunction -- with regression analysis. See, e.g., *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 313 (3d Cir. 2008)* ("[Plaintiffs' expert] identified two 'potential approaches' to estimating damages, [either]: (1) benchmark analysis, which would compare actual prices during the alleged conspiracy with prices that existed before the [alleged conspiracy]; **[**85]** and [the second option is] (2) regression analysis, through which it 'may be possible . . . to estimate the relationship between price of [the product allegedly affected by collusive activities] and the various market forces that influence prices, including demand and supply variables.' [Either one of] these methods, according to [Plaintiffs' expert], could be used to estimate the prices plaintiffs would have faced but for the conspiracy"). However, since a benchmark analysis suggested by Lamb seemingly envisioned a comparison of the overall trends in Chinese sales of magnesium oxide during the pre-alleged-conspiracy and the during-alleged-conspiracy periods, and regression analysis was seemingly meant only to adjust the during-alleged-conspiracy trend by removing effects of all conspiracy-unrelated developments that were absent during the pre-alleged-conspiracy period, the Court finds the possibility of joint utilization of these two methods not unreasonable, although the Court is left to wonder how these *generic* Chinese trends show intent of *Defendants.*

[30] The Court's overview of regression analysis is based on Larry Wasserman, All **[**86]** of Statistics: A Concise Course in Statistical Inference (Springer 2004) ("All Statistics"); Statistics, Super Review (Research and Educ. Assoc., M. Fogiel, Chief Editor 2004); Douglas Downing, Jeffrey Clark, Business Statistics (Barron's 4th ed. 2003) ("Business Statistics"); Douglas Downing, Jeffrey Clark, Statistics The Easy Way (Barron's 3rd ed., 1997) ("Easy Statistics").

[31] Such relationship between *two* variables give base to so-called "simple regression."

[32] Not all simple relationships could be reduced to *y* = m*x* + b. For instance, if the true relationship between *x* and *y* is defined by equation *y = cd<x>,* where both *c* and *d* are two unknown constants, the solution is obtained through the concept of logarithm. (An explanation of what is logarithm is best given by the question, "to what power should we raise 2 to get 128?" and its answer "7," because 2<7> = 128, so the logarithm, i.e., log[2] 128, is "7"). Applying common logarithms to the equation *y = cd<x>,* we can rewrite it as log *y* = log *d* * *x* + log *c,* i.e., as a formula resembling the familiar *y = mx + b.* Thus, logarithms are frequently used in regression analysis.

apply to simple regression (dealing with just two variables, as *y* and *x)* and to multiple regression; indeed, "multiple regression" merely means that there is more than just one independent variable *"x,"* for example, a multiple regression equation could be y[i] = *b[1]x[i1] + b[2]x[i2] + b[3] + e[i].* If the constants are expressed in numbers, such model might look, for instance, as:

y = 1.8016x[1] + 6.0658x[2] + 7.5546

(.2202) (.1422) (3.2556)

where 1.8016 is the coefficient for *x[i],* 6.0658 is the coefficient for *x[2],* **[**82]** 7.5546 is the coefficient for the constant term, and the parenthetical numbers underneath **[*354]** represent corresponding standard errors. A division of each coefficient value by its corresponding standard error results in a measure called "t-statistic," it is used to test hypotheses about the value of the coefficient. [33]

Having so reviewed the very basic points of regression analysis, the Court now returns to its discussion of Lamb's regression-related statements.

(x) Lamb begins by explaining the meanings of the terms "dependant variable" and "independent variables"; he uses alternative terms for the latter (i.e., "explanatory variables" or "regressors"). See Docket Entry No. 28-6, at 10. Lamb also clarifies that, for the purposes of his analysis, "the price of Chinese magnesite is the dependent variable" (that is, *y),* but does not state whether his observations included prices charged only with regard to Chinese exportation or with regard to domestic Chinese prices, or United States importation (which leads to Court to conclude that these prices were the same, and all buyers were treated equally regardless of their origin). See id. Moreover, the Report **[**88]** does not provide the Court with *any* observations utilized by Lamb for his calculations: the Report simply invites the Court to trust Lamb that these pools of data were properly collected, by stating as follows:

> [In order to obtain a pool of observations as to the this "price," Lamb utilized] prices obtained from Industrial Minerals, a market research firm. [34] The data [Lamb] used include[d] monthly prices for three common grades of Chinese dead-burned magnesia from July 1994 through July 2007. [[35] Lamb] used these three price series to measure the dependent variable [y] in [his] regression model[. [36] Lamb] believe[d that] these price data provide[d] reliable measures of magnesite prices [because] Industrial Minerals is cited as a source of industry information by numerous[, although unspecified] experts on magnesite, [and in] citations in Deborah A. Kramer, "Magnesium Compounds" review in 2006 Minerals Yearbook, published by United States Geological Survey in June 2007. In addition, [Lamb] compared the prices [he used as his pool of *y* observations] to other publicly available sources [37] and found them to be consistent [in an unspecified fashion] with prices for Chinese

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[33] A calculation of multiple regression output also gives an *R<2>* **[**87]** value which is called the coefficient of multiple determination. The value of *R<2>* is always between 0 and 1, it measures the percent variation in the dependent variable y that can be explained by the regression. The higher *R<2>,* the more it means that the regression does a good job accounting for the variation in y through variations in *x[1]* and *x[2].*

[34] The Court's own efforts to locate "Industrial Minerals, a market research firm" did not yield any success; the Court was merely able to locate a British-based online magazine titled "Industrial Minerals" at <<*http://www.mineralnet.co.uk/>>*.

[35] I.e., Lamb, seemingly, took observations corresponding to 156 periods, since the 13 years (from 1994 to 2007), multiplied by 12 months per year, yield 156 monthly intervals.

[36] See infra sub-paragraph (xiii) of this subsection for a discussion of the problems associated with the "three panels," the phrase which, it seems, might have been used by Lamb to refer to the very same data that Lamb alternatively designated as his "three price series."

[37] However, the sole "other publicly available" source named by Lamb is the very same CEH, see Docket Entry No. 28-6, at 11, n. 30, the reliability of which the Court cannot determine. See supra note 26 of this Opinion.

magnesite products **[**89]** sold in the United States (which Lamb, presumably, obtained from Industrial Minerals, "a market research firm"].

[*355] Id. at 11 and n. 29 (footnoted text incorporated).

(xi) With that, Lamb states that he selected the total of six independent variables, namely:

(a) two variables that Lamb believed affected **[**90]** the demand factor as to magnesite-based products (these variables are "growth of Chinese steel production" and "growth in Chinese cement production");
(b) two variables that Lamb associated with Chinese export-related "price" advantage (these variables are: (a) the exchange rate between United States Dollar and Chinese Yuan; and (b) an assessment of the value of Yuan against the basket of international currencies Lamb titled "World Foreign Exchange Rate"); [38] and

(c) two variables that Lamb associated with the costs of production and supply. These variables included: (1) cost of crude oil (since -- for the reasons not entirely clear to this Court -- Lamb presumed that the process of heating magnesite into magnesium oxide necessarily requires oil rather than natural gas, coal or other sources of energy [39]); and (2) Chinese domestic inflation (since Lamb **[*356]** believed that the overall increase in Chinese consumer prices would drive up prices charged for exported natural resources). See id. at 11-13, 15. [40]

(xii) The Report does not share with the Court Lamb's regression equation. Rather, short-cutting through all stages of his regression analysis, Lamb simply informs the Court that he reached certain results and organized some of these results into a table ("Lamb's Regression Result"), where: (1) estimates of variables were converted to their natural logarithms; (2) *R<2>* statistics show that Lamb's regression model "explains 87 percent of **[**94]** the

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[38] The Court is not familiar with the concept of "World Foreign Exchange Rate," and the Report does not enlighten the Court as to the nature of this tool. However, in light of Lamb's mentioning **[**91]** of the International Monetary Fund ("IMF") in connection with this tool, the Court presumes that Lamb aimed to refer to the Special Drawing Rights ("SDRs"). An SDR (which is a unit of account created by the IMF) is a weighted sum of contributions of four major currencies, and it is adjusted every five years (for instance, for the period of 2006-2010, one SDR is the sum of 0.632 US dollars, 0.41 euro, 18.4 Japanese yen and 0.0903 pound sterling, while for the period 2001-2005 it was 0.577 US dollars, 0.426 euro, 21 Japanese yen and 0.0984 pound sterling). See <<*http://www.imf.org/external/fin.htm>>* (IMF-Finances website, left column, SDR-rate section). Since the Dollar is already included in the SDR, utilization of both Yuan-Dollar and Yuan-SDR comparisons invited "double counting" into Lamb's assessment of his model's reliability. And, since the model subdivided data by 2000-2003 and 2003-2007 sub-periods, see Docket Entry No. 28-6, at 15, the Court is unclear as to how the 2005 change in SDR value and de-pegging of the Yuan from the Dollar were factored in the 2003-2007 sub-period.

[39] Compare <<*http://www.springerlink.com/content/h13p454817437337/fulltext.pdf?page=1>>* (reproducing an **[**92]** article showing that the USSR magnesium oxide production switched from oil to natural gas thirty years ago, i.e., in 1969, finding natural gas a more viable and efficient source of energy for the purposes of magnesium oxide production). In view of: (a) apparent viability of non-oil heating of magnesite into magnesium oxide; (b) relative scarcity of Chinese oil in comparison with its coal, see, e.g., <<*http://www.eia.doe.gov/emeu/cabs/China/Background.html>>* and <<*http://www.eia.doe.gov/emeu/cabs/China/Oil.html>>* (showing that, during the period at issue, China has become the third largest world *importer* of oil due to the lag between her domestic production and domestic consumption, while -- at the same time, China remained the world's largest producer and consumer of coal); and (c) substantial difference in price increases experienced by oil, coal and natural gas during the first decade of the XXI century, that is, the period at issue, see <<*http://tonto.eia.doe.gov/cfapps/STEO_*
Query/steotables.cfm?tableNumber=8&periodType=Annual&startYear=2000&endYear=2009&startMonthChanged=false&startQuarterChanged=false&endMonthChanged=false&endQuarterChanged=false&noScroll=true&loadAction=Apply+Changes>> **[**93]** (showing that power generation fuel costs, in dollars per million Btu, rose from 2000 to 2009 by $ 2.22 as to coal, by $ 4.57 as to natural gas, and by at least $ 9.37 as to oil), Lamb's utilization of oil prices as a regressor is unclear. Compare Docket Entry No. 77-1, at 70, and Docket Entry No. 77-3, at 11 (Plaintiffs' exhibits attached to the Amended Complaint; the exhibit suggests that coal was the source of heating involved in all relevant technical processes, and the price of coal kept soaring).

[40] Although, presumably, Lamb should have collected pools of monthly observations for each of these six variables, the Report neither provides the Court with actual pools of these observations nor even states where the Court could locate them on its own.

variation in the dependent variable" (hence, leaving 13% unexplained); and (3) t-statistics is provided as a measure of what is "statistically significant." [41] Id. at 14-15.

Specifically, Lamb's Regression Result table is as follows:

***5*Chinese Magnesite**
Regression Model Results

Observations	**429**	**Wald Statistic**	**991.35**	
Panels	**3**	**Prob. > |Wald|**	**0.00**	
Time Periods	**143**	**OLS R-Squared**	**0.86**	
Explanatory Variables [1]	**Coefficient Estimate**	**Standard Error**	**Statistical t-Statistic**	**Significance** [2]
(1) Growth in Chinese Production	0.169	0.050	3.380	***
(2) Growth in Chinese Cement Production	0.052	0.024	2.150	**
(3) Chinese Consumer Price Inflation	0.582	0.224	2.590	***
(4) Crude Oil Price				
Contemporaneous	0.037	0.022	1.650	**
1 Month Lag	0.007	0.022	0.330	
Sum of Coefficients	0.044	0.022	2.050	**
(5) Chinese Yuan/USD Foreign Exchange Rate	-1.076	0.449	-2.400	***
(6) Chinese Yuan World Foreign Exchange Rate				
Exchange	-0.192	0.163	-1.180	
1 Month Lag	0.256	0.1/5	1.460	*
2 Month Lag	-0.250	0 165	-1.520	*
3 Month Lag	0.055	0.158	0.350	
4 Month Lag	-0.155	0.159	-0.970	
5 Month Lag	-0.043	0.157	-0.270	
6 Month Lag	-0.515	0.144	-3.570	***
Sum of Coefficients	-0.844	0.206	-4.110	***
(7) Collusion				

[41] "Significance" is a statistical term informing the reader about how certain is the analyst that a relationship between the variable actually exists, i.e., that the result is unlikely to occur by chance. See Business Statistics at 287. However, "unfortunate stereotypes often arise from the use of the word *significant* in statistical studies. For example, studies often find statistically significant differences in certain abilities between men and women, but the variation in ability within each sex is much greater than the variation between the means of the two sexes. It would be wrong to use the result of such a study to prejudge the ability of any particular individual." Id. at 288.

[1] Fixed **[**95]** effects and quarterly seasonal indicator variables are incorporated in the model but not reported.

[2] Singled Taied Statistical Significance Levels: *** < 1% significance level, " < 5% significance level," < 10% significance level.

***5*Chinese Magnesite**
Regression Model Results

Observations	**429**	**Wald Statistic**	**991.35**	
Panels	**3**	**Prob. > |Wald|**	**0.00**	
Time Periods	**143**	**OLS R-Squared**	**0.86**	
Explanatory	**Coefficient**	**Standard**	**Statistical**	
Variables [1]	**Estimate**	**Error**	**t-Statistic**	**Significance** [2]
Overcharges [3]				
2000-2003	0.040	0.017	2.330	***
2004-2007	0.196	0 025	7.940	***

Notes:

Id. at 14-15.

(xiii) Even a superficial review of the table reveals that Lamb's Regression Result and the body of the Report are incongruent. For instance, while Lamb stated that his observations involved 156 periods, see supra, note 35 of this Opinion, the table somehow states that there **[*357]** were only 143 periods. And while there appears to be a correlation between these 143 periods, three "panels" and 439 "observations" (since 143 x 3 = 429), the Court is left to guess which "panels" Lamb had in mind, since he allegedly studied *six* independent variables and should have, at least theoretically, obtained six price series. [42] Similarly, the Court is left to guess a number of other aspects of Lamb's model and calculations. [43]

(xiv) The main problem with Lamb's Regression Result, however, seems to be not the string of the aforesaid incongruences and ambiguities, but the inexplicable appearance of two new regressors, called "Collusion Overcharges" ("CO"). Indeed, while the Report asserts -- although without providing the Court with either actual data or citations to the sources of such data -- that Lamb took observations of magnesite prices, steel production, **[**98]** cement production, oil prices, inflation of the Yuan and fluctuations in its exchange rate, the Report at no

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[3] Collusion period is April 2000 to Present.

[42] Since Lamb also referred to "three price series," see Docket Entry No. 28-6, at 11, the Court cannot exclude the possibility that Lamb's "three panels" and "three time series" are the same, that they **[**96]** have nothing to do with sets of data collected with regard to Lamb's six independent variables, and that they were intended, for instance, to refer to three spans of time: 1995-2000, 2000-2003 and 2004-2007. However: (a) lack of any statements with regard to 1995-2000 span in Lamb's Regression Result renders this possibility unlikely; and (b) the 1995-2000 span would yield 48 monthly observations, hence raising the Court-calculated 156 monthly periods, see supra note 35 of this Opinion, to 204 (i.e., the sum of 156 and 48), thus rendering the statement included in Lamb's Regression Result that Lamb collected observations with regard to 143 periods even more incomprehensible.

[43] E.g., the table does not explain how *R<2>* of 0.87 asserted in the Report became *R<2>* of 0.86 in the table, leaving another percent of price variation unexplained. Analogously, no reason is provided as to the relevance or even need for "Wald Statistic," which the Court presumes to be "Wald test," a parametric test typically substituted by the likelihood-ratio test (since the Wald test can give different answers to the same question, depending on how the question is phrased). See All Statistics at 153-54. In the **[**97]** same vein, the Court is left to guess why the Report stresses that t-statistics is used to determine statistical significance, if Lamb's Regression Result provides a totally different column, titled "Statistical Significance," which seemingly aims to provide the same assessment but on the grounds of what seems to be the so-called one-tailed test (applicable only if all studied relationships fell entirely within one tail of the distribution, which is unclear if it were actually true in this matter). Simply put, since Lamb did not provide the Court with his regression equation and pools of data, the Court has no opportunity to determine the validity of Lamb's calculative decisions, e.g., his resort to logarithms, or his results, or his end conclusions.

point asserts that Lamb took -- or even could have taken -- any actual observations of these Collusion Overcharges. Rather, Lamb asserts that,

> [because] Plaintiffs allege that the operation of the cartel resulted in higher prices for magnesite products in the U.S. . . . [Lamb] include[d two] variables [that he deemed to be] "indicator variables" for the period April 2000 through 2003 and for the period from 2004 forward . . . to account for the possibility that the alleged ["C]artel["] may have become more effective over time.

Docket Entry No. 28-6, at 13-14.

(xv) The statement that a certain variable is binary (also referred to as "dummy variable" or by the term preferred by Lamb, i.e., "indicator variable") merely establishes that this dummy variable is presumed to be "1" if a certain condition is true and "0" if that condition is false. See Business Statistics at 394-95; accord Docket Entry No. 28-6, at 14 **[*358]** (seemingly trying to express the same by stating that "[s]uch indicator variables take the value of one during the period in question and zero elsewhere"). "Dummy variables," **[**99]** however, are *artificially created* variables utilized with a realization that, sometimes, a certain set of factors that affects the dependent variable might not be not quantitative (i.e., while being known as present during the events statistically analyzed, it cannot be given by numbers); the coefficient of such dummy variable indicates how much effect this particular set of unquantifiable factors that the variable expresses had on the constant terms in the regression. See Business Statistics at 394-95. [44]

(xvi) Since -- unlike in the World War II example provided in note 44 of this Opinion -- there is no information establishing either the fact or the span of any Chinese collusive agreements (among Defendant or all Chinese magnesite exporters, or other entities), the Court construes Lamb's resort to dummy variables as Lamb's presumption that a "certain" factor (or a certain combination of certain factors) fluctuated with 0.04 coefficient to Chinese prices on magnesite-based products during the years 2000-2003, and with 0.195 coefficient during the 2004-2007 period. However, the Court has no reason to presume that this "certain" factor was Chinese collusive agreements rather than a collusion-unrelated economic factor other than the six independent variables selected by Lamb (that is, other than growth in Chinese steel production, growth in Chinese cement production, domestic inflation of the Yuan and fluctuation of the Yuan versus the United States Dollar and SDR). [45] Yet, **[**101]** in a **[*359]** purely conclusory fashion, the Report deduces from Lamb's Regression Result the following statement:

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[44] The concept could be illustrated as follows: "For example, suppose you are investigating [United States] consumption behavior with time series data for the period 1930 to 1950. You would expect that consumption behavior would have been significantly different during the years of World War II than it was before and after the war. To take this effect into account, you can create an artificial variable that will take the value 1 during each of the war years and the value 0 during each of the other years." Business Statistics at 394. In such example, the usage of a dummy variable based on the WWII during the years affected by the WWII is warranted since the fact of the WWII occurrence **[**100]** has been unquestionably established, the same as the years during which the United States were engaged in the WWII.

[45] The developments that could have had an influence on the prices of Chinese magnesium oxide (and, thus, might be dummy variables, that is, if the Court is to presume that these developments were, somehow, not quantitative) include: increases in Chinese domestic and export taxation, increases in cost of capital ensuing from borrowing (or issuance of debt), needs for repairs and/or new constructions caused by depreciation of equipment/other fixed assets, rising cost of labor, etc. Indeed, the increase in wages appears to be the most probable factor -- as this Court already pointed out in its December Opinion:

> the cost of labor in Chinese mining and mining-related industries more than doubled from **[**102]** 2000 to 2005. 29 See <<*http://www.stats.gov.cn/tjsj/ndsj/2006/html/E0520E.HTM>>;* <<*http://www.stats.gov.cn/english/statisticaldata/yearlydata/yb2004-e/html/E0526ae.htm* >>; <<*http://www.stats.gov.cn/english/statisticaldata/yearlydata/YB2002e/html/e0526ae*. htm>>; <<*http://www.stats.gov.cn/english/statisticaldata/yearlydata/YB2001e/html/* e0526ae.htm>> (information provided by the National Bureau of Statistics of China, indicating that the wages of employees in state-owned facilities increased, between 1999 and 2005, from 8,283 yuan to 20,992 yuan per annum, that is 254%; while the wages in collectively-owned units increased from 4,857 to 11,268 (231%), and in all other units went from 9,842 to 21,207, that is, 215%).

Docket Entry No. 73, at 45-46. It appears rather evident that the "Chinese Consumer Price Inflation" variable factored in the Lamb's Regression Result could not have accounted for these dramatic rise in labor costs, since: (a) the concept of "consumer

> The [dummy] variables included in the model measure the extent by which prices were higher as a result of the *alleged conspiracy* in this matter. These variables are both statistically significant. This result means that class members were all harmed in that they paid a higher price for magnesite products *as a result of the alleged conspiracy.*

Docket Entry No. 28-6, at 16 (emphasis supplied).

(xvii) Moreover, the Report not only declares, in conclusory fashion, that Lamb's artificially created dummy variables must be collusive activities of Defendants, the Report also omits to inform the Court of any results of the benchmark comparison of post-2000 data and 1995-2000 data that was promised by Lamb at the outset of his Report. See id. at 10-11 (promising such comparison by stating that **[**104]** "[r]egression is an appropriate technique in this context because it controls for the impact of each explanatory variable upon the dependent variable, while allowing me to quantify the difference between prices during the alleged conspiracy and the benchmark period, e.g. the overcharge"). Instead, the Report merely states:

> Table 3 [("Table 3"), replicated below,] shows the estimated overcharges from the regression model. These results show the percentage by which prices for magnesite were higher as a result of the alleged conspiracy. In order to obtain the percentage overcharge from the estimated coefficient it is necessary to make a technical adjustment. The conspiracy had greater impact in the period after 2004, since the estimated overcharge on magnesite prices was higher during that time period.

***2*Table 3**

***2*Estimated Overcharge Percentages**

	Estimated Overcharged
Collusion Period [1]	**Percentage**
2000-2003	4.03%
2004-2007	21.63%

Id. at 16 and n. 35.

In other words, the Report seems to substitute the promised benchmark analysis **[*360]** by a percentile conversion of the coefficients of arbitrarily labeled dummy variable with the goal of restating the very same **[**105]** inexplicable conclusion, i.e., that Chinese magnesite prices during 2000-2007 had to be affected by certain "Chinese" collusive activities.

(xviii) Re-repeating the same once again, the Report concludes with Lamb's assertion that, "[b]ased on [his] analysis of the market for Chinese magnesite[, Lamb] ha[s] determined that all class members were injured as a result of the alleged conspiracy." Id. at 18. However, in light of the above-discussed chain of deficiencies (e.g., the unwarranted assumption that the facts borrowed from dismissed Original Complaint were true; the failure to provide the Court with Lamb's pools of data, the sources of this data, as well as with Lamb's regression equations; the discrepancies between the figures and statements made in the Report and Lamb's Regression Results; the discrepancies between the figures and statements made in the Report and the statements made in the Amended

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price inflation" is qualitatively different from that of "labor costs"; (b) the coefficient of 0.587 detected by Lamb as an assessor of the effect the increases in inflation had on the increases in magnesium oxide prices fails **[**103]** to correspond to the above-quoted over-200% increase in labor costs; and (c) rising cost of Chinese labor was virtually certain to be higher than domestic inflation of the Yuan (causing consumer price inflation) because an increase in wages *exceeding* the increase in inflation is a feature necessary for an increase in the population's purchasing power (and its standard of living) which, seems, was unquestionably achieved in China during the first decade of the XXI century. See, e.g., Yangtze China Inv. Interim Results, London Stock Exchange Aggregated Regulatory News Service (Dec. 4, 2009); Form 8-k: Cn Dragon Announces Determination to Change Direction of Current Business Operations, US State News (Dec. 4, 2009); Low-carbon Urbanization Is Way Forward for China, Chinadaily.com (Nov. 30. 2009).

[1] Collusion period is April 2000 to Present.

Complaint; the inexplicable deducement that Lamb's dummy variables were necessarily representative of collusive activities; failure to perform the benchmark analysis originally presented as the key analytical step; etc.), the Court cannot accept the Report as proof that "Chinese" collusive **[**106]** activities actually took place and/or that these activities were the source of increase in magnesite prices. A fortiori, the Court cannot apply Lamb's conclusions specifically to Defendants. [46]

With that, the Court now returns to the second sentence composing Plaintiffs' Paragraph Sixty-Five (asserting that "[a]n overcharge analysis from a regression model by . . . Lamb . . . shows that, between 2000 and 2003, the Cartel overcharged U.S. buyers of magnesite by an average of 4 percent, while between 2004 and 2008, as a direct result of the Cartel's activities, U.S. magnesite purchasers were overcharged more than 21 percent"). Am. Compl. P 65. This statement is incorrect even regardless of above-discussed shortcomings of the Report, since the Report neither speaks in terms of "Cartel's activities" (rather, it asserts "overall Chinese" activities) nor covers the year 2008 and any time thereafter (rather, it covers only the period from July 2000 to July 2007). Moreover, **[**108]** the Report merely suggests that the increases in Chinese prices might have been related to intensification of certain factor(s), some of which were assessed through, allegedly, actual pools of data. **[*361]** The Report, however, clearly states that the "collusion factor" was merely hypothesized by Lamb into a dummy variable as a result of Lamb's taking Plaintiffs' allegations in the Original Complaint as true facts. Simply put, Lamb's Report can be reduced to a sophistic statement, "if Plaintiffs' factual assertions are true, then Lamb's calculations of Plaintiffs' factual assertions shows that these assertions are true." Such statement establishes neither *Defendants'* intent nor even anyone's intent to affect United States commerce; moreover, it does not even establish the "directness" of these "someone's" actions (since, according to Lamb's results, the collusive activities, even during the "high-tide" period, caused only a price increase of $ 2.16 per metric ton). [47] Consequently, Plaintiffs' second sentence in Paragraph Sixty-Five appears to be nothing but Plaintiffs' unwarranted distortion of the already insufficient Report. In light of the foregoing, the Court will disregard the content **[**109]** of this Paragraph for failure to provide any relevant factual proof of Plaintiffs' position.

k. *Paragraph Seventy-Two*

Next paragraph, i.e., Paragraph Seventy-Two, alleges as follows:

> During the conspiracy, prices of magnesite and magnesite products exported to the United States from China have not followed the laws of supply and demand [which, in Plaintiffs' opinion, should] exist in a competitive market. Instead, prices have been set and maintained at artificially high levels by Defendants and their [unspecified] co-conspirators.

Am. Compl. P 72.

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[46] The Court, having a mere layperson's familiarity and no expert command of statistics, is certainly mindful of the possibility that the Court misconstrued either Lamb's deducements and/or his regression model, and/or the correlation Lamb envisioned between the benchmarking and regression analyses, etc. However, the possibility of the Court's misconstruction of the Report transforms the Report into a document even less suitable to operate as a factual proof: it is axiomatic that ***HN24***[] *Rule 702* admits expert testimony "if it will assist the trier of fact to *understand* the evidence or a fact in issue," *Moses v. Payne, 543 F.3d 1090, 1101 (9th Cir. 2008)* (quoting *State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313, 318 (Wash. Ct. App. 1999))*; see also *Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 806 (3d Cir. 1997)*, and the Court has no obligation to decipher an expert's cryptic message. Moreover, since -- ***HN25***[] under *Rule 702* -- expert testimony *cannot be misleading,* see *Moses, 543 F.3d at 1101* (citing *Farr-Lenzini, 970 P.2d at 319*), **[**107]** an expert's report must be amenable to understanding by a layperson not only with respect to the words composing the end-conclusion but also with regard to the rationale and the steps of the processes employed. Indeed, construing *Rule 702* otherwise would invite experts to "create" facts by simply ushering floods of technical terminology on the judiciary stripped of an actual opportunity to analyze the testimony.

[47] Since, according to Plaintiffs, the export price rose during 2000 from $ 104 per metric ton to $ 158 per metric ton (i.e., by $ 54 per ton per year), see Am. Compl. P 55, then the deduced-by-Lamb 4.03% effect, see Table 3, of such $ 54 increase would amount to the yearly price rise of $ 2.16 per metric ton (4.03% of $ 54), i.e., it yields Lamb's conclusion that "Chinese" collusive agreements caused only a $ 2.16 rise in price of magnesium oxide, and the remaining $ 51.84 ($ 54 - $ 2.16) rise in price was attributed to factors unrelated to these "Chinese" collusive agreements.

Both of these statements fail to provide the Court with any proof necessary **[**110]** for the factual review, as defined in *Turicentro* (moreover, these statements fail to meet even the pleading requirements, as construed by *Twombly* and *Iqbal*). Indeed, the first sentence offers the Court only Plaintiffs' self-serving simplistic construction of economic models, virtually repeating the error of the above-discussed Paragraph Fifty-Five. See supra, note 22 of this Opinion (explaining the fallacy of Plaintiffs' overly simplified position). The second sentence does not even aim to state a fact: rather, it offers the Court a recital of a Sherman Act requirement, but attempts to disguise that recital as a fact. However, such pleading is insufficient even for the purposes of facial review. See *Iqbal, 129 S. Ct. at 1949-54* (***HN26***[↑] "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions [or to t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements [, i.e., by] legal conclusion[s] couched as a factual allegation [e.g.,] the plaintiffs' assertion of an unlawful agreement [or] that [defendants] adopted a policy 'because of,' not merely 'in spite of,' its adverse effects upon **[**111]** an identifiable group") (citation omitted). Needless to say, such recital of legal elements fails to provide any proof for the purposes of factual review. Therefore, the Court will disregard the content of Paragraph **[*362]** Sixty-Three for the purposes of its jurisdictional assessment.

l. *Paragraph Seventy-Five*

Finally, Paragraph Seventy-Five asserts:

> Defendants' combination and conspiracy have had the following effects, among others: (a) [t]he price of magnesite and magnesite products purchased by Plaintiffs . . . has been fixed, raised, maintained and stabilized at artificial and non-competitive levels; (b) [c]ompetition in the sale of magnesite and magnesite products has been restrained.

Am. Compl. P 75.

The shortcomings of this Paragraph are identical to those of Paragraph Seventy-Two, i.e., Plaintiffs state nothing but a set of legal conclusions depicting "a" Sherman Act scenario and merely paste Defendants' name and the product's name into the picture in an effort to repackage their self-serving legal conclusions into a statement sounding like an assertion of fact. Since the Supreme Court expressly cautioned against such pleading practices even for the purposes of facial review, see *Iqbal, 129 S. Ct. at 1949-54*, **[**112]** the Court certainly cannot accept Plaintiffs' bare legal conclusions as proof for the purposes of factual review, as defined in *Turicentro*. Therefore, this final set of allegations made by Plaintiffs in an attempt to establish that this Court has subject matter jurisdiction over this case under the FTAIA exception will also be disregarded.

m. *Amended Complaint Fails to Meet the FTAIA Exception*

As the foregoing discussion illustrates, not a single Paragraph of the Amended Complaint among those advertized in the Opposition as providing the Court with factual proof as to the Court's subject matter jurisdiction under *15 U.S.C. § 6a(1)(A)* lives up to its promise. The bulk of Plaintiffs' pleadings related to the FTAIA exception fail to assert any facts (offering, instead, a kaleidoscope of self-serving conclusions and/or recitals of legal elements) and the remainder of Plaintiffs' statements assert facts that either negate Plaintiffs' claims or are self-contradicting, or inapposite to Plaintiffs' position, or unwarranted in light of Plaintiffs' own evidence, or based on deficient assumptions and inexplicable conclusions. Since Plaintiffs failed to offer the Court even a single factual proof **[**113]** meeting the Rule 12 review, as articulated in *Turicentro*, the Court is constrained to conclude that Plaintiffs' Amended Complaint asserts Sherman Act claims (based on Defendants' status as exporters of Chinese magnesium oxide) that fall outside the Court's subject matter jurisdiction, and these claims should be dismissed.

Such conclusion, however, does not dispose of another reading of the Amended Complaint, which seems to suggest that Plaintiffs might be suing Defendants not in Defendants' capacity as exporters of Chinese goods but as importers of goods into the United States. The Court, therefore, now turns to such reading of the Amended Complaint.

B. Subject Matter Jurisdiction Under the Introductory Clause of the FTAIA

As noted supra, the FTAIA, in its introductory clause provides that:

> ***HN27***[] [The Sherman Act] shall not apply to conduct involving trade or commerce *(other than import trade or import commerce)* with foreign nations.

15 U.S.C. § 6a (emphasis supplied). Hence, in perhaps ineloquent but nonetheless unambiguous terms, *Section 6a* provides that the FTAIA-based jurisdictional bar is wholly inapplicable to pleadings alleging that the wrongful conduct was undertaken by defendants as **[**114]** importers (rather than as exporters). The Court's **[*363]** December Opinion already reviewed the Court of Appeals' guidance as to the issue of whether the defendants are importers or exporters:

> ***HN28***[] [T]he FTAIA asks whether [the] defendants were "involve[d in] import trade or import commerce." See *Carpet Group, 227 F.3d at 69, 72*. If all that defendants were doing was actually bringing goods or services into the United States, then the FTAIA . . . is not even triggered, i.e., the claim [against the defendants] squarely falls within the scope of the Sherman Act. See *Turicentro, 303 F.3d at 302* ("[While the FTAIA] does not define the term 'import,' . . . the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad") (citing Webster's Third New Int'l Dictionary (1986); Black's Law Dictionary (6th ed. 1990)). However, if "[d]efendants did not directly bring items or services into the United States . . . , they cannot be labeled 'importers,' [nor could it be said that defendants] have they engaged in 'import trade or commerce.'" Id. In other words, even if a certain importer purchased or otherwise obtained the defendants' product in a foreign market (be **[**115]** it the defendants' national market or any other market) and brought the defendants' product into the United States, the fact that the product eventually found its way into the United States does not transform the defendant into an "importer" and, hence, an antitrust claim against the defendants must pass muster under the FTAIA['s "substantial, direct and reasonably foreseeable" exception] before the Sherman Act claim can be entertained. See *id. at 304* (***HN29***[] The fact "[t]hat 'some of the goods purchased in [a foreign market] may ultimately have been imported by individuals into the United States' [is] immaterial to determining if defendants [are] involved in 'import trade or import commerce' [since the defendants' own] actions did not directly increase or reduce imports into the United States") (quoting *Kruman v. Christie's Int'l PLC, 284 F.3d 384, 395 (2d Cir. 2002)*.

Docket Entry No. 73, at 26-27 (emphases removed).

1. Plaintiffs' Allegations

The allegations stated in the Amended Complaint are less than clear as to whether Plaintiffs are suing Defendants as exporters or as *importers.*

Specifically, some Plaintiffs' claims use the term "import" and the phrase "sale of magnesite products to customers **[**116]** *in* the United States" (rather than "sale *to* United States customers," which could have been taking place *outside* the United States). See Am. Compl. PP 1-2 (asserting that "[t]his action seeks no damages or relief with respect to non-import foreign commerce," "Defendants have directly sold and delivered magnesite and magnesite products to customers in the United States"). However, while some Defendants are named as entities that "directly sold . . . and *shipped magnesite products to the United States* during the period described in the [Amended] Complaint," id. P 12-13, 15, 19-20, 22-25 and 27 (emphasis supplied), hence suggesting that Defendants were importers, other Defendants are described as "producer[s] and exporter[s] of magnesite," suggesting that Defendants were not importers at all. Id. PP 17, 26 (emphases supplied). To add to the uncertainty, Plaintiffs' Paragraph Fifty-One outright merges the "substantial, direct and reasonably foreseeable effect on United States commerce" language of the FTAIA exception from *15 U.S.C. § 6a(1)(A)* (applicable to exporters of goods that are brought into the United States by others) with an assertion that **[*364]** Defendants, on their own, brought these **[**117]** goods into the United States. See id. P 55 ("The conduct of Defendants… has directly, substantially and foreseeably restrained trade and commerce in the United States. [They] directly sold [their goods] in United States commerce"). Finally, to make Plaintiffs' allegations even more confusing, the Amended Complaint opens with the sentence asserting that Defendants ha[d] "the purpose and effect of fixing prices of magnesite . . . products *exported* to . . . the United States," id. P 1 (emphasis supplied), but then immediately proceeds to state that "Defendants have directly sold and *delivered* magnesite . . . to customers *in* the United States." Id. P 2 (emphasis supplied). These inconsistent allegations necessarily allows for two readings of the Amended Complaint: (1) one, where Plaintiffs seem to assert inapplicability of the FTAIA jurisdictional bar on the grounds of the § 6a(1)(A) exporter exception (addressed in the prior section of this Opinion); and (2) another, where Plaintiffs seem to assert an "altogether" inapplicability of the FTAIA on the grounds that Defendants were *importers* (i.e., relying on the FTAIA's introductory clause). Plaintiffs' statements to the latter effect could **[**118]** be roughly subdivided into three categories: (1) Plaintiffs' conclusory references to certain Defendants as entities that "directly . . . shipped magnesite products to the United States during the period described in the [Amended] Complaint," id. P 12-13, 15, 19-20, 22-25 and 27; (2) Plaintiffs' legal position that Defendants were importers because American entities either purchased Defendants' goods or consumed/resold these goods in the United States; and (3) Plaintiffs' assertion that Defendants were importers in light of the evidence contained in certain Plaintiffs and Defendants' exhibits.

The first category, consisting of numerously repeated factless self-serving assertions, cannot support Plaintiffs' position even for the purposes of facial review under the standard articulated in *Iqbal* and *Twombly* and, a fortiori, is insufficient for the purposes of factual review, as defined in *Turicentro*. Hence, this category of conclusory statements will be disregarded without further discussion. However, Plaintiffs' position based on alleged Defendants' sales to "American" entities, as well as Plaintiffs' reliance on certain exhibits, warrants a detailed review.

2. Claim That Defendants Effectively [**119] Acted as Importers

The Amended Complaint is void of any factual statements or references to exhibits related to Defendants' alleged importation of goods into the United States. See, generally, Am. Compl. However, Plaintiffs' included in their amended pleadings a statement seemingly aiming to assert purchases of Defendants' goods by an entity which, upon bringing these goods to the United States, resold them to Plaintiffs (and, hence, introduced these goods in United States stream of domestic commerce). See id. P 11.

Specifically, Plaintiffs' Paragraph Eleven reads:

> Possehl, Inc. [("Possehl")] has assigned to [Plaintiffs all Possehl's] rights, title and interest in and to all causes of action it may have relating to magnesite or magnesite products brokered by Possehl, Inc. and subsequently delivered to [Plaintiffs] during the relevant period. Possehl, Inc. purchased magnesite and magnesite products directly from [D]efendants during the [relevant] period and shipped those products to [Plaintiffs].

Id. All other relevant statements made in the Amended Complaint are entirely factless, i.e., they present mere conclusory assertions lacking even verbal specificity, let alone actual factual proof. **[**120]** See Am. Compl. PP 12-13, 15, 19-20, 22-25 and 27. **[*365]** Yet, Plaintiffs' factual assertions currently before the Court are not limited to the above-quoted two sentences in Paragraph Eleven. Rather, these statements and evidentiary material are contained in Plaintiffs' Opposition and exhibits attached thereto. See Docket Entry No. 105. Plaintiffs' inclusion of these statements (and exhibits) in their Opposition rather than in their Amended Complaint is a procedural oversight, since a litigant cannot plead claims, state and/or support facts by any non-pleading document, be it moving papers, an opposition to adversaries' motion, the litigant's traverse, etc. See, e.g., *Bell v. City of Phila., 275 Fed. App'x 157, 160 (3d Cir. 2008)*; *Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004)*; *Veggian v. Camden Bd. of Educ., 600 F. Supp. 2d 615, 628 (D.N.J. 2009)*. However, for the purposes of this Opinion only, the Court will consider Plaintiffs' Opposition statements and exhibits attached thereto as if they were included in the Amended Complaint by reference, via the above-quoted statement made in Paragraph Eleven.

a. *Plaintiffs' Legal Position*

Plaintiffs' legal position is not entirely **[**121]** clear, granted that Plaintiffs assert:

> Defendants . . . directly sold magnesite to U.S. customers for delivery in the United States during the relevant time period. . . . Contracts previously submitted to the Court establish that [Defendants] sold magnesite to U.S. companies pursuant to contracts requiring delivery to the United States. Publicly available import records confirm that . . . Defendants . . . sold magnesite directly to customers in the United States for delivery in the United States.

> . . .
>
> HN30[] Courts have uniformly concluded that the FTAIA exception for conduct involving import trade applies to claims by domestic importers arising from direct purchases of price-fixed goods. See, e.g., *The 'In'Porters, S.A. v. HonesPrintables, Inc., 663 F. Supp. 494, 499 (M.D.N.C. 1987)* (applying FTAIA to claims of antitrust plaintiffs "other than [] domestic importers]"); *Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394, 1398 (D. Colo. 1995)* (stating that the FTAIA applies to antitrust plaintiffs' claims "with the exception of claims brought by domestic importers"); see also *Caribbean Broad Sys. Ltd. v. Cable and Wireless PLC, 1995 U.S. Dist. LEXIS 19225, C.A. No. 93-2050, 1995 WL 767164, at *2 (D.D.C. Dec. 21, 1995)*, **[**122]** rev'd on other grounds, *148 F.3d 1080, 331 U.S. App. D.C. 226 (B.C. Cir. 1998)* (noting that the FTAIA "makes clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers").
>
> . . .
>
> In *Kruman v. Christie's Int'l PLC, 284 F.3d 384, 398 (2d Cir. 2002)*[,] the defendant auction houses were accused by plaintiffs that had purchased goods at auctions outside of the United States of conspiring to fix commissions on foreign auctions. In concluding that the import trade exception did not apply, the Second Circuit noted that, although "some of the goods purchased in those auctions may ultimately have been imported by individuals in the United States," "the commerce that is the focus of this case is the charging of fixed commissions on the purchase and sale of goods at foreign auctions, not the trade in and subsequent movement of the goods that were purchased and sold." *Id. at 395-96*.

Opp. at 14-15, 27-28.

Plaintiffs' invocation of *The 'In'Porters* does not seem to raise any legal point worthy of discussion, since it merely reiterates the Court's reading of the FTAIA **[*366]** as wholly inapplicable to claims against importers that bring goods in the United **[**123]** States. Similarly, Plaintiffs' reliance on Kruman does not seem to add any wrinkle, since the Court of Appeals for the Third Circuit already adopted the Kruman point highlighted by Plaintiffs in the Court of Appeal's Turicentro decision. See *303 F.3d at 302*. That adoption of Kruman by the Court of Appeals was already duly noted by this Court in its December Opinion, when the Court states:

> "[while the FTAIA] does not define the term 'import,' . . . the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad." *[Turicentro, 303 F.3d at 302*.] However, if "[d]efendants did not directly bring items or services into the United States . . . , they cannot be labeled 'importers,' [nor it could be said that defendants] have they engaged in 'import trade or commerce.'" Id. In other words, even if a certain importer purchased or otherwise obtained the defendants' product in a foreign market (be it the defendants' national market or any other market) and brought the defendants' product into the United States, the fact that the product eventually found its way into the United States does not transform the defendant into an "importer" and, hence, **[**124]** an antitrust claim against the defendants must pass muster under the FTAIA['s "substantial, direct and reasonably foreseeable" exception] before the Sherman Act claim can be entertained. See *id. at 304* (The fact "[t]hat 'some of the goods purchased in [a foreign market] may ultimately have been imported by individuals into the United States' [is] immaterial to determining if defendants [are] involved in 'import trade or import commerce' [since the defendants' own] actions did not directly increase or reduce imports into the United States") (quoting *Kruman, 284 F.3d [at] 395*).

Docket Entry No. 73, at 26-27.

Hence, the excerpt from Plaintiffs' Opposition quoted at the outset of this subsection leaves the Court with only two Plaintiffs' quotations, one from Carribean and another from Coors. However, *Carribean* is wholly inapposite to the case at hand since it deals with the issue of whether a purchaser in a foreign country can bring a Sherman Act claim based on foreign harm; this question was answered in the negative by the Supreme Court in *Empagran S.A., 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226*. One court explained and illustrated the issues associated with the Carribean language quoted by Plaintiffs as follows:

> In **[**125]** asserting [that they have standing to sue], Plaintiffs rely on the FTAIA's introductory language, which states that the FTAIA's requirement of a "direct, substantial, and reasonably foreseeable effect" on domestic commerce applies to claims "involving trade or commerce (other than import trade or import commerce) with foreign nations." . . . Based on this language, Plaintiffs assert that the parenthetical exclusion of "import trade or import commerce" means that a foreign antitrust claim need never satisfy the FTAIA as long as it involves products that might be shipped to the United States. . . . The court determines that Plaintiffs' position is not a correct statement of the law. The "main significance" of the FTAIA is to "make[] clear that the concern of the antitrust laws is protection of American consumers and American exporters, not foreign consumers or producers" . . . . Phillip Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 272h2, at 362-63 (1997) . . . . The antitrust laws' goal of protecting American consumers and producers cannot realistically be served by Plaintiffs' version of the FTAIA, which would permit foreign **[*367]** plaintiffs to bring treble damages suits based on conduct that **[**126]** has only indirect, insubstantial, and unforeseeable effects on commerce in this country.

United Phosphorus, Ltd. v. Angus Chem. Co., 131 F. Supp. 2d 1003, 1022 (N.D. Ill. 2001).

Since Plaintiffs' reference to Carribean is inapposite to the matter at hand, the Court is left to distill Plaintiffs' position from: (a) Plaintiffs' mentioning of Possehl in Paragraph Eleven of the Amended Complaint, see Am. Compl. P 11; (b) Plaintiffs' thrice paraphrased assertion that Defendants "sold magnesite to U.S. customers for delivery in the United States," "sold magnesite to U.S. companies pursuant to contracts requiring delivery to the United States," and "sold magnesite directly to customers in the United States for delivery in the United States," Opp. at 14-15; and (c) Plaintiffs' quotation from Coors that suggests Plaintiffs' reading of Coors as a case standing for the proposition the FTAIA jurisdictional bar is inapplicable to the claims brought *by* plaintiffs who are *United States importers.* See id. at 27. Read jointly, these statements seems to express Plaintiffs' position that a foreign exporter automatically becomes a de facto *importer* of goods in the United States (and, hence, automatically **[**127]** loses his/her ability to invoke the FTAIA jurisdictional bar) if: (a) that exporter sells his/her goods to an *importer* that is/labels/deems itself an American entity; and (b) that importer brings the goods purchased from that exporter into the United States, either for the importer's consumption or for the importer's further re-sale of these goods to other American end-users. Accord Opp. at 27 (titling this section of the Opposition as "The Sale of . . . Products *to U.S. Companies for Delivery in the United States* is 'Conduct Involving' '. . . Import Trade or Import Commerce'") (emphasis supplied). [48] Presuming that the Court correctly distilled Plaintiffs' legal position, such position -- as explained below -- is without merit and, hence, Plaintiffs cannot reclassify Defendants-exporters into importing entities prevented from invoking the FTAIA jurisdictional bar. [49]

b. *Coors Does Not Lend Support to Plaintiffs' Legal Position*

Writing one of the very few pilot FTAIA decisions, the court in Coors grappled with a question completely different, both factually and legally, from the issue **[**129]** of what circumstances could reclassify an exporter defendant into an importer. See Coors Brewing Co. v. Miller Brewing Co., 889 F. Supp. 1394. With finesse of sub-agreements addressed in Coors being factored out, the circumstances in Coors were as follows: Coors Brewing Company (a

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[48] In other words, Plaintiffs seem to invite the Court to find that the process of "importation" begins right at the loading docks of an exporter if the exporter sells to an American end-user or to a broker who informs the exporter of the broker's intent to resell the goods directly to American end-user once the goods enter **[**128]** the United States. Such reading divorces United States actual geographic borders from Plaintiffs-created "virtual borders" which become drawn at any point where an American end-user or catering-to-Americans broker gets the good.

[49] The Court notes, in passing, that it is not entirely clear as to any rights, title or interests in any cause of action that Possehl might have in this matter, since: (a) Possehl is a German entity, situated in Lubeck (Schleswig-Holstein land of Germany), see <<http://www.possehl.de/en/index.html>>; (b) Possehl is an importer of all kinds of goods and is operating world-wide, see id.; (c) here, Possehl seemingly has been purchasing Chinese goods for further world-wide importation, which bars Possehl's claims under the holding of Empagran S.A., 542 U.S. 155, 124 S. Ct. 2359, 159 L. Ed. 2d 226; and (d) the only injury Possehl might have suffered as a result of the alleged collusive activity is a wholly speculative Possehl's inability to make "more" profit on resale of Chinese goods.

Colorado **[*368]** corporation engaged in the business of brewing, marketing, and distributing beer) entered into a licensing agreement with Molson Breweries of Canada (a Canadian corporation, also in the beer industry), pursuant to which Molson would brew and distribute Coors products in Canada. See *Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1512-13 (10th Cir. 1995)*. Thereafter, Miller Brewing Company (a Wisconsin corporation also in the business of brewing and marketing beer) entered into a partnership with Molson; under that agreement, Miller became the exclusive distributor of Molson's products in the United States, and Molson became the exclusive distributor of Miller's products in Canada. See id. At no point in the Coors litigation did Molson and/or Miller deny the existence of the Miller-Molson alliance, pursuant to which Molson and Miller jointly targeted United States and Canadian markets through **[**130]** coordination of their marketing and pricing. See id.; see also *Coors, 889 F. Supp. 1394*. In light of this Miller-Molson agreement, Coors initiated a legal action asserting that the Miller-Molson alliance limited Coors' ability to export its beer to Canada and, in addition, "somewhat restrained" trade in the United States. See *Coors, 889 F. Supp. at 1397*. In response, Miller and Molson asserted that Coors' claim was jurisdictionally barred by the FTAIA, and that the FTAIA's "direct, substantial, and reasonably foreseeable effect" exception (restoring jurisdiction) did not apply. See *id. at 1397*. Presented with such contentions, the District of Colorado ruled that the Molson-Miller alliance "satisfie[d] both subsections . . . of the FTAIA [exception] because it ha[d] a direct, substantial, and reasonably foreseeable effect not only on Coors' export trade with Canada, but also, albeit less directly, on the United States beer market." In other words, the Coors court made its finding primarily under *subsection (1)(B)* of the FTAIA, which: (a) removes the jurisdictional bar with regard to claims asserting "direct, substantial, and reasonably foreseeable [effect] on *export* trade [of American **[**131]** entities selling *to]* foreign nations," see id. (emphasis supplied); and (b) is entirely inapplicable to the matter at hand, since -- here -- Plaintiffs are not suing in Plaintiffs' capacity as exporters of goods to China or to any other nation. [50]

At no point did the Coors court deal with the question of whether Molson, an exporter, could be re-characterized into an *importer* of Canadian beer to the United States on the grounds that Miller was "directly" bringing Molson's goods into the United States for sale to American consumers: the *importer/exporter* roles in Coors were firmly allocated and never contested by the parties. [51] With that observation, the Court now turns to the Coors sentence quoted by Plaintiffs; the paragraph from which Plaintiffs extracted that sentence reads, in its entirety, as follows:

> ***HN31***[] Although cases applying the FTAIA are few, its "inelegant" language has been interpreted to mean that *with the exception of claims* ***[**132]*** *brought by domestic importers,* the Sherman Act will not apply to conduct affecting foreign markets, consumers or producers unless there is **[*369]** also a direct, substantial, and reasonably foreseeable effect on the domestic market (*subsection (1)(A)*) or on opportunities to export from the United States (*(1)(B)*). [See] P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 236'a at pp. 306-07 (1993 Supp.); see *McGlinchy v. Shell Chemical Co., 845 F.2d 802, 813 (9th Cir. 1988)* (allegations of a refusal to deal in foreign markets injuring only foreign customers and plaintiff insufficient to confer antitrust jurisdiction under FTAIA); *The 'In'Porters. S.A. v. Hanes Printables. Inc., 663 F. Supp. 494, 498-99 (M.D.N.C. 1987)* (French garment distributor had no cause of action under federal antitrust laws absent evidence of injury within the United States); *Liamuiga Tours v. Travel Impressions Ltd., 617 F. Supp. 920, 922-23 (E.D.N.Y. 1985)* (court lacked jurisdictional nexus under the FTAIA where restraint of trade and conspiracy claims involved exclusively lost business and anti[-]competitive effects in St. Kitts).

Id. at 1397-98 (language quoted in Plaintiffs' Opposition italicized).

In light of the Coors court's references to Areeda & Hovenkamp, McGlinchy, The 'In'Porters and Liamuiga Tours, none of which suggests, even remotely, that an exporter could be "re-characterized" into an *importer* if a catering-

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[50] This Court does not endorse the *Coors* court's choice of words suggesting that an antitrust plaintiff might establish a direct effect necessary for *subsection (1)(A)* by pleadings asserting that the defendants' actions affected United States "less directly."

[51] Hence, even if the Coors **[**133]** court were to make a finding that Molson was a quasi-importer of its Canadian beer to the United States as a result of engaging Miller, such finding would be necessarily a dictum having no precedential value even in the Coors court jurisdiction, and certainly in no other jurisdiction, such as this District. However, it does not seem that the *Coors* court made such a finding even in dicta.

to-Americans importer or an American end-user purchases the exporter's goods in a foreign market, this Court cannot exclude the possibility that the Coors court's phrase "with the exception of claims brought *by* domestic importers" (which, it seems, merely made a generic reference to the introductory clause of the FTAIA) was meant to read "with the exception of claims brought *against* domestic importers," i.e., that the Coors court merely summarized the introductory language of the FTAIA stating the statute's inapplicability to claims against importers of goods into the United States. **[**134]** So read, the Coors decision certainly cannot support Plaintiffs' position, while -- read otherwise -- it would be mere dicta.

c. *Plaintiffs' Position Contradicts the Gist of the Third Circuit Law*

As noted supra, the Court of Appeals for the Third Circuit provided some guidance as to what entity qualifies as an "importer" for the purposes of the FTAIA analysis, stating that, while the FTAIA "does not define the term 'import,' . . . the term generally denotes a product [that] has been brought into the United States from abroad. [If d]efendants did not directly bring items or services into the United States . . . , they cannot be labeled 'importers.'" [52] Turicentro,

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[52] The Court takes note of Plaintiffs' position that, in order to avoid the FTAIA jurisdictional bar under the introductory language "[the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with **[**137]** foreign nations unless . . ." 15 U.S.C. § 6a, Plaintiffs need not show that Defendants were actually "importers" of goods to the United States but could make a "diluted" showing that Defendants were just "involved" in import to the United States. See Opp. at 29-30 ("the FTAIA exception is not limited to claims against *importers* but extends to claims alleging illegal conduct that *involves* import trade or import commerce,"emphasis in original, quoting Carpet Group, 227 F.3d at 71, statement that "[t]he proper inquiry [is] whether the alleged conduct by the defendants 'involved' import trade or commerce," and In re Air Cargo Shipping Servs. Antitrust Litig., 2008 U.S. Dist. LEXIS 107882, at *99 (E.D.N.Y. Sept. 26, 2008), rejected in part, 2009 U.S. Dist. LEXIS 97365 (E.D.N.Y. Aug. 21, 2009), for the proposition that "language makes clear that not only import commerce, but conduct *involving* import commerce, is never removed from the reach of the Sherman Act," retaining the emphasis of Magistrate Judge Victor V. Pohorelsky). Plaintiffs misconstrue the meaning the word "involved," as utilized by the Court of Appeals in Carpet Group and even by Judge Pohorelsky in Air Cargo. The paragraph **[**138]** of the Carpet Group opinion, from which Plaintiffs extracted their quotation, reads, in its entirety, as follows:

> The Magistrate Judge held that this case did not fall into the FTAIA's parenthetical exclusion, *i.e.,* did not "involve" import trade or commerce, because the plaintiffs in this case were not importers . . . . [T]his is plainly an inaccurate reading of the FTAIA. It is an incorrect focus on the plaintiffs' function rather than the defendants' conduct. ***HN32***[] [The] FTAIA's exemption from the Sherman Act focuses on the latter's application to "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations."… The implication that the Sherman Act provisions "apply to import trade and import commerce is unmistakable." Eskofot A/S v. E.I. DuPont de Nemours & Co., 872 F. Supp. 81, 85 (S.D.N.Y. 1995). The proper inquiry was therefore whether the alleged conduct by the defendants "involved" import trade or commerce, not on whether the plaintiff's conduct, which is not being challenged as violative of the Sherman Act, "involved" import trade or commerce.

Carpet Group, 227 F.3d at 71. Hence, the word "involved" was utilized by the Court of Appeals in order **[**139]** to denote which party (i.e., the plaintiff or the defendants) has to be importer(s) in order to render the FTAIA's jurisdictional bar wholly inapplicable to the plaintiff's claims; the word was not used in order to set forth a "diluted" or "relaxed" meaning of the term "import." This is especially obvious in light of the Court of Appeals' unaltered quotation from Eskofot: had the Court of Appeals wished to relax the Eskofot language, it would change it to "the Sherman Act provisions 'apply to [acts somehow involving] import trade and import commerce.'" Magistrate Judge Pohorelsky's focus on the word "involving" is, too, different from Plaintiffs' position. While his end-conclusion does not persuade this Court (and was indeed rejected, in part, by the Eastern District of New York), his "Analysis" section following the quotation extracted by Plaintiffs indicates that Judge Pohorelsky utilized the word in response to defendants' assertion that the act of price fixing outside the United States must be divorced, for the purposes of the FTAIA analysis, from any importation activities, and only the foreign situs of the price fixing could be assessed. See Air Cargo Shipping Servs., 2008 U.S. Dist. LEXIS 107882, at *99-100. **[**140]** In light of the foregoing, the Court finds Plaintiffs' reliance on Carpet Group and Air Cargo without merit. Simply put, the FTAIA is wholly inapplicable to Plaintiffs' claims if -- and only if -- Defendants were, in fact, importers: so read, the introductory language of the FTAIA yields the result comparable, policy-wise, to the "meant/intended to affect" test of Alcoa/Hartford Fire adopted in the subsection (1)(A)'s requirement for "direct, substantial and reasonably foreseeable effect," since an entity which is the "main force" behind the transaction bringing the goods on United States soil is expected to "mean/intend to affect" United States commerce.

303 F.3d at [*370] 302. This definition, while undoubtedly helpful, does not, however, provide a bright-line test as to what process qualifies as "bringing" a product into the United States. True, such inquiry is easy in a scenario where the buyer "X" goes to country "Y" and -- upon purchasing goods from the selling entity "Z" -- brings these goods into the United States and consumes the goods or resells them within the United States: in such case, "X" is undoubtedly the "importer" of Z's goods. (Alternatively, if Z brings Z's goods **[**135]** into the United States and then sells them to X, then Z is both an exporter from Z's country and, also, an importer for the purposes of the United States. However, modern trade is a process infinitely more complicated than the above-described simple scenarios. For instance: (a) seller Z typically receives a pro-forma offer from an intermediary "A" who, in turn, is interested in Z's goods because he either already has a pro-forma offer to buy from a purchaser X or anticipates such offer from X and/or from other X-like buyers; (b) in response to or in anticipation of X's offer, A obtains price quotes from Z and then quotes to X and X-like buyers A's price list (which, typically, factors in A's surcharge); (c) if X contacts A (or already contacted A), accepts A's quotes and **[*371]** places X's order, then A agrees with both Z and X on the terms of getting the goods from Z and payments to Z, as well as on getting the goods to X and payments from X (that is, unless A already had some arrangement in place with either X or Z, or both); (d) then, typically on agreement or at least in consultation with either X or Z, or both, A arranges for freight forwarder "B" to deliver the goods (that is, unless **[**136]** X or Z already have certain exclusive or preferred freight forwarding arrangements in place); and (e) upon issuance of a stream of negotiable instruments and a chain of payment instruments, e.g., letters of credit, bill of lading, etc., the goods (accompanied by negotiable instruments) begin their voyage from Y to their first port of destination, while the payment instruments start en route from X to A and then from A to Z. See, e.g., Ralph H. Folsom et al., International Business Transactions 28-299 (West 3rd ed. 1995) (taking almost 300 pages to sketch just the basic financial and legal steps associated with international trade in goods). And, since the above-outlined chain of transactions is still a very simplistic way to define the actual intricacies of the trade process, the answer to the question of which entity or entities "bring(s)" Z's goods into the United States, see Turicentro, 303 F.3d at 302, might be less than obvious.

Defendants seem to suggest that this question should be decided on the basis of the particular Incoterms governing Defendants' sale of goods contracts. [53] See, e.g., S/Reply at 11. Plaintiffs, in turn, move the Court to wholly ignore the Incoterms used in Defendants' sales contracts and, instead, determine Defendants' importer/exporter status on the basis of the country of the first official port of destination where the goods were shipped from the seller's country. See Opp. at 28-29 (citing contract law cases assessing transfer of **[**141]** title and risk of loss associated with injury **[*372]** to or destruction of goods). The Court finds both positions equally unpersuasive.

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[53] "Where the goods are to be carried from one location to another as part of the sale transaction, the parties will often adopt a commercial term to state the delivery obligation of the seller. . . . These terms are defined in the UCC [§§ 2-319, 2-320], but the UCC definitions are seldom used intentionally in international trade . . . because the abbreviations used are now associated primarily with water-borne traffic, and the statutory terms do not include the new terminology associated with air freight, containerization, or multi-modal transportation practices. In international commerce, the dominant source of definitions for commercial delivery terms is 'Incoterms,' published by the International Chamber of Commerce (I.C.C.) . . . . Incoterms is an acronym for International Commercial Terms, and provides rules for determining the obligations of both seller and buyer when different commercial terms . . . are used. They state what acts the seller must do to deliver, what acts buyer must do to accommodate delivery, what costs each party must bear, and at **[**142]** what point in the delivery process the risk of loss passes from seller to buyer. Each of these obligations may be different for different commercial terms. . . . There are other sources of such definitions, in addition to the UCC and Incoterms, such as the American Revised Foreign Trade Definitions . . . . widely used in Pacific Ocean trade . . . . Since the I.C.C. is a non-governmental entity, Incoterms is neither a national legislation nor an international treaty [and] it cannot be 'the governing law' of any contract. Instead, it is a written form of custom and usage in the trade, which can be, and often is expressly incorporated by . . . the parties to an international contract for the sale of goods. . . . Although the [the line of aforesaid sources] has definitions for [Incoterms], these definitions are expressly subject to 'agreement otherwise' [and] United States courts have so held. . . . Incoterms gives the parties a menu of thirteen different commercial terms to describe the . . . obligations of the seller and . . . the buyer . . . : (1) EXW; (2) FCA; (3) FAS; (4) FOB; (5) CFR; (6) CIF; (7) CPT; (8) CIP; (9) DAF; (10) DES; (11) DEQ; (12) DDU; (13) DDP." Ralph H. Folsom et **[**143]** al., International Business Transactions in a Nutshell 93-96 (West 5th ed., 1996).

Defendants' hard-and-fast rule based on the Incoterms ignores: (a) the fact that the meaning of any Incoterm is subject to alteration upon agreement between parties (and such alteration might even be a result of a condoned conduct), see supra note 53 of this Opinion; and (b) the axiomatic proposition that form shall not be elevated over substance, and thus the actual content of the contract -- rather than its title/caption/headings -- governs the actions of contracting parties. See, e.g., Farnsworth, Contracts § 6.3 (1982) (the determination of the nature of a transaction "is a question of substance rather than form"); *In re Underwood, 2004 Bankr. LEXIS 1461 (Bankr. E.D. Wash. Apr. 9, 2004)* ("***HN33***[] A classic maxim of contract construction dictates that [the] substance of the parties' transaction governs how their relationship is defined rather than the label or form used"); *In re Associated Bicycle Serv., 128 B.R. 436, 458 (Bankr. N.D. Ind. 1990)* ("The substance of the agreement, rather than its form, is the material issue").

Plaintiffs' mechanical position focusing on the "first port of destination" fares even **[**144]** worse, not just because it aims to import a string of largely irrelevant considerations of contract law into the predominantly policy-driven FTAIA regime, but because adoption of Plaintiffs' simplistic model would automatically transform any foreign seller into a United States importer if the sellers' goods reach the United States without a detour; that would be so regardless of whether or not the seller even cared about where the buyer of the seller's goods would take them. Since, as Judge Hand aptly noted, the idea that Congress meant to mechanically "punish all whom [United States] courts can catch" is incompatible with both the spirit of American ***antitrust law*** and constitutional mandate, *Alcoa, 148 F.2d at 443-44*, Plaintiffs' "first destination port" model would result in an impermissible overreaching and undue "exportation of American law."

Consequently, the Court rejects both sides' invitations to adopt a perfunctory rule and turns to the Court of Appeals' observation that importation is, effectively, a process of "bringing" goods into the United States from abroad. See *Turicentro, 303 F.3d at 302*. A dictionary meaning of the verb "bring" is to "cause to come along with one toward **[**145]** [a certain] place" or "to cause to move in a special way." <<*http://www.merriam-webster.com/dictionary/BRING*>>. While, indeed, this definition is moderately precise at best, it establishes the presence of at least one indelible attribute, i.e., the harbinger's act of pioneering a certain cause, which -- upon a chain of later developments -- eventually results in physical transition of the seller's goods to the buyer's country. Translated in terms of international trade, such attribute necessarily begs the question "was it mainly the seller who engaged his/her agents and/or independently contracted third parties in order to physically tender the seller's goods for sale on the buyer's soil, or was it mainly the buyer who engaged the seller and/or independent third parties in order to have the seller's goods materialize on the soil of the buyer's country?" Accord *U.S. v. Berkos, 543 F.3d 392, 396-97 (7th Cir. 2008)* ("***HN34***[] We assume that the legislative purpose [of the statute] is expressed by the ordinary meaning of the words used"). Such question seems to be warranted since it: (a) corresponds to the FTAIA's general objective of limiting the extraterritorial reach of American ***antitrust law*** **[**146]** while preserving protections for American consumers; and (b) does not render any portion of the statute "redundant or meaningless." See id. In light of the foregoing, it appears that the term "importer" employed in the introductory language of the FTAIA would be best read **[*373]** as referring to the "main force" behind the physical movement of goods to the United States; such inquiry is, by definition, unamenable to any hard-and-fast rule and must be resolved on a case-by-case basis. [54] ***HN35***[] The only aspect appearing certain is that a plaintiff (who is asserting that a purely

[54] The Court recognizes that such "main force" inquiry is, perhaps, just as open to an academic debate as the "who brings the goods into the United States?" question in Turicentro. However, it appears rather certain that such entity as a freight forwarder, that is, a retained shipper, would not qualify as the "main force" behind the transaction, even though the freight forwarder is actually charged with an obligation to physically "bring" the goods into the United States. Similarly, since no meeting of minds can be reached and, hence, no sale of goods can take place, unless the seller is interested in selling and the buyer is interested in buying, the fact that the seller is seeking to increase his/her export quotas or is engaged in generic advertisement of his/her goods, or that the intermediary is advertising his/her services, or that the buyer is making generic inquiries with sellers or intermediaries, cannot be reflective of their responsibility for **[**148]** "bringing" the goods into the United States for the purposes of a *particular* transaction. In contrast, if an intermediary buys a certain batch of the seller's goods because the intermediary has an actual or potential United States purchaser, or if the seller retains an intermediary to bring the goods into the United States and hold them for sale to the seller's potential buyers, or if the buyer approaches an intermediary with a request to obtain a specified amount of certain goods within a certain period of time and at the price the maximum of which is set within a certain

foreign seller is, effectively, not a "real" exporter but a de facto importer "bringing" the goods into the United States within the meaning of the introductory clause of the FTAIA) has to show that the seller's activities were "direct" in a degree higher that required under *15 U.S.C. § 6a(1)(A)*, with regard to exporters: the "directness" under the introductory clause should yield such substantial contacts between the seller and the United States that it establishes a nexus roughly corresponding, in its magnitude, to the nexus needed to show the "directness" sufficient to remove the FSIA-based presumptive immunity under the **[**147]** "commercial activity" exception set forth in *28 U.S.C. § 1605(a)(2)*: a conclusion otherwise would invite the danger of putting form over substance. [55] Accord infra, **[*374]** section "The FSIA Appears Relevant to Some Defendants" of this Opinion.

d. *Sales to an "American" Intermediary or End-Consumer*

With this conclusion in mind, the Court now turns to Plaintiffs' alternative position inviting the Court to qualify Defendants as importers of magnesite-based products to the United States because Defendants sold their goods to, inter alia: (a) intermediaries alleging that they were planning an immediate resale in the United States; or/and (b) alleged "American" end-consumers. See Opp. at 14-15 and ("Defendant . . . conspired . . . with other Defendants and co-conspirators that sold magnesite directly to customers located in the United States for delivery in the United States"; "[p]ublicly available import records confirm that . . . Defendants and their co-conspirators sold . . . directly to customers in the United States for delivery in the United States"; "[Defendants] were the 'exporters' of record for at least 67 direct sales of magnesite to U.S. companies delivered to ports in the United States"; [Defendants] sold magnesite directly to end-users located in the United States, including LWB Refractories in York, Pennsylvania"); **[**151]** see also Opp. at 15 and Am. Compl. P11 (asserting that Plaintiffs acquired the legal rights of Possehl, and that "Possehl [sold] the magnesite to others, including the end-user[s in the United States]"). [56]

The Court rejects Plaintiffs' argument that the seller's "importer" status may be deduced from the alleged "nationality" or reselling intentions of the buyer that purchases the seller's goods. First, the practical implications of such deducement would invite a wholly anomalous scenario where the seller might be able to ensure against legal liability in the United States only if the seller, in each and every transaction: (a) first conducts a full-fledge due **[**152]** diligence investigation of the purchaser's actual "nationality" or actual reselling intentions; and (b) then delegates a "agent" to follow each particular shipment to ensure that the buyer, in fact, consumes the goods in the United States or actually resells the goods to an American end-user instead of "unduly" diverting the goods to another country, either prior to or after clearance at the United States customs. [57] Consequently, the Court declines

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bracket, then such actions might be indicative of being the "main force" behind the particular sale of goods. And, since these types of actions are likely to require the "main force" entity to comply with United States customs clearance procedures (or to retain a freight forwarder or customs agent to perform such clearance) and to post a bond to cover customs duties or to deposit estimated customs duties upon filing the entry summary, the entity performing such clearance and liable for import duties within the meaning of United States customs law is likely to be the "importer" for the purposes of the particular transactions **[**149]** in goods if these transactions are examined with an eye on the FTAIA jurisdictional bar. See <<http:// *www.customs.gov/linkhandler/cgov/newsroom/publications/trade/iius.ctt/iius.pdf>>* at 11 (defining the features of "importer of record"); <<*http://www.census.gov/foreign-trade*/ regulations/ftsrletters/ftsr174.html>> (same); see also *19 U.S.C. § 1484* (same) and *19 U.S.C. § 1641* (providing relevant clarifications as to customs brokers).

[55] Analogously, ***HN36***[] the "directness" of the seller's contacts with the United States required under the introductory clause of the FTAIA should roughly correspond, in the magnitude of the nexus it produces between the seller and the United States, to the cumulative nexus produced by the "direct, substantial and reasonably foreseeable" elements of *§ 6a(1)(A)*: then, the defendant (whom, as here, the plaintiff seeks to re-qualify from an exporter into a de facto importer) would be subject to the jurisdiction of United States courts regardless of the plaintiff's or defendant's exercises in semantics, i.e., the mere terms "exporter" and "importer" (being products more of the discipline of economics than of law which tends to operate in such basic terms as "seller" **[**150]** and "buyer") would not invite a risk of inconsistent legal results as to the very same set of facts.

[56] Possehl appears to be either an Aktiengesellschaft, or KGaA, or GmbH (i.e., a typical business entity chartered under the German law), see supra note 49 of this Opinion; Possehl seems to have no articles of incorporation registered in one of the United States' states and no such features as an American nerve-center or main production facility (which might give rise to "local" corporate situs under state law). Therefore, the Court is not entirely clear as to the logic of Plaintiffs' reference to Possehl as an "American" importer.

to adopt this wholly anomalous position differentiating between sales to American and non-American end-consumers and intermediaries catering to American and non-American end-users, or between direct and indirect shipments from the country of export **[*375]** to the United States: the issue whether the seller is an "importer" can neither legally nor logically depend on those acts or intentions of the buyer which the seller cannot control or verify. [58]

3. Plaintiffs' Factual Proof as to Defendants' Importer Status

In addition to suggesting the above-discussed two models re-characterizing exporters as importers, Plaintiffs also support their claim that Defendants were importers through three means: (a) Plaintiffs' own exhibits; (b) certain Defendants' exhibits; and (c) Plaintiffs' assertions that Defendants' statements are self-contradicting. The Court addresses each category in turn.

a. Plaintiffs' Own Exhibits

Plaintiffs' own exhibits are attached to the declaration of Robert A. **[**155]** Magnanini, Esq. (submitted jointly with Plaintiffs' Opposition); out of the thirty-four such exhibits, Exhibits Five to Nine (docketed as Docket Entries Nos. 105-7 to 105-11) appear relevant to the issue of Defendants' status as importers of goods to the United States. Each of these Exhibits, in turn, contains numerous print-outs of public records of sales of magnesium oxide; each record has the following information:

(i) a line naming the "manifest commodity" as "dead burned magnesite" and stating the applicable tariff code;

(ii) a line naming the "exporter"; such entry is followed by one of the names of Defendants, with some Defendants being named on numerous occasions, others being named only a few times, and yet others not being named at all;

(iii) a line naming the "importer," e.g., Possehl (some of these entries are followed by the importer's address, while others are not);

(iv) a triplet of lines reading "port," "origination" and "destination," with each "origination" entry being followed by the name of some port, usually Chinese (e.g., Bayuquan or Derien (former Dalian), or Hsinkang, etc., or simply by the word "China"), and each "destination" entry being followed by the name of **[**156]** some United States port or an approximated area in the United States (e.g., Gramercy, Takoma, New Orleans or just "S[outhern] Louisiana");

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[57] The Court fails to fancy what such "agent" is to do in the event the alleged American intermediary or alleged American end-user attempts to "divert" the goods to a non-United States market. Moreover, the economic implications of a ruling tying the seller's importer status to the buyer's contractually **[**153]** irrelevant promise would invite a self-imposed quasi-embargo (preventing import to the United States), since foreign sellers, worried about liability in the United States, might start selling their goods only to those intermediaries or end-consumers that promise to ship/consume the goods only to non-United States ports, which means that American buyers or a second tier of intermediaries would have then to re-import the goods into the United States, raising the cost of these goods for the purposes of United States domestic trade by dual broker's commissions and additional freight.

[58] To illustrate, it would be anomalous to declare a French vineyard or Spanish tannery "importers" of goods to the United States simply because American tourists keep purchasing wine and hides while visiting the vineyard and tannery and bringing these goods to the United States, where they consume the wine and use the hides to decorate their living rooms. Moreover, a position somewhat similar to that suggested by Plaintiffs was rejected in *Dee-K Enters., 299 F.3d 281*. Dee-K Enters. involved a price-fixing action by two American companies against Southeast Asian producers. See *id. at 283*. On appeal, plaintiffs: **[**154]** (a) challenged the district court's adherence to the Hartford Fire standard asserting that Hartford Fire applied only to cases involving "wholly foreign" commerce; and (b) maintained that the sale of price-fixed goods by foreign sellers to an American buyer must be deemed as involving, by definition, United States commerce. The Court of Appeals for the Fourth Circuit characterized plaintiffs' latter argument as "perilously close to clear conflict with Hartford Fire," *id. at 291*, and pointed out that such "single-factor test" proposed by plaintiffs would open United States courts to a flood of claims involving "a great variety of foreign conduct." *Id. at 292*.

(v) a line indicating "unit of measure"; such entry is followed by a specific figure and a phrase "big bags" or the word "bulk";

(vi) a line indicating the "weight" of shipment, typically in thousands of pounds;

(vii) a line stating the "ship[ment]-date," these dates are all post-1999;

[*376] (viii) a line indicating the language, presumably of the print-out, reading "English"; and

(ix) a line stating the "load[ing]-date," usually sometime in 2004 and 2008; it, presumably, reflects the date of Plaintiffs' research of the database and downloading of the results. See Docket Entries Nos. 105-7 to 105-11.

Organized by: (a) alphabetized names of the entities designated as "importers"; (b) the number of such print-out records per each "importer"; and (c) the number of the particular Plaintiffs' Exhibit where copies of such print-outs can be found, these Docket Entries Nos. 105-7 to 105-11 could be reduced to the table ("Importers Table"):

Name of Importer	Number of Transactions	Exhibit(s)
ACC Resources	6	8, 9
Allied Mineral Products	8	5
American Minerals	1	7
Ami Trdg	18	6, 7, 9
Baymag	1	6
CMC Cometals	5	5, 8, 9
Comsource	14	9
Epoch Resources	1	6
George William Rueff	6	8, 9
Global Minerals	8	8, 9
Golden Resources Intl	3	8, 9
Lake Resources	13	6, 7
LWB Refractories	10	8, 9
Possehl	46	5, 8, 9
Resco Products	1	6
S & S Intersource	5	9
Schenkers Intl Fwdrs	7	8
Valudor Products	11	8
Vesuvius	2	9
Wide Go US	2	5, 9
Worldwide Refractories	1	9
Yas	4	5
Order of Shipper	1	6

Short **[**157]** of identifying the "importer," none of these print-outs sheds any light on the nature of the underlying transaction. However, even a cursory examination of the Importers Table unambiguously establishes that none of the importers named in the print-outs is a Defendant in this action. [59] In other words, Plaintiffs' own Exhibits tend to

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[59] The sole suspect print-out appears to be the one where the "importer" is identified as "Order of Shipper," since the Court is left to wonder about the form of notice to -- and the identity of -- the consignee (and the consignee's relation to the shipper, who is likely to be the exporter retaining the consignee as its United States sales agent for the purposes of that particular transaction). See Docket Entry No. 105-8, at 2. However, the nature of the transaction **[**158]** reflected by this print-out appears questionably relevant to the case at bar, since: (a) the "port [of] origination" designated in that particular print-out is "PT ALFRED," that is, a seemingly non-Chinese port having code number "14069," compare Docket Entry No. 105-11, at 54 (suggesting that the codes for all Chinese ports falls within 57000's); see also Docket Entries Nos. 105-7 to 105-11 (identifying all Chinese ports under 57000's numbers); and (b) the only "port Alfred" the Court is aware of is in South Africa rather than in China. See <<http://www.portalfred.co.za>>.

establish that Defendants were *not* importers of goods in the United States; rather, various intermediaries and end-consumers, including Resco itself, were the actual importers of the goods. If this conclusion is true, then the FTAIA would necessarily apply to Plaintiffs' claims, and the Court would necessarily lack subject matter jurisdiction over this action and would be constrained to dismiss it.

b. Discrepancies in Defendants' Statements

As noted supra, Plaintiffs also seek to establish Defendants' importer status by pointing out that statements made by Defendants are incoherent. Although the incoherence of Defendants' statements, even **[*377]** if shown, does not assist Plaintiffs (since the burden to establish jurisdiction in this matter is on Plaintiffs, and Defendants have no obligation to disprove a negative), the Court finds a brief discussion of Plaintiffs' points warranted. Specifically:

(i) Plaintiffs point to one of Defendants' previously submitted declarations (which asserted that this Defendant "d[id] not **[**159]** export magnesite from China and d[id] not import magnesite into the United States [but, rather] delivered [it] to the customer, whether a broker . . . or an end[-]user, at some location in China [and was] unaware of the ultimate location where the magnesite may be delivered or used," Opp. at 15 (quoting Docket Entries Nos. 98-16 and 98-17), and argue that this statement contradicts one of Defendants' previously submitted exhibits (attached to Plaintiffs' Opposition as Exhibits 3 and 10) which shows Defendants' awareness of the destination of their goods; Plaintiffs, somehow, deduce from this alleged inconsistency that Defendants must have been "importers" of goods to the United States. See id. at 15-16. [60] Plaintiffs' make an identical deducement from the inconsistency between: (i) Defendants' previously submitted declarations asserting that Defendants "s[old] magnesite to brokers . . . , which then s[old] the magnesite to others, including the end-user"; and (ii) one of the print-outs reflected in the Importers Table which designated LWB Refractories, i.e., an end-user rather than an intermediary, as "importer." See id. at 16. Finally, pointing out the inconsistency between: (i) Defendants' **[**160]** previously submitted declarations asserting that Defendants "d[id] not export magnesite from China"; and (ii) bids for export quotas and award of export quotas to Defendants, Plaintiffs, again, somehow deduce that Defendants must have been importers of goods to the United States; and

(ii) Plaintiffs also point out that the Sinosteel Defendants are listed as exporters in 67 print-outs reflected in the Importers Table, see Opp. at 16, and that the Sinosteel Defendants' affiants averred that, as a result of their employ, they obtained personal knowledge of Chinese exportation practices. See id. at 16-17. Reading, once again, these statements and facts against Defendants' previously submitted declarations asserting that they "d[id] not export magnesite from China," Plaintiffs similarly translate such incoherence into the fact that Defendants must have been importers of goods to the United States. See id.

The Court disagrees. While the choice of words in Defendants' declarations may be ambiguous, this language does not state anything but Defendants' pure exporter status. [61]

c. Defendants' Exhibits

Finally, the Court turns to Defendants' exhibits (rather than declarations) re-submitted by Plaintiffs' in support of Plaintiffs' **[*378]** position that Defendants were importers of goods to the United States. See Docket Entry No. 105-5, at 7-8 ("Contract/Exhibit 3"); and Docket Entry No. 105-6, at 6-7 ("Contract/Exhibit 4").

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[60] Plaintiffs' Exhibit 3 does not support Plaintiffs' point; rather, it shows a transaction by the Defendant that does not assert importation. Plaintiffs' Exhibit 10 contains a blank boilerplate contract shedding no light on this matter, plus one contract between one of the Sinosteel Defendants **[**161]** and Possehl. See Docket Entry No. 105-12, at 10-11. That contract suggests that Possehl was likely the importer of goods (since Possehl purchased the goods in Dalian, China, and insured the goods, and arranged for their transportation to New Orleans).

[61] The "incongruent" language -- upon which Plaintiffs try to capitalize -- is a product of the Sinosteel Defendants' affiants, both of whom are Chinese nationals; the overall content of their declaration suggest limited fluency in English. See Docket Entries Nos. 98-16 and 98-17.

Unlike Plaintiffs' print-outs reflected in the Importers Table, both the Contract/Exhibit 3 and the Contract/Exhibit 4 are actual agreements for sale of goods **[**162]** shedding some light on the nature of particular transactions. The Contract/Exhibit 4 was executed between one of the Minmetals Defendants and an entity named "American Minerals, Inc.," which advertises itself as an intermediary facilitating sales and purchases world-wide. See <<*http://www.infomine.com*/ index/suppliers/American_Minerals,_Inc.html>> (stating on its homepage that it is "Connecting Mining Suppliers & Buyers Worldwide"). The sale in this Contract/Exhibit 4 was executed F.O.B., see Docket Entry No. 105-6, at 6, with a clarification that the goods would be leaving Chinese port Bayuquan en route to New Orleans, that "the carrying vessel [would] be provided by the Buyer[, and] partial shipments and transshipments [would] not [be] allowed," i.e., that the Buyer was interested in delivering the entire purchase to the United States in one "chunk" and in one "shot," that is without breaking bulk and without switching from one mode of transportation to another. Id. at 6-7. The combination of these statements strongly suggests that American Minerals, Inc., the buyer, was the actual importer in that transaction, and the Minmetals Defendant was acting solely as an exporter seller. **[**163]** In other words, the content of the Contract/Exhibit 4 gives the Court no reason to presume that the FTAIA jurisdictional bar might be inapplicable to Plaintiffs' claim.

However, the same cannot be said about the Contract/Exhibit 3, which suggests the opposite. See Docket Entry no. 105-5, at 7-8. That contract was executed between a seller named "China Metallurgical Import & Export Corporation" (which, according to the Amended Complaint, is a former name of one of the Sinosteel Defendants) and a buyer named "Allied Mineral Products, Inc.," resident in Columbus, Ohio. See id. at 7. The contract arranged for sale of magnesium oxide and for delivery of the goods from Xingang, China, to Columbus. See id. at 7. Moreover, the contract specified that: (a) the sale would be C.I.F., that is, with freight and insurance arranged by the seller; and (b) "the carrying vessel [would also] be provided by the Seller[, plus] partial adjustments, transshipment [(i.e., that change in the means of transportation)] and container transportation [would be] allowed," id. at 8, which is hardly surprising since Columbus (being situated on the Scioto River, which is too small for modern commercial shipping) is **[**164]** the place where goods are delivered by air or motor transportation, rather than by ocean vessels. The combination of these statements allows for an inference that Sinosteel, the seller, was the actual importer in that transaction, since it seems that Sinosteel retained a chain of freight-forwarders to transfer the goods to the American soil, clear the goods through the United States Customs onto the American soil, pay the duties, reload the goods and bring them to Columbus. In other words, the Contract/Exhibit 3 strongly suggests the possibility that at least in this transaction one of Defendants might have been an actual importer of magnesium oxide to the United States.

VI. LEAVE TO AMEND

HN37[] Ordinarily, the plaintiff may be granted "leave [to amend,] . . . when justice so requires." See *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993)*. Indeed, "[t]he Federal Rules reject the approach that pleading is **[*379]** a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman, 371 U.S. at 182-83*. However, "[a]llowing leave to amend **[**165]** where 'there is a stark absence of any suggestion by the plaintiffs that they have developed any facts since the action was commenced, which would, if true, cure the defects in the pleadings . . . , would frustrate Congress's objective in enacting this statute of 'provid[ing] a filter at the earliest stage (the pleading stage) to screen out lawsuits that have no factual basis.'" *Chubb, 394 F.3d at 164* (quoting *GSC, 368 F.3d at 246*). For instance, where the plaintiff had already amended plaintiffs complaint and yet failed to allege sufficient facts, the courts may find that "[the previous number of] bites at the apple is enough," and conclude that it is proper to deny leave to replead. *Salinger v. Projectavision. Inc., 972 F. Supp. 222,236 (S.D.N.Y. 1997)* (citing *Olkey v. Hyperion 1999 Term Trust, Inc., 98 F.3d 2 (2d Cir. 1996)*; *Career Educ. II, 2007 U.S. Dist. LEXIS 23635, at *36* (where "plaintiffs have had ample opportunities to research and plead their claims," but failed to compose a sufficient pleading, the complaint is dismissed with prejudice).

The foregoing, however, shall be read in light of the***HN38***[] *Federal Rule of Civil Procedure 15(a)*, which provides that, where "a party may amend **[**166]** [its] pleading only by leave of court[, such] leave shall be freely given when justice so requires." Correspondingly, the Supreme Court has identified several factors to be considered when applying *Rule 15(a)*:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182; see also *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., 663 F.2d 419, 425 (3d Cir. 1981)*, cert. denied, *455 U.S. 1018, 102 S. Ct. 1714, 72 L. Ed. 2d 136 (1982)*.

Thus, ***HN39***[] while "*Rule 15(a)* gives the court extensive discretion to decide whether to grant leave to amend after the time for amendment as of [right] has passed," Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d § 1486 (2d ed. 1990), the *Rule 15(a)* **[**167]** "generous standard is tempered by the necessary power of a district court to manage a case" in light of the factors listed in Foman. See *Shivangi v. Dean Witter Reynolds, Inc., 825 F.2d 885, 891 (5th Cir. 1987)*. The Foman list of factors, however, appears to be non-exhaustive, i.e., leaving it for the district court to consider, on a case-by-case basis, whether consideration of additional factors would be appropriate in order to assure that plaintiff is granted leave "when justice so requires." *Fed. R. Civ. P. 15(a)*.

Here, two groups of considerations drive the Court's analysis. The first one consists of the Court's realization that: (a) since Plaintiffs' filing of the Original Complaint, the Supreme Court provided guidance in *Twombly* and *Iqbal* as to the construction of *Rule 8*, archiving the *Conley v. Gibson* standard operable during filing of **[*380]** the Original Complaint; and (b) the Court's order accompanying its December Opinion directed Plaintiffs to submit proof for the purposes of factual review, as defined in Turicentro, rather than facial review under Iqbal and Twombly.

A. Implications of *Twombly, Iqbal* and Factual Review Under *Turicentro*

Since, as noted supra, the Supreme Court issued **[**168]** its Iqbal and Twombly decisions after the filing of the Original Complaint and the Court's December Opinion and accompanying order, the Court finds it proper to examine the issue of whether leave to amend should be granted on the grounds of these factors (rather than those expressly listed in Foman). The Court believes that the gist of such inquiry is sufficiently analogous to that conducted pursuant to *Rule 59(e)* and, hence, allows a parallel test.

HN40[] "*Rule 59(e)* permits motions to amend or alter a judgment and may be granted to submit new, previously undiscovered evidence or to correct a clear error of law or prevent manifest injustice." *Gutierrez v. Gonzales, 125 Fed. App'x 406, 416 (3d Cir. 2005)* (citing *North River, 52 F.3d at 1218*, and *Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)*). Relief under *Rule 59(e)* is also appropriate when there has been an intervening change in the controlling law. See *Buffa v. N.J. State Dep't of Judiciary, 56 Fed. App'x 571, 574 (3d Cir. 2003)* (citing *Rule 59(e)* and *New Jersey Local Rule of Civil Procedure 7.1(i)*). This Court turns for guidance to a decision the Court finds most pertinent to the circumstances at hand, Schiller v. Physicians Res. Group, Inc. ("Schiller-Appellate"), *342 F.3d 563 (5th Cir. 2003)* **[**169]** .

The opinion of the Court of Appeals for the Fifth Circuit in Schiller-Appellate was entered in response to an appeal taken by plaintiffs from the decision entered by the District Court for the Northern District of Texas in *Schiller v. Physicians Res. Group, Inc. ("Schiller-District"), 2002 U.S. Dist. LEXIS 3240 (N.D. Tex. Feb. 26, 2002)*. In Schiller-District, the plaintiffs claimed that the defendants made false and misleading statements to investors concerning the issuer's integration of practices that it had acquired across the nation and other issuer's business operations in order to inflate stock prices. See *Schiller-Appellate, 342 F.3d at 565*. The Schiller plaintiffs filed their complaint in December 1997 and amended their complaint numerous times from July 1998 to December 2000. See id. On February 5, 2001, the defendants moved to dismiss the then-pending third amended complaint under *Rule 12(b)(6)*. See id. In response -- and instead of requesting to amend their then-pending third amended complaint for the fourth time in order to correct the deficiencies -- the plaintiffs stood by their third amended complaint **[**170]** and requested the court to grant a further amendment only if the third amended complaint failed to state a claim. See id.

The district court, in response, found that the plaintiffs' pleadings failed to state a claim and granted the defendants' motion to dismiss, but refused to give the plaintiffs "four bites at the apple." See *id.* *at 565-66*.

On appeal, the plaintiffs

> argue[d] that leave to amend [was] warranted because [the] decision [issued by the Fifth Circuit, that is, the court whose decisions are binding upon the District Court] in *Nathenson, 267 F.3d 400*, represents an intervening change in the law. [The Fifth Circuit] reject[ed the plaintiffs'] argument for two reasons. First, Nathenson was decided on September 25, 2001, approximately five **[*381]** months before the district court granted the motions to dismiss, and thus cannot constitute an intervening change in the law. Second, [the Fifth Circuit] conclude[d] that Nathenson did not change the law with respect to the pleading requirements . . . . The Court in Nathenson merely confirmed that [a certain element] remained a valid basis for liability under [the applicable law]. [The Fifth Circuit] likewise reject[ed the plaintiffs'] argument **[**171]** that [other binding decision entered in conjunction with Nathenson and reflecting on the pleading requirements], represent[ed] an intervening change in the law. [The plaintiffs were] well aware of the pleading standards, but simply failed to meet them.

Schiller-Appellate, 342 F.3d at 568, n. 3; see also *Capstead Mortg. Corp. Secs. Litig., 2003 U.S. Dist. LEXIS 16525 (N.D. Tex. Sept. 19, 2003)* (conducting the same inquiry).

Therefore, under *Schiller-Appellate*,***HN41***[] an entry of a binding precedent, which: (a) is issued while the matter is still pending, and (b) clarifies -- rather than alters the existing legal regime -- cannot qualify as an intervening change in the law. If so, the Supreme Court's decisions in Twombly and Iqbal do not provide this Court with grounds to grant Plaintiffs yet another leave to amend, since both Supreme Court's decisions clarified -- rather than altered -- Rule 8 pleading standard, which existed at the time of Plaintiffs' filing of both the Original and Amended Complaints. In other words, the fact that Plaintiffs -- at the time of drafting the Original Complaint -- were unaware of the yet-to-come Supreme Court clarifications in Twombly, and -- at the time of their **[**172]** drafting of the Amended Complaint -- were not aware of the yet-to-come Supreme Court's clarifications in Iqbal, is of no import, since Plaintiffs were obligated to inventory the facts underlying their pleadings under the Conley v. Gibson regime, where they could just plead these facts with lesser specificity. And, if Plaintiffs had duly developed their facts, they should have had little trouble stating them with precision. Accord *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 161 L. Ed. 2d at 588-89 (2005)* ("[The Court recognizes] that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. But it should not prove burdensome for a plaintiff . . . to provide a defendant with some indication of the [facts] that the plaintiff has in mind. . . . [A]llowing a plaintiff to forego giving any indication of the [facts] that the plaintiff has in mind would . . . permit a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence") (citations omitted). **[**173]** In sum, the pleading requirements of *Rule 8*, as articulated in Twombly and Iqbal, should not have caught Plaintiffs by surprise.

The same, however, cannot be said about this Court's decision to subject Plaintiffs' subject matter jurisdictional position to factual review under Turicentro: it can reasonably be assumed that Plaintiffs did not know about this development until the Clerk's entry of the December Opinion and accompanying order three months prior to Plaintiffs' filing of the Amended Complaint. Therefore, it is not unfathomable that the requirement to produce actual proof of their position - rather than to merely state their facts -- caught Plaintiffs by surprise and found them unprepared and unable to rally their evidence within three months. With that in mind, the Court assesses Plaintiffs' ability to cure the deficiencies of their factual **[*382]** proof in the event another leave to amend is granted.

B. Limited Leave to Amend Is in the Interests of Justice

The factual proof submitted by Plaintiffs with regard to the position that Defendants are exporters falling within the reach of the Sherman Act under *subsection (1)(A)* (requiring that the defendants' conduct had a direct, substantial, **[**174]** and reasonably foreseeable effect on United States domestic trade) could be tallied up as follows: (a) six paragraphs in the Amended Complaint reiterated in the Opposition and making entirely factless assertions and inviting the Court to construe Plaintiffs' conclusory self-serving statements as "factual proof"; and (b) six paragraphs in the Amended Complaint, reiterated or paraphrased in the Opposition, which refer to irrelevant or unverifiable documents, the content of which -- even if deemed true -- fails to provide any relevant factual proof establishing (or even strongly suggesting) that Defendants' alleged collusive activities resulted in export that caused direct, substantial and reasonably foreseeable effect on United States domestic commerce within the meaning of clarifications provided in *Alcoa/Hartford Fire*. [62] Thus, the statements made and documents submitted by Plaintiffs indicate that the jurisdictional requirement of *subsection (1)(A)* is neither met nor likely to be met, since Plaintiffs -- even if granted leave to **[*383]** amend -- are unlikely to improve on their already-almost-five-year-long efforts and, hence, would produce just another mix of self-serving conclusions, irrelevant **[**175]** tables and exponential layers of heavily technical language disguising the stark absence of facts and factual proof.

Hence, leave allowing Plaintiffs to amend their claims based on *subsection (1)(A)* appears futile. See *Career Educ. II, 2007 U.S. Dist. LEXIS 23635, at *36* (***HN42***[] leave to amend is not warranted where "plaintiffs have had ample opportunities to research and plead their claims," but failed to produce sufficient pleadings). This conclusion seems to be particularly warranted in light of Plaintiffs' statements that: (a) "[t]his action seeks no damages or relief with respect to non-import foreign commerce," Am. Compl. P 1; and (b) "[t]he Amended Complaint alleges [only] import commerce, **[**178]** which [falls] outside the scope of the [FTAIA]" under the statute's introductory language. Opp. at 10-11. Since these statements -- regardless of Plaintiffs' occasional use of the "direct, substantial and reasonably foreseeable" language of *subsection (1)(A)* -- strongly indicate Plaintiffs' lack of interest in pursuing claims under this subsection, the combination of such lack of interest and lack of factual support after almost five years of litigation signifies to this Court that another leave to amend would not be in the interests of justice. Therefore, Plaintiffs' claims based on *subsection (1)(A)*, that is, if such claims were actually intended to be raised, will be dismissed with prejudice.

However, the opposite conclusion appears warranted with regard to Plaintiffs' claims based on the assertion that the FTAIA is wholly inapplicable to this matter because Defendants were importers that actually brought their price-fixed magnesium oxide into the United States. [63] True, virtually all documents and statements provided by Plaintiffs

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[62] A policy point made by Plaintiffs warrants a comment. See Opp. at 11 (asserting that the Court's focus on the Alcoa/Hartford Fire requirement to show that Defendants meant to increase prices in the United States,"prevents U.S. courts from adjudicating claims [based on any defendant's] global price-fixing [affecting exportation] without regard to the harm caused to U.S. consumers. This is plainly contrary to the language and intent of the FTAIA and controlling precedent. To dismiss this case on subject matter jurisdiction grounds would jeopardize numerous ongoing prosecutions and investigations of the Department of Justice, as well as private damages actions, against [foreign] cartels exporting products [that enter] into U.S. commerce"). The Court disagrees. Historically, federal courts and Congress have been careful in crafting their language, cautious to not unduly superimpose United States law outside United States borders. This was the reason for the Alcoa court's creation of the "intended" effect test, see *148 F.2d at 444*, for Judge Hand's rejection of the idea **[**176]** that Congress meant "to punish all whom [United States] courts can catch," *id. at 443*, and for the Supreme Court's adoption of the same in *Hartford Fire.* Moreover, a similar concern prompted Congress to limit Section (1)(A) exception to the export conduct that causes "direct" and "substantial" and "foreseeable" effect in the United States, see *LSL Biotechnologies, 379 F.3d at 679*, rather than to expand Section (1)(A) to all export conduct that "harms" United States consumers: had Congress wished to so state, it would have done so. Upon analyzing "the language and intent of the FTAIA and controlling precedent," this Court concludes that foreign exporters' global price-fixing is wholly indifferent to whether their goods might be imported into any particular state, the United States included, falls within the FTAIA jurisdictional bar, accord supra note 19 (discussing the anomaly of punishing indiscriminating exporters on the grounds of the choices made by United States importers); any conclusion otherwise is likely to yield an overreaching mandate directing "special competition" catering to American consumers with full ignorance of consumers in all other nations and even in the exporters' **[**177]** own state. Accord S/Reply at 7 ("Congress specifically adopted the effects test in the FTAIA to balance the concern for over-extending the antitrust laws to foreign trade in precisely the sort of situation present here, H.R. Rep. 97-686, at 9 - 12, 97th Cong., (2nd Sess. 1982), reprinted in U.S.C.C.A.N. 2487, at 2492-97 (1982), a principle similarly recognized by the Department of Justice Antitrust Enforcement Guidelines for International Operations, § 3.121, Illus. C, Var.(1) at 13 [clarifying that] wholly foreign sales activities not subject to U.S. anti-trust laws absent express agreement directed to the U.S.").

after almost five years of litigation strongly suggest that Defendants were nothing but world-wide exporters of magnesium oxide wholly indifferent to **[**179]** where their goods would be imported. However, the Court cannot ignore: (a) the potentially ambiguous print-out that refers to "Order of Shipper"; and, especially (b) the highly suspicious agreement replicated in Plaintiffs' Contract/Exhibit 3. In light of the content of the Contract/Exhibit 3, the Court finds that it would not be in the interests of justice to dismiss, with prejudice, Plaintiffs' claims based on the exclusionary language of the FTAIA introductory clause. Consequently, leave to amend will be granted with regard to these claims, and -- in recognition of the perhaps somewhat stricter standard Plaintiffs might have been facing since the issuance of the December Opinion informing them of the Court's intentions to conduct factual rather than facial review -- Plaintiffs will be allowed another ample opportunity to produce detailed and, hopefully, more abundant factual proof than the sole exhibit fortuitously provided to them by Defendants. [64]

[*384] C. Prudential Considerations

The Court's conclusion that limited leave to amend and a grant of ample time to Plaintiffs to comply with that leave are warranted invites considerations related to the speed of administering justice. Specifically, in light of: (a) the fact that Defendants challenge the Court's subject matter jurisdiction over this matter under the FSIA and, in addition, argue that a host of comity-sourced doctrines warrants abstention; and (b) the Court's recognition that postponement of its decision as to these arguments until after Plaintiffs' filing of their next amended complaint might result in undue waste of the parties' and the Court's time and resources since -- if the matter is dismissed on the grounds of the FSIA or a comity-sourced doctrine -- Plaintiffs' efforts associated with re-pleading, the parties' motion practice based on such re-pleading and the Court's resolution of the same, would be rendered wholly academic and, hence, wasteful for all practical purposes.

HN43[] The **[**182]** Court, indeed, is mindful of the general rule that abstention factors should be deemed relevant only if the court determines that subject matter jurisdiction exists in the first place, see, *Hartford Fire 509 U.S. at 797 n. 24* (citing *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979))*, and, thus, a decision as to abstention grounds prior to resolution of the subject matter jurisdiction issue might yield a wasteful, if not facially premature, ruling. However, here, an exception to the general rule appears warranted since Defendants' abstention grounds are closely intertwined with Defendants' subject matter jurisdiction challenges under the FSIA, which means that the Court's resolution of Defendants' FSIA challenges: (a) has to come first; and (b) is likely to dispose of at least a substantial number of aspects associated with Defendants' abstention grounds. Therefore, it appears prudentially unwise to address the FSIA challenges without addressing abstention. Rather, it appears in the interests of justice to not shelve either Defendants' FSIA-based and/or their abstention challenges until after a ruling is entered as to the applicability of the FTAIA's introductory **[**183]** language to Plaintiffs' claims. Cf. *Pittsburgh Press Co. v. Preate, 797 F. Supp. 436, 440 (W.D. Pa. 1992)* (relying, inter alia, on *Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987)*, in order to first conduct abstention analysis and then follow it with a determination as to the court's subject matter jurisdiction).

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[63] While the Court notes its deep concern with what appears to be Plaintiffs' position that neither the specific composition of the alleged "cartel" nor the relation between such cartel and the collusive agreement or the collusive agreement **[**180]** and the actual imports into the United States could matter for the purposes of stating a claim, see Opp. at 35 (seemingly so suggesting), these issues fall within the scope of the Sherman Act, rather than the FTAIA. The Court, therefore, need not reach these issues at the instant juncture.

[64] Plaintiffs maintain that they should not be "required to provide [any] sales agreements, purchase orders, shipping confirmations, . . . bills of lading" or other similar documentary proof verifying Defendants' activities as importers of goods into the United States because all "[t]hese documents are, of course, in Defendants' possession." Opp. at 30. Plaintiffs' assertion appears half-hearted at best, since any typical international sale of goods leaves voluminous paper trail in the hands of the seller, the buyer and all intermediaries, plus the United States Department of Customs. Therefore, the Court is not clear as to how there could be no documentary or, at the very least, detailed first-hand testimonial evidence if, as the Amended Complaint maintains, Defendants have been in fact bringing hundreds of thousands of tons of magnesium oxide into the United States, year after year, for almost a **[**181]** decade. Cf. *Paul Morelli Design, Inc. v. Tiffany & Co., 200 F. Supp. 2d 482, 488 (E.D. Pa. 2002)* ("We do not leave our common sense at the courthouse door"). See also infra note 149 of this Opinion.

Consequently, the remainder of this Opinion will examine Defendants' abstention challenges, as well as those raised by Defendants under the FSIA with respect to the Court's subject matter jurisdiction.

VII. THE FSIA AND ABSTENTION ASPECTS

As noted supra, Defendants raise a cluster of affirmative defenses based on the FSIA [65] and interrelated abstention-causing **[*385]** tenets referred to by the courts as the "act of state doctrine," "international comity" and "government compulsion" (which is also known as "sovereign" or "foreign" compulsion). See S/Mot. at 45-54 (listing and discussing these tenets as related but nonetheless wholly independent defenses); S/Reply at 7, 18, 20, 24 (same); M/Mot. at 23-36 (same); M/Reply at 11-17 (same); accord Opp. at 34-65.

A. Standard of Review

It has been argued that, ***HN44***[] for the purposes of the FSIA, the defendant has to establish a prima facie case of immunity, and only if the defendant succeeds at that, does the burden shift to the plaintiff to rebut the presumption. See *Alberti v. Empresa Nicaraguense de La Carne, 705 F.2d 250, 256 (7th Cir. 1983)* (relying on H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, reprinted in, U.S.C.C.A.N. 6604, 6616). Since the standard of review applied to the defendant's prima facie showing has been typically construed as imposing the burden of producing factual proof rather than merely making factual allegations, accord *Matter of Sedco, Inc., 543 F. Supp. 561 (S.D. Tex. 1982)*; **[**185]** *De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900 (E.D. La. 1981)*; *Jet Line Services. Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165 (D. Md. 1978)*, the Court concludes that Defendants are obligated to make a showing under the standard comparable to the factual review process, as it was defined by the Third Circuit in *Turicentro.*

Moreover, a substantively identical standard of review appears to be applicable to Defendants' position advocating abstention, since ***HN45***[] the prevalent practice of federal courts facing abstention issues has been to focus on the factual proof presented by the abstention-advocating litigant rather than on conclusions and assertions of the litigant unsupported by evidentiary proof. Accord *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976)* (addressing the concept of abstention in domestic setting and cautioning that federal courts should exercise abstention only in "exceptional" circumstances, as the litigant proves the reason to forego the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"); *Grammar, Inc. v. Custom Foam Sys., Ltd., 482 F. Supp. 2d 853, 855 (E.D. Mich. 2007)* (applying **[**186]** Colorado River to an international setting); cf. *Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994)* (noting two similar standards, one based on Colorado River and another based on *Landis v. North American Co., 299 U.S. 248, 57 S. Ct. 163, 81 L. Ed. 153 (1936))*; *I. J. A., Inc. v. Marine Holdings, Ltd., 524 F. Supp. 197, 199 (E.D. Pa. 1981)* (applying the standard analogous to Colorado River).

The Court, therefore, will examine Defendants' position with regard to the FSIA and their abstention-prompting grounds under the standard substantively identical to the Court's factual review applied to Plaintiffs' FTAIA-related contentions, i.e., the Court will "accord no presumption of truth" to Defendants' statements unless such statements are supported by evidential proof actually presented in this matter or amenable to judicial notice. Accord *Turicentro, 303 F.3d at 299, n.4*.

B. Applicable Legal Tests

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[65] While, from the point of its legislative history, the FSIA is an affirmative defense, see H.R. Rep. No. 1487, 94th Cong., 2d Sess. at 17, **[**184]** reprinted in, U.S.C.C.A.N. 6604, 6616 (1976), the Supreme Court noted that the congressional position to that effect was not entirely accurate since a district court lacks jurisdiction over a suit against a foreign state until it is determined that the defendant does not have immunity, which means that the absence of sovereign immunity must be determined regardless of whether it was raised by the defendant or even defendant's entry of appearance. See *Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 n.20, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983)*.

1. The FSIA [66]

[*386] Nearly **[**187]** two hundred years ago, in The Schooner Exchange v. M'Faddon, Chief Justice Marshall, speaking for the Supreme Court, held that the United States had impliedly waived jurisdiction over certain conduct of foreign sovereigns, see *11 U.S. (7 Cranch) 116, 145-147, 3 L. Ed. 287 (1812)*, hence creating what is known as "absolute immunity" for foreign sovereigns, see *Verlinden, 461 U.S. at 486* (citing *Berizzi Bros. Co. v. S. S. Pesaro, 271 U.S. 562, 46 S. Ct. 611, 70 L. Ed. 1088 (1928))*, i.e., the policy is based on the principles that all sovereigns possess equal rights and equal independence under international law, and that a sovereign enters the territory of a friendly foreign nation confident that immunities conferred on it by reason of its sovereignty will be preserved. See *Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1534 (11th Cir. 1985)*. However, in 1952, the State Department abandoned the absolute immunity policy in favor of the "restrictive" foreign sovereign immunity, see *Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976)*; letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman, reprinted in, 26 Dept. of State Bull. 984-985 (1952), which confined **[**188]** immunity to suits involving only the foreign sovereign's public acts. See *Verlinden, 461 U.S. at 487 (1983)*. However, since application of this restrictive theory was inconsistent at best, see id., Congress effectively codified the restrictive theory in 1976, when it enacted the FSIA, which bestowed limited immunity upon so-called "foreign states." [67] See *28 U.S.C. § 1330*.

HN46[] The statute defined the term "foreign state" broadly, including in the definition political subdivisions of a foreign state, as well as the state's "agencies and instrumentalities." [68] See *28 U.S.C. § 1603(a)*; *Gates v. Victor Fine Foods, 54 F.3d 1457, 1460 (9th Cir. 1995)*. The latter means an entity that is a separate juridical person (corporate or otherwise) and, in addition, is an organ of a foreign state, or a majority of whose shares or other ownership **[**189]** interest is owned by a foreign state or its political subdivision. [69] See, e.g. *Abrams v. **[*387]** Societe Nationale des Chemins de Fer Francais, 332 F.3d 173, 178-180 (2d Cir. 2003)* (French national railroad company is agency or instrumentality of foreign state because it is a separate legal entity wholly-owned by French government); *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635, 639-649 (9th Cir. 2003)* (Japanese government funded corporation, expressly created by the government to perform exclusive task of

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[66] In light of the breadth and complexity of the FSIA, a multitude of aspects of the statute, its case law interpretations and its legislative history are omitted from this discussion --not for lack of significance but for having little relevance to the factual circumstances at hand.

[67] The primary purpose of the FSIA was to depoliticize sovereign immunity decisions by transferring them from the executive branch to the judiciary, hence assuring litigants that the decisions would be made on legal rather than political grounds. See *Dames & Moore v. Regan, 453 U.S. 654, 685, 101 S. Ct. 2972, 69 L. Ed. 2d 918 (1981)*; *Nat'l Airmotive Corp. v. Iran, 499 F. Supp. 401, 406 (D.D.C. 1980)*.

[68] ***HN47***[] For the purposes of the FSIA, an "agency or instrumentality of a foreign state" is not the same legal entity as the foreign state itself. See ***TransAmerica Leasing. Inc. v. La Republica de Venezuela, 200 F.3d 843, 847-848, 339 U.S. App. D.C. 385 (D.C. Cir. 2000)***; *Gates v. Victor Fine Foods, 54 F.3d 1457, 1462 (9th Cir. 1995)*.

[69] The statute's legislative history suggests that the term "agency or instrumentality" should be interpreted broadly, see *EIE Guam, 322 F.3d at 639-649*; cf. *Refco. Inc. v. Galadari, 755 F. Supp. 79, 82 (S.D.N.Y. 1991)* (statements of foreign officials to be accorded great weight in determining whether entity is foreign state within meaning of FSIA). An entity may qualify for immunity even if it has some autonomy and independence from its government, see ***Venus Lines, 210 F.3d at 1311-1313***, and without regard to its line of business, e.g., trading, mining, shipping, banking, procurement, etc. See H.R. Rep. No. 1487, 94th Cong. 2d Sess., at 15-16, reprinted in, U.S.C.C.A.N. 6604, 6614 (1976). ***HN48***[] The **[**191]** Court of Appeals for the Third Circuit explained that the "agency or instrumentality" nature is determined under the seven-factor test: (1) the circumstances surrounding the entity's creation; (2) the purposes of the entity's activities; (3) the degree of supervision by the government; (4) the level of governmental financial support; (5) the entity's employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; (6) the entity's obligations and privileges under the foreign state's laws; (7) the ownership structure of the entity. See *USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 206-208 (3d Cir. 2003)* (holding that an Irish insurer was an organ of the Irish government in light of Ireland's indirect ownership and control over the insurer's shares, and the government's decision-making role).

revitalizing financial system is a state organ); *Venus Lines Agency v. CVG Industria Venezolana de Aluminio, 210 F.3d 1309, 1311-1313 (11th Cir. 2000)* (defendant corporation is considered a foreign state because it is majority-owned by agency or instrumentality of Venezuelan government); *Mangattu v. M/V IBN Hayyan, 35 F.3d 205, 207 (5th Cir. 1994)* (entity 100% owned by several foreign states, created by agreement of all participating states, is a foreign state for the purposes of the FSIA). However, the Supreme Court held that a subsidiary of an "instrumentality" (or an entity otherwise owned by "instrumentality") is not itself an "instrumentality" for the purposes **[**190]** of the FSIA, since the exponential-level connection between such subsidiary and the state renders the entity too removed to qualify. See *Dole Food Co. v. Patrickson, 538 U.S. 468, 477-479, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003)*.

HN49[] Once the defendant's status as a "foreign state" is established, the FSIA presumes the defendant's immunity to be the rule, not an exception, see *Saudi Arabia v. Nelson, 507 U.S. 349, 355, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)*; *Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)*; *Corzo v. Banco Central de Reserva del Peru, 243 F.3d 519, 522 (9th Cir. 2001)*; **[**192]** *Kelly v. Syria Shell Petroleum Dev't B.V., 213 F.3d 841, 847 (5th Cir. 2000)*; *Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1470 (9th Cir. 1995)*; *General Elec. Capital Corp. v. Grossman, 991 F.2d 1376, 1380 (8th Cir. 1993)*, even though the FSIA includes a number of exceptions, one of which is based on the defendant's commercial activity carried on in the United States. See *28 U.S.C. § 1605(a)(2)*. For purposes of the exception, the commercial character of the activity is determined by examination of the nature of defendant's conduct rather than of its purpose, see *28 U.S.C. § 1603(d)*; *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 615-616, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)*; *Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 390 (D.N.J. 1979)*, aff'd, *699 F.2d 657 (3d Cir. 1983)* (en banc), with recognition that: (a) the term "commercial activity" was legislatively intended to include a broad spectrum of endeavors, such as extraction of minerals, commute of passengers, trade, etc.; and (b) if an activity is customarily carried on for profit, then its commercial nature can readily be assumed. [70] See H.R. Rep. No. 1487, 94th Cong., 2d Sess., at 16, reprinted in, U.S.C.C.A.N. 6604, 6614-6615 **[**193]** (1976). In sum, the gist of the commercial exception inquiry is whether the particular actions, **[*388]** regardless of the motive behind them, were of the type in which a private party would engage for the purposes of commerce. See, e.g., *Morel de Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984)*. For instance, the Supreme Court clarified that when a foreign government acts not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" for the purposes of the FSIA. See *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614-615, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)* (issuance of bonds by Argentina as part of currency stabilization plan was commercial activity because bonds were "in almost all respects garden-variety debt instruments").

2. Act of State Doctrine

HN51[] While the act of state doctrine, being judicially created, is more flexible than the FSIA --and, hence, **[**194]** might perhaps warrant abstention even where the FSIA does not strip the court of jurisdiction over a certain case, see *Republic of Austria v. Altmann, 541 U.S. at 700-701* (leaving this question open) -- the key features of the act of state doctrine and the FSIA are somewhat similar, since the doctrine prompts United States courts to refrain from judging the validity of a foreign state's governmental acts as to matters within that state's borders, see *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964)*, building on the premise that the most fundamental aspect of foreign relations is the recognition of foreign governments. Cf. *Corzo v. Banco Central de Reserva del Peru, 243 F.3d 519, 524 (9th Cir. 2001)* (observing that the purpose of the FSIA is to promote harmonious international relations). However, while being more flexible than the statute, the doctrine has evolved from a generic expression of international law into an relatively narrow inquiry into "a consequence of domestic separation of powers." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400, 404,*

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[70] ***HN50***[] In enacting the commercial-activity exception, Congress sought to make it difficult for foreign defendants engaged in commercial activity to invoke sovereign immunity with regard to commercial wrongs. See *Alberti v. Empresa Nicaraguense de La Carne, 705 F.2d 250, 256 (7th Cir. 1983)*.

110 S. Ct. 701, 107 L. Ed. 2d 816 (1990); Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804. Thus, the doctrine could be summarized as a merely strong belief **[**195]** of the judiciary that engaging in the task of passing on the validity of foreign acts of state could hinder rather than further the conduct of foreign relations. See Sabbatino, 376 U.S. at 421-423; accord Kirkpatrick, 493 U.S. at 409; see also Gross v. German Found. Indus. Initiative, 456 F.3d 363 (3d Cir. 2006) (the court must dismiss the suit if its resolution would require the court to declare invalid an official act of a foreign sovereign). Consequently, the doctrine knows numerous exceptions which include, inter alia, non-abstention in matters challenging: (a) the acts performed outside the sovereign territory of a foreign government, see Drexel Burnham Lambert v. Galadari, 777 F.2d 877, 881 (2d Cir. 1985) (the act of state doctrine does not apply to claims based on ownership of shares securing note of Dubai national because situs of debt was outside Dubai); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520-523 (2d Cir. 1985) (claims based on notes payable by Costa Rican banks fell outside the protection of the doctrine because situs of debt was outside Costa Rica); or (b) the acts qualified as "commercial activity." See Alfred Dunhill, 425 U.S. at 703-706 **[**196]** (declining to extend act of state doctrine to acts committed by foreign sovereigns in course of purely commercial operations); Williams v. Curtiss-Wright Corp., 694 F.2d 300, 302-305 and n. 2 (3d Cir. 1982); compare Callejo v. Bancomer, S.A., 764 F.2d 1101, 1114-1115 (5th Cir. 1985) (claim that Mexican bank breached contract by repayment of debt in devalued pesos did not qualify for commercial activity exception to act of **[*389]** state doctrine because promulgation of exchange control regulations was sovereign and not commercial in nature); Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408 (9th Cir. 1983) (claim that bribe to obtain offshore oil concession violated antitrust laws did not qualify for commercial activity exception to act of state doctrine because granting of concessions involved exercise of powers peculiar to sovereigns). Therefore, the **HN52**[] defendant successfully establishes the act-of-state defense if the "commercial activity" exception does not remove the reasons for abstention. See id.

3. The Concept of Comity

The main point of the parties' confusion appears to relate to the concept of comity, that is, considering the multitude of tests offered in their briefs. **[**197]** While the tests stated therein are all correct, theoretically, such theoretical correctness does not, in and by itself, render these tests applicable to the case at bar. The Court surmises that the parties' confusion as to the proper test might be rooted in the federal courts' frequent wholesale utilization of the phrase "doctrine of comity," even though such utilization blends the distinctions between various tests and corresponding circumstances.

> The use of the term "comity" to describe a theory for accommodating conflicting legal policies of territorial sovereigns was developed by scholars in 17th-century Holland to resolve conflicts between the laws of the various Dutch provinces. See Davies, The Influence of Huber's de Conflictu Legum on English Private International Law, 18 Brit. Y.B. Int'l L. 49, 52 (1937). The Dutch scholar, Ulrich Huber, set out to reconcile the fact and theory of national territorial authority with the needs of a developing international system in which persons and commerce moved across state lines. Huber summarized his analysis in three now well-known axioms: (1) the laws of every sovereign authority have force within the boundaries of its state, and bind **[**198]** all subject to it, but not beyond; (2) those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily; (3) those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state and another state's courts. See [id. at] 26 (1937).

Windt v. Qwest Communs. Int'l, Inc., 544 F. Supp. 2d 409, 434 n. 34 (D.N.J.), aff'd 529 F.3d 183 (3d Cir. 2008).

Huber's theory and his choice of word "comity" derived, in turn, from the principle of "comity of nations." See Morguard Investments, Ltd. v. De Savoye [1990] 3 S.C.R. 1077 (where the Supreme Court of Canada, quoting The Schooner Exchange, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287, traced this development, relating the fact that "states cannot live in splendid isolation" to the "common interest [which] impels sovereigns to mutual intercourse" on the legal plane). Since "comity of nations" was not a natural state of affairs but born of necessity, see Connaught Labs.

v. Medeva Pharma., 1999 F.T.R. LEXIS 1817, at *25 (Fed. Ct. **[**199]** Canada 1999) ("'*HN53*[] Comity' is the name given to the general principle that encourages the recognition in one country of the judicial acts of another. Its basis is not simply respect for other nations, but convenience and necessity, recognizing the need to facilitate inter-jurisdictional transactions"), the principle was necessarily fluid, conceptually. See id. (noting that "the content of comity must be adjusted in light of a changing world order" and citing Morguard). This fluid principle, in turn, provided a basis for an equally fluid legal concept of the same name. See *Hilton v.* ***[*390]*** *Guyot, 159 U.S. 113, 163-64, 16 S. Ct. 139, 40 L. Ed. 95 (1895)* ("*HN54*[] The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has been often criticized, no satisfactory substitute has been suggested. 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other"). The fluid concept, in turn: (a) **[**200]** indirectly provided theoretical support to areas of law related to international interactions, e.g., by supplying jurisprudential solutions for conflict of law problems, or bases for enforcement of foreign judgments or for resolutions of forum non conveniens challenges; and, in addition, (b) mushroomed into a panoply of legal doctrines, all bearing the name "the doctrine of comity," even though each of these doctrines eventually developed its own distinct set of considerations ensuring application of the umbrella concept of comity to the particular issue tackled by the doctrine. [71] See, e.g., David J. Bederman, **[*391]**

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> *HN55*[] In the United States[,] the foundation of private international law is the [concept] of international comity. Roughly speaking, courts, according to this [concept], should apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty. [See] Mark Janis, An Introduction to International Law 327 (2003). [Since] international comity requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns[,] scholars and courts have characterized international comity inconsistently as a choice-of-law principle, see, e.g., Ian F. Baxter, Essays on Private Law 22 (1966), a synonym for private international law, see, e.g., Joseph H. Beale, A Treatise on the Conflicts of Law, vol. 1 § 6.1 (1935); L. Oppenheim, International Law 34 n.1 (H. Lauterpacht ed., 8th ed. 1955), a rule of public international law [or an element of international legal order], see, e.g., 288 Domestic Letters of the Department of State, cited in, 4 Green H. Hackworth, Digest of International Law 460 (1942); . . . Harold Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am. J. Int'l. 1. 280, 281 (1982) **[**202]** , a moral obligation, see, e.g., Ian Brownlie, Principles of Public International Law 31 (3d ed. 1979); Joseph Story, Commentaries on the Conflict of Laws § 33 (1834), expediency, see, e.g., *Somportex. Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971)*, courtesy, see, e.g., Francis Wharton, A Treatise on the Conflict of Laws 5 (2d ed. 1881), reciprocity, see, e.g., Hilton, 159 U.S. [at] 163-64; Hans Smit, International Res Judicata and Collateral Estoppel, *9 UCLA L. Rev. 44, 53 (1962)*, utility, see, e.g., Beale, id., § 71; Henry Wheaton, Elements of International Law § 79 (Richard Henry Dana, Jr. ed., 8th ed. 1866) or diplomacy. See, e.g., Harold Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579, 589 (1983). . . . For all these reasons, international comity [might have been perceived as] too vague, incoherent, illusory, and ephemeral to serve as a foundation for U.S. private international law. Yet, it is precisely these qualities that have allowed the [concept] of comity to mutate over time in ways that [allowed for creation of various "doctrines of comity" that] responded to different geopolitical circumstances. **[**203]** [In its direct manifestations, the concept of] international comity [yielded] comity []as a discretionary doctrine that empowered courts to decide when to defer to foreign cases [and to the] broader concept of comity as a rule and a justification for deference encompasses a wider constellation of . . . [inter]related doctrines -- like the foreign-act-of-state doctrine -- which, though analytically distinct . . . , nonetheless share[] certain methods, values, and justificatory rhetoric.

Joel R. Paul, Transformation of International Comity, 71 L. & Cont. Probs. 19 (2008) (citations restored to the main text, parenthetical explanations and citations to the author's prior publication, i.e., Comity in International Law, 32 Harv. Int'l L.J. 1 (1991), omitted). Hence, the panoply of "doctrines of comity," distinctly named doctrines (e.g., "the act of state") and even the statutory language of the FSIA, are different legal faces expressing an overall position of United States legislators and the judiciary as to the modern "comity of nations." See *Republic of Aus. v. Altmann, 541 U.S. at 689-691* (the doctrine of foreign sovereign immunity had always been viewed as a matter of grace and comity); **[**204]** *Verlinden, 461 U.S. at 486* (same); *Ex parte Republic of Peru, 318 U.S. 578, 586-590, 63 S. Ct. 793, 87 L. Ed. 1014 (1943)* (same); accord *Aquamar S.A. v. Del Monte Fresh Produce N.A., 179 F.3d 1279, 1294-1298 (11th Cir. 1999)* (same); *Aquamar S.A. v. Del Monte Fresh Produce N.A., 179*

International Law Frameworks 182 (Foundation Press 2006) ("Comity has been construed by the Supreme Court to mean a number of different things"); N. Jansen Calamita, Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings, 27 Pa. J. Int'l Econ. L. 601, 614 (2006) (same); see also *Windt, 544 F. Supp. 2d at 434 n. 35* (pointing out different doctrinal incarnations of the concept of comity and citing M. Wolfe, Private International Law 19-20 (2d ed. 1950); Yntema, The Comity Doctrine, 65 Mich. L. Rev. 9 (1966); and Lorenzen, Huber's de Conflictu Legum, **[**201]** 13 Ill. L. Rev. 375, 375-77 (1918)).

4. Government Compulsion

While just a handful of courts addressed the doctrine of government compulsion and its being moored to the broad concept of comity, a string of judicial decisions forming the doctrine can clearly be detected. The seminal decision appears to be Hartford Fire, the case where the Supreme Court read comity as a jurisdictional rule of reason applied to potential impossibility of compliance with conflicting regimes (rather than to the scenarios where simultaneous but potentially conflicting or forum non conveniens-like adjudications might be conducted). Cf. *Hartford Fire, 509 U.S. at 817* (Scalia, J., dissenting) (clarifying that "[t]he 'comity' [the Court] refer[s] to is not the comity of courts, **[**205]** whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed 'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws"). Applying the principles of prescriptive comity to the challenges presented in that particular matter, the Court in Hartford Fire held that such form of comity did not prevent the extraterritorial application of the Sherman Act to British reinsurers because the requirements of the Sherman Act did not directly conflict with British regulations covering the defendants, see id., *509 U.S. at 799*, i.e., because conforming with United States law did not require the foreign defendants to violate British law. See id. It is, however, an error to construe the holding of *Hartford Fire* as a decision stating that the absence of a "true conflict between domestic and foreign law" automatically precludes abstention on the basis of preclusive comity. As one court noted,

> Hartford Fire's holding is not necessarily that expansive. [See] In re Maxwell Commc'n Corp. plc, *93 F.3d 1036, 1050 (2d Cir. 1996)* ("As we have previously noted, Hartford Fire recognized that 'other **[**206]** concerns' might be implicated if the context were different") (citing *Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733, 747 (2d Cir. 1994))*. [Hence, courts] decline[] to construe Hartford Fire's conflict analysis as a prerequisite to the application of comity principles . . . because of numerous countervailing considerations that counsel in favor of abstention. . . . The limited scope of the Supreme Court's comity holding is demonstrated **[*392]** by its statement that the presence of a conflict between domestic and foreign law was "[t]he only substantial question" before the Court with respect to the comity issue. *Id. at 798*. Moreover, the main authority cited in Hartford Fire for the "true conflict" proposition -- the Third Restatement Foreign of Relations Law *§ 403* and comment j --requires conflict analysis only if the exercise of jurisdiction is first found to be reasonable. See *id. at 821* (Scalia, J., dissenting in part). The Hartford Fire Court appears to have assumed that exercising jurisdiction over the foreign defendants was reasonable in that case. See *id. at 799* ("We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise **[**207]** of jurisdiction on grounds of international comity"); see also *id. at 799 n.25*. Therefore, Hartford Fire did not forbid [rule of reason] abstention on comity grounds in the absence of [expressly] conflicting laws; it merely assumed that no other considerations existed in the [Hartford Fire] case that justified abstention.

Freund v. Republic of France, 592 F. Supp. 2d 540, 573-74 (S.D.N.Y. 2008).

In sum, it appears that the holding of *Hartford Fire* is best read as: (a) articulating a broad rule-of-reason approach to prescriptive comity; (b) specifying that the defendant's inability to comply simultaneously with the laws of the defendant's nation and United States laws would necessarily warrant abstention, accord Report of the Attorney General's Committee to Study the Antitrust Laws 83 (1955), quoted in, Wilbur L. Fugate, Foreign Commerce and the Antitrust Laws 148 (1958) ("should the laws of another country require uniform non-competitive prices by

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F.3d 1279, 1294-1298 (11th Cir. 1999) (since Congress intended international law to inform the courts in their interpretation of the FSIA, courts may look to the concepts of international law as a guide to the meaning of the FSIA).

companies doing business there, then compliance with that law should constitute a defense in this country to an antitrust charge of price fixing solely in that country"); and (c) guiding that abstention based on prescriptive comity might also **[**208]** be appropriate in other scenarios, e.g., where a foreign government's manifestation of its sovereign power (through the means other than issuance of a legal provision directly contradicting United States law) compels defendants' conduct which, if assessed under United States law, would be deemed illegal. See, e.g., *Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976)*, and *Mannington Mills, 595 F.2d 1287* (the leading cases that declined to read the jurisdictional rule of reason narrowly).

It seems the Court of Appeals in *Mannington Mills* and the Ninth Circuit in *Timberlane Lumber* were the pilot tribunals that bridged the prescriptive comity of Hartford Fire into what has developed as its sprout: the doctrine of government compulsion. Addressing the considerations that might be pertinent to the application of the doctrine, both courts came up with similar lists of factors setting forth a "tidy framework, easily workable in practice." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1188 n.63 (E.D. Pa. 1980)*, vacated sub nom, *In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980)*, rev'd sub nom, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. **[**209]** [72] However -- being **[*393]** merely framework-building guideposts -- these compilations of factors were not offered by both courts as either exhaustive lists of pertinent considerations or as sets of mandatory elements, each of which must be present to trigger an application of the doctrine. Cf. *Trugman-Nash, Inc. v. New Zealand Dairy Board, 954 F. Supp. 733, 737 (S.D.N.Y. 1997)* (observing that, "[i]n Hartford [Fire], the Supreme Court granted certiorari to consider the Ninth Circuit's decision in *In re Insurance Antitrust Litigation, 938 F.2d 919 (9th Cir. 1991)*, [where t]he Ninth Circuit referred to the factors [it already] articulated in its prior Timberlane decision[. The Ninth Circuit in Insurance Antitrust Litigation] concluded [that all these factors, short of one] militated in favor of [non-abstention], but [the remaining] factor . . . requir[ed] abstention. . . The Supreme Court reversed, finding [that this remaining factor was not present in light of the evidence in the record]. In doing so, the Court did not have before it, and accordingly expressed no view upon, the validity of [the analysis had it been performed only under] other Timberlane factors"); see also *Laker Airways. Ltd. v. Pan American World Airways, Inc., 604 F. Supp. 280, 292 (D.D.C. 1984)* **[**210]** (employing a selective application of the Mannington Mills factors).

Since Mannington Mills and Timberlane Lumber, a handful of courts reflected, either in holding or in dicta, upon the gist and/or the sketchy parameters of the government compulsion doctrine. See, e.g., *Williams v. Curtiss-Wright Corp., 694 F.2d 300, 303 (3d Cir. 1982)* (stating that abstention pursuant to the doctrine of "governmental compulsion . . . is available [where] the [allegedly illegal] action was mandated by a foreign sovereign," relying on *Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1293 (D. Del. 1970)*, the case observing that it "should be self-evident [that a]nticompetitive practices compelled by foreign nations are not restraints of commerce, as . . . understood in the Sherman Act, because refusal to comply would put an end to commerce [since c]ommerce may exist [only] at the will of the government, and to impose liability for obedience to that will would eliminate for many companies the ability to transact **[**212]** business in foreign lands[, including the United States" and citing Kingman Brewster, Antitrust and American Business Abroad 94 (1976)); accord In re Vitamin C Antitrust Litig. ("Vitamin C"), *584 F. Supp. 2d 546, 559 (E.D.N.Y. 2008)* (outlining the perimeter of the government compulsion doctrine as ensuing from the circumstances where the alleged wrongdoers-defendants were "acting as private citizens pursuant to governmental directives "); *Linseman v. World Hockey., 439 F. Supp.*

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[72] The Timberlane factors are: (a) the degree of conflict with foreign law or policy; (b) the nationality or allegiance of the parties and their place of business; (c) the likelihood of compliance with judicial orders; (d) the effects on the countries involved; (e) whether there was an explicit intention to harm United States commerce or the foreseeability of such effect; and (f) where the conduct occurred. See *Timberlane, 549 F.2d at 614*. The Court of Appeals refined the Timberlane list by offering the following list of considerations: (a) the degree of conflict with foreign law or policy; (b) nationality of the parties; (c) relative importance of the alleged violation of conduct here compared to that abroad; (d) availability of a remedy abroad or pendency of litigation there; (e) existence of intent to harm or affect United States commerce; (f) possible effect upon foreign relations if the court grants relief; (g) whether the defendant will be under conflicting requirements by both countries if the requested relief is granted; (h) whether the court's order could be made effective in practice; (i) whether the same **[**211]** type of order would be acceptable in the United States if made by a foreign nation under similar circumstances; and (j) whether a treaty with the affected nations has already addressed the issue at bar. See *Mannington Mills, 595 F.2d at 1297*.

1315, 1324 (D. Conn. 1977) (quoting Timberlane Lumber, 549 F.2d at 606, for a somewhat-doctrines-conflating observation that "corporate conduct which is compelled by a foreign sovereign is also protected from antitrust liability, as if it were an act of the state itself").

All these statements seemingly build on the Court of Appeals' broad observation **[*394]** that ***HN56***[] the government compulsion doctrine "shields from . . . liability the acts of [the defendant that were] carried out in obedience to the mandate of a foreign government" and so, in order to successfully invoke the doctrine, the defendants must show that the defendants' act challenged as a violation of United States law was compelled by the foreign government **[**213]** through a compulsion that was "basic and fundamental" to the defendants' acts (rather than served as a mere peripheral aspect which landed certain supporting considerations to the defendants' decision to engage in the challenged conduct). Mannington Mills, 595 F.2d at 1293-94. This Court, therefore, distills from the aforesaid observation that the defendant invoking government compulsion must show that: (a) a certain entity in the defendant's nation qualifies as an arm of the state by enjoying governmental or quasi-governmental powers that are either uniquely peculiar to sovereigns or of essentially sovereign nature; (b) there is a direct link between the entity's powers and the defendant, which enables the entity to compel the defendant to act in accordance with the entity's prescripts as a result of the entity's ability to subject the defendant to a significant negative repercussion for failure to comply with the entity's prescripts; and (c) the entity, in fact, compels the defendant to act in accordance with a certain prescript, and such compulsion is the fundamental force causing the defendant's act challenged as a violation of United States law. See id; see also Interamerican Refining, 307 F. Supp. at 1298 **[**214]** (observing that actual compulsion need not be based on a validly promulgated foreign mandate or a duly published binding order); accord Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943) (compliance with a state regulatory program shields individuals from liability).

C. Parties' Relevant Exhibits and Factual Assertions

1. Defendants' Moving Papers

The Minmetals Defendants open the relevant part of their assertions with an observation that, since "China is still in the process of transitioning from a completely state-controlled economy to a market-based system [like] the United States[, t]he Chinese government still practices extensive intervention in its economy and, in particular, in the export of commodities." M/Mot. at 9 (citing Docket Entry No. 99-3 (U.S. Trade Representative ["USTR"], 2008 Report to Congress on China's WTO Compliance (Dec. 2008)), which, in turn, states that "[d]espite its [WTO] commitments, . . . China has continued to impose restrictions on exports of raw materials, including[, inter alia,] minimum export prices . . . as China's economic planners have continued to guide the development of downstream industries. These export restrictions are widespread. For example, China maintains **[**215]** some or all of these types of export restrictions on [such goods as] magnesium [oxide and] magnesium carbonate [i.e., crude magnesite]"). Switching then to the pertinent aspect of Chinese governmental administration, Minmetals Defendants state:

> The Chinese . . . government relies . . . on two actors to carry out its export control policies[: (a)] the Ministry of Commerce ("MOFCOM"), [which, being] an executive agency of the State Council [("State Council")] of the People's Republic of China, is responsible for formulating, promulgating, supervising and enforcing policies and regulations pertaining to the exportation of products and commodities from China[; and (b)] numerous "chambers of commerce" [that] were created and organized by commodity type [to assist MOFCOM in its goals]. The [particular] **[*395]** chamber responsible for assisting MOFCOM in [regard] to the export of magnesite is the Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters ("CCCMC"), which was established in 1988. . . . [With regard to, inter alia,] magnesite[-based goods], China has instituted [an] export quota and license system . . . in April 1994 [in order] to enable stricter control of export volumes **[**216]** and prices, reduce smuggling and minimize allegations of dumping. . . . [Such] control over the [export practices with regard to] magnesite . . . is achieved through two mechanisms. First, MOFCOM directly controls [these practices] by setting an aggregate export quota that caps the total amount of magnesite that may be exported from China in a single year . . . MOFCOM also controls each exporter's individual [exportation] of

> magnesite . . . by requiring prospective exporters to "bid" on an allotment from the aggregate quota. [Thus, t]wice a year [all] exporters bid [on licenses] to export a portion of the aggregate export quota. The "bidding" [process] is administered by the CCCMC on behalf of the government, and t]he allocations to individual exporters . . . are made by a Bidding Committee . . . consist[ing] of individuals employed by MOFCOM and the CCCMC. It is only through participating in this process that exporters may receive a license to export, and the [Chinese] government requires that every magnesite export be licensed[since the Chinese] Customs Bureau will not allow exports of commodities subject to licensing without an export license. . . . [Each] exporter must export **[**217]** its quota allotment during the calendar year for which it received the allotment ([with a very] limited extension . . .) [and n]o exporter may stockpile magnesite to manipulate [its business strategy] because [a] fail[ure] to [export its allotted share would cause the exporter to] lose [this unexported] portion of [its] allotment [for the purposes of] the following year. Like-wise, an exporter cannot export in excess of its lawful allotment [in order to manipulate its business strategy] without risking termination of its right to export and potential criminal liability. . . . In addition to restricting the [amount] of magnesite [allotted] for export, MOFCOM also mandates that exporters follow a uniform minimum export price . . . . [Specifically,] the minimum export price . . . is arrived at through a meeting of exporters convened by the CCCMC. MOFCOM regulations explicitly prohibit entities from exporting at prices below those established within the CCCMC and prohibit the issuance of export licenses [to exporters that sell at] prices . . . lower than the coordinated prices fixed by the [CCCMC. Consequently], pricing below the minimum export price in violation of MOFCOM regulations **[**218]** can subject [the so-selling] exporter[] to the loss of [its export] quota allotment[, to] imposition of fines and [even full] revocation of [its] export license[]. In addition to mandating a minimum export price for magnesite, the Chinese government manipulates the price of magnesite exports through other means[, e.g., reduction of export-geared tax "rebate," levy of customs duty and export tax, and imposition of "resource protection" fees by the local governments of relevant Chinese provinces]. . . . The U.S. Executive Branch has repeatedly raised its concerns about China's . . . export restrictions [with regard to magnesite-based products] both bilaterally and at the [WTO,] has pressured China to eliminate [these] restrictions . . . and has expressed its intention to continue to do so in 2009.

M/Mot. at 10-16 (quotation marks omitted, original brackets removed) (citing Docket **[*396]** Entry 99-17; Docket Entry No. 99-9 (Defendants' exhibits to Li Declaration ("Li Exhibits"); [73] and Docket Entries Nos. 99-11 to 99-14 (Defendants' exhibits to Chen Declaration ("Chen Exhibits")). [74]

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[73] Docket Entry No. 99-9 includes the following documents (replicated in their original Chinese sinographs and in **[**219]** English translation): (a) MOFCOM's Notice on the Working Rules on the Issuance of an Export License of Sep. 7, 2007; (b) Circulation of Ministry of Financial People's Republic of China and State Administration of Taxation on Adjustment of Export Rebate Rate for Part of Products of Apr. 29, 2005; (c) MOFCOM's Measures for the Administration of License for the Export of Goods of Jan. 1, 2005; (d) MOFCOM's Working Rules on the Application for an Export License of Dec. 2003; (e) Announcement of the MOFCOM, the General Administration of Customs and the General Administration of Quality Supervision, Inspection and Quarantine of Nov. 10, 2004; (f) Notice of the Ministry of Finance and the State Administration of Taxation on Adjusting the Export Rebate Rates of Jan. 1, 2004; (g) Regulation of the People's Republic of China on the Administration of the Import and Export of Goods of Jan. 1, 2002; (h) MOFCOM's Measures for the Administration of Export Commodities Quotas of Jan. 1, 2002; (i) MOFCOM's Measures for the Invitation of Bid for Export Commodity Quotas of Jan. 1, 2002; (j) MOFCOM's Provisions on the Export License Administration of Dec. 20, 2001; (k) Circulation of Office of The People's **[**220]** Government of Liaoning Province on Change of Collecting Standard for Resource Protection Fees of Exported Processing Products of Magnesite of Dec. 7, 2001; (1) MOFCOM's Circular on Working Rules on the Application for and Release of an Export License of Dec. 14, 1999; (m) MOFCOM's Measures for Administration of Foreign Economic Relations and Trade Social Organizations of Feb. 26, 1999; (n) MOFCOM's Circular on the Strengthening the Job in the Coordination of Export Commodities of Feb. 12, 1998; (o) MOFCOM's Implementation of the Methods on Export Quota Bidding with Compensation of May 6, 1996; (p) MOFCOM's Interim Regulations on Punishment For Conduct Of Exporting at Lower-Than-Normal Price of Mar. 20, 1996; (q) Notice of the MOFCOM, the General Administration of Customs and the State Administration for Import and Export Commodity Inspection on Strengthening the Export Administration of Magnesium Oxide of Mar. 27, 1996; (r) MOFCOM's Notice on the Working Rules for Import and Export License Issuing Departments to Issue Licenses of Mar. 14, 1996 MOFCOM's Regulations on Export License Control of Jan. 2, 1996; (s) Circular of the State Administration of Foreign Exchange, MOFCOM, State **[**221]** Administration of Taxation, and China Customs of July 1, 1995; (t) MOFCOM's Notice on Several Provisions on the Personnel Management of Chambers of Imports and Exports of Sep. 23, 1994; (u) MOFCOM's Notice on Several Provisions on Export License Administration and

The statements made in the moving papers of the Sinosteel Defendants are substantively identical with regard to their discussion of the nature and operations of the MOFCOM and CCCMC, both generally and specifically as to the exporters of magnesite-based products. See S/Mot. at 38-40 (providing a brief overview analogous to the statements made by the Minmetals Defendants and relying on selected Li Exhibits, as well as citing Li Exhibits for an additional clarification that: (a) after the MOFCOM requires exporters to **[*397]** coordinate production volume and set certain minimum prices at which magnesite-based products would be sold for export, these minimum prices are registered with the MOFCOM; so (b) when Chinese entities seek to obtain export licenses for magnesite-based goods, they must submit documentation, including their magnesite sales contracts, to the Office of the Special Commissioner ("Special Commissioner") at the MOFCOM, which physically issues such export licenses; but (c) the Special Commissioner reviews the submissions and issues export licenses only upon establishing that the price stated in **[**223]** the sales contracts meets the minimal price registered with the MOFCOM).

2. Plaintiffs' Opposition

In response to the above-described Defendants' assertions as to the nature of the MOFCOM and the CCCMC, and the MOFCOM/CCCMC's operation of Chinese export of magnesite-based products, Plaintiffs state their position, which is as follows:

> China began the shift from a [planned] economy [75] to a market economy in the 1970s. Starting in the 1980s, the pace of change increased . . . as China negotiated its accession to the . . . WTO. During negotiations prior to its accession, China's trade representative explained to the WTO . . . that "[t]here were [] three types of prices [in China]: government price, government guidance price and market regulated price." . . . "[M]arket-regulated prices" were prices that companies were free to set in accordance with traditional market factors (i.e., supply and demand). China represented in 2001 that 94.7% of products from China were subject to market-regulated pricing. [Since m]agnesite [was] not on the . . . list[] of . . . products . . . subject to government guidance pricing or government pricing submitted by the Chinese government [to the WTO] in 2001[, **[**224]** and] China . . . agreed that it would not add any products or services to [that] list, . . . China functionally repealed any . . . law [existing as of 2001] that controlled the price of magnesite for export. The WTO accession is an international agreement of law, and the legislative approach for China is to incorporate international agreements and law as its own. [Since] China explicitly abolished or amended more than 3,000 laws and regulations to bring its policies in line with WTO requirements, . . .[t]he government of China has stated in official comments to the U.S. Department of Commerce that these changes have resulted in industries exporting to the United States becoming independent and market-oriented[, and, i]n 2006, China declared that since its accession to the WTO, it had avoided any government intervention in the economic activities of state

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Application of Apr. 1, 1994; (v) MOFCOM's Detailed Rules for the Implementation of Calling for Bids for Magnesium Oxide Export Quotas for Trial Implementation of Mar. 1, 1994; (w) MOFCOM's Notice on Program on the Reform of the Administration of Licenses for Quotas of Commodities for Export of Feb. 8, 1994 (later repealed); (x) MOFCOM's Interim Procedures for Export Commodities Control of Dec. 29, 1992; and (y) MOFCOM's Circular on Strengthening The Administration Of Magnesium Product Export of April 6, 1992.

[74] Docket Entries Nos. 99-11 to 99-14 include the following documents (replicated in their original Chinese sinographs and in English translation): (a) CCCMC charter; (b) CCCMC's bylaws; (c) Assistant Minister of Commerce Liu Xiangdong's Speech to the Third Congress of the CCCMC; and (d) CCCMC's Bidding Committee's Announcement Regarding the First Public Bidding for the Export Quota of Magnesium Oxide in 2005 and Announcement **[**222]** Regarding the Second Public Bidding for the Export Quota of Magnesium Oxide in 2005.

[75] "Planned economy" is an economic regime where the central government makes all decisions on the production and sale of goods and services. See Alec Nove, The New Palgrave: A Dictionary of Economics vol. 3, at 879-80 (1987). Although a planned economy may consist of state-owned enterprises, private enterprises directed by the state, or a combination of both, the term is most often associated with the economy of the Soviet Union prior to its "perestroika" **[**230]** period, of China before 1978 and of India before 1991. See, e.g., Andrew C. Wilson, Politics and Market Forces in China's Planned Economy: the Case of Grain Self-sufficiency Versus Cash Crop Benefits (1986); T. Mathew, Fiscal Policy in the Planned Economy of India (1960); V. Ossinsky et al., Socialist Planned Economy in the Soviet Union (1932).

trading enterprises and that [even its] state[-owned] trading enterprises [have become] fully independent, responsible for their own gains and losses, and make their export decisions based on factors such as supply/demand **[*398]** and price in the domestic and international markets[, there is no reason to presume that the export of magnesite-based **[**225]** products is regulated by Chinese government. True,] MOFCOM includes magnesite [in its] list of products subject to export quota bidding and licensing requirements[, but t]he rules and regulations cited by . . . Defendants [in regard to] the export quota and licensing system do not mandate a minimum price and do not compel industry members to agree on export prices . . . . [Specifically, Exhibit 27 among Li Exhibits states the rules that] do not [expressly] mention a minimum price or compulsory price-fixing. [Similarly, Exhibit 24 among Li Exhibits] does not [expressly] refer to any minimum export price or mandatory price-fixing. [Analogously, Exhibit 4 among Chen Exhibits consists of a]nnouncements [that] do not [expressly] mention a minimum price or compulsory price fixing. [In the same vein, Exhibit 25 among Li Exhibits replicates the regulation that] do[es] not [expressly] mention a minimum price or compulsory price-fixing[, plus, this regulation was] repealed in 2008. [Similarly, Exhibit 23 among Li Exhibits uses the word "when" in the statement] "when the export prices are recommended by the chambers of commerce, the export price shall be in compliance with the relevant price **[**226]** limit regulations" [so the use of the word "when" should be read as a statement that t]he rules do not compel price-fixing for any product. [Likewise, Exhibit 21 among Li Exhibits] do[es] not mention a minimum price or compulsory price-fixing. [Also, Exhibit 20 among Li Exhibits] do[es] not [expressly] mention a minimum price or compulsory price-fixing. [And Exhibit 19 among Li Exhibits is a regulation] specifically repealed on December 10, 2004. Further, [it] only refers to recommended export prices fixed by the relevant chamber of commerce [but] it does not [expressly] require the fixing of any price for any specific product. [Similarly, Exhibit 18 among Li Exhibits] describe[s] the export quota licensing system but do[es] not [expressly] require -- and do[es] not [expressly] authorize any ministry to require -- minimum prices or the coordination of prices among competitors. [Rather, it] require[s] the promulgation of new rules governing export quota licensing that conform to the State Council Regulations[, which should be interpreted to mean that] the State Council Regulation effectively repealed any existing export quota licensing rule issued by MOFCOM including minimum pricing **[**227]** requirements. [Analogously, Exhibit 16 among Li Exhibits reproduced] rules [that] were officially abolished on September 7, 2007. Moreover, these rules were based on the export license regulations effective in 1999, which were revised in 2001 and again in 2004 [to] state only that a price cannot be lower than the coordinat[ed] price regulated by the relevant import and export commerce commission[, but this language did not expressly] compel price-fixing for any particular product[, and so it might have not included magnesite-based products. In the same fashion, Exhibit 13 among Li Exhibits] does not [expressly] refer to any minimum export price or mandatory price-fixing and [this regulation] was abolished in 2005. [In sum, t]he only document cited by Defendants that specifically refers to a coordinated price for magnesite is [the regulation] promulgated in 1994[, but it should be presumed repealed because, i]n 1998 and 1999, [the] MOFCOM promulgated new rules and regulations governing the export bidding process[, especially since] the 2001 export quota bidding rules do not mention **[*399]** minimum prices or mandatory price fixing. [Consequently, the fact that t]he export quota licensing system **[**228]** . . . was effective during the [Class P]eriod . . . does not [mean that it was] requiring price-fixing of magnesite by members of the [CCCMC] or any other group of [Chinese] exporters. [Moreover, Defendants' assertions that non-compliance with minimal price requirement could result in reduction of the non-complying exporter's export allotment should not be deemed credible in light of the fact that t]he volume of export quotas for magnesite changes from year to year[, and, i]n 2001, the export quotas awarded by the government far exceeded the [overall] actual volume of magnesite exports by more than 300,000 tons[, and the e]xport quotas were also left unused in 2004[, same as i]n 2009, [when Chinese] export quotas have again exceeded the total volume of [the nation's magnesite] export[. Finally, the governmental nature of the CCCMC is not true, since] Defendants are members of the CCCMC, [and it] is a non-governmental trade organization. The CCCMC was established in 1988, prior to the establishment of a market economy in China and prior to the vast reform of China's export laws and regulations. The Magnesite Product Branch of the CCCMC was formed in 1994. The CCCMC currently describes **[**229]** itself as a self-disciplined organization that [merely] provides service to enterprises, including the provision of information and offering of coordination and guidance to its members. [The] CCCMC also describes itself as a non-government organization under the current market economy system in China[; it] is a corporate body[] funded through the receipt of membership fees from its member entities[, and s]ome of [its] employees [are also employed by CCCMC's members and] continue to be paid by the[se] member[s.] . . . With

> respect to export activities of its members, the CCCMC has stated that Chinese enterprises are all independent in decision making . . . .

Opp. at 18-25 (quotation marks omitted, original brackets and ellipses removed). [76]

[*400] In light of the foregoing, Plaintiffs conclude that, "[even r]egardless of [the] CCCMC's legal status, no document submitted by Defendants demonstrates that the price collusion . . . was initiated at the direction of the CCCMC or was required by the CCCMC." Id. at 52.

3. Defendants' Reply

Disagreeing with Plaintiffs' position, the Sinosteel Defendants point out that

> Plaintiffs admit that [the MOFCOM] includes magnesite among the products subject to government-mandated export bidding and licensing requirements [but] then . . . cite various regulations [not expressly referring to the minimum price] in an attempt to show that lack of [such] requirement. [Yet,] Plaintiffs do not challenge that the . . . [r]ules requiring **[**233]** coordinated pricing were in place from December 4, 1999, through September 7, 2007, and thus were in effect at all times during [the Class] period [including] when the original Complaint was filed in 2005. [Since these] 1999 . . . [r]ules provided that a price cannot be lower than the coordinating price regulated by . . . the CCCMC[,] . . . [t]he fact that [the] regulations adopted in the interim may not [expressly] mention price coordination is no more relevant than the fact that not all securities regulations promulgated since the Securities Exchange Act of 1934 mention insider trading, nor does every antitrust regulation adopted since the Sherman Act mention horizontal price fixing. Plaintiffs also . . . omit mention[ing] other Chinese regulations adopted in the interim that confirm the requirement of export price coordination[, e.g.: (a) the January 1, 2000, regulation stating that, w]hen examining an application for an export license, the [Office of the Special Commissioner] shall . . . [e]xamine export contract [and] especially examine [the] price [because the p]rice of goods [subject to] export . . . shall be . . . not lower than the coordinating price regulated by [the] CCCMC[; **[**234]** (b) the January 1, 2002, regulation providing that Chinese] license issuing [administrative body] shall stress . . . verification of the prices of export commodities when examining the export contracts, [and if] the prices in the export contracts are lower than the recommended export price fixed by the . . . CCCMC, the license issuing [administrative body] shall refuse to issue the export licenses[; (c) the December

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[76] Plaintiffs' Opposition cites, in addition to the specified-in-the-above-quotation Li and Chen Exhibits, other Li and Chen Exhibits, as well as Docket Entries Nos. 35-29; 77-1; 105-4; 105-14 to 105-22; and 105-25 to 105-31 (replicating: (a) undated CCCCMC's Comments; (b) a 2003 Congressional Hearing on China (although the Court presumes that Plaintiffs wished to refer not to the Hearing but rather to 2005 Report by the United States Representative to Congress); (c) CCCMC's Comments to David Spooner, Assistant Secretary for Import Administration, United States Department of Commerce, of Apr. 19, 2007; (d) article China Advancing to Full Market Economy at <<*http://www.chinaembassy.org/ene/xw/t141877*. htm>> (Feb. 7, 2004); (e) China Summary, Global Trade Negotiations Home Page by the Center for International Development at Harvard University, at **[**231]** <<*http://www.cid.harvard.edu*/ cirtrade/goy/chinagov.html>> ; (e) the WTO's Report of the Working Party on the Accession of China of Oct. 1, 2001; (f) the WTO's Protocol on the Accession of the People's Republic of China of Nov. 10, 2001; (g) article Legal System of China from <<*http://www.lawinfochina*. com/Legal/index.asp>> (Feb. 7, 2004); (h) Comments of the Bureau of Fair Trade of the MOFCOM on Determination and Treatment of Market-Oriented Enterprises, of June 25, 2007; (i) WTO Dispute Settlement Proceeding Regarding China -*Measures Related to the Exportation of Various Raw Materials, 74 Fed. Reg. 32218 (July 7, 2009)*; (j) Ch. 18, Supplement 1 to the Harmonized Tariff Schedule of the United States (2009); (k) Administrative Measures for Goods Export Licenses (June 7, 2008), at 2008 China Law LEXIS 2247; (1) Legislation Law of the People's Republic of China (Mar. 15, 2000), at 2000 China Law LEXIS 1492; (m) United States Geological Survey 2005 ("Magnesium Compounds"); (n) copy of the CCCMC's website, at <<*http://wwww.cccmc.org.cn/EnglishWeb/Company/CmcMember.aspx>>;* (n) the WTO's Report of the Council For Trade In Goods On China's Transitional Review of Dec. 7, 2007; and (o) article **[**232]** China Magnesia Export Quotas Turn to Be a "Chicken Rub" from magazine Refractories Window, of May 2009. In addition to these citations, Plaintiffs' above-quoted excerpt is accompanied by footnotes informing the Court, inter alia, that "[t]he United Trade Representative recently filed a request for consultation with the WTO relating to commodities subject to export quota licensing systems . . . [but] did not include magnesite in its request." Opp. at 20, n. 3 (citations omitted).

> 2003 rule stating that, w]hen the export prices are recommended by the [CCCMC, the actual]export price shall be in compliance with [those] price limit regulations.

S/Reply at 18-19 (citing Docket Entries Nos. 35-54, 35-57 and 35-61). The response of the Minmetals Defendants largely corresponds to the position of the Sinosteel Defendants, since the Minmetals Defendants state:

> Plaintiffs . . . characterize China as[, effectively,] a market economy wherein its industrial enterprises act independently and are not subject to price controls [but none of Plaintiffs'] sources pertains [specifically to export of] magnesite[-based products from] China [which turns on Chinese] export licensing system. . . **[*401]** [While] Plaintiffs . . . argue that many of the regulations [relied upon by] Defendants **[**235]** [were] repealed [and, thus, do not pertain to the issue of minimum price, this] is . . . incorrect [because a]ll of the regulations cited by Defendants were in effect and applicable to magnesite at some time from September 2001 to the present, which is the [Class Period. Magnesite has been listed as a commodity subject to export quota and licensing system in each] Catalogue of Goods [issued by Chinese government during the] 2000-2009 [period. Thus, w]hile some of the export price regulations have been repealed and replaced, at all times during the [Class Period, Chinese] exporters were in fact subject to uniform, minimum export price requirements. [For instance, such chain of changing but never disappearing minimum price requirements can be established in Li Exhibits that include a regulation] effective through Jan[uary] 1, 2002; [a regulation effective] through Jan[uary] 1, 2005; [and a regulation effective] through Sept[ember] 7, 2007. Furthermore, many . . . other regulations [that did not epressly refer to minimum price] provide[d, nonetheless,] the context in which both the quota and minimum pricing [we]re implemented . . . through [the type of] bidding process [employed in China **[**236]** with regard to magnesite-based products].

M/Reply at 11-12 and n.7 (incorporated in the quoted main text) (citing exhibits replicated in Docket Entries Nos. 109-3 to 109-5; as well as in 35-47; 35-51; 35-53; 35-56; and 35-60).

D. Relevant Legal Proceedings and Evidence Submitted Therein

In addition to stating their legal positions and directing the Court's attention to the exhibits which they read as supporting their assertions, the parties also make reference to a certain legal proceeding conducted in the European Union and to another legal action still pending before the United States District Court for the Eastern District of New York. The Court's own research of the issues presented by this matter revealed two additional proceedings that appear just as relevant as the legal matters brought to the Court's attention by the parties. Therefore, a detailed discussion of these four proceedings appears warranted. However, in light of the parties' apparent confusion as to the precedential value of the legal decisions reached by the tribunals presiding over those matters and the value of evidence submitted in those matters, the Court finds it proper to precede its discussion of these four **[**237]** legal proceedings with a clarification as to the distinction between a legal precedent and material subject to judicial notice.

1. Judicial Notice and the Concept of Stare Decisis

HN57[] At common law and under the Federal Rules, most proof is presented by means of testimonial evidence or by the offering of documentary evidence. One an exception to the requirement that a party who relies on a certain proposition must prove it is judicial notice. *Rule 201 of the Federal Rules of Evidence* governs judicial notice, providing that facts noticed cannot be subject to reasonable dispute and specifying certain procedural requirements that must be followed.

> *Rule 201(b)* . . . permits a district court to take judicial notice of facts that are "not subject to reasonable dispute in that [they are] either[:] (1) generally known within the territorial jurisdiction of the trial court[;] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Rule 201(b)*.

In re NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1331 (3d Cir. 2002) (finding that ***HN58***[] judicial notice could be properly taken with **[*402]** respect to three different categories of documents which include: (1) **[**238]** documents relied upon in the complaint; (2) documents filed with a United States law enforcement agency; and (3) undisputable data, e.g., purely informational opinion-free data compiled by a very widely quoted and, thus, deemed reliable, news service); accord *Jackson v. Broad. Music. Inc., 2006 U.S. Dist. LEXIS 3960, at *18 (S.D.N.Y. Jan. 31, 2006)* ("the court may take judicial notice of public records and of 'admissions in pleadings and other documents in the public record filed by a party [to the instant matter] in other judicial proceedings that contradict the party's factual assertions in [the instant] action,' [and the court may do so even] without converting the motion [to dismiss] into one for summary judgment") (quoting *Harris v. New York State Dep't of Health, 202 F. Supp. 2d 143, 173 (S.D.N.Y. 2002)*, and citing *Munno v. Town of Orangetown, 391 F. Supp. 2d 263, 268 (S.D.N.Y. 2005))*. In addition, since the court may take judicial notice of a fact "capable of accurate and ready determination by resort to sources [which] accuracy cannot reasonably be questioned," *Rule 201(b)*, the court "'may take judicial notice of records and reports of administrative bodies,' such as notices **[**239]** and opinion letters." *Wible v. Aetna Life Ins. Co., 375 F. Supp.2d 956, 965 (C.D. Cal. 2005)* (taking judicial notice of a notice and opinion letter issued by the Department of Justice and citing, inter alia, *Interstate Natural Gas Co. v. Southern California Gas Co., 209 F.2d 380, 385 (9th Cir. 1953))*; see also *Toth v. Automobile Club of California Long Term Disability Plan, 2005 U.S. Dist. LEXIS 40746 (CD. Cal. 2005)* (same).

Conversely,***HN59***[] judicial notice is improper if a question exists as to the legitimacy of the source of the information. See *Hinton v. Dep't of Justice, 844 F.2d 126 (3d Cir. 1988)*; see also *Oneida Indian Nation of New York v. State of N.Y., 691 F.2d 1070 (2d Cir. 1982)*. Therefore, contentions made by the parties are not subject to judicial notice, see e.g., *Taylor v. Charter Medical Corp., 162 F.3d 827 (5th Cir. 1998)* (the court cannot take judicial notice of defendant's status as a state actor); *General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074 (7th Cir. 1997)* (trial court erred in taking judicial notice of a finding that a settlement in a prior proceeding was fair, reasonable and adequate), since "judicial notice applies [only] to self-evident **[**240]** truths that no reasonable person could question, truisms that approach platitudes or banalities." *Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347 (5th Cir. 1982)*.

HN60[] The tool of judicial notice is qualitatively different from the concept of legal precedent, since a legal conclusion reached by another tribunal (or a particular court during its prior ruling) is assessed not under the requirements of *Rule 201(b)* but under the common law doctrine of stare decisis.

> [J]udicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.
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> *Allegheny General Hospital v. NLRB, 608 F.2d 965, 969-970 (3rd Cir. 1979)* (footnote omitted). Stare decisis is the policy of the court to stand by precedent; the term is but an abbreviation of stare decisis et non quieta movere -- "to stand by and adhere to decisions and not disturb what is settled."

United States IRS v. Osborne, 76 F.3d 306, 309 (9th Cir. 1996); see also *Planned Parenthood of Southeastern Pennsylvania v. [*403] Casey, 947 F.2d 682, 691-92 (3d Cir. 1991)*, **[**241]** aff'd in part and rev'd in part on other grounds, *505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)*.

HN61[] It has become axiomatic that the doctrine has two applications, vertical and horizontal. Vertical stare decisis could be summarized as a principle that a controlling precedent by a superior court is binding upon the lower courts. [77] See, e.g., *Briley v. City of Trenton, 164 F.R.D. 26, 29 (D.N.J. 1995)* ("[where] the Supreme Court declined to rule with respect to [a certain issue], the doctrine of stare decisis compels this Court to apply the Third Circuit's . . . standard to [that issue]"); compare *Rodriguez de Ouijas v. Shearson/American Express. Inc., 490 U.S.*

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[77] Moreover***HN62***[] , the following factors must be present before a prior decision has stare decisis effect: (a) the decision must be from the same court or from a court which the court applying stare decisis *owes obedience;* (b) an issue was actually determined by the decision; (c) the decision must constitute a holding of the majority of the court and, if a particular result is adopted by a clear majority of the court, it has **[**243]** absolute precedential effect; (d) the decision must involve an issue of law; and (e) the decision was rendered in substantially identical legal and factual circumstances. See 3-30 Moore's Manual-Federal Practice and Procedure § 30.11, (2007) (citing, inter alia, *City of Erie v. Pap's A.M., 529 U.S. 277, 285, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000)*, and *Rappa v. New Castle County, 18 F.3d 1043, 1061 (3d Cir. 1994))*.

477, 486, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (observing that a circuit court "engage[s] in an indefensible brand of judicial activism" when it "refuse[s] to follow" a "controlling precedent" of the Supreme Court). In contrast, horizontal stare decisis merely implies a court's discretional consideration of non-binding decisions, which that court can -- and, perhaps, is even obligated to -- ignore if it finds that the rationale of these decisions is insufficiently persuasive or outright unsound, or that the legal issues and/or the facts addressed in these decisions are too removed from **[**242]** the legal issues and facts at hand to have a meaningful impact on the court's judicial analysis. Accord *Planned Parenthood, 947 F.2d at 691-92* ("As Justice Kennedy has stated, courts are bound to adhere not only to results of cases, but also 'to their explications of the governing rules of law.' Our system of precedent or stare decisis is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone. This distinguishes the American system of precedent, sometimes called 'rule stare decisis,' from the English system, which historically has been limited to following the results or disposition based on the facts of a case and thus referred to as 'result stare decisis'") (citations and later procedural treatment of the case omitted).

With these rules and principles in mind, the Court now turns to the four proceedings the Court finds relevant to the case at bar.

2. Antidumping and Countervailing Proceedings

Two of these four proceedings involve antidumping or countervailing issues. Since, in the United States, the legal matters raising such challenges fall within the exclusive jurisdiction of the United States Court of International Trade, see *28 U.S.C. § 1581(i)*; <<*http://www.cit.uscourts*. gov/informational/about.htm#FOREWORD>> and, hence, these issues are rarely considered by federal district courts, a brief explanation as to the economic underpinnings and legal rationale of these regimes appears warranted.

HN63[] In general terms of economics, the practice of "dumping" means sale at "predatory pricing," i.e., sale of the product so cheaply that **[**244]** the seller's competitors are eventually forced out of business. See Brian **[*404]** Hindley, The Economics of Dumping and Anti-Dumping Action: Is There a Baby in the Bathwater?, in Policy Implications 27 (Workshop on Policy Implications of Antidumping Measures of the European Institute for Advanced Studies in Management, Brussels, Belgium (Oct. 1989)). In the more specific terms of international trade, "dumping" means that a seller from one country is exporting its product to another country at a predatory price, e.g., at the price which is below the price the seller charges for its goods in its home market (such low price is referred to as "less than fair value" price or "LTFV"): since the seller's predatory practices might endanger the well-being and even the very existence of the industry producing the seller's types of goods in the importing country, the law of the importing country might be crafted to alleviate some of the harsher consequences of this controversial reality of free trade; [78] such remedy is usually a penalty (i.e., an import duty) aiming to either economically force the seller to raise its export price or to dissuade the seller from a future LTFV export practice. See Lucius **[**245]** B. Lau, Agency Interpretation of the Statute After *Mead* with a Special Emphasis on the Antidumping and Countervailing Duty Laws 4-11 (Comm. Litig. Branch, Civ. Div., U.S. Dep't of Justice, Apr. 8, 2002). Correspondingly, both United States law and the WTO condemn dumping if the practice causes (or threatens to cause) material injury to the domestic

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[78] Therefore, it can be argued that LTFV sales arise from "profit-discrimination" rather than "price-discrimination." See Tara Gingerich, Why the WTO Should Require the Application of the Evidentiary Threshold Requirement in Antidumping, *48 Am. U. L. Rev. 135 (1998)*. Consequently, while the allegations of antitrust and antidumping are often raised jointly, these legal regimes often put the sellers between the proverbial rock and hard place, since sellers' heavy-handed tilt from one direction to another could place the sellers seeking to avoid dumping accusations in the position where **[**246]** these very same sellers get accused of antitrust practices. This is so largely because the policies driving these two legal regimes could get occasionally at odds in terms of their economic goals, since the goal of ***antitrust law*** is to create the maximum market competition between the sellers of the same goods and, hence, to drive the price on these goods as much down as possible, while the goal of antidumping law is to limit this very same market competition by forcing the sellers striving to charge their lowest prices into selling their goods at higher prices that are comparable to those charged by their competitors. See, e.g., Christopher M. Barbuto, Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman, *62 Fordham L. Rev. 2047 (1994)* (discussing this incongruity of policies).

industry of the importing country. See *19 U.S.C. § 1673*; see also Marrakesh Agreement Establishing the World Trade Organization, Annex 1A (presenting the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade) (Apr. 15, 1994).

HN64[] The concept of countervailing is analogous, in its gist, to that of antidumping, although it introduces a third player into the equation, i.e., the state of the exporting seller. Similar to antidumping duties, countervailing duties ("CVDs") are imposed to neutralize the negative effects of predatory pricing if it has been determined that the seller's state subsidized **[**247]** the seller's exports through certain governmental measures, and these subsidies enabled the seller to charge predatory prices causing or threatening to cause an injury to the producers of the seller's types of goods in the importing state. See <<*http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/* wto-issues/trade-remedies/countervailing-duties>>. In the United States, investigations of countervailing activities and determinations as to the propriety and magnitude of CVDs imposed, is performed **[*405]** by the International Trade Administration ("ITA"). See <<*http://www.trade.gov/ITAoverview.asp*>>. Here: (a) Plaintiffs bring to the Court's attention an antidumping legal matter resolved by the Court of First Instance of the European Communities in Zhejiang Xinan Chemical Industrial Group Co. Ltd v Council ("Zhejiang Xinan"), 2009 ECJ EUR-Lex LEXIS 529 (Gen. Ct., June 17, 2009); [79] and (b) the Court, on its own, notes a relevant countervailing investigation that has been recently conducted by the ITA in Certain Magnesia Carbon Bricks from the People's Republic of China ("Magnesite from China").

a. [249] *European Union Proceedings***

The parties' statements made in this matter are not exactly reflective of what was asserted and concluded in Zhejiang Xinan. Specifically, Plaintiffs maintain that, in light of Zhejiang Xinan,

> [any argument that] the CCCMC is a de facto instrument of the Chinese government [is unwarranted]. The European Court of Justice squarely rejected this argument [in Zhejiang Xinan], holding, based on the urging of a CCCMC member, that the CCCMC is a non-governmental body that is not directed or controlled by the government of China. The [Zhejiang Xinan court] concluded that price agreements among members of the CCCMC ([involved in production and export of glyphosate rather than magnesite-based products]) were voluntary agreements initiated by the members themselves, not imposed by [Chinese government]. Finally, the [Zhejiang Xinan court] concluded that the [plaintiff in Zhejiang Xinan, a business entity and] a member of the CCCMC . . . agreed with other members [involved in glyphosate production and export] to fix export prices . . . under market conditions and was free to decide export prices without significant [Chinese government] interference.

Opp. at 50-51 (citations **[**250]** omitted). In response, the Minmetals Defendants assert that

> [the CCCMC] is a unique organization with no parallel in the United States, and thus is a de facto instrument of the Chinese government. This is not contradicted by the [Zhejiang Xinan court's] ruling [since that] court had before it the unrelated issue of whether the European Commission applied the proper [formula while] computing an anti-dumping duty [with respect to export by] a single Chinese producer of glyphosate [rather than multiple producers/exporters of magnesite-based goods. Moreover, the Zhejiang Xinan] court based its

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[79] The General Court ("Trial Court") was previously known as the "Court of First Instance." **[**248]** The Trial Court procedural rules envision a written phase and an oral phase; at the oral hearing, the parties' lawyers state their legal positions, and the judicial panel poses questions (While the General Court has on its staff at least one judge from each European Union state, 80% of the cases are presided by a panel of three judges, although it might be five judges, thirteen judges, or even an en banc tribunal if the matter is deemed truly complex or important). One of the panelists, "Judge-Rapporteur" (a position which, duties-wise, encompasses the tasks performed in the United States by magistrate judges), prepares a report and a recommended decision ("R&R"). This R&R is then deliberated by the presiding panel that delivers the judgment which is subject to appeal to the European Court of Justice, the highest court in the EU on the matters of European Union law. See<<*http://curia.europa.eu/jcms/jcms/Jo2_7033/* presentation>>. An appeal as to the Trial Court's decision in Zhejiang Xinan was filed on June 17, 2009, by the Council of the European Union. See Vitamin C, Civil Action No. 06-md-1738 (DGT) (E.D.N.Y.), Docket Entry No. 399-5 (the application detailing appellate grounds).

> finding about the nature of the CCCMC on only a CCCMC brochure[, a]nd the court's finding regarding glyphosate **[*406]** pricing decisions was based on submissions from the [Zhejiang Xinan plaintiff that were left] unchallenged by [the EU Council].

M/Reply at 13, n. 9. Since the Plaintiffs' and the Minmetals Defendants' statements read Zhejiang Xinan as if they reflected on two completely different proceedings, a clarification as to what was -- and was not -- asserted and determined in that proceeding appears necessary.

Pursuant to Article 230 (previously, Article 173) of the European Community Treaty, [80] a juridical **[**251]** or natural individual applicant may seek annulment of a measure adopted against that individual by an institution of the EU; this is exactly what occurred in Zhejiang Xinan, where the Trial Court set aside a prior EU determination refusing market economy treatment ("MET") to Zhejiang Xinan Chemical Industrial Group Co. Ltd ("Zhejiang"), a Chinese agrochemical producer and exporter specializing in glyphosate. [81] The Trial Court summarized the factual and procedural background as follows:

> In February 1998, the [EU] adopted . . . anti-dumping [regulation] applicable to [Zhejiang, and this regulation remained active until late 2002, subjecting Zhejiang to the non-MET level of duty. In] 2002, . . . an interim review [was initiated. In] April 2004, . . . decision refusing [Zhejiang] grant [of the MET status was re-entered. In] September 2004, [another determination was made as to Zhejiang, also] imposing . . . anti-dumping duty [of the non-MET level; this is] the contested regulation[. [82] This] regulation [explained that, even though the majority of Zhejiang shares] were owned by private persons, . . . [Zhejiang was] under State control [since] the majority of the directors of the board [was] **[**252]** either State officials or officials of State-owned enterprises [plus, the Chinese government] had entrusted the . . . CCCMC with the right [to approve export] contract[s upon] verifying export prices . . . , [and t]his system include[d] setting of a minimum price for glyphosate exports and . . . allowed the CCCMC to veto exports that did not respect these prices. [In light of these facts,] it was decided not to grant [the MET status] to [Zhejiang. [83]] . . . Since **[*407]** [Zhejiang's] request for [the MET status] was refused, [it continued paying higher anti-dumping duties but] brought the [Zhejiang Xinan] action [in] December 2004 [asserting that] the contested regulation [shall be annulled as to Zhejiang personally. In response, the EU] Council contend[ed] that [Zhejiang's application had to be] dismiss[ed, and the EU] Commission contend[ed the same].

Zhejiang Xinan, 2009 ECJ EUR-Lex LEXIS 529, PP 4-28 (original brackets and quotation marks removed). A typical panel of three judges presided over Zhejiang Xinan and detailed Zhejiang' position as follows:

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[80] Treaty Establishing the European Community, 298 U.N.T.S. **[**257]** 11 (Mar. 25, 1957), amended by, Treaty of Amsterdam, 1997 O.J. 1 (Oct. 2, 1997), amended by, Treaty of Nice, consolidated version reprinted in, 2002 O.J. 33 (Feb. 26, 2001).

[81] To be granted the MET status, a business must demonstrate that it meets five criteria so composed that this status is typically refused to businesses unable to show that their decisions as to prices, costs, etc., have been taken free of significant interference of their government (in other words, the end result of the inquiry turns not on whether the government could or did interfere, but on whether the government actually succeeded in interfering with that particular businesses' operations). Since the MET status directly affects one of the elements plugged into the applicable calculative formula for anti-dumping duties, lack of the status means that the exporter is charged higher duties. Therefore, there is a direct financial incentive for exporters to obtain the MET status through asserting that they, in particular, operate free of significant interference of their government. See Van Bael & Bellis, Brussels Monitor 3-4 (July 10, 2009).

[82] EU legal decisions, including the decisions of the Trial Court, are drafted **[**258]** in a style different from that common to modern United States jurisprudence, especially in terms of their structure, limited citations to legal and factual sources and their terminology.

[83] Hence, in September 2004, that is, halfway into the Class Period asserted in the instant matter, the EU held that the CCCMC was setting minimum export price on behalf of the Chinese government and that Zhejian's personal export practices were subject to this price requirement.

> [Zhejiang] claims that it [made] its business decisions [on the basis of] supply and demand without significant State interference[, and] that **[**253]** it negotiated prices at arm's length . . . . [Zhejiang] disputes the relevance of the . . . composition of its board of directors . . . . [Zhejiang also] observes that [the] 1998 amend[ment of a certain EU provision allowed for the possibility that a certain business entity in transitional economy such as China might operate under market conditions, and this provision was expressly enacted] to enable qualified Chinese exporters, however few they may be, to show . . . that they [operate in accordance with] market economy forces . . . .

Id. PP 45-78 (original brackets and quotation marks removed). Finding that Zhejiang sufficiently established that its own export of glyphosate was free from a substantial interference of the Chinese government, the Trial Court explained its conclusion as follows:

> [The issue here is solely] whether the . . . actions by the State . . . render [Zhejiang's] decisions incompatible with market economy conditions . . . . [Consequently], State control, as established in this case, [may be not] incompatible with the taking of commercial decisions by [Zhejiang. Here, Zhejiang] claims . . . that it showed that its export prices were freely set on the sole basis of **[**254]** commercial considerations [because] the Chinese glyphosate [exporters] agreed among themselves on the need for guided export pricing in order to minimi[z]e the risks of anti-dumping [actions] in foreign markets[; and t]he CCCMC's role in that regard was to facilitate such coordination and provide the services of a secretariat. . . . [Zhejiang] claims that . . . all [Zhejiang's] export contracts[, since at least September of 2004, were approved] by the CCCMC[] regardless of price, and, therefore, that the alleged minimum export price was not binding . . . so far as [Zhejiang] was concerned. . . . Finally, [Zhejiang] claims that [even if it were possible that] the CCCMC could refuse to [approve] an export contract because of the price, that possibility could not, in view of [Zhejiang's own export] practice . . . justify the refusal of [Zhejiang's] request for [the MET status, because a] right of veto without any use of that right cannot constitute [a] significant State interference [with respect to Zhejiang]. In response, t]he Council contends . . . that there was a very efficient control system in place, that it was run by [China] through the CCCMC and customs authorities and [the very **[**255]** existence of that system] constituted interference by [China] in the setting of [Zhejiang's] export prices. . . . [T]he fact that the CCCMC [approved Zhejiang's] contracts in which the price was lower than the [minimum] price is irrelevant [since Zhejiang concedes that] all export contracts had to be submitted to the CCCMC, which checked the selling prices and [approved] the contract if the selling price exceeded the [minimum] price[, plus] **[*408]** China directed the Chinese customs authorities not to permit exports . . . unless the contract bore the CCCMC's [approval. In sum, the fact] that . . . the CCCMC was . . . entitled to refuse [approval of] a contract wh[ich] price was lower than the [minimum] price [in and of itself indicated the power of the CCCMC] to ensure . . . the pricing of Chinese glyphosate exports[, including Zhejiang's. Zhejiang] does not dispute that [this CCCMC's approval and veto] mechanism . . . exists [but it] maintains, however, . . . that such mechanism [is] not inconsistent with the criterion [applied by the EU grant to the grant of the MET status. Zhejiang stresses that the] CCCMC [should be deemed] a non-governmental body [in light of the statement to that effect **[**256]** in] the CCCMC's brochure [and because compliance with the CCCMC's guide] price . . . was not enforced either by the government, or by the CCCMC [against Zhejiang. Therefore, in Zhejiang's practice,] the CCCMC's role [was] only [to note] the contract price, enter[] it in a database for statistical purposes and [approve] the contract [after that ministerial task. The lack of enforcement of minimum price by the CCCMC was verified by the fact that, in] 200 sales . . . investigat[ed by the EU for Zhejiang Xinan], the average price was below the [minimum] price [set by the CCCMC. In light of the fact that the Council] never challenged [Zhejiang's] statements that the CCCMC was a non-governmental body and [the Council also] did not take issue with [Zhejiang's] statements that . . . the glyphosate [exporters] themselves . . . took the initiative in establishing the system [of the minimum price, the Trial Court concluded that Zhejiang should qualify for the MET status, finding, inter alia,] the CCCMC's role [in Zhejiang's price control was] not sufficient [to conclude otherwise].

Id. PP 79-136 (original brackets and quotation marks removed).

The goal of the parties' debate over Zhejiang Xinan is not entirely clear to this Court. Since the Trial Court is not a tribunal whose decisions could be binding on this Court, the value of Zhejiang Xinan for the purposes of the principle of stare decisis cannot be more than persuasive. However, since the case deals with a different area of law, different legal standard and even the focus of that standard, plus a different factual inquiry, any ruling "by analogy" would be unwarranted. Moreover, the Court cannot take judicial notice of anything related to Zhejiang Xinan, that is, short of the fact that such decision was actually entered: *none* of the Zhejiang Xinan litigants is a party to *this* action (i.e., the statements in the **[**259]** CCCMC's brochure, even if true, cannot be deemed as an admission by the CCCMC, which was neither a party to Zhejiang Xinan nor is a party here), the evidence relied upon by the Trial Court is not before this Court, and -- to top it all off -- no detailed description of the factual matters considered by the Trial Court are given in the Zhejiang Xinan, that is, short of the statement that the CCCMC described itself as a non-governmental body in "a" brochure, and that the Council representing the EU failed to challenge the truthfulness of that statement. See *Hinton v. Dep't of Justice, 844 F.2d 126 (3d Cir. 1988)* (judicial notice is improper if a legitimate question exists as to the underlying source of the information); *Oneida Indian Nation of New York v. State of N.Y., 691 F.2d 1070 (2d Cir. 1982)* (same); accord *Dashiell v. Meeks, 396 Md. 149, 174-75, 913 A.2d 10 (2006)* (***HN65***[] matters of which judicial notice may be taken must include facts capable of verification by resort to sources); *State v. Green, 890 So. 2d 1283 (Fla. Dist. Ct. App. 2d Dist. 2005)* (sources of a judicially-noticed fact must **[*409]** necessarily exist and be known to the court to enable even the very consideration of whether the fact is amenable **[**260]** to judicial notice).

b. *Proceedings Before the International Trade Administration*

Unlike in Zhejiang Xinan, some statements made in the countervailing proceedings in Magnesite from China, ITA Matter No. C-570-955 (*Preliminary Negative Countervailing Duty Determination, 74 Fed. Reg. 68,241 (Dec. 23, 2009)*), appear to be amenable to judicial notice.

According to the ITA, the procedural history of Magnesite from China was as follows:

> On July 29, 2009 (i.e., three weeks prior to Plaintiffs' filing of their Opposition), the [ITA] received a countervailing duty . . . petition concerning [magnesite] from . . . China filed by Resco Products, Inc. ([i.e., by one of the two named Plaintiffs in the instant matter]). [Consequently, an] investigation was initiated on August 18, 2009. See . . . , 74 F[ed.] R[eg.] 42858 (Aug[.] 25, 2009) . . . . On September 15, 2009, the [ITA] selected Liaoning Mayerton Refractories Co., Ltd. ("LMR") and RHI Refractories Liaoning Co., Ltd. ("RHIL") as mandatory respondents in this investigation. See Memorandum [of] Sept[.] 15, 2009. On September 15, 2009, [the ITA also] issued the initial . . . questionnaire to the Government . . . of China (["China"]), LMR, and RHIL. **[**261]** . . On November 5, 2009, [China] submitted a response to the initial . . . questionnaire . . . . Also on November 5, 2009, LMR submitted a response for itself and for its affiliate Dalian Mayerton Refractories Co. Ltd., . . . and RHIL submitted a response for itself and for its affiliates RHI Refractories (Dalian) Co., Ltd. (RHI Dalian) and Liaoning RHI Jinding Magnesia Co., Ltd. (RHI Jinding) . . . . On December 8, 2009, [the ITA] issued supplemental questionnaires to [China] and the respondent[s] . . . . On December 14, 2009, counsel for [Resco] met with [ITA] officials. . . . Also on December 14, 2009, [Resco] submitted further information regarding the provision of preferential loans [by China to magnesite-products] industry. . . . [In its petition to the ITA and/or during its December 14, 2009, meeting with ITA officials, *Resco] alleged that [China] has established export quotas and a minimum acceptable export sales price (i.e., export restraints) for a number of raw materials, including three types of magnesi[te] used in the production of [the products at issue. According to Resco, a]ll [Chinese] exporters of magnesi[te] are subject to these export restraints, including the affiliated **[**262]** and unaffiliated magnesi[te] suppliers of the [respondents named by the ITA]. Under this system, [Resco asserts, China] appears to rank "bids" received from exporters by price and quantity and then awards exporting rights to the companies that can command the highest export prices.* In its response, [China did not deny the existence of governmental control over export price and export quotas alleged by Resco, rather China] stated that there [was] no basis under WTO rules to treat [such] export restraints as a countervailable [subsidy]. Moreover, [China] reported that the purpose of setting export quotas for magnesi[te was] to help regulate an exhaustible natural resource and protect the environment, as processing magnesi[te into, e.g., magnesium oxide] is an energy-intensive, high-polluting activity. . . . The [ITA] has issued a supplemental questionnaire requesting that [China] fully describe and document the process [of setting] that export quota and minimum acceptable export price. In addition, [the ITA sent] supplemental **[*410]** questions to the

> respond[ents] request[ing] that each provide complete volume and value information. . . relevant to [that] analysis. . . . [Upon receipt of this **[**263]** supplemental information, the ITA determined that] the countervailable subsidy rates for all . . . exporters [were] de minimis [regardless of the existence of the above-defined export restraints].

74 Fed. Reg. 68,241-49 (emphasis supplied).

Since Resco is a Plaintiff in this matter, and the ITA expressly clarified that Resco, either in its petition filed with the ITA or in its supplemental statements made for the record to the ITA officials, expressly asserted that Resco was basing its ITA claims on the facts that: (a) Chinese exporters of magnesite were subject to price export restraints, and these restraints applied to all Chinese entities dealing in magnesite-based products; and (b) the Chinese government system of export quota was directly tied to export prices, the Court finds it proper to take judicial notice of Resco's admissions made in Magnesite from China. [84] See *Jackson, 2006 U.S. Dist. LEXIS 3960, at *18* ("***HN66***[] the court may take judicial notice of . . . admissions in pleadings and other documents in the public record filed by a party in other judicial proceedings that contradict the party's factual assertions in [the instant] action") (quoting *Harris, 202 F. Supp. 2d at 173*), **[**264]** and citing *Munno 391 F. Supp. 2d at 268*) (internal quotation marks omitted).

3. Antitrust Proceedings

a. *Proceedings in the Western District of Pennsylvania*

Resco is no stranger **[**265]** to litigation. The magazine Industrial Minerals, seemingly identified as Plaintiffs' data source through their reliance on Lamb's Report (which, in turn, relied on Industrial Minerals data, see supra note 34 of this Opinion), provides the following headlines (and accompanying articles) as to Resco's recent litigation endeavors: (a) "US Probes Refractory Dumping -- Resco Alerts USITC to Alleged Refractory [Product] Dumping by China and Mexico" (Jul. 30, 2009) (referring to the ITA proceedings other than Magnesite from China [85]); (b) "Resco revives magnesite case" (Apr. 1, 2009) (referring to the **[*411]** instant matter); and (c) "Resco Bites Bauxite Dragon -- The US Refractory Producer Has Submitted an Amended Complaint Against Chinese Bauxite Suppliers" (Aug. 2009); etc. See <<http>>. This last entry seems to refer to a putative class action currently pending in the United States District Court for the Western District of Pennsylvania before Judge Joy Flowers Conti. See Resco v. Bosai Minerals Group, et al. ("Resco WDPa"), Civil Action No. 06-235 (JFC) (W.D. Pa.). [86]

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[84] Although this matter cannot be conclusively resolved on the basis of Resco's statements made in Magnesite from China, the fact that, with only three weeks difference, Resco asserted in its Opposition that no government-mandated system of price restraint exists with regard to magnesite-based goods exported from China (or that none was enforced, or that the prices were not tied to export quotas and the export bidding process), and yet asserted an opposite position in its petition filed with the ITA, brings Resco's objective good faith belief in question. ***HN67***[] "The first prong of the test to determine if Rule 11 sanctions should be imposed is met if the complaint is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith. The pleader . . . must have an objective good faith belief in the merit of [the pleader's] legal argument." *Mitford v. Marsh, 1992 U.S. App. LEXIS 30070, at *9-10 (9th Cir. Aug. 25, 1992)* (internal quotation marks and citation omitted).

[85] See ***Certain Magnesia Carbon Bricks From China and Mexico, 74 Fed. Reg. 49,889*** (notice of investigation of Sep. 29, 2009); see **[**266]** also Dumping, CVD Petition Targets Magnesia Carbon Bricks -- China, Mexico <<*http://www.npwtradelaw.com/hot/08062009.pdf>>* (a client bulletin issued by Neville Peterson LLP, a law firm concentrating in international and domestic trade regulation matters, which summarizes Resco's petition to the ITA in the China and Mexico matter, provides a detailed discussion of countervailing duty calculation and points out that -- with respect to China -- the ITA calculates such duty, if any, through utilization of "surrogate value" figure, i.e., *the figure applicable only to non-market economies).*

[86] In its Resco WDPa action, Resco is represented by four attorneys (the United States Department of Justice, being seemingly invited by Resco's counsel to make an appearance in the Resco WDPa declined that invitation two months after the Resco

The procedural records of the instant matter and Resco WDPa are strikingly similar. Initiated five-and-a-half month after the case at bar, see Resco WDPA, Docket Entry No. 1, Resco WDPa was: **[**267]** (a) triggered by a complaint virtually identical, in its substantive respects, to the Original Complaint in this matter; and (b) then lingered in extensions of time until Resco's filing of a motion for default judgement, see id. Docket Entry No. 42, which raised the service of process issues and Judge Conti's denial of default. See, generally, id. Docket Entries Nos. 1-88. On July 13, 2009, Judge Conti granted Resco leave to file amended complaint. See id. Docket Entry No. 90. The amended complaint followed, mimicking in all substantive respects the Amended Complaint currently before this Court. See id. Docket Entry No. 92. On October 7, 2009, defendants in Resco WDPa filed motions: (a) seeking dismissal of Resco's amended complaint on the grounds of the act of state and government compulsion doctrines; (b) raising an argument as to lack of jurisdiction grounded on the defendants' lack of minimum contacts with the United States (since the Resco WDPa defendants were exporters rather than importers), [87] see id. Docket Entries Nos. 98-101; see also Docket Entries Nos. 102-109 (supporting exhibits); and (c) requesting stay of discovery. See id. Docket Entry No. 121. Stay of discovery has **[**268]** been granted, see id. Docket Entry No. 125, and the dismissal motions are pending decision.

Perhaps the most remarkable aspect of Resco's opposition to the dismissal motions filed in Resco WDPa and Plaintiffs' Opposition in the instant matter is the striking, nearly cut-and-paste, similarity of plaintiffs' arguments in both matters. Compare Resco WDPa, Docket Entry No. 117 to Instant Matter, Docket Entry No. 105. While the arguments with respect to the FTAIA and the "minimum contacts"-based subject matter jurisdiction differ due to the distinction in the underlying law (although both oppositions sought to establish a relaxed "involving importation" test and "directness" through sales to alleged American intermediaries and/or American buyers), the arguments presented here and in Resco WDPa with regard to abstention repeat each other almost verbatim. Compare Resco WDPa, Docket Entry No. 117 to Instant Matter, Docket Entry No. 105. Effectively, the sole distinction between the instant matter and Resco WDPa is that, in Resco WDPa, the challenge lies **[**269]** against Chinese exporters of bauxite-based products (that are members of the bauxite section of the CCCMC), while here the **[*412]** challenge lies against Chinese exporters of magnesite-based products (that are members of the magnesite section of the CCCMC).

All other aspects are effectively the same, i.e., Resco asserted that the bauxite section of the CCCMC was a democratic and voluntary association of Chinese exporters of bauxite-based products that joined the CCCMC as a voluntary trade association and were free not to comply with any minimum price their section of CCCMC was setting but, nonetheless, somehow elected to enter into collusive agreements producing their own "cartel(s)," which were operating in a succession largely similar of the chain of "Cartels" alleged in this matter. See Resco WDPa, Docket Entry No. 92; Docket Entry No. 117, at 24-25. Peculiarly enough, the Resco WDPa defendants asserted -- in response to Resco's Resco WDPa claims -- a governmental regulatory scheme of the MOFCOM and CCCMC substantively identical to the scheme asserted by Defendants in this matter. Basing their position on the compulsive force of such governmental regulatory scheme, the Resco WDPa defendants, **[**270]** too, asserted abstention stating:

> [T]o combat the perceived competitive evils of "low price selling," the Chinese government adopted, among others, regulations prohibiting exporters from selling commodities at "lower than normal" prices. [That regulation was the MOFCOM's] 1996 Interim Regulations on Punishment for the Conduct of Exporting at Lower Than Normal Price. . . . [Resco] concedes that [this] 1996 [MOFCOM's] regulation is currently valid [88] . . . [T]he

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WDPa was initiated, without making even an appearance and without filing any document). Two of Resco's counsel in Resco WDPa are also among Resco's counsel in the instant matter.

[87] In other words, the Resco WDPa asserted a point substantively analogous to that addressed by this Court under the FTAIA exporter exception.

[88] The **[**273]** Resco WDPa defendants cite to their exhibit docketed as Docket Entry No. 103-5. Resco's Resco WDPa opposition concedes the current validity of this 1996 regulation but maintains that the regulation's reference to "lower-than-normal price [did] not require collusive pricing" reached under the auspices of the CCCMC. Resco WDPa, Docket Entry No. 117, at 16. The Court disagrees. See infra, note 121 of this Opinion, for discussion of this aspect.

> U.S. government has no doubt that the Chinese government continues to impose both quantity and price controls on bauxite exports, in violation of China's WTO obligations, as part of "pursuit of industrial policies that rely on excessive . . . government intervention intended to promote or protect China's domestic industries."[] These measures led the USTR last June to request consultations with China. . . . [Moreover, o]n November 9, 2009, dissatisfied with the Chinese government's responses in the consultations, the U.S. requested the WTO to convene a panel to hear and decide whether China's bauxite export measures violate China's treaty commitments as a WTO member. The U.S. specifically charges that these measures are administered, **[**271]** in part, through chambers of commerce:
>
> > China administers the export quotas imposed on bauxite, . . . through its ministries and other organizations under the State Council as well as chambers of commerce and **[*413]** industry associations, in a manner that restricts exports and is not uniform, impartial and reasonable. In connection with the administration of the quotas for these materials, China imposes restrictions on the right of Chinese enterprises as well as foreign enterprises and individuals to export . . . . China allocates the export quotas . . . through a bidding system. China administers the requirements and procedures for this bidding system through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, in a manner that restricts exports and is not uniform, impartial and reasonable . . . . China also imposes quantitative restrictions on the exportation of the materials by *requiring that prices for the materials meet or exceed a minimum price before they may be exported.* Further, *through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, China administers* ***[**272]*** *the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable.*
>
> In support of these charges,. . . the U.S. cites the CCCMC charter [that is, the very document upon which Plaintiffs in this matter and Resco in Resco WDPa rely for their position that the CCCMC is a voluntary trade organization not being an arm of Chinese government] and [various Chinese] governmental measures [implemented through corresponding letters, notices and regulations.]

Id. Docket Entry No. 123, at 3-6 (emphasis removed in part) (citing: (a) documents filed as the defendants' exhibits in Resco WDPa and as exhibits of Defendants in this matter; and (b) Resco WDPa Docket Entries Nos. 123-2 and 123-4 (replicating the USTR Report and its Panel Request)). Since Plaintiffs seem to draw the Court's attention to Zheiiang Xinan in order to suggest the CCCMC's general modi operandi on the basis of the CCCMC's treatment of *one member* of the glyphosate section of the CCCMC, it appears logical to similarly consider the CCCMC's treatment of its *entire bauxite section* as an indication of the CCCMC's general modi operandi with regard to all members of the CCCMC, including Defendants.

b. *Vitamin C Proceedings*

If the Court were to look for a matter informative as to the general modi operandi of the MOFCOM and its "chambers of commerce," one of which is the CCCMC, the Court would be hard pressed to find proceedings more enlightening than Vitamin C, Civil Action No. 06-md-1738 (DGT) (E.D.N.Y.). Much like Resco WDPa, the gist of the *Vitamin C* controversy is strikingly similar to the matter at hand. [89] On November 6, 2008, Judge David G. Trager, presiding over Vitamin C, issued an opinion summarizing the claims, defenses and the then-docketed documentary evidence, as well as Judge Trager's concerns and conclusions, as follows:

> [The p]laintiffs in [the Vitamin C] case allege that defendants, Chinese corporations that manufacture and **[**274]** sell vitamin C, formed an illegal cartel to fix prices . . . for exports of vitamin C . . . to the United States.

[89] Two of Plaintiffs' counsel in this matter also represent the plaintiffs in the Vitamin C litigation, and one of these attorneys **[**282]** is also Resco's counsel in Resco WDPa. Moreover, one of Resco's counsel in Resco WDPa is also among counsel for Animal Science (the other of the two named Plaintiffs in the instant matter) in another action, Animal Science v. Hebei Welcome Pharm., Civil Action No. 05-453 (DGT) (E.D.N.Y.), which was joined by the Eastern District of New York with the Vitamin C, Civil Action No. 06-md-1738 (DGT) (E.D.N.Y.), proceedings.

. . . Defendants . . . move to dismiss[] on the grounds that their price-fixing activities were compelled by the Chinese government . . . . [The plaintiffs maintain that,] beginning in December 2001, defendants and their co-conspirators formed a cartel to control prices . . . of exports for vitamin C [under the auspices of their respective "chamber of commerce" dedicated to] Medicines and Health Products of China **[*414]** [("CCMHPC") and to] restrict quantity [of exported Vitamin C, and] to safeguard [their export] prices . . . [The p]laintiffs allege that . . . defendants' sales constitute . . . "virtually 100 percent of the manufacturers who can produce vitamin C for a cost below $ 4.50 to $ 5 per kilogram" <u>[i.e.,</u> that the defendants' prices are the cheapest in the world]. . . . The complaints allege that [as a result of the alleged] collusive price increases . . . , prices remained substantially above [those that they should have been had Chinese vitamin C producers actually competed with each other. The defendants move to dismiss on grounds of act of state, foreign sovereign **[**275]** compulsion and international comity. [In other words, the defendants do not deny the allegations in the complaints [as to their collusion for the purposes of price fixing]. Rather, they argue that their actions were compelled by the [MOFCOM, through the CCMHPC. The] defendants insist that this case may be properly dismissed at the pleadings stage because the [MOFCOM] has submitted an <u>amicus</u> brief detailing the [MOFCOM's] role in orchestrating and maintaining the vitamin C cartel. The Chinese government's appearance as <u>amicus curiae</u> is unprecedented. It has never . . . come before the United States as <u>amicus</u> to present its views. This fact alone demonstrates the importance the Chinese government places on this case. [The MOFCOM's brief states that the MOFCOM] is the highest administrative authority in China authorized to regulate foreign trade, and is the equivalent in the Chinese governmental system of a cabinet level department in the U.S. governmental system. The [MOFCOM states] that [the CCMHPC] is an entity under the [MOFCOM's] direct and active supervision that plays a central role in regulating China's vitamin C industry. [The MOFCOM also points out that, i]n contrast to the **[**276]** voluntary, non-governmental chambers of commerce that exist in the United States, chambers of commerce in China have played a central role in China's shift from a command economy to a market economy. In particular, the [MOFCOM] asserts that the [CCMHPC] stepped into the shoes of stated-owned national exporting entities when those entities stopped regulating exports of pharmaceutical products, including vitamin C [prior to China entering the endeavor of transitioning away from pure command economy. The CCMHPC] had its origins in 1991, when the [MOFCOM] promulgated Measures for Administration over Foreign Trade and Economic Social Organizations[("Measures"); these] Measures dictate that ["s]ocial organization[s"] established with coordination and industry regulation functions as authorized by [the MOFCOM] must implement the administrative rules and regulations relating to foreign trade and economy. The [MOFCOM] represents that the [CCMHPC] was one of those ["]social organizations["] authorized to implement rules and regulations, thus imbuing it with governmental regulatory authority. Indeed, the [MOFCOM] asserts that the [CCMHPC] act[s] in the name, with the authority, and under active **[**277]** supervision of the [MOFCOM], thus performing a governmental function so authorized under Chinese law. The . . . Measures further provide . . . that the [MOFCOM] shall be directly responsible for the daily management of social organizations established with coordination and industry regulation functions. In 1997, the [MOFCOM] and State Drug Administration . . . issued a notice . . . requiring . . . the [CCMHPC] **[*415]** to . . . coordinate . . . export market [and] price . . . [and] explain[ing] that [t]he specific method for coordination shall be formulated by the [CCMHPC], and filed [with the MOFCOM] for [the] record. In 1998, the [MOFCOM approved the CCMHPC's request to establish a vitamin C section and] declared that the major responsibilities of [that section would be]: to be responsible for coordinating the Vitamin C export . . . price . . . . [This section's] charter . . . provides that [it had to] coordinate and administrate market [and] price . . . of [v]itamin C export [and] requires [its] members to strictly execute export coordinated price set by the [CCMHPC] and keep it confidential. [In addition, t]he charter provides for sanctions for failure to perform any member's obligation, **[**278]** [such sanctions included various measures, up to] revocation of . . . membership. In describing the ultimate penalty for non-compliance, the charter notes that the [section would] suggest to the competent governmental department, through the [CCMHPC], to suspend and even cancel the . . . export right of such violating member. In 2002, the [MOFCOM] changed the method of price review in order to accommodate the new situations since China's entry into WTO. The new regulation subjected 30 categories of export products (including vitamin C) to [p]rice [v]erification . . . by their respective chambers . . . The [verification] procedure . . . [required] exporters to send the[ir] export contracts to the relevant chambers for verification before [completing their c]ustoms declaration. [The department of c]ustoms [was obliged to] only allow for export those shipments that [were] accompanied by export contracts with the required [verification. In light of the foregoing, the MOFCOM]

> argue[s] that [the] defendants were compelled under Chinese law to collectively set a price for vitamin C exports. Although [the MOFCOM is] careful to note that [the MOFCOM] itself did not decide what specific prices **[**279]** should be, [it] assert[s] that [the] defendants could not have exported vitamin C that did not conform to the agreed-upon price. . . . [The p]aintiffs attack the exhibits attached to the [MOFCOM's] brief as mere notices [rather that "laws"] and charter documents of [the CCMHPC, which, they claim is a] nongovernmental organization. . . . They note, furthermore, that the price collusion [asserted] began in December 2001, long after the [CCMHPC and the vitamin C section] were established and purportedly compelled to set prices. [The plaintiffs assert] that [the] defendants' price agreements were voluntary [because the defendants] were able to reach a self-regulated agreement [which should mean that the defendants had control over the] export prices. [In other words, the plaintiffs assert that, if defendants reached the price requirement by a] self-restraint[, it must mean that they did it] without any government intervention. . . . The [MOFCOM] argues that [a reference to a self-restraint] should not be taken at face value [because such terms as self-regulation and self-restraint, etc. are] many of the terms [that] have meanings in the context of China's government and economic policy **[**280]** that are quite different from their literal translations [and American perceptions as to the meaning of these concepts]. Among the controversial terms are [such terms as] social organization, voluntary self-restraint, coordination, industry self-discipline, and verification. [The p]laintiffs [however,] rely on [the opinion of their] expert in Chinese law, Professor . . . Feinerman [("Feinerman")], **[*416]** who [opined] that defendants' conduct was not compelled by Chinese law [because] many of the [MOFCOM's] exhibits [did] not contain a [certain stamp, and because these documents, in his opinion, should be qualified not as "real"] laws or regulations, [or as "real" laws and regulations but only if they were] not specific to vitamin C. . . . Feinerman note[d] that the document [addressing the creation of the vitamin C section] merely authorize[d but did not require] the creation of th[is] entity [and] point[ed] out that this reflected [his understanding of Chinese law, where anything] not expressly allowed would be prohibited, in contrast to the long-standing Western norm that anything not expressly prohibited is allowed. [Judge Trager found Feinerman's point questionably helpful to the plaintiffs' **[**281]** cause, observing that, a]ccepting . . . Feinerman's characterization leads to the conclusion that a cartel in China could only exist with governmental sanction[, and that makes it] difficult to differentiate between a cartel that was [allegedly] voluntarily formed . . . and a cartel that was mandated by governmental fiat.

Vitamin C, 584 F. Supp. 2d at 547-55 (original brackets and quotation marks removed, citation to exhibits verifying Judge Trager's factual observations and case law citations omitted). Judge Trager, however, denied the defendants' motion to dismiss finding that "[i]t [was] not clear from the record [accumulated] at th[at] stage . . . whether defendants [themselves, that is, the exporters of vitamin C] were performing a government function, [or] whether they were acting as private citizens pursuant to governmental directives or whether they were acting as unrestrained private citizens. . . [Simply put,] the record[,] as it st[ood, was] simply too ambiguous to foreclose further inquiry into the voluntariness of defendants' actions." [90] *Id. at 559*.

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[90] Plaintiffs assert that Judge Trager reached his decision to deny the defendants' motion because the act-of-state and government compulsion "defenses rest on facts that are not found within the complaints -- namely, [that] the Chinese government required defendants to fix prices in violation of the Sherman Act," and such inquiry "could not be resolved at the motion to dismiss stage even after limited discovery." Opp. at 64 (quoting *Vitamin C, 584 F. Supp. 2d at 555-56*). Plaintiffs misread Judge Trager's decision. Had Judge Trager found the inquiry into the evidentiary material submitted by the Vitamin C defendants and amicus not a viable ground for dismissal, he would have ended his decision at page 11 and footnote 6, skipping the remaining 25 pages of his opinion. See **[**283]** Vitamin C, Civil Action No. 06-md-1738 (E,D.N.Y.), Docket Entry No. 338. In light of the content of Judge Trager's footnote 6 and the context in which it was entered, it appears that Judge Trager merely observed the general rule that a *Rule 12(b)* motion is a motion on pleadings, i.e., a motion on what is alleged in the plaintiff's complaint. However, Judge Trager did not directly address the issue of subject matter jurisdiction (since the defendants in Vitamin C did not raise a FSIA-based challenge) or the prudential considerations of judicial economy associated with resolution of claims substantively intertwined with the FSIA. Moreover, Judge Trager's discussion did not involve the issue of judicial notice which allows the court consider evidence not made part of the plaintiff's submission at the motion to dismiss stage. See, e.g., *Jackson, 2006 U.S. Dist. LEXIS 3960, at *18*.

Since Judge Trager's issuance of the above-quoted decision, the MOFCOM filed another amicus statement, dated August 31, 2009, reading as follows: [91]

> [The MOFCOM] authorizes its Department of Treaty and Law to respectfully submit this [s]tatement ([reproduced **[*417]** herein in Chinese sinographs and submitted] together **[**284]** with an authorized English translation). [The MOFCOM] has attached great importance to the antitrust litigation in the United States. . . . [The MOFCOM] would like to . . . reiterate here that the alleged conduct by the defendant[s who are] Chinese . . . exporters is the result of the defendants' performing their obligations to comply with Chinese laws, rather than conduct on their own initiative. In order to prevent self-destructive competition through distorted pricing by Chinese exporters caught unprepared for the drastic change of China's export policies, and to mitigate potential exposures to antidumping investigations in other countries against Chinese exporters, the [MOFCOM] took active measures by exerting export regulation over certain commodities that might encounter or have encountered such problems. Although different regulatory measures may have been implemented in line with changes of circumstances at different times, enterprises in regulated industries were nevertheless compelled to comply with relevant rules and regulations, or they would otherwise be subject to penalties. The actual specific measures taken by China to effect its regulatory policies include what is **[**285]** referred to as a "system of self-discipline." This system has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right. . . . The [MOFCOM] authorized and instructed the [CCMHPC] and its Vitamin C [section] to implement relevant policies related to the export of vitamin C products. Embodied in the [MOFCOM's] delegation of authority to the [CCMHPC] were industry regulatory functions and powers as well as necessary enforcement measures. [The] exporters were thus subject to the **[**286]** regulation by the [CCMHPC], including compliance with the [CCMHPC's] requirements of self-discipline, the very purpose of which was to coordinate each exporter's behavior. No . . . exporter could ignore these policies, nor could they abstain from such coordination with regard to export price and production volume when asked to by the [CCMHPC]. The self-disciplinary system of export coordination also includes meetings and discussions between and among the parties subject to the [CCMHPC's] direction and supervision, and reaching agreements among themselves on taking appropriate actions in the interest of the country as a whole. Participation in such discussions, taking a vote and conducting other similar activities to reach their final consensus constitutes an integral part of the self-discipline process. [The] exporters must comply with the above procedures and the agreements reached in compliance with such procedures; otherwise, the [CCMHPC] would be required to exercise its power to penalize those who were in violation of such procedures and agreements. The [MOFCOM] has read the report issued by plaintiffs' expert, [and] believes that statements of representatives of the [MOFCOM] **[**287]** and other **[*418]** government agencies, with regard to China's market economy status, and remarks regarding Chinese companies setting price and production volume according to the principle of market demand, quoted by [the plaintiff's expert] were made in a different context -- one that had nothing to do with export price regulations -- and were general descriptions of the current status of China's market economy presented in a special context. These general descriptions are irrelevant to the present case and should not be deemed as explicit or implicit statements of China's abandonment of its . . . regulatory policies over certain designated industries . . . , or of China's waiver of its power to continue to regulate according to Chinese . . . law. The [MOFCOM] believes that maintaining its regulation in a limited manner (such as its regulation over . . . export [of certain goods]) is consistent with China's national goal of establishing a socialist market economy.

[91] The documents filed in the Vitamin C proceedings which the Court finds worthy of mentioning but not amenable to judicial notice are accompanied by appropriate clarifications.

Id., Docket Entry 400-1, at 1-3.

E. The FSIA Appears Relevant [288] as to Some Defendants**

Here, Plaintiffs concede that Defendant Minmetals and Defendant Sinosteel are fully owned by the Chinese government and, hence, are instrumentalities of China. See Opp. at 43. Plaintiffs simultaneously assert -- and Defendants seem to concede -- that Defendants China National Minerals, Sinosteel Trading and Liaoning Jiayi Metals & Minerals are not directly owned by the state; rather, they are either subsidiaries of Minmetals and Sinosteel or privately owned. Thus, there seems to be no dispute among the parties that the FSIA-based presumption of immunity applies to Defendants Sinosteel and Minmetals. Rather, the disagreement between the parties focuses on the reach of the "commercial activity" exception which, as both sides seem to concede, is interpreted broadly and includes such activities as trade/extraction of minerals, i.e., the *business* activities of the Defendants. See, e.g., *Behring, 475 F. Supp. at 390*.

As the Court noted supra, ***HN68***[] the most commonly invoked form of the "commercial activity" exception is based on the claim that the activities at issue were carried on in the United States. See *28 U.S.C. § 1605(a)(2)*. However, *subsection (a)(2)* (i.e., the subsection **[**289]** dealing with various forms of "commercial activity" restoring federal jurisdiction by invalidating the presumption of immunity) sets also two other forms of "commercial activity" removing immunity. Specifically, under these two additional options, the grant of immunity is also unwarranted if "the action is based upon[: (a)] an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [(b)] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Id.

Plaintiffs maintain that the Court has jurisdiction under the option "(a)" because Defendant "Minmetals has directly sold and continues to sell magnesite products to U.S. companies and in U.S. commerce. And [Defendant] Sinosteel conspired with [other] Defendants to fix the export price to the United States and, in fact, is on the Standing Committee of the CCCMC. [92] The commercial activity of [Defendants] Minmetals and Sinosteel[,] thus[,] had a direct effect on U.S. commerce[,] and the FSIA[-based immunity] is inapplicable." [93] Opp. at 42-43.

[*419] This assertion is both legally and logically flawed. As the Court already explained in its discussion of the **[**291]** FTAIA, ***HN69***[] the Court's jurisdiction over an exporter cannot depend on whether an American purchaser (be it an intermediary or a purported end-consumer) elects to actually bring the exporter's goods into the United States or "diverts" these goods to another country: the reach of the United States jurisdiction cannot depend on the whim of the purchaser who is free to create his own injury by first deciding whether the purchased goods cross -- or get consumed after crossing -- a particular meridian, and then filing a suit against the exporter who has no meaningful control over the purchaser's business elections (or over the purchaser's choice not to act in accordance with its contractually non-binding representations that might have been made to the exporter at the time of the exporter's sale of goods). And, indeed, one's entry into a "conspiracy" or one's "sitting on a committee" cannot qualify as one's "commercial activity" of the type in which a private party engages for the purposes of "trade

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[92] Sinosteel points **[**290]** out that Plaintiffs' exhibit allegedly showing that Sinosteel is on the Standing Committee of the CCCMC actually lacks such information. See S/Reply at 18.

[93] Given Plaintiffs' stretch of logic, the Court is not entirely clear as to Plaintiffs' preference of the option "(a)" over the option "(b)". If Plaintiffs assert that the FSIA-based immunity is inapplicable because Defendants' goods were sold in China but, allegedly, used in the United States, or because Defendants' conspiracy allegedly affected the prices of goods used in the United States, then *any* usage/consumption of Defendants' goods in the United States could just as well be qualified as "an act performed in the United States in connection with [Defendants' export sales in China, which could be just as well qualified as] a commercial activity of the foreign state elsewhere," thus yielding an option "(b)" scenario. In sum, Plaintiffs' position, taken to its logical conclusion, removes the FSIA-based immunity from *any* foreign state's activity, provided there is an American usage/consumption of that foreign state's goods.

and traffic or commerce," see Weltover, 504 U.S. at 614, this is so regardless of how broadly the term "commercial activity" is defined by the FSIA legislative history and case law. [94]

However, regardless of incongruence of Plaintiffs' argument, the Court cannot ignore that ***HN70***[] the language of the FSIA does envision jurisdiction based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [if] that act causes a *direct effect* in the United States," 28 U.S.C. § 1605(a)(2). Hence, the Court, mindful of Defendants' obligation to meet the burden of establishing inapplicability of the "commercial activity" exception, cannot cease its inquiry upon Defendants' mere assertion that **[**293]** they were instrumentalities of China.

As noted supra, ***HN71***[] the meaning of "directness" under Subsection 1605(a)(2) was clarified in Weltover, 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394, and this "directness" is, seemingly, of the same nature (although, perhaps, of different magnitude) as that referred to in 15 U.S.C. § 6a(1)(A). See LSL Biotechnologies, 379 F.3d at 679. [95]

The Supreme Court in Weltover guide-posted the "directness" test by finding "little **[*420]** difficulty [to] conclud[e] that [the defendant's actions] had a direct effect in the United States" because New York was the contractually-designated "place of [the defendant's] performance." 504 U.S. at 618-19 (internal quotation marks omitted). This Court is reluctant to read Weltover as narrowly stating that the "commercial exception" restores the Court's jurisdiction over Plaintiffs' claims against the presumptively immune Defendants if -- and only if -- these Defendants' express contractual obligations required performance in the United States. See Weltover, 504 U.S. at 618-19 (stressing that **[**294]** the difficulty of determining "directness" was "little" in a scenario of such express contract and, hence, suggesting that a less obvious connection to the United States than a contract directing the defendant's actual performance on American soil might still suffice to establish the requisite degree of "directness"). Consequently, in the event the focus (or, at least, the end-goal) of Defendants' business endeavors actually was a physical materialization of their goods on the United States soil, and Defendants acted in accordance with such goal, then a substantial contact/nexus between Defendants' business and the United States might be established, triggering the "commercial activity" exception. See BP Chems. Ltd. v. Jiangsu Sopo Corp., 285 F.3d 677, 686-687 (8th Cir. 2002) (suggesting a "substantial contact" test); see also Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1018 (2d Cir. 1991) (same); accord Filetech S.A. v. France Telecom S.A., 304 F.3d 180 (2d Cir. 2002) (setting forth an analogous "nexus test"); NYSA-ILA Pension Trust Fund v. Garuda Indonesia, 7 F.3d 35, 38 (2d Cir. 1993) (same).

Consequently, in coherence with the Court's finding reached under the introductory clause **[**295]** of the FTAIA, the Court would requiring Defendants to show that the presumptively immune Defendants were not a "main force" behind the transactions that placed their goods on American soil (as the term "main force" is explained supra, see note 54 of this Opinion) in order establish to the Court's satisfaction that the presumptively immune Defendants were not engaged in commercial activities restoring the Court's jurisdiction under 28 U.S.C. § 1605(a)(2). [96]

F. The Act of State Doctrine Does Not Warrant Abstention

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[94] The nature **[**292]** of Defendants' *business* activities, i.e., production/sale of magnesite-based goods, squarely qualifies as "commercial activities" under the FSIA, but Defendants' alleged "conspiratorial" meetings, partaking in administrative duties at the CCCMC, reports to and deliberations at the CCCMC, etc. fall outside of the realm of "commercial activities," even if Plaintiffs allege that the *goal* of such "extracurricular" endeavors was an increase in Defendants' business: the commercial character of the activity is determined by the *nature* of the defendant's conduct, *not* by its purpose. See 28 U.S.C. § 1603(d); Weltover, 504 U.S. at 615-616.

[95] It would be indeed anomalous if the conclusions reached by this Court under the FTAIA and the FSIA on the very same set of facts would, nonetheless, yield different results.

[96] Hence, the FSIA-based burden of the presumptively immune Defendants would be largely a mirror image of Plaintiffs' FTAIA-based burden.

The bulk of the parties' abstention-related arguments focus on the act of state doctrine, even though the doctrine is facially inapplicable to the case at bar. As noted supra, *HN72*[] the doctrine is, effectively, an inquiry into "a consequence of domestic separation of powers," *W.S. Kirkpatrick, 493 U.S. at 404 (1990)*; *Sabbatino, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804*, and it directs the court to "dismiss the suit if its resolution would require the court to declare invalid an official act of a foreign sovereign." *Gross, 456 F.3d 363*. Although the law is unsettled as to whether **[**296]** the doctrine is amenable to the FSIA's expansive definition of the term of "foreign state" (i.e., whether "instrumentalities," such as 100% state-owned entities, might be deemed a "foreign sovereign" for the purposes of the doctrine), it is well settled that the doctrine envisions a "commercial activity" exception, pursuant to which abstention is unwarranted as to the acts committed by foreign sovereigns in course of commercial operations. See *Alfred Dunhill, 425 U.S. at 703-706*; *Williams, 694 F.2d at 302-305* and n. 2; see also *Clayco Petroleum, 712 F.2d 404, 408*. Hence, in no ambiguous terms, the **[*421]** doctrine mandates the defendant to make a direct connection between its sovereign status and the uniquely sovereign qualities of its activity being challenged, and allows no cross-matching. See, e.g., *Callejo, 764 F.2d at 1114-1115*. Here, however, Defendants try to do exactly that: they match themselves with the regulatory activities of the MOFCOM and CCCMC. See M/Mot. at 36; S/Mot. at 31-32; S/Reply at 21-22; M/Reply at 11-15. Specifically, Defendants' position can be reduced to the following chain of sentiments: (a) the Chinese government, operating through the MOFCOM and CCCMC, adopts **[**297]** regulations and similar measures with regard to the export of magnesite-based goods; (b) Defendants' business actions comply with such governmental regulations and measures; and (c) since an inquiry into the validity of Chinese regulations shall be abstained from, Defendants' business actions shall similarly be left unexamined. See id.

Defendants mix apples and oranges. Defendants' business activities were purely commercial and not regulatory, [97] which means that, even if the broad construction of the phrase "foreign state" were borrowed by the act of state doctrine from the FSIA, all Defendants, including 100% state owned enterprises, would still be unable to establish grounds for abstention due to the operation of the doctrine's "commercial activity" exception. Simply put, the name of the principle is "act-of-state doctrine," not *"act-because-of-state* doctrine." Once Defendants add the preposition "because" into their argument, they are asserting the doctrine of government compulsion which, as Judge Trager aptly observed, "recognizes that a defendant trying to do business under conflicting legal regimes may be caught between the proverbial rock and a hard place where compliance with **[**298]** [the requirements posed by] one country . . . results in violation of [laws of] another." *Vitamin C, 584 F. Supp. 2d at 551*. Therefore, abstention on the grounds of the act of state doctrine will be: (a) denied as factually inapplicable, if taken at face value; but (b) Defendants' position will be construed as a mislabeled argument seeking abstention on the basis of government compulsion.

G. Doctrine of Government Compulsion Appears Relevant

1. Preliminary Considerations

a. *Concept of Compulsion through the Prism of Common Law*

While the doctrine of government compulsion enjoyed few clarifications (short of the guidance provided in Mannington Mills and Timberlane Lumber), the legal principle of compulsion has been known to humanity since the Roman canon law, and became part of the United States jurisprudence since its inception in the British common law: being known as defense of duress, where the defense implied both lack of voluntary **[**299]** conduct by the defendant and the resulting inequity of sanctioning the defendant for compliance with a compulsive force. See, e.g., Rick Bigwood, Coercion in Contract: The Theoretical Constructs of Duress, 46 U. Toronto L.J. 201, 206 (1996) ("the emphasis of legally cognizable coercion -- duress -- appears . . . to do with questions of 'freedom [of will]' or 'voluntariness' [and] with questions of . . . 'unfairness'"); Laurence A. Benner, Requiem for Miranda: The Rehnquist

[97] The only entity vaguely hinting that Defendants' activities were "regulatory" are Plaintiffs, since their Opposition stresses that Defendants partook in administration of the CCCMC and in CCCMC's coining of the minimum price applicable to magnesite export.

Court's Voluntariness Doctrine in Historical Perspective, 67 Wash. U.L.Q. 59, 93 (1988) (tracing the ancient history of defense of duress). The concept of common **[*422]** law duress has been summarized as follows:

> Duress is constraint of another's will . . . Persuasion amounting to a form of constraint can take various forms . . . Some forms of "economic duress" such as the threat of infliction of pecuniary loss, as in the case in which the actor threatens to obtain the other's discharge from his employment, may be ground for relief of an equitable origin and character . . . The early common law view that duress is restricted to imprisonment or threats sufficient to put a brave man in fear of loss of life or limb or of imprisonment **[**300]** of himself or a member of his immediate family clearly does not apply. . . . [Rather, d]uress means a threat of [repercussion] that is intended to prevent and does prevent another from exercising free will and judgment in his conduct. [Duress] is commonly committed by an oral or written threat but may be accomplished by acts [conveying an unwritten and even unspoken threat of repercussion]. The test of what act or threat produces the required degree of fear is not entirely objective. The threat need not be one that would put a brave person or even a person of ordinary firmness in fear. [Rather, the personal circumstances of the threatened entity, as well as] the relation of [the threatened entity to the entity seeking to extract consent] and antecedent circumstances must all be considered. It is therefore not essential that a threat be made under such circumstances that a reasonable [entity] would believe that it will be executed, provided the threatened [entity] believes the [entity seeking to extract consent] has the means and intends to carry it out. However, in determining whether the fear that is essential for duress did in fact exist in a particular case, the trier of fact can **[**301]** properly consider whether a reasonable person would be put in fear under the circumstances [present in the particular case at bar].

Restatement 2d, Torts, §§ 871, comment f; 892B, comment j. [98]

Reflecting on these tenets through the comity-driven prism of government compulsion doctrine, it appears logical to presume that the ***HN73***[] defendant could successfully invoke the doctrine if (s)he shows that a reasonable entity standing in the defendant's shoes (that is, having a similar-to-defendant's understanding of the local legal, economic, political and cultural peculiarities, as well as being exposed to similar antecedent circumstances and current relation to the entity seeking to extract consent) would feel compelled to consent by the totality of these conditions. Conversely, it appears wholly illogical to factor in this **[**302]** concept: (a) the socio-political and cultural perceptions of a foreigner; or (b) the concerns of an entity which is in notably different circumstances; or (c) the degree of bravery common only to bold risk takers. In other words, it appears unreasonable to obligate the defendant to either ignore the realities of his/her world or to take an excessive risk.

b. ***Concept of Compulsion through the Prism of Foreign Regimes***

Reflecting on the position taken by Plaintiffs in this matter (which is substantively identical to the position taken by Resco in Resco WDPa and the Vitamin C plaintiffs), this Court surmises that the three key points of logical deducement **[*423]** Plaintiffs are aiming to foster are: (a) Defendants cannot be deemed "actually compelled" because Defendants concede that they partook in those aspects of the CCCMC's operations that led to systemic rendition and registration with the MOFCOM of the minimum price figure, i.e., because Defendants were de facto creating the numerical figure they claim they were compelled to comply with; (b) Defendants were not "actually compelled" because Defendants do not assert facts showing they actually suffered any negative repercussion for not complying **[**303]** with the minimum price requirements, i.e., Defendants could have just as easily refused compliance, and could have done it with Zhejiang's rate of success; and (c) Defendants were not "actually compelled" because the minimum price requirement was only occasionally referenced in certain "regulations," "circulars," "measures," "notices" and oral statements of Chinese government officials/agencies (instead of being made part of a codified statute or, at the very least, instead of being expressly repeated in each new regulation, circular, measure, notice, etc., that dealt with Defendants' specific area of business operations) and, in addition,

[98] Federal constitutional law provides a somewhat relevant test with regard to *First Amendment* retaliation: it requires the plaintiff seeking to state such claim to show, inter alia, that there is a causal link between the plaintiffs' activity at issue and the adverse action that the supervising official takes against him. See *Rauser v. Horn, 241 F.3d 330, 333 (3d Cir. 2001)*.

Defendants were not "actually compelled" because the broad language of these prescripts utilized such terms as "self-discipline" or "self-restraint," which rendered these prescripts not as mandatory as a "real law" would be.

The Court finds each of these positions logically flawed. The fact that a certain natural or juridical entity fails to comply with the requirements of the legal regime, or that this entity succeeds at avoiding negative repercussions, cannot be read as a sign that the legal regime is not compelling, e.g., it would be wholly anomalous **[**304]** to expect one to keep committing serious crimes as a means to establish the actual might of the penal code. Similarly, the unfortunate reality that a rather substantial number of individuals elects to disregard the prescripts of the penal code and commit crimes, as well as the even more unfortunate reality of some individuals' success at avoiding law enforcement, in no way renders the penal code less compulsory. Moreover, one need not focus on a crime as dire as murder (where the rate of detection and law enforcement is statistically rather high): the same sense of compulsion applies to less-publicized offenses, e.g., to shoplifting, where the rate of actual detection and law enforcement is statistically rather low, i.e., the very realization that an applicable prescript (with criminal penalties attached) exists causes the shoplifter fear of repercussions. [99]

Furthermore, law need not be actually codified in order to be a "real law" that may be enforced: for example, the common law of torts has been "codified" only in the Restatement of Torts, but the legal might of tort principles is present through the power of the injured party to act as a "private attorney general" and to rely on government institutions, i.e., the courts, to civilly penalize the wrongdoer; this is so **[*424]** regardless of the fact that certain victims of tortious conduct might -- and in fact do -- elect not to enforce their rights. [100] Likewise, it cannot

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[99] In addition, the fact that a certain prescript is rarely enforced or even has not been invoked for many years fails to reclassify the prescript into "not-law." For instance, the United States government relied on an 18th-century law on sedition to investigate the September 11 terror attacks. See <<*http://www.cbsnews.com/stories/2001/11/09/terror/main317461.shtml>>*. **[**305]** Similarly, the Intelligence Identities Protection Act of 1982, *50 U.S.C. §§ 421-426*, was enacted in 1982 but never invoked until 2003, when Valerie Plame's identity was leaked. See <<*http://www.washingtontimes.com/news/2003/oct/01/20031001-113800-2356r/>>*. In the same vein, in 2001, a Mormon Fundamentalist was sentenced under Utah law that outlawed plural marriages since 1896, which has been barely invoked over the past decades regardless of the state officials' estimate that as many as 30,000 Utahans live in polygamy. See Valerie Richardson, Mormon Polygamist - and a Lifestyle - Go on Trial Today, Wash. Times A3 (May 14, 2001).

[100] The Court finds Plaintiffs' position that, in order to be "real law," a mandate must be reduced to a recent statute, executive order, agency regulation, etc. (i.e., a written statement issued by a government) unduly condescending toward foreign legal regimes structured differently from the system used in the United States, Europe, or akin. To illustrate, many prescripts of religious law (carrying, on occasion, very severe punishment for non-obedience) were originally orally stated many centuries ago -- often, in indefinite and largely aspirational terms selected by authors whose authority and even existence is hard to verify, or in terms attributed directly to the Almighty -- but, reduced to non-governmental writings centuries ago, they remain very "real law" till today, even though they have not been "re-enacted," republished or validated by government stamp, and even though they have been coexisting **[**307]** with newer religious or civil prescripts rendered with regard to the same issues without reciting the contents of the older laws. The same applies with even more force to the countries where there is a complex interplay between civil, religious *and local customary* laws, many of which are unwritten but, nonetheless, enjoy the force of "real law" and entail very real sanctions. See, generally, Richard Frimpong Oppong, Private International Law in Africa: The Past. Present, and Future, *55 Am. J. Comp. L. 677 (2007)*; Christina Jones-Pauly & Neamat Nojumi, Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan, *52 Am. J. Comp. L. 825 (2004)*; Ruth Lapidoth, The Fundamental Agreement Between the Holy See and the State of Israel, *47 Cath. U. L. Rev. 441, 462 (1998)*. As one judge in this District noted:

> The legal system in Saudi Arabia is fundamentally different from that of the United States. Western conceptions of the role that law plays in society, the legal process, and methods of legal interpretation, often mistakenly assumed to be universal in nature, are in many ways poles apart from those concepts in Islamic countries such as Saudi Arabia. . . . [T]he Saudi Arabia **[**308]** legal system is governed exclusively by what is known as the "Shari'a," or divine law. In fact, there are no "laws" in Saudi Arabia other than Islamic law, and any supplemental rules promulgated by the Saudi government are actually considered regulations . . . . These regulations, issued under the authority of the King [and] the Council of Ministers, are valid only to the extent that they are consistent with Shari'a. The Shari'a is the product of several interrelated sources of religious authority. The doctrines comprising Shari'a are derived primarily from the Qur'an, the "Book of God." . . . Because the Qur'an commands adherents of Islam to obey the Prophet, the recorded examples of the acts and words of

[306]** be said that a prescript is not "real law," and its violation would not result in repercussions if the prescript is merely set forth in terms of a broad caution: not every type of prescript enacted by every legal regime in the world is open to the constitutional challenge of vagueness. [101]

Finally, one's participation in coining a legal/regulatory prescript does not render **[*425]** such participant exempt from the compulsion of the law (s)he helped to create. Indeed, had it been otherwise, all the legislators enacting state and federal statutes, agency officials crafting regulations, reporters **[**310]** compiling the Restatements of Law, judges sitting on advisory committees, etc., would be deemed exempt from the reach of laws they helped to create. And, of course, it would be an error to automatically qualify a foreign prescript as non-mandatory on the grounds that a literal translation of a certain term employed in that prescript has non-compulsory connotations to an American ear in light of the socio-political and cultural peculiarities of United States life. [102] Rather, the law of the foreign sovereign has to be examined, with due consideration given to interpretative statements made by that foreign sovereign.

c. *Deference to Statements Made by an Arm of a Foreign Sovereign*

HN74[] *Federal Rule of Civil Procedure 44.1* governs the judicial determination of foreign law. The Rule states that, in deciding issues of foreign law, the court may consider any relevant material or source, including testimony, **[**312]** whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law. See *Nat'l Group for Communs. & Computers, Ltd. v. Lucent Techs. Int'l, Inc., 331 F. Supp. 2d 290, 294 (D.N.J. 2004)*. Moreover, the Rule provides courts with broad authority -- and, perhaps, even with an obligation -- to conduct their own independent research in order to determine the meaning of foreign law. [103] See id.; see also *Bel-Ray Co., Inc. **[*426]** v. Chemrite Ltd., 181 F.3d*

> [Prophet] Muhammed, known as the "Sunnah," constitute an additional integral part of the Shari'a. In the centuries since the founding of Islam, Islamic religious-legal scholars . . . have produced opinions known as "fiqh" [that must, too, be factored in as law].

Nat'l Group for Communs. & Computers Ltd. v. Lucent Techs. Int'l Inc., 331 F. Supp. 2d 290, 294-95 (D.N.J. 2004); accord *Mannington Mills, 595 F.2d at 1297* ("The legislation and policy of each nation is not likely to be the **[**309]** same").

[101] For example, Canon 1 of the Model Code of Judicial Conduct merely states that "[a] judge shall . . . avoid impropriety and the appearance of impropriety," without either specifying the meaning of the phrase "appearance of impropriety" or consequences for a violation of the prescript; this broadly-termed Canon could be viewed as a United States counterpart of a foreign mandate directing exercise of professional self-discipline. Accord Brian C. Buescher, Out with the Code and in with the Rules: The Disastrous Nebraska "Bright Line" Rule for Conflict of Interest: A Direct Consequence of the Shortcomings in the Model Code, *12 Geo. J. Legal Ethics 717 (1999)* (providing a thoughtful discussion of the grounds that might be utilized for questioning of a certain negative repercussion, which ensued from the Supreme Court of Nebraska's interpretation of the "appearance of impropriety" phrase).

[102] For instance, the phrase "Soviet Union" is composed of two words, the first of which, "soviet," literally means "advice, opinion, consultation." See V.K. Muller, Russian-English Dictionary 651 (1947). However, it would be wrong to claim that the decisions rendered by the Soviet Union upon its subjects were nothing but non-mandatory invitations to unite for consultations. Analogously, the phrase "Supreme Arbitration Court of Russian Federation" implies the Supreme Court of Russia, Commercial Part, a government body that has nothing to do with the process of arbitration, **[**311]** as it is known in the United States (i.e., the "Arbitration Court" obtains jurisdiction on the grounds of the nature of disputes, not because the parties voluntary agreed to its jurisdiction, and its decisions are enforced as mandatory legal judgments and not open to the test applicable to arbitral awards). See <<*http://www.arbitr.ru/eng/>>*. This is so regardless of a multitude of United States legal articles, which are written by scholars who are well aware of the distinction but, nonetheless, utilize the literal translation "Arbitration Court," i.e., the phrase having very different connotations to an American legal ear. See, e.g., Robert Rothenberg, Tatyana V. Melnikova, Comparative Forms of Doing Business in Russia and New York State, *40 Am. Bus. L.J. 563 (2003)*; Hon. Sidney Brooks, The International Scene: Russia's March to a Market Economy Assisted by New Bankruptcy Law, Am. Bankr. Institute J. (1998).

[103] ***HN75***[] Translations of foreign provisions, be they actually provided by the parties or obtained by the court from other sources, may be used by the court in its determinations of foreign law. See *Grand Entm't Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476, 489 (3d Cir. 1993)*; *Overseas Dev. Disc Corp. v. Sangamo Constr. Co., 840 F.2d 1319, 1324-1326 (7th Cir. 1988)*

435, 440 (3d Cir. 1999); Twohy v. First Nat'l Bank, 758 F.2d 1185, 1194 (7th Cir. 1985); cf. Curley v. AMR Corp., 153 F.3d 5, 12-13 (2d Cir. 1998) ("We urge district courts . . . to determine issues relating to the law of foreign nations"). Moreover, the courts may extract from foreign legal material, see Access Telecomm., Inc. v. MCI Telcomms. Corp., 197 F.3d 694, 713 (5th Cir. 1999) and may even consider material that would be inadmissible at trial, see Sidali v. I.N.S., 107 F.3d 191, 198 n. 10 (3d Cir. 1997); as the Advisory Committee's Original Committee Note to Rule 44.1 clarified that "the ordinary rules of evidence are often inapposite to the problem **[**313]** of determining foreign law and have in the past prevented examination of material which could have provided a proper basis for the determination," and the 1975 Committee Note to an amendment to Rule 44.1, further stressed that, even if not admissible under the Federal Rules of Evidence, evidence of foreign law is properly considered, "[s]ince the purpose of the provision is to free the judge, in determining foreign law, from any restrictions imposed by evidence rules . . . ." See 9-44.1 Moore's Federal Practice - Civil § 44.1 App.01 and App. 02. Hence, "differences of opinion among experts on the content, applicability, or interpretation of foreign law do not create a genuine issue as to any material fact" for the purposes of the court's review and final ruling. See Banco de Credito Indus., S.A. v. Tesoreria General, *990 F.2d 827, 838 (5th Cir. 1993)* ("even differences of opinion on the content, applicability, or interpretation of the foreign provision may not be characterized as a 'genuine issue as to any material fact' under Rule 56") (citation omitted); Access Telecomm., 197 F.3d at 713 (differences of opinion among experts on the content, applicability, or interpretation of foreign **[**314]** law do not create genuine issue as to material fact).

Moreover, ***HN76***[] a foreign sovereign's admission of legal compulsion of its subjects might warrant a high -- often, nearly binding -- degree of deference, even if the admitted compulsion was based on what might be deemed, in American jurisprudence, a form of "unwritten law."

> [Here, "the Ministry] of Justice of the [Soviet Union] certifies that[,] by virtue of the laws of the organs of the Soviet Government[,] all nationalized funds and property of former private enterprises and companies, in particular by virtue of the decree of November 28, 1918 . . . , the funds and property of former insurance companies, constitute the property of the State, irrespective of the nature of the property and irrespective of whether it was situated **[**316]** within the territorial limits of the [Soviet Union] or abroad." . . . [T]his official declaration is conclusive so far as the intended extraterritorial effect of the Russian decree is concerned. . . . [I]t is clear that the [lower] court ha[d] authority to consider [this declaration] even though [it was] rendered subsequently to the trial [and judicial] notice of [this declaration as an interpretation of] the foreign law [can be] taken. We conclude that this official declaration of Russian law [is] not only properly before the court . . . , but also that it has embraced . . . "written authorities" **[*427]** [even if] it was not "printed"[:] it would seem to be "other written law" of unquestioned authenticity and authority . . . .

United States v. Pink, 315 U.S. 203, 220, 62 S. Ct. 552, 86 L. Ed. 796 (1942); [104] accord Antitrust Enforcement Guidelines for International Operations, U.S. Dep't of Justice (Apr. 1995), <<http://www.justice.gov/atr/

(court relied on translations of Kuwaiti statutes found in a compilation titled "Business Laws of Kuwait"); Kaho v. Ilchert, 765 F.2d 877, 881-883 (9th Cir. 1985) (in determining the validity of customary adoptions under the law of Tonga, the court considered an interpretation adopted in an earlier case involving same legal prescripts). Although courts may be faced with varying translations of the same foreign statute or unauthenticated copies of foreign law, such discrepancies or lack of authentication does not prevent a Rule 44.1 resolution. See Pittway Corp. v. United States, 88 F.3d 501, 503, 504, n.1 (7th Cir. 1996) (determining the meaning of French statutes notwithstanding inconsistent translations); United States v. First Nat'l Bank, 699 F.2d 341, 344, n.2 (7th Cir. 1983) **[**315]** (determining Greek law after concluding that variations in translations were not substantive); Ramirez v. Autobuses Blancos Flecha Roja, S.A., 486 F.2d 493, 497, n.11 (5th Cir. 1973) (reliance on unauthenticated copy of Mexican law did not violate Rule 44.1); Forzley v. AVCO Corp. Elecs. Div., 826 F.2d 974, 979, n.7 (11th Cir. 1987) (allowing usage of unofficial translation of Saudi Labor Law because there is no such thing as an "official translation" of that law).

[104] Considerations of "unwritten law" appear particularly pertinent to Chinese regulatory regime, which has a substantial history of so-called "drawer regulations." "['The drawer regulations'] are regulations . . . issued by various ministries [such regulations], even though not labeled secret, have not been publicly disseminated. They are kept in a ministry official's drawer, removed on one occasion, and left in the drawer on another . . . . [These regulations] may be applied with an inconsistency permitted by the lack of public disclosure." Michael W. Gordon, Of Aspirations and Operations: The Governance of Multinational Enterprises by Third World Nations, 16 U. Miami Inter-Am. L. Rev. 301, 334 (1984). China seems to be still in the process of eradicating this mode of administering Chinese law. See Vitamin C, 584 F. Supp. 2d at 549 (observing that "[t]he [MOFCOM] has been forthright

public/guidelines/internat.htm>> ("DOJ Guidelines") ("Although U.S. antitrust jurisdiction extends to conduct and parties in foreign countries whose actions have the required effects on U.S. commerce, as discussed above, those parties may find themselves subject to conflicting requirements **[**317]** from the other country (or countries) where they are located. . . . In these circumstances, at least one court has recognized [the] defense [of government compulsion], and the [DOJ] will also recognize it. There are two rationales underlying the defense of foreign sovereign compulsion. First, Congress enacted the U.S. antitrust laws against the background of well recognized principles of international law and comity among nations, pursuant to which U.S. authorities give due deference to the official acts of foreign governments. . . . Second, important considerations of fairness to the defendant require some mechanism that provides a predictable rule of decision for those seeking to conform their behavior to all pertinent laws. Because of the limited scope of the defense, the [DOJ] will refrain from enforcement actions on the ground of [government] compulsion . . . when . . . the foreign government [asserts that the compulsion at issue was made] under circumstances in which a refusal to comply with [its] command would give rise to the imposition of. . . severe sanctions. As a general matter, the [DOJ would] regard the foreign government's formal representation that refusal to comply **[**318]** with its command would have such a result as being sufficient to establish that the conduct in question has been compelled, as long as that representation contains sufficient detail to enable the [DOJ] to see precisely how the compulsion would be accomplished under local law").

In the instant matter, the Court takes notice of the MOFCOM's statements **[*428]** (made in its capacity of a cabinet level department of the Chinese government) in the Vitamin **[**320]** C proceedings. However, in light of the fact that these statements discussed not the operations of the CCCMC but those of its sister "chamber of commerce," the high degree of deference that seems to ensue from the holding of *Pink* and DOJ Guidelines appears unwarranted for the purposes of the case at bar. [105] However, it appears equally erroneous to wholly ignore these statements: a foreign sovereign's views regarding its own laws typically merit at least some degree of deference. Accord *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002)* (citing *In re Oil Spill by The Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992)* (per curiam) and *Access Telecomm, 197 F.3d at 714*)), cert. denied, *539 U.S. 904, 123 S. Ct. 2256, 156 L. Ed. 2d 113 (2003)*.

Here, the Court finds the facts and conclusions of Access Telecomm, instrumental **[**321]** as to setting a pertinent "floor" with respect to the issue of the degree of deference. See *197 F.3d 694*, reh'g, en banc. denied, *210 F.3d 365*, cert. denied, *531 U.S. 917, 121 S. Ct. 275, 148 L. Ed. 2d 200 (2000)*. In Access Telecomm., the issue was whether the defendants' challenged conduct was compelled by Mexican law.

Specifically,

> [t]he defendants focus[ed] on . . . the [Mexican] Secretary of Communications and Transportation's [("SCT")] Official Circular Letter [("Official Circular"), which] condemn[ed certain] services in addition to "other similar or equivalent procedures with the same purpose" [asserting] that [all] such services are "rendered outside the legal provisions established by [Mexican] Federal Law on Telecommunications" [("MFLT Provisions)]." The defendants maintain[ed] that the Official Circular [was] entitled to [absolute] deference by th[e] court as an

in its admission that Chinese **[**319]** law is not as transparent as that of the United States or other constitutional or parliamentary governments" and quoting the transcript reading "the laws of the government of China do not have . . . quite the same transparency as the laws of the United States, in the sense that there are statute books that are available, that there are lengthy Congressional statements of intent, where you can read what the debates were all about. The way the Chinese system operates is that you have the state council and the state council is then composed of a number of key ministries. The [MOFCOM] is not some backwater regulator in a small city in China. The [MOFCOM] is the preeminent regulator of the economy, export economy of [China]"); see also Resco WDPa, Docket Entry No. 123-4, at 7 (the USTR's Request for a WTO Panel with regard to China's export regulation of bauxite, reading "China does not publish certain measures relating to these requirements in a manner that enables governments and traders to become acquainted with them").

[105] It is unclear from the holding of Pink whether the fact that the MOFCOM's statements were addressed to Judge Trager rather than this Court should diminish the degree of deference since, in Pink, the statements by the Soviet Union were addressed not to the Supreme Court, which relied on the statement for its determination, but to a state court. See *Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796*.

> agency's interpretation of the laws which it administers and enforces, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)* [(that is, the decision detailing the degree of deference given, under various circumstances, by United States courts to *United States* agencies empowered to interpret *United States* law). The plaintiffs, **[**322]** however, pointed out] that the [O]fficial [C]ircular[had] no legal effect [because,] in Mexico, only federal courts have the power to issue resolutions determining the legality or illegality of acts[, and a Mexican governmental entity other than the SCT had] the sole power to "establish and systematize" the legal criteria concerning the application of legal and regulatory provisions . . . . Recognizing the difficulty of interpreting foreign law, [the Access Telecomm. court noted that] courts may defer to foreign government interpretations [and pointed out that t]he Seventh Circuit reached this conclusion in deferring to an administrative agency in France[,] see Amoco Cadiz, 954 F.2d [at] 1312[where the Seventh Circuit concluded that "g]iving the conclusions of a sovereign nation less respect than those of [a U.S.] administrative agency [was] unacceptable" [being presented with the situation where] the Republic of France [itself] was before the court . . . . [In contrast, in Access Telecomm., t]he Republic of Mexico [was] not a litigant before th[e] **[*429]** court and neither is the SCT. [Moreover,] while the evidence in [Access Telecomm.] show[ed] that the SCT was empowered to enforce Mexican **[**323]** law, it d[id] not. . . show that the SCT was empowered to interpret Mexican law. . . . For these reasons, [the Access Telecomm. court did] not feel compelled to credit the SCT's determinations [as to the meaning of MFLT Provisions] without analysis.

Access Telecomm., 197 F.3d at 714.

This Court finds the distinction drawn between an official circular issued by a governmental agency, which is a non-litigant, and a statement made by a litigating foreign sovereign instructive. Similarly, this Court finds the distinction drawn between an agency's power to merely enforce a regulatory provision and a governmental entity's power to promulgate or interpret a regulatory provision both valuable and highly relevant to the case at bar.

Since the two MOFCOM's statements were made part of public record by being filed in the Vitamin C proceedings ("MOFCOM's E.D.N.Y. Statements"), but neither China nor the MOFCOM are litigants before this Court, the MOFCOM's E.D.N.Y. Statements appear to have --for the purposes of this action -- worth and significance no lower than those of an official circular discussed in Access Telecomm. Moreover, since the bulk of evidentiary material presented in this matter (as **[**324]** well as in Resco WDPa and Vitamin C) consists of actual regulatory directives issued by the MOFCOM (either singularly or jointly with other Chinese governmental agencies) rather than the MOFCOM's interpretations of Chinese law, it appears that the MOFCOM's E.D.N.Y. Statements warrant a higher degree of deference than that given in *Access Telecomm.* for the purposes of the Fifth Circuit's assessment of the SCT's interpretations of Mexican provisions not enacted or promulgated by the SCT: indeed, it would be unseemly of this Court to claim that it could determine the scope or the goals of the MOFCOM's directives (or the meaning of the terminology that the MOFCOM elected to use in these directives) better than the MOFCOM itself. Consequently -- for the purposes of reading the MOFCOM's E.D.N.Y. Statements -- the Court will consider the MOFCOM's interpretations the final authority unless the Court detects a Chinese legal provision or an alternative MOFCOM's statement that clearly and convincingly establishes the incorrectness of these interpretations.

In contrast, for the purposes of construing directives or statements made by other entities, (or for the purposes of assessing the MOFCOM's **[**325]** perhaps supervisory but, nonetheless, still a third party's opinion as to the mode of operations employed by Chinese "chambers of commerce"), this Court will utilize an analysis recommended in *Access Telecomm., 197 F.3d at 714*, i.e., the Court will examine other evidence (presented in this matter and also detected by the Court) in order to establish: (a) whether there is an incongruence between such body of evidence and the interpretations offered in the MOFCOM's E.D.N.Y. Statements; and, in the event such incongruence is detected, (b) whether this incongruence is of such nature or magnitude to render MOFCOM's interpretations unreliable.

2. The CCCMC Is a Government Entity for the Purposes of the Doctrine

Plaintiffs cite *Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 (11th Cir. 2004)*, for an inference that this matter is but a garden-variety proceeding because "[f]ederal courts adjudicate claims against foreign corporations every day." Opp. at 61, n. 24. This is not exactly true. The matter at bar falls within the handful of cases where, as Judge Trager observed, defendants do not deny compliance with a **[*430]** fixed minimum price but rather "move to dismiss[] on the grounds that their **[**326]** price-fixing activities were compelled by the . . . government," *Vitamin C, 584 F. Supp. 2d at 547*, i.e., Defendants effectively admit to collusion thus making, at least in part, Plaintiffs' Sherman Act claim. [106]

Challenging Defendants' position, Plaintiffs maintain that Defendants were not compelled by the Chinese government because, inter alia, "[t]he CCCMC is not the Chinese [g]overnment." Opp. at 50-52. In support of that assertion, Plaintiffs state as follows:

(i) the Trial Court in Zhejiang Xinan "squarely rejected [the] argument [that the CCCMC is a government organization by] holding [that the CCCMC was] a non-government body that **[**327]** is not directed or controlled by the government of China"; [107]

(ii) "the CCCMC has given testimony and submissions to the U.S. government stating [that it is not an arm of the state]";

(iii) the CCCMC charter, adopted at the CCCMC's formation in 1988, "[merely] states that the CCCMC follows state policies and guidelines and is subject to supervision by the state[, but this statement in the charter does not] establish the CCCMC as a de facto arm of Chinese government";

(iv) since Chinese "Measures" of 1991 were followed by Chinese "Regulations" of 1998, the former were repealed by the beginning of the Class Period, and overall "Chinese foreign trade regulations have undergone dramatic changes since 1991 and every law or regulation relating to exports has been abolished or amended[, so] the CCCMC now represents itself as a non-government organization"; [108] and

(v) the MOFCOM's Circular of February 12, 1998, "pre-dates the formation of two initial export cartels by two years and pre-dates the formation of the unified export cartel by three years[, as well as] China's accession to the WTO [during which] China explained to the WTO [that,] by 2000[,] there [was] only a limited number of products **[**328]** subject to government price control[. Plaintiffs believe that, if the 1998] Circular applied to all export products and all chambers of commerce [then the Circular would be] mandating price-fixing of all exports by all chambers of commerce[, but s]uch an interpretation [would be] clearly contrary [to the] interpretation [given] by the CCCMC." Id. (emphasis removed). [109]

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[106] A graph of the relationships between the CCCMC and its various "cartels" and "sub-cartels" of magnesite exporters sketched by the parties depicts a structure uncommon to the law of antitrust (which usually deals with polygon-like agreements typical to international treaties); rather, it resembles a structure frequent to *18 U.S.C. §§ 1961-68*, where a hub-and-spoke combination may yield an organizational chart akin to an "exponential tree" (a graph common to computer science, which resembles a tree trunk with multiple levels of branches and twigs).

[107] This Court is not entirely clear as to Plaintiffs' logic underlying this argument. A claim that the CCCMC "is not directed or controlled by the government of China" cannot serve as a premise needed to draw the conclusion that the CCCMC is a "non-government body"; this is so because the conclusion is also the premise, since any sovereign can governmentally control/direct only its subjects, but not itself.

[108] The Court gathers from this argument that Plaintiffs read the 1991 "Measures" as supporting Defendants' position, although the Court is not entirely clear as to whether the Plaintiffs' reading is related to the CCCMC's status or the existence of compulsion, or both.

[109] The Court gathers from this argument that Plaintiffs read the Circular of February 12, 1998, as a document supporting Defendants' position, although **[**329]** it appears that Plaintiffs' reading is unrelated to the CCCMC's status, since it addresses the other issue: compulsion.

[*431] The Court disagrees. Plaintiffs' arguments are either without merit or simply inapposite to the issue of whether the CCCMC is an integral part of the Chinese government.

Plaintiff's first argument is erroneous because the Trial Court in Zhejiang Xinan did not, actually, rule that the CCCMC is a non-government organization ("NGO"). Rather, the Trial Court found that Zhejiang, the plaintiff, perceived the CCCMC as posing no sufficient threat of punishment for failure to comply with the requirements the CCCMC issues or was empowered to enforce, and that personal perception and Zhejiang's actions in accordance with its perception entitled Zhejiang to the MET status. See Zheiiang Xinan, 2009 ECJ EUR-Lex LEXIS 529, PP 79-136. This is why the Trial Court in Zhejiang Xinan outlined the issue in that case as an inquiry into whether "[Zhejiang's business] decisions [were not so] incompatible with market economy conditions" to deny Zhejiang the MET status. [110] Id. P 80. Conversely, the Trial Court made no findings as to the *nature* of the CCCMC, either for the purposes of the entire **[**330]** EU antidumping regime or for the purposes of passing a political judgement transferrable into any area of law of any nation in the world. [111] See generally, Zhejiang Xinan, 2009 ECJ EUR-Lex LEXIS 529. Therefore, the Court finds that the holding of Zhejiang Xinan has no bearing on the CCCMC's actual status, while the background discussion provided in that case vaguely suggests that the CCCMC was, and still is, an integrated appendage of the state.

In support of their second argument, i.e., that "the CCCMC has given testimony **[*432]** and submissions to the U.S. government stating [that it was not an arm of the state]," Plaintiffs rely on two exhibits. However, neither one of these exhibits contains any statement by the CCCMC suggesting that it is an NGO. One of these exhibits replicates the CCCMC's undated letter addressed, seemingly, to the United States Department of Commerce ("DOC") with the goal of assisting Chinese exporters in obtaining the MET status for the purposes of their United States antidumping duties. See Docket Entry No. 77-1, at 1-3. In that exhibit, the entire discussion of the CCCMC's "status" is limited to the statement "[w]e **[**333]** are [the CCCMC]. With a membership of 4,000 [business entities], we are the largest and most representative association in the field of metals, minerals and chemicals." Id. at 1. Plaintiffs' other exhibit, Docket Entry No. 105-4, is another CCCMC's letter to the DOC, dated April 19, 2007; in that letter, the CCCMC was still advocating its MET point. That letter is equally silent as to the issue of the CCCMC's "status" as a government entity or as an NGO: rather, this document merely begins with a paraphrase of the statement already given by the CCCMC in the prior letter. See Docket Entry No. 105-4, at 2 ("On behalf of [the CCCMC] and our 4[,]000 companies, we submit the following comments on [the non-MET status applied by the DOC to the Chinese goods imported into the United States]").

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[110] The Trial Court merely acknowledged that Zhejiang's perceptions of the CCCMC as an NGO were "borne out by the contents of the CCCMC's brochure," and that "the wording [of the brochure was such that it omitted to expressly] contradict [Zhejiang's] statements that the [price-fixing] mechanism was not imposed by the State," id. PP 141. 153, hence allowing the possibility of Zhejiang's qualification for the MET status.

[111] Indeed, a number of observations made by the Zhejiang Xinan court suggests against deeming the CCCMC an NGO. First, at least as of September 2004, that is, halfway through the Class Period in this matter, the EU consistently held that Zhejiang's business activities were under such strict governmental control that they were incompatible **[**331]** with operations under free market conditions and, as part of this strict regime, "[the Chinese government] had entrusted the . . . CCCMC with the right [to approve export] contract[s upon] verifying export prices." Zhejiang Xinan, 2009 ECJ EUR-Lex LEXIS 529, P 14. Second, the Trial Court observed that such governmental powers of the CCCMC were well integrated with governmental powers of other Chinese agencies, see id. P 131 ("[Zhejiang concedes that] all export contracts had to be submitted to the CCCMC, which checked the selling prices and [approved] the contract if the selling price exceeded the [minimum] price[, plus] China directed the Chinese customs authorities not to permit exports . . . unless the contract bore the CCCMC's [approval] "), and these CCCMC's powers were operative at least as of the date of rendition of the Zhejiang Xinan decision. Consequently, the statements of the Zhejiang Xinan court: (a) reject Plaintiffs' claim that the CCCMC became an NGO by 1998 (or by 2000); and (b) indicate that the CCCMC exercised governmental power through the CCCMC's ability to approve or disapprove an export contract on the grounds of the export price. See id. PP 130, 140 (noting **[**332]** that there was no dispute -- as to the *system,* in which the CCCMC was an appendage of the state, -- by observing that "[t]he Council contends . . . that there was a very efficient control system in place, that it was run by [China] through the CCCMC and customs authorities and [the very existence of that system] constituted interference by [China] in the setting of [Zhejiang's] export prices" and that Zhejiang "d[id] not dispute that [this CCCMC's approval and veto] mechanism exist[ed in 2009]").

Consequently, Plaintiffs' decision to rely on these two exhibits is not entirely clear to this Court, since: (a) these exhibits suggest the DOC's opinion that, at least as of April 19, 2007, the members of the CCCMC have been presumed by the United States government to operate under a Chinese government-compelled trade regime; but (b) these exhibits do not suggest that the CCCMC was an NGO. The Court, **[**334]** thus, will disregard Plaintiffs' factually unsupported second argument. See also note 146, infra (discussing, inter alia, Plaintiffs' Exhibit 15, which -- although not cited in Plaintiffs' Opposition in support of Plaintiffs' second argument -- appears relevant to their point).

The logic of Plaintiffs' third argument, i.e., that the CCCMC charter "[merely] states that the CCCMC follows state policies and guidelines and is subject to supervision by the state[, but the charter] does [not] establish the CCCMC as a de facto arm of the Chinese government," is, too, not entirely clear to this Court because the CCCMC charter, being a document (that is, a stamped, signed and registered piece of paper) rather than a course of conduct (that is, a number of consistent overt actions manifesting relationships between the parties), cannot possibly establish anything de facto. [112] The Court, hence, presumes that Plaintiffs' usage of the phrase "de facto" is meant to express Plaintiffs' opinion that the CCCMC's governmental status was not "written between the lines" in the charter. If so, the Court disagrees.

The articles of the CCCMC charter provide as follows:

> [The] CCCMC is [an] authorized department to deal with import and export trade of metals, minerals and chemicals. It . . . is responsible for coordination within the industry. . . . The aims of [the] CCCMC include: coordinating import and export trade activities in the industry of metals, minerals and chemicals; maintaining import and export trade orders; protecting the legal rights and interests of the State, industry and member enterprises . . . . [The] CCCMC . . . carries out the state policies and **[*433]** guidelines in foreign trade and economic relations, and accepts guidance and supervision of the competent authority [e.g., the MOFCOM and other Chinese government agencies involved in export, e.g., the Chinese department of customs]. . . . Functions of CCCMC include . . . coordinating commodity prices for import and export; . . . [a]ssisting the competent authority in direction and supervision of member enterprises to manage and utilize their import and export quotas and permits legally; . . . [b]eing responsible for specific actions including the bidding for import and export quotas under the authorization of the **[**336]** competent authority[;] . . . coordinating . . . the bargaining and bid for foreign customers[; and p]erforming other functions which are authorized by the competent authority. . . . Obligations of [the CCCMC's m]embers [are: a]biding by [the] CCCMC [c]harter and carrying out resolutions and regulations made by CCCMC; [t]aking part . . . actively [in] the work assigned by [the] CCCMC; [p]roviding relevant information, materials and statistical data for [the] CCCMC; [p]aying membership fees . . . . The . . . CCCMC shall have the right to . . . terminate the membership of any member who violates this charter or any regulations . . . . For anyone who commits serious violations, the competent authority may be advised to suspend or revoke part or all of its right to deal with import and export trade.

Docket Entry No. 99-11, at 2-3.

While it is true that this language does not contain a sentence expressly stating that the CCCMC is an appendage of the Chinese government, the gist of these statements suggests such governmental status by pointing out: (a) the integrated relationship between the CCCMC and the MOFCOM (and between the CCCMC and other bodies of the Chinese Government) typical for **[**337]** a large governmental department and one of its agencies; and (b) the CCCMC's right to enjoy the powers of governmental nature, e.g., the power to allocate (and/or hold bidding for) export quotas with regard to China's natural non-renewable resources, [113] as well as the powers to supervise the use of export licenses, to recommend punitive measures for non-compliance and to partake in enforcement of such

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[112] See Black's Law Dictionary 416 (6th ed. 1990) (defining the phrase "de facto" as "in fact, **[**335]** in deed, actually").

[113] Although some natural resources are renewable, the resources falling within the province of the CCCMC appear non-renewable or renewable at great expense. For instance, magnesite is a non-renewable natural resource, and magnesium oxide, while being amenable to production from seawater, see supra, note 17, could be so produced only at substantial expense.

measures. Thus, the Court construes the charter as a document suggesting the CCCMC's status as a governmental appendage rather than an NGO.

Plaintiffs' fourth argument consists of two groups of statements: (a) one group is asserting that, since China underwent certain economic changes since 1991, and the MOFCOM's "Regulations" of 1998 were issued after the MOFCOM's "Measures" of 1991, the "Measures" must be deemed inapplicable to the **[**338]** CCCMC as of 1998 (or as of 2000) because "every law or regulation relating to exports [must be deemed] abolished or amended"; and (b) another group is limited to the contention that "the CCCMC now represents itself as a non-government organization." Docket Entry No. 105-1, at 51.

The "(a)" group of Plaintiffs statements appears unwarranted. Had all Chinese laws been abolished, China would, by now, be a lawless state. Similarly, the claim that "all" pre-1998 Chinese laws must be deemed amended by the mere promulgation of later-issued provisions is facially **[*434]** overreaching. Typically, a provision is deemed repealed or amended when a statement to that effect is actually made; otherwise, the newer law is deemed supplementing the older and construed with an aim to harmonize the two. Plaintiffs do not direct the Court's attention to any source stating that Chinese law does not follow this, rather basic, approach. See *Sullivan v. Finkelstein, 496 U.S. 617, 623, 110 S. Ct. 2658, 110 L. Ed. 2d 563 (1990)* ("the expression of a legislator relating to a previously enacted statute may bear upon the meaning of a provision in a bill under consideration . . . since statutes in pari materia should be interpreted harmoniously"); *State v. Stoll, 84 U.S. 425, 431, 21 L. Ed. 650 (1873)* **[**339]** ("To justify this court in holding that the act passed in that year repealed or modified the [prior statute], it must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly"). Thus: (a) the fact that the 1998 "Regulations" were issued after the 1991 "Measures" in no way suggests that the regime set forth in the "Measures" was necessarily repealed, since no language in the 1998 "Regulations" so states; and (b) the content of the "Measures" [114] depict the CCCMC as a governmental agency operating as a limb of the MOFCOM and, hence, an appendage of China.

The "(b)" group is the statement asserting that "the CCCMC now represents itself as a non-government organization." Opp. at 51. In support, Plaintiffs cite Docket Entry No. 77-1, at 30-39, a United States Government Survey on Magnesium Compounds, issued with regard to the year 2000. See id. However, the Court's reading of Docket Entry No. 77-1 failed to locate any mentioning of the CCCMC, moreover an express statement as to how the CCCMC represented itself and to whom; [115] the sole relevant statement, which the Court detected sua sponte, reads, "[i]n spite of *export licensing requirements imposed by the Chinese Government,* magnesia exports from China to the United States continued to rise [throughout 2000]." Id. at 31-32 (emphasis supplied). Since the CCCMC charter indicates that the CCCMC enjoyed certain powers with regard to export licensing, the Survey's reference to the export licensing in the context of "the Chinese Government" suggests that the CCCMC was an appendage of China. Therefore, Plaintiffs' fourth argument appears without merit.

Finally, Plaintiffs' fifth argument -- that the MOFCOM's Circular of February 12, 1998, should be deemed repealed because, during China's accession to the WTO, China stated that it had only a limited number of price-controlled products, and the Circular could not have mandated price-fixing of all exports by all chambers of commerce ("Misplaced Argument") -- is wholly inapposite to the issue of the CCCMC being a government body or an NGO; rather, it addresses the issue of compulsion. Thus, the Misplaced Argument will be disregarded for the purposes of the inquiry at hand **[*435]** and addressed in the "Miscellaneous Considerations" section of this Opinion.

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[114] The 1991 "Measures" stated that "[the MOFCOM] shall take charge of vocational administration of all . . . trade social organizations such as chamber of commerce, . . . which are organized within the territory of . . . China . . . in accordance with these Measures. [Such MOFCOM's] administration . . . will be either . . . direct . . . or [through MOFCOM's] authorized departments concerned [with the particular social] organizations." **[**340]** Docket Entry No. 35-39, at 2.

[115] Plaintiffs' Opposition, unfortunately, did not direct the Court's attention to any particular page of this exhibit **[**341]** and did not quote the language which Plaintiffs read as a support.

Since Plaintiffs' arguments (and evidence provided by Plaintiffs) neither establish nor even suggest that the CCCMC was/is an NGO, the Court turns to Defendants' evidence and evidence detected by the Court in Magnesite from China, Resco WDPa and Vitamin C.

In Magnesite from China, Resco (one of the two named Plaintiffs in this matter) represented to the ITA that the Chinese government established and enforced export quotas for a number of raw materials (including magnesite), and **[**342]** that the Chinese government established a bidding system for such exports. See Magnesite from China, 74 Fed. Reg. at 68,248. Since the CCCMC charter unambiguously states that the CCCMC is the entity responsible for allocating export quotas and holding the bidding (including for magnesite), and Plaintiffs' allegations in Magnesite from China concede that these activities are performed by the "Chinese government," the content of Magnesite from China suggests an express admission that the CCCMC is, indeed, an appendage of the Chinese government [116] for the purposes of the instant matter, where Resco is also a Plaintiff.

The defendants in Resco WDPa rely on the USTR's November 9, 2009, Request for a WTO panel with regard to China's export practices; the Request **[**343]** is: (a) asserting that the Chinese government administers export quotas and bidding for export quotas with regard to bauxite (one of the minerals falling within the province of the CCCMC's authority); and (b) clarifying that such measures have been administered by the Chinese government through Chinese "chambers of commerce." See Resco WDPa Docket Entry No. 123-4. Moreover, the USTR cited the CCCMC charter in support of its WTO charges against China. See id. Since the USTR, the agency responsible, inter alia, for recommending United States trade policy to the President and for coordinating trade policy within the United States government, unambiguously states its perception of the CCCMC's status as that of a government entity, the Court reads the USTR's WTO Request as strongly suggesting that the CCCMC is an appendage of China.

The documents provided by Defendants in the instant matter suggest the same. For instance, the MOFCOM's 1994 "Program on the Reform of the Administration of Licenses for Quotas of Commodities for Export" was addressed expressly to the "chambers of commerce," like the CCCMC, see Docket Entry No. 35-42, at 2, and designated such "chambers" as entities to hold export **[**344]** bidding and allocate export quotas as to the country's natural resources, which suggests vesting of governmental powers in the CCCMC. See id. at 5-6. Similarly, the statement made by Assistant Minister Liu Xiangdong of the MOFCOM to the Third Congress of the CCCMC suggests the same, informing the audience that, being "overseen by Central Committee and State Council, guided by MOFTEC, . . . and supported by [other] departments [of Chinese national government and] local government[,] . . . [the] CCCMC has . . . taken many very effective measures to carry out state guidelines, policies and regulations . . . safeguard[ing the] interests of the state." Docket Entry No. 99-13, at 2. Since this statement indicates **[*436]** the CCCMC's power to execute (or partake in) export licensing, allocation of export quotas, holding export quota bidding and punishing for non-compliance with Chinese export regime, the Court reads these powers as strongly suggesting governmental nature of the CCCMC. See also Docket Entry No. 77-3, at 12-13 *(Plaintiffs'* exhibit replicating an article in the Industrial Minerals magazine, stating that, "[o]f critical importance was the introduction of control on export prices and **[**345]** volumes by China's central government in 1994 . . . Export licenses . . . initiative is unique to China [since] *China's central government, through the . . . CCCMC[,] implemented its export license system")* (emphasis supplied); Docket Entry No. 35-57 (MOFCOM's 2001 "Measures for the Administration of Export Commodities Quotas" detailing the process of obtaining an export license and referring to the entities involved in the process of issuing a license as "bodies authorized by the MOF[COM]"); Docket Entry No. 35-57, at 3 (MOFCOM's 2001 "Measures for the Invitation of Bid for Export Commodity Quotas" directing that the "offices for the invitation for bid for export commodity quotas [shall be set] within the relevant chambers of commerce for import and export according to the types of commodities subject to the invitation for bid").

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[116] Notably, since Magnesite from China was a countervailing -- rather than anti-dumping -- proceeding, the Court cannot factor in the possibility that Resco, being the petitioner in Magnesite from China, "accidentally" referred to the Chinese government: this is so because countervailing proceedings are necessarily the proceedings based on a foreign government's (rather than an NGO's) interference with the exporters' trade activities.

And while it is true that, in some statements issued by the CCCMC, the CCCMC utilized the term "self-discipline," which -- *to a Western ear* -- suggests the entity's complete discretion, see, e.g., Docket Entry No. 99-4, at 6 (replicating the CCCMC's brochure which includes a statement that the "CCCMC guides and oversees members['] . . . conduct [of] self-discipline **[**346]** within the industry"), the Court finds the statement made by the MOFCOM in the Vitamin C proceedings enlightening as to the *Chinese* meaning of this term, which suggests a disguised form of strict government compulsion. [117] See Vitamin C, Docket Entry 400-1, at 2 ("The actual specific measures taken by China to effect its regulatory policies include what is referred to as a "system of self-discipline." This system has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean [as it would be in the Western world,] complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government"); accord *Vitamin C, 584 F. Supp. 2d at 555, n.7* ("The [MOFCOM] argues that [a reference **[*437]** to a self-restraint] should not be taken at face value [because such terms as self-regulation and self-restraint, etc. are] many of the terms [that] have meanings in the context of China's government and economic policy that are quite different from their literal translations [and American perceptions as to the meaning of these concepts]").

Assessing the evidence presented in this matter and detected sua sponte, the Court concludes that the totality of evidence convincingly suggests that the CCCMC was and is a governmental appendage, especially in light of the CCCMC's power to affect its members' ability to practice their licensed vocation (or the extent of that ability): under the United States law, this is the power to legally affect one's constitutional property right -- something no NGO can do. [118] Cf. *Town of Castle Rock v. Gonzales, 545 U.S. 748, 789, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005)* ("The types of interests protected as 'property' are varied and, as often as not, intangible, relating to the whole domain of social and economic fact") (citation omitted).

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[117] Both **[**347]** sides seem to agree that the CCCMC was chartered (and its bylaws were adopted) in 1988, and no superceding charter or bylaws were ever registered or even attempted. Since the structure and powers of the CCCMC were settled in the charter and bylaws that were adopted: (a) long before Chinese economic reforms began to affect such industry as export of China's natural resources, see *Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842, 867 (D.N.J. 2008)* (setting the time line): (b) three years prior to the issuance of 1991 "Measures" detailing the intertwined relationship between the MOFCOM and its "chambers of commerce," see supra note 114; and (c) thirteen years prior to China's accession to the WTO, and no changes in charter/bylaws were ever entered or attempted, the Court has no reason to presume that the use of the term "self-discipline" in the CCCMC's brochure was a sign that the CCCMC transformed into an NGO, or that the Chinese mandatory version of term "self-discipline" existing at the CCCMC's inception had mutated into a qualitatively different Western type of "self-discipline" simply as a result of China's accession to the WTO or China's **[**348]** decision to start a gradual transition from centrally planned economy to *socialist* market economy. See Barry Naughton, The Chinese Economy: Transitions and Growth (MIT Press, 2007) (discussing qualitative differences between a pure market economy and China's *socialist* market economy).

[118] "[T]he term 'NGO' is generally used to mean what its initials stand for -- a 'non-governmental organization' -- a group of persons in the private sector working in concert, playing a significant role in the **[**349]** public sphere in order to garner support for influencing government policies." Judith Resnik et al., Ratifying Kyoto at the Local Level: Sovereigntism. Federalism, and Translocal Organizations of Government Actors (TOGAs), *50 Ariz. L. Rev. 709, 784 (2008)*; see also Jude L. Fernando & Alan W. Heston, The Role of NGOs: Charity and Empowerment: NGOs Between States, Markets and Civil Society, 554 Annals 8 (1997) (providing a detailed answer to the question "what is an NGO?"). For instance, the New Jersey State Bar Association ("NJBA") is an NGO. Conversely, the New Jersey Office of Attorney Ethics ("OAE") is not an NGO; rather, it is an appendage of the state: an agency at the New Jersey Supreme Court. However, the attorneys employed by the OAE came to their AOE employ after being admitted to practice, and they were and still are subject to the very rules the AOE enforces. Moreover, over 600 volunteer members of NJ Bar (i.e., members of the industry over which the OAE enjoys investigative and prosecutorial powers) work each year on OAE matters initiated against other members of the Bar. Furthermore, the membership fees paid by the members of NJ Bar (that is, the "regulated industry") fund **[**350]** the operations of the OAE, entirely. Finally, the OAE also has the power to recommend new rules, which -- upon a notice by the New Jersey Supreme Court -- are commented upon by the "regulated industry" and issued after these comments are considered. However, none of these features transforms the OAE into an NGO, and while non-compliance with a decision rendered by the NJBA (or a non-membership in the NJBA) has no effect on the attorney's ability to practice law, a failure to comply with the rules enforced by the OAE (or a failure to pay one's Bar fees that fund the OAE) entails punitive consequences verifying the true governmental nature of the OAE's powers.

3. Presence of Compulsory Processes

Here, both sides tend to conflate three distinct aspects of the alleged compulsory processes: (a) the relevant source of compulsion; (b) the maximum severity of theoretically possible repercussions for non-compliance; and (c) the actual existence of punitive compulsion. However, each aspect shall be treated separately in order to ensure the clarity of discussion.

a. *Source of Compulsion*

The initial confusion appears to be rooted in Plaintiffs' position that the compulsion at issue cannot be deemed **[**351]** governmentally produced because Defendants, effectively, "compelled themselves" by attending the meetings held under the auspices of the CCCMC, disclosing to the CCCMC (and, hence, to each other) their accounting and managerial data, deliberating on the actual figure of the minimum price and submitting the result of their deliberation to the CCCMC for registration with the MOFCOM. See, generally, Opp. at 18-25, 45-53.

[*438] There is, however, a qualitative distinction between the inquiries into whether: (a) Defendants *obeyed* these registered with -- and enforced by -- the government minimum price requirement; and (b) Defendants *partook in coining* of the minimum price figures plugged into the requirement. The distinction is important since, in the former, the focus is on the source of compulsion that forced Defendants to performed the very acts challenged by Plaintiffs (namely, employ the minimum price requirement at the time when Defendants were consummating their export contracts), while -- in the latter -- the focus is on the compulsion that forced Defendants to partake in a ministerial task entirely different from the challenged conduct.

The latter inquiry, while presenting a perhaps interesting **[**352]** academic exercise, is inapposite to the doctrine of government compulsion, since the process of coining a regulatory regime is distinct from governmental enforcement of the same: as the Court already noted, the fact that the state legislators debate the language of various prescripts (or that the members of regulated industries submit comments to proposed agency regulations, etc.) does not affect the "compulsiveness" of the resulting statutes, regulations or agency rules: each of these prescripts becomes a governmental -- and, hence, compulsive -- force upon its enactment, adoption, registration, etc., and applies with equal force to the public in general and to those who participated in coining these prescripts. [119]

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[119] It appears that this conflation of the "law-coining" and "law-enforcement" aspects is also present in Resco WDPa and Vitamin C, since -- in response to the Vitamin C plaintiffs' similar claim the MOFCOM clarified that,

> [u]nder [Chinese] regulatory system, the parties involved [in exportation must] consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and **[**353]** policies. [Natural and juridical p]ersons engaged in such required [consultations based on the Chinese version of] self-discipline are well aware that they are subject to penalties for failure to participate in such coordination[,] . . . including forfeiting their export right. . . . [The] exporters were thus subject to the regulation by the [chamber of commerce], including compliance with the [chamber of commerce's] requirements of self-discipline, the very purpose of which was to coordinate each exporter's behavior. No . . . exporter could ignore these policies, nor could they abstain from such coordination with regard to export price and production volume when asked to by the [chamber of commerce]. The self-disciplinary system of export coordination also includes meetings and discussions between and among the parties subject to the [chamber of commerce's] direction and supervision, and reaching agreements among themselves on taking appropriate actions in the interest of the country as a whole. Participation in such discussions, taking a vote and conducting other similar activities to reach their final consensus constitutes an integral part of the self-discipline process. [The] exporters **[**354]** must comply with the above procedures and the agreements reached in compliance with such procedures; otherwise, the [chamber of commerce] would be required to exercise its power to penalize those who were in violation of such procedures and agreements.

Vitamin C, Civil Action No. 06-md-1738 (E.D.N.Y.), Docket Entry No. 400-1, at 2. Hence, even if the question of how the minimum price figures came about were relevant to the doctrine of government compulsion, the statement made by the MOFCOM unambiguously indicates the exporters' mandatory obligation to partake in deliberations held by the exporters'

[*439] Consequently, for the purposes **[**355]** of this Court's abstention analysis, the inquiry into the "source" of compulsion should be limited to the existence and enforcement of Chinese governmental prescripts compelling obedience with *"a"* minimum price requirement, regardless of how the actual minimum price figures plugged into that requirement were coined. [120]

b. *Theoretical Severity*

Another source of confusion appears to be the parties' failure to distinguish the issue of "theoretical severity" of **[**356]** repercussion from that of "practical severity" (which is effectively the issue of enforcement of the theoretically possible punishment).

The degree of the "theoretical severity" of repercussion is not exactly spelled out by the documentary evidence filed in this case and detected by the Court in other matters, i.e., no statement issued by the MOFCOM, CCCMC or other Chinese agencies is accompanied by "sentencing guidelines" correlating a particular form (or a particular frequency) of noncompliance to a specific punishment. Rather, this evidence suggests that the degree of punishment has been left to the discretion of the MOFCOM, CCCMC and other Chinese government bodies. However, those documents that skirt the issue clearly set forth the range of the possible punishment, encompassing such measures as: (a) forfeiture of the enterprise's export license (i.e., loss of the ability to practice one's vocation which, for an exporting enterprise, would be loss of livelihood); (b) reduction of one's export quota (i.e., reduction of the ability to make living); (c) monetary fines imposed upon the enterprise, as well as upon natural persons employed as executives of such enterprises (plus, imposition **[**357]** of legal liability on such persons). [121]

"chamber of commerce," so an attempt to filibuster would cause a substantial punishment. The Court has no reason to presume that such compulsion was limited only to the CCMHPC, since all MOFCOM's regulations, circulars, working rules, etc., invariably referred to "chambers of commerce," see generally, exhibits docketed in Docket Entries Nos. 98, 99, 109 and 110, i.e., utilized a generic definition suggesting that the mandatory obligation to partake in deliberations applied to the CCCMC members (like Defendants) as much as it did to the members of the CCMHPC.

[120] Moreover, ***HN77***[] the availability of the doctrine of government compulsion cannot depend on the presence or absence of any collusion: had it been otherwise, the doctrinal abstention would be limited only to antitrust, racketeering and similar matters that require proof of collusion. Consequently, for the purposes of the government compulsion doctrine, it would be a logical error to ask whether Defendants *reached an agreement to comply* with the minimum price requirement. Rather, where the doctrine is applicable, such "agreement" aspect should be automatically supplied by the defendant's obedience of his/her/its sovereign's law: so, if there is an alleged hub-and-spokes agreement, then the foreign sovereign should be viewed as the "hub."

[121] See Docket Entry No. 35-51, at 15 (the MOFCOM's regulation stating that "[t]he Bidding Committee is entitled to revoke the quotas won in the bidding and rescind the qualification for quota bidding . . . of the enterprises which . . . [e]xported at prices lower than the regulated prices set forth by relevant . . . chambers of commerce"); see also Docket Entry No. 35-49, at 2-3 (the MOFCOM's regulation explaining that the MOFCOM "shall mete out the following punishments on enterprises which commit conducts of exporting at lower-than-normal price: enterprises . . . shall be fined, investigations can also be [conducted] to affix the administrative or economic responsibility on the legal representative of the enterprise or any person who is directly responsible for the conduct of exporting at lower-than-normal price," and stating the definition of "lower-than-normal **[**358]** price means [as] the export price [which is] lower than the necessary price for the product[, where the] necessary price [is the sum of] the cost for the production . . . , the expenses for storage, transport, insurance and management [plus a] reasonable profit"). Defendants' perception that the term "lower-than-normal price" used in Docket Entry No. 35-49 has the meaning identical to the phrase used in Docket Entry No. 35-51 ("price[] lower than the regulated prices set forth by relevant . . . chambers of commerce") appears warranted since: (a) the phrase "reasonable profit" used in Docket Entry No. 35-49 is not defined anywhere else; (b) only 37 days passed between the MOFCOM's issuance of Docket Entries No. 35-49 and No. 35-51; and (c) the very goal of the CCCMC's price coordination was a determination of what is "normal profit" in light of the interest of China, as a sovereign under which rule Defendants had to operate and were mandated to prospect in accordance with China's vision of how prosperity is to be achieved. See Docket Entry No. 99-11, at 2 (the CCCMC charter, providing that the "CCCMC is authorized . . . to deal with . . . export trade, . . . [t]he aims of [the] CCCMC **[**359]** include. . . protecting the legal rights and interests of the State[, with] . . . guidance and supervision of [the MOFCOM, by] . . . coordinating commodity prices [as to its members'] export"); see also Vitamin C, Civil Action No. 06-md-1738 (E,D.N.Y.), Docket Entry No. 400, at 2 (the MOFCOM's statement that "[n]o . . . exporter could ignore [minimum price] policies" imposed by its chamber of commerce); accord the instant matter, (statement made by MOFCOM Assistant Minister Liu Xiangdong, noting that, "guided by [the MOFCOM], . . . [the]

Moreover, an **[*440]** analogously severe theoretical punishment applies to prospective non-compliance, i.e., to a mere attempt to export goods priced below the required minimum price; such punishment is denial of export licence to consummate sale, i.e., the exporter's inability to make living. [122]

The Court, of course, recognizes that the phrase "severity of punishment" necessarily entails cultural perceptions, and what might be a severe deprivation in one country could easily be a way of life in another. However, being mindful of the Court of Appeals' guidance in *Mannington Mills, 595 F.2d at 1297* (teaching that this Court's determination would be best reached upon considering **[**362]** whether an analogous determination rendered by a foreign court against a United States defendant would be acceptable in the United States), the Court finds that the theoretical "severity of punishment" would be best addressed by assessing the punishment as an "injury" under the United States law. Since the maximum punishment envisioned under the prescripts issued by the MOFCOM, CCCMC and other Chinese government **[*441]** bodies was akin to what the United States jurisprudence qualifies as loss of livelihood as a result of suspension/loss of one's licence to practice one's vocation, the Court assesses such punishment accordingly. [123]

HN78[] The Supreme Court of the United States invariably recognized that a license to practice a certain trade should be treated similarly to a property right and an injury to this right invokes protections of the *Due Process Clause*. See *Barry v. Barchi, 443 U.S. 55, 63-64, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979)* (finding a horse trainer's license similar to property right); *Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117, 123, 46 S. Ct. 215, 70 L. Ed. 494 (1926)* (same, as to an accounting license); *Dent v. West Virginia, 129 U.S. 114, 121-22, 9 S. Ct. 231, 32 L. Ed. 623 (1889)* (same, as to a physician's license); *Ex parte Robinson, 86 U.S. (19 Wall.) 505, 512-13, 22 L. Ed. 205 (1873)* (same, as to an attorney's license). Given that the United States law considers one's loss of license to practice one's vocation an injury of constitutional magnitude, see, e.g., Jeffrey M. Gamso, Cleveland Board of Education v. Loudermill, 17 Tex. Tech. L. Rev. 255, 256-57 (1986) (explaining the reasons why the inclusion of the

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CCCMC has . . . taken many very effective measures to carry out state guidelines, policies and regulations [in order to] safeguarded interests of the state and the industry as well as [export] companies, and made outstanding achievements in pushing forward the development of [China's] export trade"); Docket Entry No. 35-60, at 2 (the MOFCOM's working rules explaining that, "[w]hen the export prices are recommend by the chambers of commerce, the export price shall be in compliance with the *relevant* price limit regulations," suggesting that the phrases "relevant price," "normal price" and "minimum price" **[**360]** had identical meaning in the MOFCOM's parlance).

[122] See Docket Entry No. 35-47, at 6 (the MOFCOM's regulation directing that, "[w]hen applying for export licences, every export enterprise should submit to the licence-issuing body the export permits and contract[, and an] application form . . . for the export license. . . . When examining the export contracts, the license-issuing body concerned should pay major attention to the prices of the export commodities. . . . When the prices in the export contracts are lower than the coordinated prices by the related import and export chamber of commerce, . . . the license-issuing body should refuse to issue the export license"); Docket Entry No. 35-51, at 14 (the MOFCOM's regulation clarifying that "[e]vidence [needed for] issuance of export license [include a proof of e]xport contract price[, which should be] not less than the prices set forth by the chambers of commerce for . . . exporters"); Docket Entry No. 35-53, at 5 (the MOFCOM's circular stating that, "[w]hen examining an application for an export license, the releasing authority shall inspect the contents [of] export contract[,] especially examine [the] price. [The p]rice of goods on **[**361]** export license shall the same as that in the export contract [and] not lower than the coordinating price regulated by relevant import and export commerce commission"); Docket Entry No. 35-56, at 6 (the MOFCOM's provision directing that "[p]rices of export commodities shall be in accord with the export prices recommended by the chambers of commerce. The license issuing agencies shall stress on the examination and verification of the prices of export commodities when examining the export contracts, the commodity prices on the export licenses issued shall be the same as the prices in the export contracts; but when the prices in the export contracts are lower than the recommended export prices fixed by the relevant chambers of commerce, the license issuing agencies shall refuse to issue the export licenses").

[123] Since the range of monetary fines envisioned by the MOFCOM's regulation Docket Entry No. 35-49 is unknown to this Court, it appears unwarranted to conclude that such fines must necessarily be a "severe" punishment, since these fines might, just as well, be of nominal value, even within the meaning of Chinese average income. Moreover, since Docket Entry No. 35-49, at 2-3, merely refers to "legal liability" of the person responsible for exportation at a "lower-than-normal" price, the court concludes that it would be an undue generalization to equate this unspecified **[**363]** "legal liability" to "penal liability" (which is a severe punishment per se).

Due Process Clause and its source in law of England suggests that protection of intangible property rights is among those of constitutional magnitude), the Court concludes that the direct ties drawn by **[**364]** the Chinese regulations, circulars, working rules, etc., between the prohibition on exportation at a price lower than the minimum price and the exporter's ability to obtain an export licenses (or to fully exercise it, or to keep exercising it in the future) establish a sufficiently severe theoretical punishment, i.e., the punishment sufficient to compel compliance and, thus, trigger the doctrinal abstention. Cf. *Negusie v. Holder, 129 S. Ct. 1159, 1170, 173 L. Ed. 2d 20 (2009)* (Scalia, J., Alito, J., concurring) ("The rationale for the duress defense . . . is conventionally 'not that the defendant . . . somehow loses his mental capacity to commit the [conduct] in question,' but rather that 'even though he has done the [physical] act [he is charged with,] . . . and[had] the mental state which the [conduct] requires, his conduct . . . is excused") (quoting 2 W. LaFave, Substantive Criminal Law § 9.7(a), at 73 (2d ed. 2003)).

c. *Actual Existence of Prescripts*

Plaintiffs' position that Defendants' actions were not governmentally compelled "in reality" appears two-fold. First, Plaintiffs assert that the danger of punishment for non-compliance was not "real" because the relevant prescripts were: (a) paraphrased **[**365]** in terms of "self-discipline" or used analogous language that allowed Defendants' discretion; and/or (b) not "actually enforced." See, generally, Opp. at 18-25, 45-53. Second, Plaintiffs maintain that the regime of mandatory minimum price requirement did not exist throughout the entire Class Period because: (a) some prescripts were expressly repealed; (b) other prescripts were amended; (c) the topics addressed by yet other prescripts were tackled in later-issued **[*442]** provisions that omitted to mention the minimum price requirement; and (d) the remaining prescripts -- left unaffected by all of the above -- must have developed a "new meaning" as a result of China's efforts to transition from a centrally planned economy to socialist market economy, as well as a result of China's accession to the WTO. See id. For the reasons detailed below, the Court disagrees.

Specifically:

(i) Plaintiffs begin by claiming irrelevance of the "Working Rules on the Issuance of an Export License, [issued by the] MOFCOM [on] September 7, 2007 [("Working Rules II"), because their Working Rules II did] not mention a minimum price." Opp. at 20. However, the "Working Rules II" provide that "[the MOFCOM] shall authorize **[**366]** its Quota & License Administrative Bureau to conduct the uniform . . . inspection . . . of . . . the issuance of an export license. . . A business applying for an export license shall submit . . . [t]he approval documents on export issued by the competent authorities[, the] . . . contract o[f sale for] export[, and o]ther materials that [are] required by the [MOFCOM]." Docket Entry No. 35-64, at 2-3. Since the regulatory regime established by the pre-"Working Rules II" prescripts required a proof that the export sale was conducted at above minimum price in order to obtain an export licence, and the bidding/customs authorities could deny export quota/actual exportation in the even of noncompliance with the minimum price, the Court has no reason to presume that all prior prescripts were "repealed" or "amended" by the "Working Rules IF'; rather, the "Working Rules II"-based obligation to present the export contract and unspecified other "approval documents" to the "competent authority" could be a paraphrased version of the previously spelled-out duty to show proof of sale at or above the minimum price. Moreover, even if the "approval documents" language referred to other matters, the **[**367]** Court detects no reason for finding that the minimum price requirement was abolished on or prior to September 7, 2007, since not a single statement in the "Working Rules II" expressly states or even suggests so. [124] Accord infra subsection (x) (discussing the "Working Rules I").

(ii) Plaintiffs also maintain that the "Notice of the Strengthening of the Export Administration of Caustic-Calcine (Dead-Burned) Magnesite, [issued by the] MOFCOM and the State Administration of Quality, Supervision,

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[124] Even if **[**380]** a certain prescript had abolished the minimum price requirement on September 7, 2007, Defendants' conduct would still be subject to abstention from the inception of the Class Period (in mid-2000) to September 7, 2007. That might effectively dispose of Plaintiffs' claims altogether, since the Amended Complaint ends its account of Defendants' alleged collusive activities with the statement that, "[i]n February 2007, [that is, seven months prior to the issuance of the "Rules," unspecified] members of [the ever-changing] Cartel met to discuss a possible agreement to increase the export price," Docket Entry No. 77, P 64, with no allegations as to any other manifestations of Defendants' alleged post-February 2007 collusion.

Inspection, and Quarantine, [on] November 10, 2004 ("Notice II"), indicated that the minimum price requirement was abolished because the Notice did] not refer to any minimum export price." Opp. at 20. However, the "Notice II" explains why it was issued, stating that,"[i]n order to strengthen [Chinese] export" of magnesium oxide, the government designated certain exclusive ports as points of exit and initiated the mode of inspections to eradicate the practice of "smuggling" magnesium oxide by declaring the **[*443]** goods to be "kaolin clay, calcined brucite, dead-burned ironstone, dolomite, wollastonite, fireclay, dinas earth" (products having physical appearance similar to that of magnesium oxide). Docket **[**368]** Entry No. 35-61, at 2. No statement made in the "Notice II" suggests that the minimum price requirement was abolished on or prior to November 10, 2004: [125] on the contrary, the "Notice II" strongly suggests a concern of numerous Chinese governmental bodies with the fact of exportation of magnesium oxide at prices cheaper than those required by the prescripts addressing the issue of the minimum price. Accord infra subsection (xi) (discussing the "Notice I").

(iii) Plaintiffs also assert that the "Announcements Regarding the First and Second Public Bidding for Export Quota of Light-Burnt and Dead-Burnt Magnesite, [issued by the] MOFCOM [on] December 3, 2004[,] and May 25, 2005[, indicated that the minimum price requirement was abolished because t]hese Announcements d[id] not mention a minimum price." Opp. at 20. However, both "Announcements" contain the following language: "Minimum price for the bid[:] A minimum bid price is set up [by the government] for this invitation for bidding. A bidding enterprise may directly adopt the minimum price for the bid as determined by the [government] in its own electronic bidding document. Electronic bidding documents with prices lower than those determined **[**369]** by the [government] shall be regarded as invalid." Docket Entry No. 4, 6-7. Thus, while no statement made in the "Announcements" suggests that the minimum price requirement was abolished by December 3, 2004, or even by May 25, 2005, [126] the language of both "Announcements" indicates that the Chinese government took extra precautions to ensure impossibility of exporting at a price lower than those selected by the government, i.e., the minimum price.

(iv) Analogously, Plaintiffs contend that the "Measures for the Administration of Licenses for the Export of Goods, [issued by the] MOFCOM [on] December 10, 2004[, indicated that the minimum price requirement was abolished because t]hese Measures d[id] not mention a minimum price [and, as a prescript,] were repealed in 2008." Opp. at 21. However, the "Measures" did not contain any statement suggesting that the minimum price requirement was abolished: rather, the "Measures" reiterated that, "[w]hen applying for an export license, an operator shall submit the relevant quota of export goods or *other relevant documents of approval to the license issuing agency,"* Docket Entry No. 35-62, at 3 (emphasis supplied), hence allowing for a reasonable **[**370]** deducement that the mandate of all prior prescripts tying export licenses with the minimum price requirement remained intact and incorporated by the "Measures" reference to "other relevant documents [that have to be submitted for] approval to the license issuing agency." Consequently, the Court has no reason to read the "Measures" as stating that the minimum price requirement was **[*444]** abolished on or prior to December 10, 2004. [127]

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[125] Even if a certain prescript had abolished the minimum price requirement on November 10, 2004, Defendants' conduct would still be subject to abstention from the inception of the Class Period (in mid-2000) to November 10, 2004: for almost half of the Class Period.

[126] Even if a certain prescript had abolished the minimum price requirement on May 25, 2005, Defendants' conduct would still be subject to the government compulsion-based abstention from the inception of the Class **[**381]** Period (in mid-2000) and until May 25, 2005, that is, for more than half of the proposed Class Period.

[127] Even if a certain prescript had abolished the minimum price requirement on December 10, 2004, Defendants' conduct would still be subject to the government compulsion-based abstention from the inception of the Class Period (in mid-2000) and until December 10, 2004, that is, for almost half of the Class Period. A foriori, if the "Measures" were a statement reinforcing the minimum price requirement, this fact could effectively dispose of Plaintiffs' claims altogether, since the Amended Complaint ends its account of Defendants' alleged collusive meetings with the statement that, "[i]n February 2007, [that is, more than a year prior to the repeal of the "Measures," unspecified] members of [the ever-changing] Cartel met to discuss a possible agreement to increase the export price," Docket Entry No. 77, P 64, and provides no facts as to any other manifestations of Defendants' alleged post-February 2007 collusion.

(v) Plaintiffs continue by asserting that the "Working Rules on the Application for an Export License, [isued by the] Dailan [Division of the MOFCOM in] December 2003 [still cannot be read as imposing the minimum price requirement, even though these R]ules state that, '[w]hen the export prices are recommended by the chambers of commerce, the export price shall be in compliance with the relevant price limit regulations,' [because these R]ules do not compel price-fixing for any [particular] product." Opp. at 21. Plaintiffs' argument is, at best, half-hearted, since the CCCMC is a chamber of commerce subject to the MOFCOM's rule, and the CCCMC's magnesite section (of which Defendants are members) are, too, subject to this rule. Therefore, it would be anomalous to **[**371]** deem the "Rules" inapplicable to any particular section simply because the MOFCOM did not bother to expressly list each and every product falling within the authority of each and every section of each and every chamber of commerce the MOFCOM controlled. Moreover, and paramountly here, as the Court already explained, the process of price-fixing, i.e., how the actual figure of the minimum price comes about, is irrelevant to the inquiry posed by the government compulsion doctrine, which concerns itself not with the legislative niceties of a foreign sovereign's enactment process but with whether this foreign sovereign's prescripts compel the defendant's behavior. Consequently, all that the "Rules" unambiguously establish is that, as of December 2003 (that is, at least more than one quarter into the proposed Class Period), the threat of repercussion for non-compliance with the minimum price requirement was actually existing.

(vi) In the same fashion, Plaintiffs maintain that the "Measures for the Invitation to Bid for Export Commodity Quotas, [issued by the] MOFCOM [on] December 20, 2001[, indicated that the minimum price requirement was abolished simply because t]hese [M]easures do not **[**372]** mention a minimum price." Opp. at 21. The Court disagrees. There is no statement in the "Measures" indicating that the minimum price requirement was abolished, since the "Measures" -- while detailing certain new ministerial aspects of the bidding process -- did not include any language suggesting that the minimum price requirement was repealed. [128] Docket Entry No. 35-58, at 3-5. Therefore, the Court can not read **[*445]** the "Measures" as stating that the requirement was abolished on or prior to December 20, 2001. [129]

(vii) Identically, Plaintiffs assert that the "Measures for the Administration of Export Commodities Quotas, [issued by the] MOFCOM [on] December 20, 2001[, indicated that the minimum price requirement was abolished simply because t]hese [M]easures do not mention a minimum price." For the reasons reiterated time and again in subsections (i) to (vi), the Court finds this argument invalid. As the Sinosteel Defendants correctly observed, a government's decision not to reiterate each and every previously established aspect of the regulatory regime in each newly adopted provision cannot be construed as an abolition of all previously adopted aspects. See S/Reply at 19 ("The fact that **[**373]** [the] regulations adopted in the interim may not [expressly] mention price coordination is no more relevant than the fact that not all securities regulations promulgated since the Securities Exchange Act of 1934 mention insider trading"). Plaintiffs invite the Court to reach an odd conclusion that, by the end of 2001, Chinese law lost all its continuity and started so much "from scratch" that every provision, rule and legal policy not expressly re-enacted was necessarily deemed abolished. However, neither China's decision to initiate a gradual transition from centrally planned to socialist market economy nor China's accession to the WTO transformed China into a "new" nation, with a legal regime wholly divorced from all Chinese pre-WTO/pre-transition law. Accord *United States v. Grainger, 346 U.S. 235, 248, 73 S. Ct. 1069, 97 L. Ed. 1575 (1953)* (***HN79***[] "Codification contemplates, implies and produces continuity of existing law in clarified form rather than its interruption"); Halsbury's Laws of

[128] Moreover, a MOFCOM's regulation issued prior to the "Measures" already clarified, while addressing the very same issue of the bidding process, that "[t]he Bidding Committee **[**382]** is entitled to revoke the quotas won in the bidding and rescind the qualification for quota bidding. . . of the enterprises which . . . [e]xported at prices lower than the regulated prices set forth by relevant. . . chambers of commerce." Docket Entry No. 35-51, at 15; and (b)

[129] Even if a certain prescript had abolished the minimum price requirement in December 2001, Defendants' conduct would still be subject to the government compulsion-based abstention from the inception of the Class Period (in mid-2000) and until December 2001, that is, for about a year and a half of the proposed Class Period.

Hong Kong, Commentary, Continuity of Hong Kong's Judicial System After Reunification of Hong Kong with the People's Republic of China (Oct. 3, 2008), at HLHK Courts and Judicial System 2, LEXIS. [130]

(viii) Plaintiffs also assert that **[**374]** the "Provisions on the Export License Administration, [issued by the] MOFCOM [on] December 20, 2001," should be construed as indicating that the minimum price requirement was repealed because these "Provisions" were operable only until December 10, 2004, and -- while operable -- "only refer[red] to 'recommended export prices fixed by the relevant **[*446]** chamber of commerce' [but the "Provisions" did] not require the fixing of any price for any specific product." For the reasons already articulated by the Court in the subsection (v), supra, Plaintiffs' position is without merit. [131]

(ix) Plaintiffs then point at the "Regulations" issued on December 10, 2001, by the State Council (i.e., by the highest governmental body in China) with regard to the "Administration of the Import and Export of Goods." See Opp. at 21. Plaintiffs maintain that the "Regulations" verify that no mandatory minimum price requirement existed by December 10, 2001, because the "[Regulations] describe the export quota licensing system but . . . do not authorize any ministry to require . . . minimum prices . . . . [According to Plaintiffs, repeal of the minimum price requirement is particularly evident because these] Regulations **[**375]** further require[d] promulgation of new rules governing export quota licensing that conform to [these] Regulations." Id. This statement presents a compilation of legal and logical errors. First, the fact that the "Regulations" did not *authorize* the MOFCOM (or the CCCMC, or any other Chinese governmental agency) to issue prescripts requiring compliance with the minimum price has no bearing on whether such prescripts (if actually issued) resulted in government compulsion, see *Interamerican Refining, 307 F. Supp. at 1298* (explaining that the issue of whether the compulsion-causing provision was issued with or without authority is irrelevant to the doctrine). [132] Second, the fact that the "Regulations" were silent as to the minimum price requirement in no way indicates that they repealed that requirement. See supra, subsection (vii) and note 130 of this Opinion (explaining why issuance of a provision silent as to certain aspect cannot be deemed as a breach of legal continuum). Moreover, contrary to Plaintiffs' position, the relevant language of the "Regulations" seems to the suggest a conclusion opposite to that prompted by Plaintiffs. Specifically, the "Regulations" include a section titled **[**376]** "The Goods Limited in Exportation," which provides, inter alia, that "[t]he term 'export license' [means] the various kinds of certificates and documents that [relate to] export . . . as provided in laws and *administrative regulations,"* hence suggesting an incorporation of the minimum price requirement that was adopted in previous administrative regulations. See Docket Entry No. 35-55, at 9; accord Docket Entry No. 35-47, at 6 (a pre-"Regulations" MOFCOM's mandate directing that, "[w]hen applying for export licences, every export enterprise should submit to the licence-issuing body the export permits and contract[, and an] application form . . . for the export license. . . . When examining the export contracts, the license-issuing body concerned should pay major attention to the prices of the export commodities. . . . When the **[*447]** prices in the export contracts are lower than the coordinated prices by the related import and export chamber of commerce, . . . the license-issuing body should

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[130] See also Ian Dobinson, the Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?, *11 Pac. Rim L. & Pol'y 1, at 22, 55 (Jan. 2002)* (where -- just one month after the issuance of the MOFCOM's "Measures" discussed in this subsection -- the author, a professor of law at the University of Hong Kong, observed that "[c]ontinuity . . . was applicable to the [bulk of the] Standing Committee Decisions and Supplementary Provisions. This principle also related to the numerous Interpretations that were issued by the Supreme Court and the Supreme Procuratorate." The author concluded, **[**383]** upon conducting a scrupulous study of Chinese legal regime, that "[t]here is no denying that there has been significant change in the law [in China]. . . . Chinese rhetoric concerning [these] reforms has lead to the claim that there has been an adoption of [a new] rule of law in China. These changes and the rhetoric are extremely important, but . . . while the [language of the provisions have] changed, the underlying principles and policies on which Chinese . . . law is based have not. On the contrary, [the legal] policy, in particular, has shown a remarkable continuity and resistance to change").

[131] Even if a certain prescript had abolished the minimum price requirement on December 10, 2004, Defendants' conduct would be subject to abstention from the inception of the Class Period (in mid-2000) to December 10, 2004, that is, for almost half of the Class Period.

[132] As the Court already explained, many provisions are treated as "law" regardless of the fact that the delegated authority of the authors is not -- or cannot -- be established. See supra, note 100 of this Opinion (discussing the sources of religious law and customary law that are enforceable regulatory mandates regardless of **[**384]** coming about without any "delegated authority").

refuse to issue the export license"); Docket Entry No. 35-51, at 14 (another pre-"Regulations" MOFCOM's mandate clarifying that "[e]vidence [needed for] issuance of export license [include a proof of **[**377]** e]xport contract price[, which should be] not less than the prices set forth by the chambers of commerce for . . . exporters"); Docket Entry No. 35-53, at 5 (a pre-"Regulations" MOFCOM's circular stating that, "[w]hen examining an application for an export license, the releasing authority shall inspect the contents [of] export contract[,] especially examine [the] price. [The p]rice of goods on export license shall be the same as that in the export contract [and] not lower than the coordinating price regulated by relevant import and export commerce commission"). [133]

(x) Next, Plaintiffs' claim that the "Working Rules on the Application for and Release of an Export License, [issued by the] MOFCOM [on] December 14, 1999 [("Working Rules I") indicate that the minimum price requirement was abolished on or prior to September 7, 2007, because t]hese [R]ules were officially abolished on September 7, 2007 . . . , [and because] these [R]ules were based on the export license regulations effective in 1999, which were revised in 2001 and again in 2004. *Like the other regulations,* these . . . [R]ules state[d] only that a price [could not] be lower 'than the coordinating price regulated by the relevant **[**378]** import and export commerce commission' [but the Rules did] not compel price-fixing for any particular product." Opp. at 21-22 (emphasis supplied). The net result of Plaintiffs' statement appears to be the sum of: (a) a concession that the original 1999 version of the Rules expressly directed exportation at minimum price or above; (b) another concession that this minimum price requirement was present, expressly or implicitly, in 2001 and 2004 related provisions; and (c) yet another concession that this minimum price requirement was made part of many other Chinese regulations. See id. Since the issue of how the actual minimum price came about is inapposite to the government compulsion doctrine, see supra, subsection (v), Plaintiffs' statement does nothing but concede that numerous governmental prescripts consistently compelled the exporters to obey the minimum price requirement, and did so throughout the period stretching from the pre-Class Period time to, at the very least, September 7, 2007 (that is, until seven months after the last alleged meeting of "Cartel," see Docket Entry No. 77, P 64). Moreover, the post-Working-Rules-I period appears, too, marked by the minimum price requirement **[**379]** since: (a) the September 7, 2007, "abolition" of the Working Rules I occurred as a result of the enactment of the later Working Rules ("Working Rules II), issued by the MOFCOM on the same date, that is, on September 7, 2007; and (b) these Working Rules II cannot be **[*448]** read as abolishing the minimum price requirement. See supra, subsection (i) (discussing the "Working Rules II").

(xi) Finally, much in line with their statements detailed in subsections (i) to (x), supra, Plaintiffs maintain that the "Notice of the Strengthening of the Export Administration of [Magnesium Oxide, issued by the] MOFCOM and the State Administration for Import and Export Commodity Inspection [on] March 27, 1996 [("Notice I") indicates that, as early as 1996, the minimum price requirement stopped existing simply because t]his Notice [I] does not refer to any minimum export price . . . and was abolished in 2005." Opp. at 22. For the reasons numerously reiterated in the preceding subsections, this argument is without merit. Moreover, the post-"Notice-I" period cannot be deemed as the period during which the minimum price requirement was abolished. See supra, subsection (ii) (discussing the "Notice II").

In sum, the evidence challenged by Plaintiffs invariably indicates, although with a different degree of forte, that -- throughout the Class Period -- a stream of prescripts was issued; these prescripts either expressly stated the minimum price requirement or employed a language strongly suggesting that the requirement was remaining in force, or made directives reading as entirely compatible with the minimum price requirement, or were simply silent as to the issue.. [134]

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[133] Finally, even if the Court were to adopt Plaintiffs' reading of the "Regulations" as repealing the actually existing minimum price requirement, the logical conclusion of such presumption would be that, until December 10, 2001, Defendants were, in fact, subject to the minimum price requirement imposed by the highest governmental body of China which, in turn, calls into question Plaintiffs' good faith with respect to their argument that, since the inception of the proposed Class Period, that is, since in mid-2000, Defendants could not have been subject to any government compulsion as to the minimum price requirement.

[134] In addition, Plaintiffs dedicate substantial effort **[**385]** to asserting that: (a) the "Detailed Rules for the Implementation of Calling for Bids for Light (Dead) Burned Magnesia Export Commodity Quotas (for Trial Implementation)," which were promulgated by the MOFCOM in 1994 and expressly directed both collusive agreement on a particular minimum price as to export of magnesite-based products and compliance with that minimum price, had to be deemed repealed by the MOFCOM's

d. *Composite Effect*

As stated above, each piece of documentary evidence referred to by Plaintiffs either evinces the minimum price requirement or strongly suggests the same, or is entirely compatible with the requirement. The same conclusion applies to: (a) the multitude of Defendants' exhibits not challenged in Plaintiffs' Opposition, see supra notes 73-74 of this Opinion (listing Defendants' exhibits); and even to (b) Plaintiffs' own exhibits. **[**387]** See supra note 76 of this Opinion (listing Plaintiffs' exhibits). In sum, not a single document before the Court states -- or otherwise indicates -- that the minimum price requirement was abolished **[*449]** for any period of time, let alone permanently. However, Plaintiffs appear to be correct in their observation that there has been no particular single prescript issued by the MOFCOM that expressly mandated Defendants' compliance with the minimum price requirement while remaining operable, without any amendment or re-issuance, throughout the entire Class Period which started sometime in mid-2000 and is, allegedly, still running as the Court writes this Opinion.

Rather, the evidence before the Court is an amalgamation of mutually corroborating prescripts. [135] This particular aspect makes the factual scenario at hand more complex than that addressed in *Trugman-Nash, 954 F. Supp. 733*, and even that examined in *Interamerican Refining, 307 F. Supp. 1291*, i.e., the cases dealing with more straight-forward examples of government compulsion.

As Judge Trager observed in Vitamin C, the Trugman-Nash scenario "involved [a] much clearer example[] of government compulsion [since] the court in Trugman-Nash, . . . consider[ed the effect of only] the New Zealand Dairy Board Act of 1961, a formally codified New Zealand law[, expressly] 'mandat[ing] . . . disapproval of sales price competition among New Zealand dairy producers in respect of exports to nations . . . that restrict import quantities." *584 F. Supp. 2d at 558*. And while the circumstances in Interamerican Refining were less clear-cut, see *307 F. Supp. at 1295-98* (explaining that the Venezuelan government directed boycott of the plaintiff **[**389]** not through a codified provision but through two phone calls from Venezuelan Coordinating Commissioner to the defendants directing them to cease sale to the plaintiff and through a soon-thereafter-issued order of the Minister of Mines and Hydrocarbons who made a public promise that "an end will be put to it" in the wake of a national media upheaval scorning sales to the plaintiff), the time-span during which the foreign prescripts examined in Interamerican Refining was rather short, and the content of these prescripts was not affected by amendments, re-issuance, etc.

Here, in contrast, the alleged governmental compulsion has stretched for more than a decade and was achieved not through a simple issuance of a single legal mandate that remained continuously operative; rather, it was created

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issuance of 1998 and 1999 rules that addressed the subject of export bidding, and that these 1998 and 1999 rules were, too, repealed by the MOFCOM's 2001 "Measures for Administration of Export Commodities Quotas and the 2001 Measures for the Invitation of Bid for Export Commodity Quotas"; and (b) this chain of enactments necessarily discarded the minimum price requirements because, "[u]nder Chinese law, [the later enacted rules] prevail over any conflicting provisions in prior rules governing the same subject matter." Opp. at 22-23 (citing to Docket Entries Nos. 35-44 (the 1994 "Rules"); 35-57 (one 2001 "Measure"); and 35-58 (another 2001 "Measure")). The Court studied Docket Entries Nos. 35-44, 35-57 and 35-58 but failed to locate any language in Docket Entries Nos. 35-57 **[**386]** and 35-58 *conflicting* with the minimum price-related language in Docket Entry No. 35-44. Conversely, the MOFCOM's statements that "[t]he export enterprises shall file the [export] quota applications [together with] the relevant documents [that are] according to the requirements" (included in the language of Docket Entry No. 35-57, at 4) and that "[an export bid that is] lower than the minimum limit shall be deemed as an invalid one" (included in Docket Entry No. 35-58, at 5) appear fully in coherence -- or, at the very least, easily harmonizable and certainly not in conflict with the MOFCOM's 1994 requirement that "[the bidding] price for export shall not be lower than the . . . price determined by [the CCCMC]." See Docket Entry No. 35-44, at 4.

[135] Inductive logic is the mode of reasoning by detecting a general conclusion from a set of specific facts. See *United States v. McGlory, 968 F.2d 309, 334 (3d Cir. 1992)* **[**388]** (illustrating the process of inductive reasoning by quoting the Supreme Court's observation in *Bourjaily v. United States, 483 U.S. 171, 179-80, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)*, which explained that "[i]ndividual pieces of evidence, insufficient in themselves to prove a point, may [--] in cumulation [--] prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence").

by a legal "regime" that employed various regulatory mechanisms producing a composite effect of a never-ceasing correlation between the minimum price requirement and punitive measures for non-compliance with it. Both the gist and the continuum of such regime was, seemingly, left unaffected by China's decision to embark on the path of gradual reforms toward socialist market economy or by China's accession **[**390]** to the WTO: the MOFCOM's statement filed in the Vitamin C expressly stressed the MOFCOM's opinion that Chinese economic reforms had neither automatic nor direct effect on Chinese export regulations falling within the MOFCOM's rein. See Vitamin C, Civil Action No. 06-md-1738 (E.D.N.Y.), Docket Entry No. 400-1, at 3 (explaining that the "statements of representatives **[*450]** of the [MOFCOM] and other government agencies, with regard to China's market economy status, and remarks regarding Chinese companies setting price and production volume according to the principle of market demand . . . were made in a different context -- one that had nothing to do with export price regulations -- and were general descriptions of the current status of China's market economy presented in a special context . . . . [These statements] should not be deemed as explicit or implicit statements of China's abandonment of its . . . regulatory policies over certain designated industries"). Given that the MOFCOM has had such perceptions throughout the entire Class Period and, hence, promulgated all its prescripts with the intention to convey its views to the "chambers of commerce" and the industries regulated by these **[**391]** "chambers," Defendants' reading of the relevant regulations in the way identical to the intentions the Chinese government wished to convey appears reasonable.

Moreover, here, Defendants established the actual danger of enforcement through showing constant governmental monitoring: the existence of such monitoring follows from the language of the CCCMC charter, i.e., the document that remained operable and unchanged from 1988 and throughout the entire Class Period. In its relevant parts, the charter reads as follows:

> The aims of [the] CCCMC include[] coordinating . . . export trade activities in the industry of . . . minerals[, like magnesite-based products. The] CCCMC conforms to the laws and regulations of the State, carries out the state policies and guidelines in foreign trade . . . . Functions of [the] CCCMC include . . . coordinating commodity prices for . . . export . . . according to . . . the [MOFCOM and assisting the [MOFCOM] in . . . supervision of [the] member enterprises [so they would] utilize their . . . export quotas and permits legally. . . . Obligations of [the CCCMC m]embers [include] carrying out resolutions and regulations made by [the] CCCMC . . . .For anyone who **[**392]** commits serious violations, the [MOFCOM] may . . . suspend or revoke part or all of [the violator's] right to deal with . . . export trade. The general meeting for [the CCCMC] members . . . is the supreme body of CCCMC, [it is] held every three years [but, in the interim, the] powers and authorities of the general meeting [are] exercised by the Council [which] duties include[s]upervising . . . the work of its branches [like the branch of magnesite-based products. In the interim] of any meeting of the Council, [the] powers and authorities of the Council [are] exercised by its Standing Committee[, which has a] meeting . . . every six months . . . . [In the interim,] several functional departments [are] set up [which are] responsible for the daily work of [the] CCCMC . . . . Branches . . . carry out their activities in accordance with CCCMC [c]harter and [under the] supervision of [the] CCCMC . . . . [B]ranches . . . hold their meetings [during which they] examin[e] the implementation of regulations in regard to coordinated prices for . . . exports and . . . deal with problems occurring due to enterprises that violate the regulations . . . . [In between such branch meetings,] the branch **[**393]** council [has the] powers and authorities to [act] in accordance with CCCMC [c]harter . . . .

Docket Entry No. 99-11, at 2-5.

The language of the charter unambiguously establishes that each member of the CCCMC, including Defendants, could reasonably expect to have: (a) its affairs monitored by the CCCMC on regular basis; and (b) the regulatory regime, including its minimum price requirement, punitively enforced through invocation of those particular prescripts which the CCCMC and/or **[*451]** the MOFCOM could construe as operable at the time of each particular violation of the minimum price requirement. [136] Accord Minister Wu Yi Discusses the Reform of Import and Export

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[136] Plaintiffs erroneously assert that the CCCMC could not be a true enforcement arm of the Chinese government simply because the CCCMC's website describes it as a "self-disciplined organization." See Opp. at 24. However, the MOFCOM clearly indicated that it intended to use **[**395]** the term "self-discipline" in its Chinese meaning, i.e., as a mandate conveying the members' obligation to obey and be ruled by their "chambers of commerce," see Vitamin C, Civil Action No. 06-md-1738

Chambers of Commerce, ("Minister Wu") Vitamin C, Civil Action No. 06-md-1738 (E.D.N.Y.), Docket Entry No. 394-2, at 84, 87 (a publication in which Xu Guo Ming, a "specially invited correspondent," related Minister Wu's explanation that: (a) "[b]usinesses having the right to conduct foreign trade . . . all shall obey the coordination of the [CCCMC]"; (b) "[c]oordination means that all [c]hambers of [c]ommerce must . . . coordinate the . . . export transactions of [their] members from the perspective of safeguarding . . . the normal **[**394]** order of China's foreign trade"; (c) "[China's] socialist market economy is still in a nascent stage [where s]ome enterprises[,] after their operational discretion has expanded[,] have not formed their own mechanism enabling [the Chinese versions of] self-determination . . . , self-discipline and self-development [corresponding to the government policies, and caused t]he phenomemnon of blind competition among domestic companies and disruption of market order"; (d) "[w]ith respect to any individual business found to be in violation of the government regulations and the industry-wide agreement [e.g., as to the minimum price, the CCCMC] shall punish these businesses [and] may propose to the [MOFCOM] to impose sanctions upon such business; and (e) "[t]o facilitate the coordination of the [CCCMC, the MOFCOM plans to] set up several examples by seriously punishing businesses that do not follow the coordination process").

A person applying the United States standard of reasonableness would read the language of the CCCMC charter and Minister Wu's statement as evidence of the CCCMC's: (a) actual enforcement powers; and (b) intent to use these powers punitively. Accord Resco WDPa, Civil Action No. 06-235 (JFC) (W.D. Pa.), Docket Entry No. 123-4, at 7 and 9 (the November 4, 2009, Request for a WTO Panel by the USTR, asserting that "China . . . imposes . . . restrictions on the exportation of the [minerals falling within the scope of the **[*452]** CCCMC] by requiring that prices for the[se] materials meet or exceed a minimum **[**397]** price before they may be exported" and relying, inter alia, on the language of the charter). A fortiori, a reasonable person *standing in Defendants' shoes* could duly conclude that a violation of the minimum price requirement would entail, in actuality, such high risk of punishment that it would warrant compliance. [137] Therefore, Defendants's actions could be viewed as governmentally

(E,D.N.Y.), Docket Entry No. 400-1, at 3, and the Court has no reason to presume that the CCCMC, being directly controlled by the MOFCOM, defined itself by using the American rather than the Chinese meaning of the phrase "self-discipline." See, e.g., Wang Xiaoye, The Prospect of Antimonopoly Legislation in China, 2002 Wash. U. Glob. Studies 2001, 208-09, available at <<http://law.wustl.edu/wugsh/issues/volume1/p201Wang.pdf>> (where the author, a professor of law at the Chinese Academy of Social Studies, being unaffiliated with any litigation, observed that "[o]ne always should view 'industrial self-discipline prices' as a synonym for government intervention in price competition among enterprises. In August 1998, the State Economic and Trade Commission [of China] issued its 'Opinions On Self-Discipline Pricing For Certain Industrial Products,' which, on the grounds that it was necessary to end price wars and disorderly competition, demanded that the producers of certain industrial products **[**396]** observe the minimum price limits set by their respective trade associations. . . . 'Industrial self-discipline prices' operate as a type of compulsory price cartel because they force enterprises to sell their products according to 'coordinated prices' . . . which [are] based . . . on the average costs within a particular industry [and, thus, necessarily] exceed[] the individual costs of . . . efficient enterprises[; that, in turn,] restrict[s] the scope of price reduction for these enterprises and deprive[s] them of the opportunity to expand their production and operation") (footnote omitted).

[137] Charles Sanders Peirce, an American philosopher, logician and scientist, introduced the method of logical inference known as abductive reasoning, where an assessment of a set of facts that appear related is performed with a presumption that these facts are indeed related. See Collected Papers of Charles Sanders Peirce 248, 268 (Charles Hartshorne & Paul Weiss editors, 1934). "We proceed by guesses, Pierce explain[ed], because 'our knowledge is never absolute." Louis Menand, American Prodigy, N.Y. Rev. Books 30, 35 (Dec. 2, 1993). Abductive reasoning permits use of a known rule in order to explain **[**398]** an observation: the statement "if it rains, the grass is wet" is an example, since the technically correct observation should be an Occam razor "if the grass is wet, the most probable explanation is that it recently rained." Piercian philosophy is manifested in human tendency to accept one's word as one knows it, and it has become an indelible part of the United States jurisprudence after the decisions written by Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo and Learned Hand, who transformed American legal formalism into contextualism. See Richard A. Posner, The Problems of Jurisprudence 26-28 & n.41 (1990); Robert L. Hayman Jr. & Nancy Levit, Jurisprudence 453 (1994); see also Wilson Huhn, The Five Types of Legal Arguments 13-68 (2002); Jeremy Paul, The Politics of Legal Semiotics, *69 Tex. L. Rev. 1779 (1991)*; accord *Warner v. Goltra, 293 U.S. 155, 156, 55 S. Ct. 46, 79 L. Ed. 254 (1934)* (Cardozo, J., utilizing the "policy of liberal construction" to correct a prior line of cases where "verbal niceties were bent to the over-mastering purpose of the [law]"). Thus, Defendants' correlation of the monitoring/enforcement by the CCCMC to the stream of prescripts creating the legal regime and to the possible **[**399]** maximum punishment is a valid exercise in contextual logic.

compelled, even if Defendants never decided to challenge the CCCMC/MOFCOM by non-compliance with the minimum price requirement: the defense of duress does not require the defendant to act self-destructively.

e. *Miscellaneous Considerations*

Plaintiffs, however, appear to be of opinion that the risk of punishment Defendants faced for non-compliance was insufficiently high to substantiate compulsion. In support of that position:

(i) Plaintiffs assert that a third of Chinese exporters of magnesite products did not comply with the minimum price requirement. This argument seemingly aims at suggesting that a persistent non-compliance with the requirement did not endanger the operations of those exporters ("Market-split Point");

(ii) Fostering, it seems, an analogous point, Plaintiffs rely on the asserted export practices of Zhejiang, the litigant which European Union case was built on its alleged non-compliance with the minimum price requirement applicable to the members of the glyphosate section of the CCCMC ("Zhejiang Xinan Point"); and, in addition

(iii) Plaintiffs point out that the respective yearly export quotas allotted by the Chinese government to the magnesite products industry were frequently not fully used. This argument, seemingly, aims to suggest that the punishment of having one's export quota reduced as a result of non-compliance **[**400]** with the minimum price requirement would not be a "real" punishment because the so-punished enterprise would stand to lose an opportunity it cannot use anyway ("Quota-allotment Point"). See Opp. at 23, 50-51 and 58.

For the reasons detailed below, the Court is not persuaded.

[*453] The gist of Plaintiffs' Zhejiang Xinan Point appears to be that, if Zhejiang was not punished for not complying with the minimum price requirement, then the requirement existed only "on paper" and, thus, could not compel Defendants "in actuality." However, Plaintiffs' reading of Zhejiang Xinan omits to take into account that Zhejiang was a member of the glyphosate section of the CCCMC, see Zhejiang Xinan, 2009 ECJ EUR-Lex LEXIS 529, P 4, which might have had far less stringent supervision/enforcement than the magnesite section, of which Defendants were members. In addition, Plaintiffs ignore the Trial Court's careful clarification that the EU amended its antidumping law hoping to "enable qualified Chinese exporters, *however few they may be,"* to achieve the MET status, see id. P 62 (emphasis supplied): such acknowledgment suggests the Trial Court's realization that non-compliance with the minimum price requirement **[**401]** was recognized by the European Union to be an exception rather than the rule of the Chinese exportation. Similarly, Plaintiffs omit noticing Zhejiang's own concession of the EU Council's position that MOFCOM/CCCMC's well-developed regulatory, monitoring and enforcement mechanisms remained invariably operable (at least until the date of the issuance of Zheiiang Xinan, that is, until June 17, 2009). See id. PP 130, 140 ("[t]he Council contends . . . that there was a very efficient control system in place . . . [Zhejiang] does not dispute that [this CCCMC's approval and veto] mechanism"). Therefore, the conclusions that can be drawn from Plaintiffs' Zhejiang Xinan Point is that Defendants' situation might have been different from Zhejiang's, and Defendants were not as intrepid in their business affairs as Zhejiang was in his. However, these conclusions are inapposite to the issue of actual risk of punishment faced by Defendants because a duress inquiry turns on the ability to resist pressure of an average person and, in addition, on the "egg-shell" qualities of the defendant. See *Restatement 2d, Torts, §§ 871, comment f*; 892B, comment j.

Advancing their Market-split Point, Plaintiffs' **[**402]** claim that, "if the law had compelled magnesite exporters to fix-prices, all magnesite exporters would have participated in the cartel. Instead, up to 30% of the exporters declined to participate in 2001." Opp. at 58 (citing Am. Compl. P 54). However, the allegations stated in Paragraph Fifty-Four are silent as to anyone's refusal to comply with the minimum price requirement; rather, Paragraph Fifty-Four merely states that "[t]he members of the two Jiyuan and Huaxia Magnesite Groups [i.e., the initial "sub-cartels,"] collectively represented more than 70 percent of the export volume of magnesite in China." Docket Entry No. 77, P 54. Hence, it appears that Plaintiffs simply deduced from the compulsion-unrelated statement in the Amended Complaint that the remaining less-than-thirty percent of Chinese exporters ("Remaining Exporters") did not comply with the minimum price requirement because they did not feel "compelled enough."

Plaintiffs' deducement is logically flawed, being not only a stretch of logic but also inconsistent in light of other statements made in the Amended Complaint. Specifically, in Paragraph Sixty-Nine of the Amended Complaint, Plaintiffs contend that "Defendants have **[**403]** been able to increase [export] prices [for magnesite-based products] without maintaining 100 percent control of the market [because they] have competitive advantage of lower costs than their competitors," that is, the Remaining Exporters. Id. P 69 and note 22. [138]

[*454] In other words, Plaintiffs concede that these Remaining Exporters were exporting their magnesite-based goods at the prices equal to or exceeding **[**407]** Defendants' prices which, in turn, were equal to or exceeding the minimum price mandated by the government. Consequently, Plaintiffs effectively concede that these Remaining Exporters were *automatically complying with the minimum price requirement* by exporting at above the minimum price, **[*455]** which -- in turn -- means that none of these exporters could have possibly displayed a Zhejiang-like non-compliance with the requirement. In light of the foregoing, this Court cannot conclude that the conduct of these Remaining Exporters somehow indicated that the risk of punishment for non-compliance was absent, granted that these Remaining Exporters invariably complied with the minimum price requirement. [139]

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[138] Note 22 of the Amended Complaint refers the Court to CEH, the document seemingly central to Lamb's Report. See supra note 26 of this Opinion (observing that CEH was not attached to Lamb's Report, and the Court could only locate the "product review" titled "Magnesium Oxide and Other Magnesium Chemicals" online which allows the reader only the table of contents but, otherwise, requires a $ 3,000 subscription, see <<*http://www.sriconsulting*. com/cgi-bin/listoptions.pl?/CEH/Public/Reports/747.2000/>>). Same as Lamb's Report, Plaintiffs' Opposition, in footnote 3, referred to this "product review" and advised the Court that certain "excerpts [of this 'product review' were] attached [to Plaintiffs' Opposition] as Exhibit 2." Opp. at 14, n.3. However, the Declaration of Robert A. Magnanini ("Magnanini Declaration"), also attached to the Opposition, advises the Court that "[a]ttached hereto as Exhibit 2 is a . . . copy of the Comments **[**404]** from the [CCCMC] to [the DOC]." Docket Entry No. 105-2, at 2. Giving Plaintiffs the benefit of the doubt, the Court examined the entire Magnanini Declaration and all exhibits attached to the Opposition in order to determine whether the promised excerpts of CEH were attached as an exhibit other than Exhibit 2, but detected no such exhibit. See, generally, Docket Entry No. 105-2. Since Plaintiffs' Amended Complaint was also accompanied by certain exhibits, the Court -- in order to ensure fairness to Plaintiffs -- also examined all those exhibits aiming to locate these excerpts of CEH, but detected none. See Docket Entries Nos. 77-1, 77-2 and 77-3. Therefore, the Court has no information as to either the content or reliability of CEH statements on the basis of which Plaintiffs reached their conclusion that Defendants' costs were lower than the costs of the remaining less-than-thirty percent of Chinese exporters. Moreover, it is unclear to the Court how could CEH authors possibly provide such information since: (a) in order to make an accounting determination as to average costs, data was needed as to the actual identities and actual fixed and variable costs (plus marginal costs) of each **[**405]** member of such "sub-cartels," as well as to the identities and the corresponding costs of alleged non-members of these "sub-cartels," see ***Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883, 909 (9th Cir. 2008)** (detailing the calculation of per-unit cost); (b) CEH, not being a member of the CCCMC, could not have access to Defendants' (and other CCCMC members') accounting data, which was disclosed only internally; and (c) any public information upon which the authors of CEH could have relied had to be facially insufficient, because the Chinese Accounting Standards ("CAS"), rather than Accounting Standards for Business Enterprises ("ASBE"), governed the disclosure requirement until January 1, 2007 (that is, until six years after CEH was produced), see, e.g., <<*http://www.chinaorbit.com*/ china-economy/chinese-accounting- standards.html>>, and -- unlike the ASBE (which still differ from and are perceived as less stringent than the International Accounting Standards ("IAS"), see, e.g., Songlan Peng, Chinese Accounting Standards (VDM Verlag Dr. Mueller e.K. 2007)) --the CAS required only a limited disclosure of the enterprise's accounting and financial data, and, in addition, directed **[**406]** the accounting approaches, which -- under the IAS and the Generally Accepted Accounting Principles United States -- should be qualified as data distortion. See Michael E. Burke IV, China's Stock Markets and the World Trade Organization, *30 Law & Pol'y Int'l Bus 321, 363-64 (1999)* ("[the CAS] require that fixed assets be stated at cost[,] . . . inventories [be] stated at cost [too,] . . . [d]epreciation [information be distorted because] residual value [could not be disclosed in excess of] 3% to 5% of original cost[,] . . . [p]re-operating expenses [had to be] amortized in equal installments over five years [rather than as they were in reality], [s]hareholder equity [had to be] valued at the official rate [rather than at market rate, and] bad debts [could not be disclosed in excess of] 0.3% to 0.5% of total receivables") (relying on CAS provisions discussed in detail in Matthew Harrison, Asia-Pacific Securities Markets (2d ed. 1994), and Deloitte Touche Tohmatsu International, International Tax and Business Guide: People's Republic of China (1997)).

[139] Moreover, it seems that Plaintiffs' position could be reduced to a concession that the entire Chinese magnesite industry complied with the minimum price requirement, but Defendants and their unidentified "co-conspirators" were not "truly compelled" because they embraced the law willingly, while the Remaining Exporters "rebelled responsibly" by complying with the minimum

Finally, Plaintiffs' Quota-allotment Point is flawed both statistically and economically. Plaintiffs assert that, "[i]n 2001, the export quota[] awarded by the [Chinese] government [to all Chinese exporters, as an industry,] exceeded the actual volume of magnesite exports by more than 300,000 tons. [Unspecified amount of such industry-wide e]xport quota[was] also left unused in 2004. In 2009, export quota [allotted, too, industry-wide] have again exceeded the total volume of exports." Opp. at 23 (citing Docket Entry No. 99-15, at 3 (addressing 2001); Docket Entry No. 105-28, at 4 (addressing 2004); and Docket Entry No. 105-29 (addressing 2009)). However, the Court has no reason to deduce from such **[**409]** industry-wide statistics that Defendants *personally* did not fully use their allotted quotas and, hence, that the danger of having their personal quotas reduced was necessarily perceived by Defendants as a punishment too irrelevant to remove the compulsive force of the minimum price requirement. Moreover, even if the Court were to presume that the danger of having the export quota reduced was only a nominal concern to Defendants, such presumption has no effect on Defendants' concerns as to their ability to make a living altogether, i.e., the concern that non-compliance with the minimum price requirement might result in revocation of the exporter's license, thus yielding the "allotted quota" of zero. Since there is a dramatic distinction between: (a) one's lack of concern with being able to conduct hypothetical *extra* business; and (b) one's ability to conduct *any* business, Plaintiffs' Quota-allotment Point cannot change the outcome of the Court's analysis. [140]

The remaining points made by Plaintiffs are, alas, outlined rather faintly. However, recognizing that ***HN80***[] abstention is a case-dispositive measure that shall not be imposed lightly, see *Mannington Mills, 595 F.2d at 1293*, the Court feels obligated to address every Plaintiffs' argument the **[*456]** Court can detect. For instance, the Court notes Plaintiffs' statement that, "the most that can be said of the [Chinese legal regime] is that the Chinese government [was] enforc[ing] agreements among members of a chamber of commerce regarding minimum export prices[; however, legislation of a foreign country that merely aids defendants' conspiracy does not convert defendants' deliberate acts into acts of the **[**411]** foreign government." Opp. at 48 (citing *United States v. Sisal Sales Corp., 274 U.S. 268, 276, 47 S. Ct. 592, 71 L. Ed. 1042 (1927)*, and *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 705, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962))*. The Court agrees with Plaintiffs as to the latter aspect (that is, as to the statement of the legal rule), but not with Plaintiffs' application of that rule to the fact in the instant matter, since both cases cited by Plaintiffs expressly turned on lack of direct (or even indirect) government compulsion, [141] which is not the case here.

Another ambiguous argument fostered by Plaintiffs is the Misplaced Argument (raised in support of Plaintiffs' position that the CCCMC was/is not an appendage of the Chinese government). As noted supra, the Misplaced Argument asserts, in part, that the MOFCOM's Circular of February 12, 1998, should be deemed repealed by the

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price out of business necessity but being "emotionally opposed" to the legal regime and "hypothetically willing" to not comply **[**408]** with its requirement. The Court cannot accept Plaintiffs' assertion of such hypothetical rebellion by unspecified enterprises as a proof that the risk of punishment was not actually present. Moreover, Plaintiffs' reference to *unspecified* "co-conspirators" of Defendants, see supra note 14 of this Opinion, allows for a conclusion that, after 2001, *all* exporters became Defendants' "co-conspirators" by abandoning their hypothetical rebellion and willingly embracing the minimum price requirement.

[140] Plaintiffs' Quota-allotment Point appears particularly duplicitous in light of Plaintiff Resco's claim to the ITA that China has *successfully* utilized the process of export quota allotment (jointly with China's minimum price **[**410]** requirement) to achieve compulsive control over the business practices of Chinese exporters dealing in magnesite-based goods. See Magnesite from *China, 74 Fed. Reg. 68,247*-48 ("[China] has established export quotas and a minimum acceptable export sales price (i.e., export restraints) for a number of raw materials, including three types of magnesi[te] used in the production of [the products at issue in the instant matter. All Chinese] exporters of magnesi[te] are subject to these export restraints").

[141] Plaintiffs' reading of Sisal Sales is virtually identical to the reading of Sisal Sales by the plaintiffs in *In re Refined Petroleum Prods. Antitrust Litig., 649 F. Supp. 2d 572 (S.D. Tex. 2009)*. The Refined Petroleum court provided a detailed discussion of Sisal Sales and carefully explained why the holding of Sisal Sales does not apply to the scenario where a foreign sovereign creates -- and/or directs compliance with -- the prescript that lies at the root of the defendants' conduct. See *Refined Petroleum, 649 F. Supp. 2d at 590-91*. Hence, for the reasons provided by the Refined Petroleum court, Plaintiffs' position is without merit. Similarly, Plaintiffs' reliance **[**412]** on Continental Ore is misplaced: in that matter, the Supreme Court dealt with a scenario where "nothing . . . indicate[d] that [the foreign sovereign's] law in any way compelled [the defendants' conduct,]" and where "there [was] no indication that . . . any . . . official within the structure of the [foreign] Government approved or would have approved [the defendants' conduct] or directed that [conduct]." *Continental Ore, 370 U.S. at 706-07*.

beginning of the Class Period because the Circular "pre-date[d] the formation of two initial export cartels by two years and pre-date[d] the formation of the unified export cartel by three years[, as well as] China's accession to the WTO [during which] China explained to the WTO [that,] by 2000[,] there [was] only limited number of products subject to government price control." The errors in Plaintiffs' position that the passage **[**413]** of time or China's decision to embark on the path of gradual economic reforms (or China's accession to the WTO) interrupted the legal continuum of Chinese law were already addressed supra. What has not been addressed thus far is Plaintiffs' position that Defendants' reading of the 1998 Circular is "clearly contrary to [the] interpretation [given] by the CCCMC." Opp. at 52 (emphasis removed) (relying on Plaintiffs' exhibits filed as Docket Entries Nos. 105-4 and 105-21).

Plaintiffs misread the Circular, the position taken by Defendants, and the content of their own exhibits evincing the position of the Chinese government. The Circular reads as follows:

> . . . All chambers . . . shall actively do a good job in the coordination of export goods. [The MOFCOM] hereby notif[ies the chambers as follows : You must be s]trengthening [your] investigation on the export situation of price coordination . . . . [You must be] adjusting the coordinating prices of export commodities . . . : at present, being affected by the Asian Financial Crisis, [142] the condition of some commodities in the international market is not stable, and **[*457]** China's competitiveness in export has been under threat. Therefore, all **[**414]** chambers . . . shall clean up the current export price coordination plans in an all-round way and organize member enterprises to deliberate and adjust the negotiated prices of some export commodities so as to, under the precondition of maintaining the [profitable] economic effects of exports, improve China's competitiveness of export and enhance [the Chinese version of] the normal development of export.

Docket Entry 35-52, at 2-3. Defendants' reliance on the Circular is limited to two statements made in the Minmetals' Motion, reading: "[t]he chamber responsible for assisting [the] MOFCOM in connection with the coordination of numerous issues relating to the export of magnesite is the [CCCMC]," and "[the] MOFCOM . . . mandates [inter alia,] that exporters follow [the] minimum export price [the actual figures of which are e]stablished through [Defendants'] chambers of commerce." M/Mot. at 10, 14. Hence, Defendants in no way asserted that *all* "chambers of commerce" were engaged in developing minimum price figures or in enforcement of the minimum price requirement: they merely stated that the CCCMC was performing these functions, and that these functions were in accord with the MOFCOM's **[**415]** mandate stated in the Circular.

The content of the exhibits relied upon by Plaintiffs in support of their assertion that the CCCMC's reading of the Circular is contrary to the reading offered in the Minmetals' Motion provides Plaintiffs with no such support. In fact, Plaintiffs' exhibit filed as Docket Entry No. 105-4 was already discussed supra, in conjunction with Plaintiffs' position that the CCCMC is not an appendage of the Chinese government. As noted supra, this exhibit is the CCCMC's letter to the DOC, dated April 19, 2007, which begins with the statement, "[o]n behalf of [the CCCMC] and our 4[,]000 companies, we submit the following comments on [the non-MET status applied by the DOC to the Chinese goods imported into the United States]." Docket Entry No. 105-4, at 2. The other exhibit upon which Plaintiffs rely, filed as Docket Entry No. 105-21, is the MOFCOM's comments ("Comments") dated June 25, 2007, and addressed to the DOC. Same as the CCCMC's letter of April 19, 2007, the MOFCOM's Comments seek to persuade the DOC

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[142] "The Asian financial crisis was a period of extreme difficulties in the financial and construction sectors of Pacific Rim countries" in 1997-1998. *Comm. for Fair Beam Imps. v. United States, 477 F. Supp. 2d 1313, 1324 n.12, 31 Ct. Int'l Trade 313 (C.I.T. 2007)* (citation and quotation marks omitted). The crisis started in Thailand upon financial collapse of baht, the Thai currency, and swiftly spread throughout most of Southeast Asia, affecting predominantly Japan, Indonesia, South Korea and Thailand, but also hurting the economies of Hong Kong, Malaysia, Laos and the Philippines, and causing losses in China, India, Taiwan, Singapore, Brunei and Vietnam, with a prolong ripple effect throughout the entire global community. See generally, William C. Hunter et al., The Asian Financial Crisis: Origins. Implications and Solutions (Springer 1999); see also Bee Hua Goh, The Dynamic Effects of the Asian Financial Crisis on Construction Demand and Tender Price Levels in Singapore <<*http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6V23-4D99B9X-3&_user=10&_coverDate=02%2F01%2F2005&_rdoc=1&_fmt=high&_orig=search&_sort=d&_docanchor=&view=c&_searchStrId=1187540465&_rerunOrigin=google&_acct=C000050221&_version=1&_urlVersion=0&_userid=10&md5=f7976040d268ddaf15fa375f7c83efe9>>* **[**416]** (June 2004) (discussing the ripple effect of the crisis still existing in 2004).

that the non-MET status shall apply to Chinese enterprises importing goods into the United States. The Comments **[**417]** state, in relevant part, as follows:

> [T]he United States has persistently refused China's application [for the MET status] on various pretexts and fully ignored the evidence and facts that have **[*458]** been provided by China. Because the United States has persisted in designating China as a non-market economy country in its antidumping investigations, the result is that Chinese enterprises cannot [get more favorable MET] treatment in antidumping investigations. Over more than 20 years of accelerating reforms in its economic system, China has established a market economy system [that] has not only been written into the Chinese constitution, but is, in fact, a more developed market economy system than the system of some countries which the U.S. has actually recognized as market economies . . . . We hope that the U.S. government can also objectively see the achievements that China has achieved in its reforms and in opening-up and becoming a true market economy. There is no basis to deny the status of market orientation to China's exporting industries on the pretext that the prices of . . . main raw materials inputs by enterprise are controlled by the government. [China does not see such price **[**418]** control as an intervention qualifying China as a non-market economy because] China does not intervene in these prices any more than do governments in countries that the U.S. considers market oriented. Market economy countries, including the United States, are no exception to selective interventions [employed by China]. Governments in market economies attempt to influence price trends in the same way that China attempts to influence price trends. [Since t]his practice is not unique to China and not unique to non-market economies[, China should be deemed a market economy].

Docket Entry No. 105-21, at 2-7. Since the case at bar is not an antidumping proceeding, this Court need not address the issue of whether the DOC/ITA correctly calculate antidumping duties imposed on Chinese enterprises bringing their goods for sale in the United States. However, the content of Comment appears enlightening as to what seems to be a conflict in the CCCMC/ MOFCOM's tendency to simultaneously claim that: (a) the exporting enterprises have been operating under "market economy conditions"; but, nonetheless, (b) the exporting enterprises have been subject to enforcement of the minimum price requirement. This **[**419]** seeming incongruence appears to be rooted in the difference between: (a) the Western world's perception of a market economy as a materialization of the laissez-faire concepts articulated by Adam Smith; [143] and (b) the Chinese unique vision of "socialist market economy." See also, supra note **[*459]** 117 of this Opinion (discussing the difference between "pure" and "socialist" market economies).

This Court is neither in the position nor has a mandate to pass judgment on the economic route or economic goals chosen by the Chinese government. Accord *Vitamin C, 584 F. Supp. 2d at 559* ("The court does not question th[e] goal or even China's methods of [transition from a command to a market economy]"). The inquiry before the Court is narrow, i.e., whether the Chinese government compelled Defendants' compliance with the minimum price requirement. The MOFCOM's Comments answer this question in the affirmative, explaining that the Chinese government exercised such compulsion while perceiving it wholly compatible with the Chinese version of **[**421]** socialist market economy. Such answer eliminates the conflict in the position taken by the MOFCOM and CCCMC, and -- jointly with the MOFCOM's E.D.N.Y. Statements filed in Vitamin C, Resco's admissions noted in

[143] Adam Smith is perceived as the father of political economics. His "Theory of Moral Sentiments" (1756) and his magnum opus "The Wealth of Nations" (1776) set the framework of what is known as laissez-faire market economy, driven by the invisible hand consisting of such forces as self-interest, competition, and supply and demand. See *Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 592, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)* (Rehnquist, J. dissenting) (detailing the concept of the invisible hand and discussing Smith's influence on the theories of markets); ***Hume v. Moore-McCormack Lines, Inc., 121 F.2d 336,338-45 (2d Cir. 1941)*** (same). The concepts articulated by John Maynard Keynes in "The General Theory of Employment, Interest and Money," published in 1936, altered laissez-faire economics by introducing the **[**420]** concept of a "mixed economy," based predominantly on private sector but, nonetheless, envisioning a large role played by the government. See *Ronconi v. Larkin, 253 F.3d 423, 427 and n. 3 (9th Cir. 2001)* (summarizing the rationale of Keynesian economics); see also *United States Dep't of Labor v. Triplett, 494 U.S. 715, 724, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990)* (quoting Keynes' famous justification for governmental intervention, "[i]n the long run, we are all dead"). It appears that the MOFCOM's Comments were referring to the Keynesian model widely employed by many current nations.

Magnesite from China, the USTR's request for a WTO panel filed in Resco WDPa, evidence filed in this matter and those detected by the Court -- concludes the Court's inquiry into whether abstention is warranted: this inquiry is limited to the actual presence and enforcement of governmental compulsion, and it does not concern itself with how China harmonized such compulsion with the economic terminology and goals she selected.

That being said, the Court cannot ignore the implications of one more, although rather vaguely articulated, Plaintiffs' argument that reads as follows:

> Plaintiffs allege the formation of two separate [sub-] cartels acting outside the purview of the CCCMC in 2000 and the unification of those cartels [into a single "Cartel"] in 2001. The[] acts [of creating these specific "sub-cartels" and "Cartel"] were not contemplated or directed by any CCCMC document[] submitted to the Court.

Opp. at 53 (citing Am. Compl. PP 1, 52-55, 57-65 and 68).

It appears that Plaintiffs' **[**422]** logic is as follows: since (a) there is no CCCMC's document on the record directing, in express writing, creation of the first two alleged "sub-cartels"; and (b) there is also no CCCMC's document on the record directing, in express writing, unification of these alleged "sub-cartels" into the alleged "unified Cartel," such lack of documentary proof as to the government-mandated stages of "cartelization" must also mean lack of government-mandated minimum price requirement, because -- had it been a government-mandated minimum price -- it would have applied to all exporters of magnesite-based goods at once and long before the two alleged "sub-cartels" came about.

The argument -- if correctly distilled by the Court -- is flawed with regard to the issue of government compulsion, as a concept, due to Plaintiffs' misreading of the exhibits filed in this matter. Here, the CCCMC charter indicates that the magnesite section of the CCCMC was continuously operating by holding mandatory meetings at various levels. See Docket Entry No. 99-11, at 4-5. The fact that the list of attendees of these meetings varied (and, at each meeting, different attendees expressed their ardor in supporting China's export **[**423]** goals or in deliberating the actual minimum price figures) in no way renders a nation-wide governmental enforcement of the minimum price requirement impossible. [144] However, this fact **[*460]** also suggests that -- unrelated to the issue of MOFCOM/CCCMC's enforcement of the government-mandated minimum prices --certain members of the Chinese magnesite industry could have entered into a number of their private agreements to sell their goods at a certain "supra-minimum price" ("SMP"). See Opp. at 53 (citing Am. Compl. PP 1, 52-55, 57-65 and 68, where the relevant Paragraphs [145] rely on Plaintiffs' Exhibits 6-9 and 11-20, filed as Docket Entries Nos. 77-1, 77-2 and 77-3). [146]

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[144] China covers 9,596,961 square kilometers, being just slightly smaller than the United States, and is the fourth largest country in the world. See, e.g., <<*https://www.cia.gov/library*/ publications/the-world-factbook/geos/ch.html>>. Climate conditions, infrastructure, technical advancement, cost of labor, standards of living, etc., differ dramatically throughout China, although some of these differences are gradually dissipating. See, e.g., Stephen L. Morgan, Richer and Taller: Stature and Living Standards in China, 1979-1995, **[**424]** The China Journal 44 (July 2000) (discussing the differences between regions at the end of the 20th century). Therefore, it would be improper for this Court to presume that the "minimum price" was necessarily a single figure rendered for a country-wide application: indeed, such "one price" approach is typical only to a centrally planned economy, with which China is trying to part. Rather, China's decision to transition to a socialist market economy appears far more compatible with an initial balkanization of the industry and a "schedule of minimum prices" factoring in the peculiarities of different locales, state or private ownership of the enterprises, size of production facilities, length of export license operation, etc., with progressive harmonization of such schedule later on, as the differences in the exporters' operations fade out. The Court, being a United States district court, is not in the position to fancy the political or economic considerations utilized by the CCCMC/ MOFCOM throughout a decade of administrative regulations: the federal courts tend to avoid second guessing even the expertise of the agencies operating in the United States, see, e.g., *Browning-Ferris Indus. of South Jersey, Inc. v. Muszynski, 899 F.2d 151, 160 (2d Cir. 1990)* **[**425]** ("***HN81***[] [c]ourts should be particularly reluctant to second-guess agency choices involving [technical matters] that are in the agency's province of expertise"), and they are certainly not in the position to render on or guess the considerations falling within the expertise of a foreign agency.

[145] The Court is not entirely clear as to the rationale underlying Plaintiffs' citations to the paragraphs in the Amended Complaint that state either irrelevant information or factless self-serving conclusions, i.e., Paragraph One (asserting that "[t]his case arises out of a conspiracy among all Defendants and their co-conspirators that has the purpose and effect of fixing prices of magnesite and magnesite products"); Paragraph Fifty-Five (asserting that, "[a]s a result of [Defendants'] agreements, despite slumping

Specifically:

[*461] (i) Exhibits 6, 7 and 8 seem to describe the creation of the first alleged "sub-cartel," stating: "China Jiayuan Magnesite Export Group has been formed by 13 Chinese **[**428]** magnesite enterprises. . . Currently, this group produces more than 70% of total magnesite output and 50% of the export quota in China"; "A magnesite export group has been set up in Dalian, a coastal city in Northeast China's Liaoning Province. The group has 13 member companies"; and "Chinese leading magnesite producers formed an alliance, Jia Yuan Magnesite Export Group, on [April 9,] 2000." Exhibit 9 seems to describe the creation of the second "sub-cartel," stating: "[a] second magnesium carbonate group has been formed in China. Huaxia Magnesium Products Export Group is made up of 25 companies . . . . The group indicates that it will account for over 55% of Chinese magnesium products. However, the first export group[,] Jia Yuan, has also claimed to have 50-60% of total export licence for magnesite." Hence, if -- as Plaintiffs assert -- both alleged "sub-cartels" were created at the same time, see Am. Compl. P 53, the Chinese export industry dealing in magnesite-based goods was simultaneously "cartelized," *in its entirety:* this scenario seems highly compatible with a nation-wide government compulsion (and government-imposed minimum price requirement), but it appears utterly peculiar **[**429]** in the absence of it.

(ii) Exhibits 11, 12, 13 and 14 seem to describe the creation of the "unified Cartel" (which appears to be the entire magnesite section of the CCCMC) and its initial operations, reporting: "the formation of a new single unified group to take the place of two previous separate groups designed to control China's magnesite prices and exports"; "The Chinese Magnesite Export Association . . . so far the group has acted in unity"; "One of the major developments over the past year has been the formation of a powerful magnesite exporters' group -- the Chinese Magnesite Export Association." Hence, these exhibits also suggest a government compulsion and a governmentally imposed minimum price requirement.

(iii) Exhibit 16 seems to describe one of the meetings held by the magnesite section, stating: "[o]n March 22, 19 major enterprises from the [m]agnesite export industry held a meeting in Shenyang to thoroughly review and analyze the [m]agnesite export industry and to discuss and forecast the international market demand and price trend for the year 2003. After much discussion and exchange of ideas, the group agreed to the immediate setting up of the Magnesite Export Industry **[**430]** Self-regulating Group . . . . [The attendees expressed their willingness to] accept arbitration and guidance from the [CCCMC (which the CCCMC charter required anyway)], establish

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demand, the price of magnesite products imported from China to the United States increased during 2000"); Paragraph Sixty-Five (asserting that, "[d]ue to the efforts to increase prices at the end of 2003, the [unified] Cartel achieved significant price increases in the U.S., stabilized U.S. prices, and avoided major price cutting despite low levels of demand"); and Paragraph Sixty-Eight (asserting **[**426]** that "Defendants' decision to enter into the per se unlawful agreements . . . was and is wholly voluntary").

[146] Exhibits 6-9, 11-14, 16-17, and 19-20 replicate: (a) China Jiayuan Magnesite Export Group, Engineering & Mining J. (Aug. 1, 2000); (b) Magnesite Export Group Set up in China's Dalian, Asia Pulse (Apr. 11, 2000); (c) Magnesium Carbonate Producers Form Export Syndicates, Indus. Minerals (Aug. 18, 2000); (d) Second Chinese Magnesium Carbonate Export Group Formed, Indus. Minerals (Aug. 22, 2000); (e) And Then There Was One: China's Latest Magnesia Export Group, Indus. Minerals (Apr. 2, 2001); (f) Chinese Export Association Holds Dbm Prices Steady, Metal-Pages (Aug. 15, 2001); (g) Brian Coupe, Magnesite, The Mining J. (Oct. 2001); (h) New Chinese Magnesia Export Group Formed Prices Rise, Elsevier Engineering Info. (Apr. 1, 2003); (i) Magnesite Export Industry Self-regulatory Group - The China Magnesite Forum, A Statement by the CCCMC of Mar. 24, 2003; and (j) United States Surveys for 2004 and 2006. Exhibit 15 does not address the issue of "cartelization"; rather, it reproduces a statement by Liu Jianwei, the head of Legal Services Department of the CCCMC, stating that the CCCMC **[**427]** "is a non-government organization" but, nonetheless, it acts "as a bridge between the government and its [2600] members," thus suggesting that the CCCMC is an appendage of China within the meaning of Chinese version of socialist market economy. Exhibit 18, Docket Entry 77-2, presents no information as to the issue of "cartel-creation." Exhibit 20, Docket Entry 77-3, at 13-14, advocates against Plaintiffs' position since the Exhibit states that, "[o]f critical importance was the introduction of controls on export prices and volumes by China's central government in 1994, which had an immediate and lasting effect on minerals trade from China . . . . Export licenses [are] unique to China but has transformed the trade in certain minerals from China to the West. China's central government, through the [CCCMC], implemented its export license system [since] 1994 . . . to enable stricter control of export volumes and prices [and] reduce smuggling." The Court is not entirely clear as to why Plaintiffs' rely on Exhibit 20.

standards for export behaviors [(same)], protect the interest of the country [which the CCCMC charter, as well as the MOFCOM's regulations and its Minister Wu required anyway], of the industry [(same)], and of legal interests of its members against improper competition [(same), and also to] encourage **[*462]** healthy development of the magnesite products industry [(same)]."

(iv) Exhibit 17 seems to describe either another local meeting or, potentially, the creation of an unrelated-to-the-CCCMC's-operations collusive group that entered into its own SMP agreement, stating: "[i]n February [2004, under the name] the China Magnesite Self-disciplined Association[,]. . . the fifth version of the group was established. . . . The new group represents [only] five . . . Chinese producers . . . ." The Exhibit is silent as to the identities of the producers that entered into that agreement.

(v) Same as Exhibit 17, Exhibit 19 seems to describe either another local meeting or, potentially, the creation of an unrelated-to-the-CCCMC's-operations **[**431]** collusive group entering into its own SMP agreement (or a re-creation of the collusive group described in Exhibit 17), stating: "In December [2006], the four principal producers of magnesite in China agreed on a $ 10-per-metric-ton price increase for their [magnesium oxide]. This followed the $ 30-per-metric-ton price increases that were [already] announced in November [2006]." Just as Exhibit 17, the Exhibit 19 is silent as to the identities of the producers that entered into that agreement. See Docket Entries Nos. 77-1 and 77-3.

5. Compulsion Established and Asserted

As the foregoing illustrates, the evidence presented in this matter, jointly with the evidence detected by the Court, establishes to the Court's satisfaction that the Chinese government indeed compelled compliance with *"a"* minimum price, which -- in turn -- means that Defendants' conduct prompted by *that particular* compulsion warrants this Court's abstention.

This conclusion, however, leaves two aspects unresolved. The first requires establishing the minimum price *figures* that applied to Defendants' export operations during the period at issue: if such actual figures were never coined or coined but left unknown to Defendants **[**432]** and to the Chinese governmental bodies enforcing the minimum price requirement (i.e., the CCCMC, MOFCOM, Chinese customs, etc.), then such actual figures were, for all practical purposes, equal to zero, and every agreement to comply with a minimum price above zero would, in that case, be just a private contract lacking governmentally compelled nature and not warranting abstention. [147]

Moreover, even if it is determined that the minimum price figures were known to Defendants and the Chinese governmental bodies enforcing the minimum price requirement, such determination cannot eliminate the possibility that **[**433]** certain Chinese entities, opportunely taking advantage of Chinese governmentally-imposed minimum export prices, entered into their private SMP agreements. [148] If so, such **[*463]** SMP agreements could be illegal

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[147] As the Court pointed out in its notes 104 and 145 of this Opinion, the Court is mindful of the possibility that the minimum price figures might exist in the form of complex schedules and might even be available for verification only through testimonial rather than documentary evidence in light of the secrecy shrouding the process of Chinese minimum price creation and compliance. Accord *Vitamin C, 584 F. Supp. 2d at 553* (observing that the charter of the CCMHPC required its members to strictly follow the minimum price but simultaneously directed them keep this matter "confidential").

[148] An SMP scenario is, in its workings, identical to the scenario where the governmental minimum price figures are unknown to Defendants/Chinese government bodies because, there, any agreement privately reached between the parties as to the sale at/above a certain minimum price would automatically be an SMP agreement, with the SMP equal to itself (SMP minus zero). Conversely, if the governmentally-imposed minimum price is known to Defendants/Chinese government bodies, then the entities that purchased these **[**434]** defendants' goods could have suffered the base injury equal to the market-forces-unrelated share of the SMP (where the SMP is the difference between the price actually charged and the government-compelled minimum price). Accord Docket Entry No. 77-1, at 70 (Plaintiffs' Exhibit 17, a United States Survey discussing increases in Chinese magnesium oxide prices "[b]ecause of increasing prices in China for fuel coke and increasing freight costs" and, hence, suggesting, that price increases could be a result of market forces unrelated to collusion); Docket Entry No. 77-3, at 3 (a United

for the purposes of the United States ***antitrust law***, regardless of whether or not the CCCMC was standing ready to enforce them. The involvement of the CCCMC would have no relevance to the issue of government compulsion, just as the fact that American courts stand ready to direct performance upon finding a breach of a specific performance contract: no adjudication/enforcement of a contractual obligation transforms the underlying contract into a mandate "compelled" by the government.

Defendants appear to be of the opinion that Plaintiffs' Amended Complaint **[**435]** is wholly void of any statements suggesting allegations based on such SMP agreements. See S/Reply at 20 ("here, plaintiffs at best allege price coordination consistent with China's regulatory scheme for magnesite[,] and their Opposition is noticeably silent [as to] exports of magnesite above the set price"). This is not entirely true. Plaintiffs at no point admit Defendants' "price coordination consistent with China's regulatory scheme" (indeed, had Plaintiffs so stated, they would come dangerously close to conceding that Defendants qualify for abstention). See generally, Am. Compl. Moreover, Plaintiffs' Opposition asserts that Defendants failed to "demonstrate[] that the price collusion alleged [in the Amended Complaint] was initiated at the direction of [--] or was required by [--] the CCCMC [or any other Chinese government body]" Opp. at 52. This statement suggests Plaintiffs' intent to assert claims based on agreements unrelated to Defendants' compliance with the government-mandated minimum price requirement, and it would be an error for this Court to ignore Plaintiffs' intended assertions, even if they were stated rather nebulously. See *Foman, 371 U.S. at 182-83* ("***HN82***[] [t]he Federal **[**436]** Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

Consequently, Plaintiffs will be allowed an opportunity to re-amend their pleadings (by factually establishing -- in accord with the requirements of *Turicentro* -- that those defendants whom Plaintiffs would name in their re-amended pleadings, were importers into the United States within the meaning of the introductory clause of the FTAIA and, in addition, by asserting -- in accord with the requirements of *Iqbal* and *Twombly* -- the facts of such named defendants' agreement(s) to sell their goods at SMP. Defendants then, will be in a position to provide the Court with evidentiary proof, if such is in existence, showing that the SMP prices alleged by Plaintiffs were, in fact, the actual minimum price figures: (a) mandated by the Chinese **[*464]** government; and (b) known to Defendants and Chinese governmental bodies capable of enforcing -- or otherwise punishing Defendants for non-compliance with - the minimum price requirement. [149]

States Survey suggesting the same by noting China's imposition of a new 10% export tax on the export of magnesite-based goods in 2007); see also Docket Entry No. 35-59, at 3 (the MOFCOM's 2004 regulation that prompts the same conclusion by informing the reader about China's reduction of its magnesite export stimulus, which existed in the form of "rebate" allowing exporters to keep prices low); Docket Entry No. 35-63, at 2 (the MOFCOM's 2005 regulation informing the industry about complete elimination of this magnesite export stimulus).

[149] The Court stresses that Plaintiffs and **[**437]** Defendants' facts cannot be "sketched": they must be established in detail. Simply put, the Court will not credit Plaintiffs' assertions that --regardless of a decade of United States importation of thousands of tons of magnesite-based products from China -- all (or the bulk of) documentary evidence verifying such transactions disappeared and all witnesses, too, developed a memory failure. Accord supra note 64 of this Opinion. State and federal courts consistently refused to accept such "dog ate my homework" defense/evidentiary submission, and the Court will not change this rule. See *Lowe v. McGraw-Hill Cos., 361 F.3d 335, (7th Cir. 2004)* (refusing to accept the claim that evidence vanished and noting "[t]his 'the dog ate my homework' defense [is] no defense at all") (citing *In re Riggs, 240 F.3d 668, 670 (7th Cir. 2001))*; *Allen v. Dockery, 2008 U.S. Dist. LEXIS 27447, at *4-5 (M.D. Ga. Apr. 4, 2008)* ("Such an excuse, which sadly sounds like the proverbial and desperate 'dog ate my homework' defense, is not legally sufficient"); *Alsentzer v. Bulboff, 2006 N.J. Super. Unpub. LEXIS 816 (N.J. Super. App. Div. Jan. 26, 2006)* ("[The trial court correctly] observed that [the litigant's] excuses **[**438]** for the lack of evidence most closely resembled 'the dog ate my homework' [defense]. Yet, in this case, we have no dog, [and even] no x-ray of the dog, to establish . . . an appropriate excuse") (internal quotation marks and citation omitted). In the same vein, the Court will not allow Plaintiffs to conduct discovery of to the entire Chinese magnesite industry in search for the entities, which Plaintiffs might deem suitable defendants for purposes of their re-amended pleadings, i.e., the entities that were importers of goods into the United States. Similarly, the Court will not accept re-amended pleadings failing to state the identities of the entities that entered into SMP agreements or to detail the facts/circumstances of such SMP agreements, as well as the prices of these SMP agreements. Accord *Iqbal, 129 S. Ct. at 1954* ("[The plaintiff] is not entitled to discovery [where the complaint asserts some wrongs] "generally, [i.e., as] a conclusory allegation [since] *Rule 8* does not [allow] pleading the bare

VIII. CONCLUSION

For the foregoing reasons:

(i) Plaintiffs' Amended Complaint will be dismissed. Such dismissal will be with prejudice as to Plaintiffs' claims based on the exporter **[**440]** exception to the FTAIA. However, Plaintiffs' claims invoking this Court's subject matter jurisdiction under the introductory clause of the FTAIA will be dismissed without prejudice, and Plaintiffs will be allowed an opportunity to amend these claims and submit factual proof in support. Plaintiffs will also be allowed an opportunity to amend their pleadings by stating facts showing that the defendants named in Plaintiffs' re-amended pleadings entered in private collusive agreements: such allegations shall specify the particular defendants that entered in such agreements, the circumstances of **[*465]** these agreements and the particular SMP prices agreed upon;

(ii) Defendants' application for abstention on the grounds of the act of state doctrine will be denied, with prejudice, as factually inapplicable;

(iii) Defendants' motions to dismiss, for lack of jurisdiction and pursuant to the FSIA, Plaintiffs' claims against those Defendants that are 100% owned by the Chinese government will be denied, without prejudice to renewal, for insufficiency of evidence currently on the record; and

(iv) The Court's decision as to Defendants' application for abstention on the grounds of the government compulsion **[**441]** doctrine is reserved. In the event Plaintiffs establish this Court's subject matter jurisdiction pursuant to the factual review, as defined in *Turicentro*, and, in addition, duly plead the facts of Defendants' SMP agreements, the Court will re-visit the issue of abstention by directing Defendants to produce a verified schedule of the actual minimum prices:

(a) that existed during every three months of the Class Period;

and

(b) that ensued from the Chinese regulatory regime (imposing a minimum price requirement as to Chinese export of magnesite-based goods) composed by the prescripts issued by the State Council of China and/or China's Ministry of Commerce, and/or China's Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, and/or China's Department of Customs and/or similar Chinese government entities, and/or by public letters, addresses or similar statements or pronouncements made by officials of the aforesaid Chinese government entities;

and

(c) that were known to Defendants *and* to the Chinese government entities capable of enforcing -- or otherwise punishing Defendants for non-compliance with -- the aforesaid minimum prices,

in order to determine whether complete abstention **[**442]** is warranted in light of Plaintiffs' SMP prices arid Defendants' schedule of the actual minimum prices being identical.

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elements of [the] cause of action [and] affix[ing] the label 'general allegation' [in hope of developing actual facts through discovery]"); Am. Compl. at 4 (expressly stating that **[**439]** this matter is not based on any parallel pricing by any Defendant). Simply put, Plaintiffs' belief that they suffered an injury cannot substitute for a valid complaint. Accord *Kumho Tire, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238* (explaining that the law of evidence eliminates claims based on "phantom" injuries, i.e., cases involving actual harms, in a literal sense, but unwieldy in a legal sense for the lack of means to trace the injury to a specific action of a specific defendant); compare Opp. at 10 (where Plaintiffs, inexplicably, claim that "[t]he only remarkable feature of [the] Amended Complaint is the specificity with which agreements on price are alleged and the accompanying documentary evidence supporting those allegations," even though the Amended Complaint's allegations, e.g., as to the last "conspiratorial" meeting, are limited to a mere statement that, "[on] February 2007, [unspecified] members of the Cartel met [at unspecified location] to discuss a possible agreement to increase the export price [to an unspecified level]").

An appropriate Order accompanies this Opinion.

/s/ Garrett E. Brown

Garrett E. Brown, Jr.

Chief Judge

United States District Court

Dated: April 1, 2010

ORDER

For the reasons stated in the Opinion filed herewith,

IT IS on this 1st day of April, 2010,

ORDERED that the Clerk shall reopen this matter for the purposes of addressing Plaintiffs' Amended Complaint, Docket Entry No. 77, and Defendants motions, Docket Entries Nos. 98 and 99; and it is further

ORDERED that Defendants motions to dismiss are granted to the extent that Plaintiffs' Amended Complaint, Docket Entry No. 77, is dismissed:

(a) with prejudice as to Plaintiffs' claims invoking this Court's subject matter jurisdiction pursuant to *15 U.S.C. § 6a (1)(A)*, i.e., the exporter exception of the Foreign Trade Antitrust Improvements Act ("FTAIA"); *and*

(b) without prejudice as to Plaintiffs' claims invoking this Court's subject matter jurisdiction pursuant to the introductory clause of the FTAIA. Plaintiffs will be allowed an opportunity to amend this group of their claims; and it is further

ORDERED that Defendants' application **[**443]** for abstention on the grounds of the act of state doctrine is denied with prejudice; and it is further

ORDERED that Defendants' motions to dismiss, pursuant to the Foreign Sovereign Immunities Act, Plaintiffs' claims against those Defendants that are 100% owned by the Chinese government are denied. Such denial is without prejudice to Defendants' renewal of these motions; and it is further

ORDERED that Defendants' application for abstention on the grounds of the government compulsion doctrine is reserved in accordance with the guidance provided in the Opinion filed herewith; and it is further

ORDERED that, within 180 days from the date of entry of this Order, Plaintiffs shall electronically file -- and serve upon Defendants -- Plaintiffs' re-amended pleadings. Plaintiffs shall also file documentary and/or testimonial evidence establishing this Court's jurisdiction. In the event Plaintiffs wish to execute such filing under seal, Plaintiffs shall make an application to that effect no later than two weeks prior to such filing and in accordance with the Local Rules; and it is further

ORDERED that, in the event Plaintiffs elect to rely on testimonial evidence, Defendants will be entitled to **[**444]** depose Plaintiffs' witnesses producing such testimonies. Both sides shall strive to agree on the mode(s) and schedule of these depositions, negotiating the same in good faith and with an aim to preserve, to the maximum degree feasible, both Plaintiffs' time and resources and Defendants' time and resources, and also with an aim to avoid or minimize to the maximum degree feasible (but without compromising the merits of these proceedings) undue inconveniences to the witnesses. The parties' joint statement specifying the anticipated mode(s) and time frame for completion of all such depositions (or the parties' individual statements conceding impasse of their negotiations and suggesting, in good faith and with due considerations of the limited resources of the party's adversaries and of the burdens likely to be faced by the witnesses, the mode(s) and time frame for such depositions) shall be electronically filed with the Court within 60 days from the date of Plaintiffs' service of their witnesses' affidavits upon Defendants; and it is further

ORDERED that reconciled verified transcripts of *all* depositions, *accompanied by corresponding video-recordings,* shall be electronically filed with **[**445]** the Court no later than within 90 days from the date of the last deposition conducted. All video recordings shall be placed onto clearly identified Digital Versatile Discs and filed with the Court in *duplicates;* and it is further

ORDERED that no complimentary hard copies of any parties' documents or of any documentary evidence shall be served either upon the Chambers of the undersigned or filed with the Clerk, except upon specific request of the Court; and it is finally

ORDERED that the Clerk shall administratively terminate this matter subject to reopening upon Plaintiffs' timely filing of a re-amended complaint.

/s/ Garrett E. Brown

Garrett E. Brown, Jr.

Chief Judge

United States District Court

LaFlamme v. Societe Air Fr.

United States District Court for the Eastern District of New York

April 5, 2010, Decided; April 5, 2010, Filed

08-CV-1079 (KAM)

Reporter

702 F. Supp. 2d 136 *; 2010 U.S. Dist. LEXIS 33480 **; 2010-1 Trade Cas. (CCH) P77,033

EUGENE M. LaFLAMME and WORLD WIDE TOURS OF MISSION VALLEY, INC., individually and on behalf of all others similarly situated, Plaintiffs, v. SOCIETE AIR FRANCE, KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V., AMERICAN AIRLINES, INC., DEUTSCHE LUFTHANSA AG, and UNITED AIRLINES, INC., Defendants.

Core Terms

surcharges, allegations, defendants', passenger, airlines, fuel, conspiracy, tariff, prices, fares, Air, immunity, complaint alleges, plaintiffs', motion to dismiss, antitrust immunity, air cargo, Sherman Act, transatlantic, antitrust, Global, illegal agreement, give rise, investigations, quotation, flights, direct evidence, factual context, implemented, increases

Counsel: **[**1]** For Eugene M. LaFlamme, individually and on behalf of all others similarly situated, Plaintiff: Kent Andrew Bronson, LEAD ATTORNEY, Milberg Weiss Bershad & Schulman LLP, New York, NY; Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, New York, NY; Peter G.A. Safirstein, LEAD ATTORNEY, Milberg Weiss & Bershad LLP, New York, NY; William Beecher Scoville, Jr., LEAD ATTORNEY, Milberg LLP, New York, NY.

For World Wide Tours of Mission Valley, Inc., Plaintiff: Paul F. Novak, LEAD ATTORNEY, PRO HAC VICE, Milberg LLP, New York, NY; Peter G.A. Safirstein, LEAD ATTORNEY, Milberg Weiss & Bershad LLP, New York, NY; William Beecher Scoville, Jr., LEAD ATTORNEY, Milberg LLP, New York, NY; Ralph B. Kalfayan, Krause Kalfayan Benink & Slavens, LLP, San Diego, CA.

For Deutsche Lufthansa AG, Defendant: Eric Mahr, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr, Washington, DC; Rachel Z. Stutz, PRO HAC VICE, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For United Air Lines, Inc., Defendant: John Roberti, LEAD ATTORNEY, Jennifer Marie Driscoll, Mayer, Brown LLP, Washington, DC.

For American Airlines, Inc., Defendant: Dotan Weinman, Weil, LEAD ATTORNEY, Gotshal & Manges, New York, **[**2]** NY; Martin C. Geagan, Steven Alan Reiss, LEAD ATTORNEYS, Weil, Gotshal & Manges, LLP, New York, NY.

For Societe Air France, Defendant: James R. Warnot, Linklaters LLP, New York, NY; Ruth E. Harlow, Linklaters, New York, NY.

For Koninklijke Luchtvaart Maatschappij N.V., Defendant: Gary A. MacDonald, LEAD ATTORNEY, Jeff J. VanHooreweghe, PRO HAC VICE, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC; John M. Nannes, Skadden, Arps, Slate, Meagher, & Flom LLP, Washington, DC.

Judges: KIYO A. MATSUMOTO, United States District Judge.

Opinion by: KIYO A. MATSUMOTO

Opinion

[*139] **MEMORANDUM & ORDER**

MATSUMOTO, United States District Judge:

In their Second Amended Complaint ("Complaint"), plaintiffs Eugene M. LaFlamme and World Wide Tours of Mission Valley, Inc. (collectively, "plaintiffs"), individually and on behalf of all others similarly situated, allege that Societe Air France ("Air France"), Koninklijke Luchtvaart Maatschappij N.V. ("KLM"), Deutsche Lufthansa AG ("Lufthansa"), and United Air Lines, Inc. ("United"), all international air carriers (collectively, "defendants"), [1] of conspiring to fix prices for air passenger fares and passenger fuel surcharges [2] on transatlantic flights between the United States, Germany, **[**3]** and various other transatlantic destinations within the European Union, during the period between August 2004 and June 2006 in violation of the Sherman Antitrust Act ("Sherman Act"), *15 U.S.C. § 1* ("*Section 1*"). Through their Complaint, plaintiffs plead a single count of Sherman Act Section 1 liability against all defendants and claim that because of defendants' unlawful conduct, plaintiffs and other members of a putative class paid artificially inflated fares and surcharges for transatlantic flights and are therefore entitled to, *inter alia*, injunctive relief and treble damages. All defendants move to dismiss the Complaint for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)* ("*Rule 12(b)(6)*"), and alternatively to dismiss certain claims for lack of subject matter jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(1)* ("*Rule 12(b)(1)*"). [3] Additionally, United moves separately to dismiss the claims against it on the grounds that the Complaint asserts a claim that was discharged by United's 2006 emergence from bankruptcy. [4]

For the reasons that follow, defendants' *Rule 12(b)(6)* motions are granted and this **[*140]** case is dismissed because plaintiffs' Complaint fails to state a claim. The court thus finds it unnecessary to address either defendants' alternative motion to dismiss under *Rule 12(b)(1)* or United's alternative motion to dismiss based on its bankruptcy.

BACKGROUND

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[1] Although the Second Amended Complaint also originally named American Airlines ("American") as a defendant, American is no **[**4]** longer a party to this action pursuant to a Stipulated Order of Voluntary Dismissal Without Prejudice dated February 17, 2009. (See Doc. No. 48.)

[2] The Complaint defines surcharges as "fees charged to passengers by airlines purportedly to compensate the airlines for increased fuel and other costs." (Doc. No. 17, Second Amended Complaint ("Compl.") P 1.)

[3] The parties have submitted the following briefs in connection with all defendants' motions to dismiss: Doc. No. 57, Memorandum of Law in Support of Defendants' Motion to Dismiss the Second Amended Complaint ("Defs. Mem."); Doc. No. 58, Declaration of Ruth E. Harlow in Support of Defendants' Motion to Dismiss the Second Amended Complaint ("Harlow Decl."); Doc. No. 64, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint ("Pls. Mem."); Doc. No. 63, Declaration of William B. Scoville, Jr. in Opposition to Defendants' Motion to Dismiss the Second Amended Complaint ("Scoville Decl."); Doc. No. 59, Reply Memorandum of Law in Support of Defendants' Motion to Dismiss the Second Amended Complaint ("Defs. Reply Mem."); Doc. No. 73, Plaintiff's Letter dated 2/4/10 ("Pls. 2/4/10 Ltr."); and Doc. **[**5]** No. 74, Defendants' Letter dated 2/8/10 ("Defs. 2/8/10 Ltr.").

[4] The parties have submitted the following briefs in connection with United's alternative motion to dismiss: Doc. No. 52, Brief of Defendant United Air Lines, Inc. in Support of Motion to Dismiss the Second Amended Complaint; Doc. No. 65, Plaintiff's Memorandum of Law in Opposition to Defendant United Air Lines, Inc.'s Motion to Dismiss the Second Amended Complaint; Doc. No. 56, Defendant United Air Lines' Reply Memorandum of Law in Support of Motion to Dismiss the Second Amended Complaint.

A court considering a motion to dismiss pursuant to Rule 12(b)(6) must accept all factual allegations of a complaint as true, but need not give any effect to legal conclusions couched as factual allegations. Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010). The well-pleaded factual **[**6]** allegations of the Complaint are as follows.

According to the Complaint, plaintiffs represent a putative class numbering "at least in the hundreds-of-thousands," consisting of "all persons and entities . . . who purchased [p]assenger [a]ir [t]ransportation and paid passenger surcharges that included at least one direct flight segment between the United States, Germany, and other transatlantic European Union destinations directly from Defendants" in the period between August 2004 and June 2006 (the "class period"). (Compl. PP 23, 24.) Both named plaintiffs, Eugene M. LaFlamme, a Wisconsin resident, and World Wide Tours of Mission Valley, Inc., a travel agency incorporated and doing business in California, claim to have purchased air passenger fares directly from one or more defendants and paid the related surcharges on airfare between the United States and certain transatlantic destinations during the class period. (Id. PP 10-11.)

Defendants are international airline carriers. (Id. PP 12-16.) Each defendant is also a member of the International Air Transport Association ("IATA"), a trade organization that includes most of the world's international airlines and which was "established to **[**7]** enable members to discuss and agree upon international rates and fares for scheduled cargo and passenger transportation services." (See id. P 32; see also Scoville Decl. Ex. 8 (DOT Order 2006-7-3) at 1, 3.) [5] Defendants are also each members of various Global Alliances with other domestic and foreign airlines. (Compl. PP 42-48.)

A. Immunized IATA and Global Alliance Activity

As part of its mission to coordinate international airline service, the IATA conducts tariff conferences where competing airline members discuss the passenger fares and surcharges they wish to charge for international markets and establish proposed fares and rates by passing resolutions. (Compl. PP 32-34; Scoville Decl. Ex. 8 at 1, 3.) During the putative class period, IATA and its member airlines received **[*141]** limited U.S. antitrust immunity from the United States Department of Transportation ("DOT") to conduct tariff conferences. (Compl. PP 33, 37, 43; Scoville. Decl. Ex. 8 at 1.) The various Global Alliances to which defendants belong also received limited antitrust immunity from DOT. (Compl. PP 42-48.) The limited immunity for both IATA tariff conferences and the airlines' Global Alliances applied under **[**9]** certain conditions. (See id. PP 33, 37, 44.)

Among other things, in order to maintain the tariff conference antitrust immunity, the IATA or the member airlines were required to submit all tariff conference resolutions and other agreements to DOT for approval and to withhold implementation of any such resolution or agreement until DOT approval was granted. (Id. P 37; Scoville Decl. Ex. 8 at 15.) However, by order dated March 30, 2007 and effective June 30, 2007, DOT prospectively terminated this limited antitrust immunity for fare coordination on transatlantic routes without altering the immunity existing prior to the effective date. (See Harlow Decl. Ex. B (DOT Order 2007-3-23) at 2-3; see also Compl. P 44 (citing DOT Order 2007-3-23).) Additionally, to preserve both IATA and Global Alliance antitrust immunity, the airline carriers were required to refrain from participating in IATA tariff conference discussions involving routes between the United States and the home countries of their Global Alliance partner airlines. (Compl. PP 33, 43-44.)

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[5] In accordance with the well-settled law of this Circuit, along with the Complaint, in deciding this Rule 12(b)(6) motion to dismiss, the court will consider those documents submitted by the parties which are matters of public record or which are deemed included in the Complaint. See *Pani, M.D. v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998)* (noting that it is "well-established" that a court may rely on matters of public record in deciding a Rule 12(b)(6) motion to dismiss); see also *Sira v. Artuz, 380 F.3d 57, 67 (2d Cir. 2004)* (noting that a court deciding a motion to dismiss under Rule 12(b)(6) may consider all documents included in the complaint whether by attachment as an exhibit, through incorporation by reference, or because the documents are "integral" to the pleading) (internal citations omitted). However, as discussed further *infra*, **[**8]** note 18, the court declines to consider those documents submitted by plaintiffs to support allegations first raised in their motion papers and found nowhere in the Complaint. See, e.g., *Wright v. Ernst & Young LLP, 152 F.3d 169, 178 (2d Cir. 1998)* (noting a party is not entitled to amend pleadings through statements made in motion papers).

B. Alleged Agreement Regarding Resolution 001w and Surcharge Adjustments

Plaintiffs allege that defendants and others unlawfully conspired in July **[**10]** 2003 to fix fuel surcharges on transatlantic air passenger flights by agreeing, without DOT approval, to implement an IATA resolution known as "Resolution 001w." [6] (Id. PP 70, 88.) According to the Complaint, Resolution 001w was introduced in July 2003 at an IATA tariff conference in Geneva, Switzerland ("July 2003 IATA Tariff Conference"), and had an intended effective date of April 2004. (Compl. PP 58, 62, 63.) Resolution 001w proposed an air passenger surcharge facility that would include "fuel insurance and security applied by components to be prorated by all participating air carriers." (Id. PP 58, 60, 62.)

According to its publicly filed DOT Application, Resolution 001w was designed not as a "limitation" on airlines, but as a means to facilitate "the application of interline fares worldwide [by] applying surcharges that have been adopted by individual airlines." (See Harlow Decl. Ex. E (2003 IATA Application, Docket **[**11]** OST-2003-_) ("DOT Resolution 001w Application").) Specifically, the terms of Resolution 001w: (i) proposed a procedure by which carriers could make a filing with IATA to change existing surcharges or introduce new surcharges; (ii) identified the required contents for such a proposed filing; (iii) permitted proposed surcharges in the form of "a percentage of the fare, tiered, capped or flat rate"; and (iv) placed the onus on the filing carrier to obtain any necessary government approvals. (See id.)

At the July 2003 IATA Tariff Conference, Resolution 001w was adopted by the IATA pending government approvals and later submitted to DOT for approval of antitrust immunity. (Id. PP 58, 62, 67; see also DOT Resolution 001w Application.) Defendants Air France, KLM and Lufthansa voted in principle to support Resolution 001w. (Compl. P 64.) United expressed opposition to Resolution 001w on **[*142]** grounds that it was concerned the resolution would not be able to obtain DOT approval and would not fulfill carrier needs, but it ultimately indicated that it would abstain from voting on the Resolution. (Id. P 65.) The request for DOT approval of Resolution 001w was withdrawn in 2007 prior to any DOT determination **[**12]** on the issue. (Id. PP 67-71.)

The Complaint alleges that despite the lack of DOT approval, "[i]t appears that Defendants and others decided to adopt the terms of Resolution 001w during May and August 2004." [7] (Id. P 70.) The Complaint does not contain any specific allegations about which defendants or which other parties "decided" to adopt the terms of Resolution 001w absent DOT approval, or when, where, how, or whether this decision was collectively agreed to. [8] (See id.)

The Complaint then alleges that IATA convened another tariff conference on May 28, 2004 ("May 2004 IATA Tariff Conference"), and at that meeting "additional proposals to adopt coordinate and/or adjust air passenger surcharges on a worldwide basis . . . were discussed." (Id. P 75.) According to the Complaint, during that discussion various IATA members, including defendants Lufthansa and United, asserted conflicting views regarding the amounts and

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[6] The court notes that while plaintiffs allege a conspiracy involving both passenger fares and surcharges (Compl. P 1), the sole agreement alleged in the Complaint involved Resolution 001w, which plaintiffs allege concerned only fuel surcharges (Compl. PP 60, 62, 70).

[7] In what appears to be an alternative argument, in their motion papers, but not in their Complaint, plaintiffs also contend that apparently aside from agreeing to implement Resolution 001w without DOT approval as alleged in the Complaint, (P 70), defendants used the IATA discussions of Resolution 001w as a "pretextual device for a much deeper level of pricing discussions and agreements that were never submitted to the DOT, never received governmental approval, and never received DOT antitrust immunization." (See Pls. Mem. at 21.) Plaintiffs do not allege what specific agreement, if any, resulted from such "discussions" or whether such agreement, if one existed, was ever implemented.

[8] The Complaint later alleges that **[**13]** the defendants went forward with charging uniform surcharges even without DOT approval "as previously agreed upon" during the July 2003 IATA Tariff Conference, apparently in reference to the adoption of Resolution 001w. (See Compl. PP 70, 72.) Although plaintiffs allege that "it appears that [d]efendants . . . decided to adopt the terms of Resolution 001w during May and August 2004 absent DOT approval," (Compl. P 70), plaintiffs do not allege that the defendants actually agreed to do so at the July 2003 Tariff Conference or at any later date.

methods of deriving proposed air passenger surcharges. (Id.) Although illustrating the *disagreement* between the various IATA members about possible passenger fuel surcharge adjustments, the Complaint does **[**14]** not allege that the IATA members or defendants reached any agreement on the issue at the May 28, 2004 tariff conference. [9] (Id.)

The Complaint later refers to the defendants' implementation of "planned" adjustments to transatlantic passenger surcharges without identifying when, where, and by whom such adjustments were "planned." (Id. P 80.) Presumably, the Complaint intends to imply that the adjustments were "planned" at the May 2004 IATA Tariff Conference. (See id.; see also Pls. Mem. at 7-8.)

Finally, the Complaint alleges that "[c]ertain IATA carrier members also appear to have agreed to cancel passenger surcharges if the market price for oil dropped below a collar for a fixed amount of time." (Compl. P 81.)

C. Subsequent Alleged Parallel Conduct and Alleged Further Discussion

The Complaint alleges that despite the absence of DOT approval for Resolution **[*143]** 001w, in May 2004, shortly after the Resolution's proposed effective date, Air France, KLM, United, and other non-parties began to implement fuel surcharges or surcharge adjustments. (Id. P 73.) **[**15]** Specifically, the Complaint alleges that on May 16, 2004, Air France implemented a surcharge of 3 Euros ($ 3.56); and on May 18, 2004, KLM implemented a surcharge of 5 Euros ($ 6.01); while on May 27, 2004, United increased its existing surcharge by upwards of $ 10 U.S. (Id.; see also Defs. Mem. at 5.) [10] The Complaint also alleges that sometime after May 28, 2004, American and other members of the OneWorld Alliance re-introduced passenger fuel surcharges in unspecified amounts. (Compl. P 77.)

Additionally, the Complaint alleges that non-parties British Airways and Virgin Atlantic, as well as certain defendants made "planned adjustments" to transatlantic passenger surcharges in August and September 2004. (See id. P 80.) Specifically, the Complaint alleges that in August and September 2004, defendants and other non-parties such as TAP Air, Czech Air CSA, and Olympic Air **[**16]** adopted or adjusted passenger surcharges in varying amounts ranging from 5 to 15 Euros ($ 6.09 to $ 18.21 USD). [11] (Id. PP 73, 80; see also Defs. Mem. at 5.)

Additionally, the Complaint alleges that other co-conspirators, who are not parties to this action, also implemented surcharges and adjustments of varying amounts during the period between May 13 and September 4, 2004. (Compl. PP 73, 80.) The Complaint contains no allegations that defendants or others implemented any fuel surcharge facility or that the surcharges imposed by defendants adhered to any sort of fuel index. [12] (See generally Compl.)

The Complaint alleges that in May 2004, a single airline, United, implemented **[**17]** fare increases for long-haul passenger fares and blamed higher jet fuel costs for the increases. (Id. P 74.) Additionally, citing media reports dated June 7, 2004, the Complaint alleges that following the May 28, 2004 IATA tariff conference Lufthansa

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[9] However, plaintiffs' motion papers characterize these discussions as a "meeting of the minds" regarding surcharge amounts. (Pls. Mem. at 8.)

[10] The allegations in the Complaint refer to various currencies. For ease of comparison, the court cites both the Complaint's figures as well as defendants' calculations of those figures in equivalent United States dollars at the relevant time (Defs. Mem. at 5) which are undisputed by plaintiffs (see generally Pls. Mem.).

[11] Plaintiffs have not disputed defendants' calculation that at the relevant time, 5-15 Euros was equivalent to $ 6.09 - $ 18.21 USD. (See Compl. PP 73, 80; see also Defs. Mem. at 5.)

[12] However, plaintiffs' motion papers make allegations, again not contained in the Complaint, asserting that at a July 2005 IATA Tariff Conference, "air carriers agreed to resume distribution of an 'index for fuel prices'" without alleging the actual existence or use of such an index. (Pls. Mem. at 8-9 (citing Scoville Decl. Ex. 5), 12.).

announced a 3% upward adjustment of fares as of July 1, 2004 along with two other unidentified airlines announcing adjustments between 3-7%. (Id. P 77.)

Finally, the Complaint alleges that defendants Air France, KLM and Lufthansa reduced their passenger surcharges in unspecified amounts during the fourth quarter of 2006 when fuel prices had fallen for thirty consecutive days from the $ 75 per barrel mark. (Id. P 82.)

D. Evidence of Other Allegedly Anticompetitive Conduct

The Complaint also contains allegations of other allegedly anticompetitive conduct by certain defendants and other non-parties to this action, including allegations that certain defendants and others are or **[*144]** were under investigation by various U.S. and foreign bodies in connection with possible antitrust violations.

1. Alleged Anticompetitive Conduct Related to Global Alliances

The Complaint claims that at unspecified times during the class period, defendants participated in **[**18]** IATA discussions for fares and surcharges on routes between the U.S. and the home countries of Global Alliance partner airlines in violation of their limited DOT antitrust immunity. (Id. PP 44-45.)

2. Air Cargo Surcharges

Although not at issue in the instant action, the Complaint discusses at some length IATA members' past alleged attempts to adopt a fuel surcharge pricing index for air cargo rates through enactment of IATA "Resolution 116ss." (Id. PP 49-57.) Resolution 116ss proposed the use of a standardized fuel index to aid in the implementation and adjustment of fuel surcharges on air cargo rates, and was submitted to DOT for antitrust immunity approval. (Id. PP 49, 56; see also Pls. Mem. at 3.) However, the Complaint alleges that prior to a DOT determination on immunity for Resolution 116ss, a fuel index was provided to IATA members at a tariff conference in February 2000, and that in the early part of that year "certain air carriers went forward with their agreement to adopt air cargo surcharges." (Compl. PP 50, 51, 54.) The Complaint further alleges that "many of the same air carriers that adopted air cargo surcharges" have pled guilty to charges brought by the United States **[**19]** Department of Justice ("DOJ") that they conspired to fix prices on air cargo services and surcharges in violation of the Sherman Act. (Id. PP 54-55.)

Additionally, the Complaint alleges that after DOT denied immunity for Resolution 116ss, certain "IATA air carrier members discussed methods to get around" that denial. (Id. PP 56, 57.) Plaintiffs also claim that during the early part of 2000, defendants participated in concurrent discussions at IATA meetings regarding both air cargo and passenger surcharges. (Id. P 54.) Finally, the Complaint notes that in May 2000, David Short, an individual involved in IATA's Legal Department, allegedly advised IATA air carrier members that they must avoid the appearance of "conscious parallelism" in connection with air cargo surcharges. (Id. P 57.)

3. Other Antitrust Investigations

The Complaint notes that in June 2006, United received a subpoena from DOJ requesting information related to pricing of air passenger fares and surcharges on international routes. (Id. PP 16, 89.) Similarly, in May 2007, the United States Federal Bureau of Investigation served subpoenas on various airlines (notably the Complaint does not specify any defendant) at a May 2007 **[**20]** IATA meeting and interviewed various unidentified airline managers. (Id. P 90.)

Further, the Complaint alleges in August 2007, the DOJ charged IATA members Korean Airlines and British Airways with violations of the Sherman Act, and the two airlines each pleaded guilty to conspiring with rivals to fix passenger fares and surcharges during what appeared to be, according to the Complaint, the same August 2004 timeframe when many IATA members adjusted or adopted passenger surcharges. (Id. P 91.) Notably, public records identified by defendants make clear that the guilty plea by Korean Airlines [13] solely involved flights between **[*145]** the United States and Korea, and the guilty plea by British Airways [14] involved flights between the United States and the United Kingdom and its collusion with a single "co-conspirator" elsewhere identified [15] as Virgin Atlantic Airways.

The Complaint also references investigations and charges involving defendants and others carried out by other global antitrust authorities. For example, the Complaint alleges that the European Commission investigated defendants Lufthansa, Air France and KLM in March 2008 in connection with price fixing on routes between Europe and Japan. (Id. P 92.) Similarly, the Complaint alleges that in April 2008 Brazilian antitrust authorities charged United with violations of Brazilian law relating to air cargo surcharges. (Id. P 93.)

DISCUSSION

I. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint based on allegations which fail "to state a claim upon which relief can be granted." When attacked on a *Rule 12(b)(6)* motion to dismiss, "[o]nly a complaint that states a *plausible* claim for relief survives . . . ." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* (emphasis added). The Supreme Court and Second Circuit have provided guidance about the general contours of a "plausible claim for relief" at the pleading stage and the appropriate standards **[**22]** for determining whether such a claim has been sufficiently stated in the context of a Sherman Act antitrust claim. See, e.g., id.; see also *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Starr, 592 F.3d 314*. [16]

A. Legal Standard

1. Pleading [23] Standards Generally**

Pursuant to *Federal Rule of Civil Procedure 8(a)(2)*, a pleading must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief[.]" While *Rule 8*'s requirement of a "short and plain statement" obviates the need for detailed factual allegations at the pleading stage, "[t]o survive a motion to dismiss, a

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[13] See Plea Agreement, P 4(b)(ii), United States v. Korean Air Lines Co., Ltd., Crim No. 07-184 (JDB) (D.D.C. Aug. 1, 2007) available at *http://www.usdoj.gov/atr/cases/f225500/225524.htm*.

[14] See Plea Agreement, P 4(b)(ii), United States v. British Airways PLC, Crim No. 07-183 (JDB) (D.D.C. Aug. 23, 2007) available at *http://www.usdoj.gov/atr/cases/f225500/225523.htm*.

[15] See **[**21]** Press Release, DOJ, at 2 (Aug. 1, 2007), available at *http://www.usdoj.gov/opa/pr/2007/August/07_at_569.html*.

[16] The court notes that the briefs of counsel on the present motion, filed in March 2009, cite and discuss *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929*, but do not discuss *Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868*, which was decided in May 2009. However, neither party requested leave of the court to discuss Iqbal in a supplemental brief, nor did the court request additional briefing. However, the court notes that although Iqbal further clarified the principles enunciated in Twombly and that those principles apply to "all civil actions," as opposed to antitrust actions, *Iqbal* did not alter or add any new concept to the Twombly principles. See *129 S. Ct. at 1953* (internal quotation and citation omitted). Both parties, however, submitted letter briefs construing the Second Circuit's recent holding in *Starr, 592 F.3d 314*, as further support for their respective positions. (See Pls. 2/4/10 Ltr.; Defs. 2/8/10 Ltr.) This opinion considers all three decisions in light of the record before the court.

complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 570*).

The facial plausibility standard is met when "the plaintiff pleads factual content **[*146]** that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949*. Such factual content must consist of more than mere labels, legal conclusions, or a "formulaic recitation of the elements of a cause of action." See *id. at 1949-50* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (internal citations omitted). This does not require a showing of a "probability" of misconduct, but it does demand more than "a sheer possibility **[**24]** that a defendant has acted unlawfully." See *id. at 1949*.

Indeed, a well-pleaded complaint may survive a motion to dismiss even where "it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly, 550 U.S. at 556* (citations and internal quotation omitted). However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," dismissal is appropriate. *Starr, 592 F.3d at 321* (quoting *Iqbal, 129 S. Ct. at 1950*); see also *Twombly, 550 U.S. at 570* ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

Assessing whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 129 S. Ct. at 1950*. In conducting such an assessment on a *Rule 12(b)(6)* motion to dismiss, it is well-settled that a court must "assume [the] veracity" of all well-pleaded factual allegations contained in the complaint, id., *129 S. Ct. at 1950*, and afford the plaintiff every reasonable inference, see *Zinermon v. Burch, 494 U.S. 113, 118, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)*. **[**25]** However, allegations amounting to no more than bare legal conclusions are "not entitled to the assumption of truth." *Iqbal, 129 S. Ct. at 1950*.

2. Pleading Standards for Sherman Act § 1 Claims

The Supreme Court in Twombly discussed the application of these general principles to a Sherman Act Section 1 claim. See *Twombly, 550 U.S. at 556*. *Section 1 of the Sherman Act* proscribes "every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." *15 U.S.C. § 1*. Because *Section 1 of the Sherman Act* does not prohibit all restraints of trade, but rather only *agreements* to restrain trade, "[t]he crucial question in a Section 1 case is therefore whether the challenged conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Starr, 592 F.3d at 321* (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*.

Thus, in order to state a viable Section 1 claim, a complaint must provide "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly, 550 U.S. at 556*. A plausible suggestion of agreement can be derived from specific allegations of actual agreement among defendants. See *id. at 565 n.10*. **[**26]** Additionally, a plausible suggestion of agreement may be derived from allegations of parallel conduct. See *id. at 564-65*. However, as the Supreme Court noted, alone, "lawful parallel conduct fails to bespeak unlawful agreement . . . [and] an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified **[*147]** point does not supply facts adequate to show illegality." *Twombly, 550 U.S. at 556-57*. Accordingly, to survive a motion to dismiss, a Sherman Act Section 1 complaint must contain "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id. at 556*.

B. Application

Plaintiffs principally contend that their Complaint gives rise to a plausible inference of illegal agreement in three ways: (1) allegations of actual agreements made at antitrust-immunized IATA meetings; (2) allegations of parallel conduct; and (3) evidence suggesting other anticompetitive conduct by defendants and others in the United States and abroad. Under any of these methods, plaintiffs' allegations fail to plausibly suggest an agreement, **[**27]** and are therefore insufficient to state a claim under *Section 1 of the Sherman Act*.

1. Conclusory Allegations of Agreement at Antitrust-Immunized IATA Meetings

Plaintiffs contend that the Complaint contains direct evidence of conspiracy. (Pls. Mem. at 1-2, 16-18.) Specifically, plaintiffs contend that the allegations of "joint discussion" of surcharges under the guise of Resolution 001w at the July 2003 IATA Tariff Conference and the subsequent alleged implementation of Resolution 001w by defendants and others comprise enough direct evidence to state a plausible claim for relief. [17] (See Pls. Mem. at 18; see also Compl. P 70 ("It appears that [d]efendants and others decided to adopt the terms of Resolution 001w during May and August 2004 absent U.S. DOT approval.") and P 72 ("Defendants went forward without U.S. DOT approval and began to uniformly charge passenger surcharges as previously agreed upon during the July 2003 IATA meeting in Geneva.").) The court disagrees.

At the outset, the court notes that plaintiffs are incorrect in their contention that the Twombly plausibility standard does not apply to their allegations of direct evidence of conspiracy (Pls. Mem. at 2, 16). See *Iqbal, 129 S. Ct. at 1953* ("Twombly expounded the pleading standard for 'all civil actions'") (quoting *Twombly, 550 U.S. at 555-56* and n.3). Rather, the allegations that the meetings and discussions which took place at the July 2003 Tariff Conference constitute direct evidence of a price-fixing agreement must meet the standard of "facial plausibility" set forth in Twombly. See *Twombly, 550 U.S. at 570*. **[**29]** Plaintiffs' allegations fail to do so for three reasons.

First, plaintiffs' purported "direct evidence" of agreement is based on a bald, conclusory allegation that "it appears that [d]efendants and others decided to adopt the terms of Resolution 001w during May and August 2004 absent U.S. DOT approval." (Compl. P 70.) Indeed, plaintiffs fail to allege any specific facts providing any basis to infer an actual unlawful agreement by defendants to implement **[*148]** Resolution 001w without DOT approval. (See Compl. PP 70, 72.) Such conclusory allegations are not entitled to the presumption of truth by a reviewing court deciding a *Rule 12(b)(6)* motion to dismiss. [18] See *Iqbal, 129 S. Ct. at 1951* ("the conclusory nature of respondent's allegations . . . disentitles them to the presumption of truth"). Moreover, such allegations fail to identify any specifics regarding the claimed illegal agreement as Twombly contemplates. See *Starr, 592 F.3d at 325* (noting in dicta that allegations in a Sherman Act § 1 complaint based on direct evidence of agreement would likely require references to "'specific time, place, or person involved in the alleged conspiracies'") (quoting *Twombly, 550 U.S. at 565 n.10*).

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[17] Plaintiffs also allege that a 3% fare increase announced by a single defendant allegedly "in line with IATA adjustments" is "direct evidence" of conspiracy. (Compl. P 77; see also Pls. Mem. at 8 ("A few days after discussing **[**28]** the 3% increase with the other Defendants . . . Lufthansa announced that it would implement the 3% increase 'in response to the oil price increase and to the latest recommendation by the [IATA].").) The Complaint does not allege whether or when any 3% fare increase was implemented, if ever, either by any defendant or any other party. Because a conspiracy necessarily involves more than a single participant, and because the Complaint fails to articulate how the isolated announcement of a sole defendant can constitute direct evidence of conspiracy, the court declines to further consider this argument.

[18] The **[**30]** Complaint itself contains only one allegation of direct evidence of illegal agreement. (See Compl. P 88 ("But for [d]efendants' anti-competitive conduct . . . [d]efendants would have been unable to implement the July 2003 agreement and increase and sustain the prices of their fares and passenger surcharges.").) Yet plaintiffs' motion papers attempt to characterize the discussions at the May 2004 IATA Tariff conference as a "meeting of the minds" regarding the imposition of surcharge adjustments. (Compare Compl. P 75-77 and Pls. Mem. at 8.) Thus, it appears that plaintiffs' motion papers may also intend to offer the May 2004 IATA Tariff Conference discussion of fuel surcharges as additional direct evidence of conspiracy. However, the court disregards these allegations which are first raised in plaintiffs' motion papers because it is well-settled that a claim for relief may not be amended by the briefs in opposition to a motion to dismiss. See, e.g., *Wright, 152 F.3d at 178*. Similarly, the court cannot consider plaintiffs' conclusory arguments regarding the alleged agreement to circulate a passenger fuel surcharge price index which is first raised in their briefs and nowhere discussed **[**31]** in the Complaint. (Compare Compl. and Pls. Mem. at 8-9, 12, 21-22.) Regardless, even had such allegations been included in the Complaint, they would still be insufficient to state a plausible claim for relief, as discussed fully *infra*.

Second, to the extent plaintiffs suggest that defendants did not actually agree to implement Resolution 001w absent DOT approval but instead used discussions surrounding Resolution 001w as an "avenue" to conspire to fix fuel surcharge prices, their bald argument fails to give rise to a plausible inference of conspiracy. The court notes as an initial matter that membership and participation in a trade association alone does not give rise to a plausible inference of illegal agreement. See, e.g., *Twombly, 550 U.S. at 567 n.12* (rejecting inference of conspiracy based upon mere participation in an industry trade association); *In re Elevator Antitrust Litig., No. 04-CV-1178 (TPG), 2006 U.S. Dist. LEXIS 34517, at *30-31 (S.D.N.Y. May 30, 2006)* ("allegation that elevator company executives attend trade, industry, or social functions together is clearly insufficient to state a claim") aff'd *502 F.3d 47 (2d Cir. 2007)*.

Thus the critical issue here, and the crux **[**32]** of plaintiffs' Complaint, is the allegation that defendants violated their limited antitrust immunity by using the July 2003 IATA Tariff Conference to conspire secretly to implement Resolution 001w without DOT approval or as an avenue to conspire generally about surcharges. (Compl. PP 3, 49-88; see also Pls. Mem. at 16-18.) This necessarily raises an issue about the scope of the limited antitrust immunity afforded to defendants' IATA activities by DOT.

Plaintiffs contend that it would be improper to consider the scope of defendants' IATA immunity at the 12(b)(6) stage because the Second Circuit has held that qualified immunity defenses "cannot *ordinarily* support dismissal under *Fed. R. Civ. P. 12(b)(6)*." (Pls. Mem. at 14 (quoting **[*149]** *Liffiton v. Keuker, 850 F.2d 73, 76 (2d Cir. 1988))* (emphasis added)). Certainly, plaintiffs are correct that most immunities are affirmative defenses, and as such, not ordinarily considered at the pre-answer stage. See, e.g., *McKenna v. Wright, 386 F.3d 432, 435 (2d Cir. 2004)* (noting that qualified immunity is an affirmative defense "normally asserted in an answer" and observing that "'*usually*, the defense of qualified immunity cannot support the grant of **[**33]** a [Rule] 12(b)(6) motion'") (quoting *Green v. Maraio, 722 F.2d 1013, 1018 (2d Cir. 1983))* (emphasis in quoting authority); see also 2 *Moore's Federal Practice-Civil § 8.08[5]* (Mathew Bender 3d ed.) (noting that affirmative defenses "have been found to include common law immunity, statutory immunity, [and] exemption under a statute or regulation").

Nonetheless, plaintiffs' blanket assertion that defendants' immunity cannot properly be considered at the motion to dismiss stage is unsupported by the case law. Indeed, the Second Circuit has "broadly stated" that "an affirmative defense may be raised by a pre-answer motion to dismiss under *Rule 12(b)(6)*, without resort to summary judgment procedure, if the defense appears on the face of the complaint." *McKenna, 386 F.3d at 436* (internal citation and quotation omitted). Further, the Second Circuit has noted that it has allowed a qualified immunity defense to be "successfully asserted in a *Rule 12(b)(6)* motion on at least two occasions" where "the complaint itself established the circumstances required as a predicate to a finding of qualified immunity." *Id. at 435* (internal citation and quotation omitted). A plaintiff, however, is entitled **[**34]** to all reasonable inferences from the facts alleged that defeat the immunity defense. *Id. at 436*.

Here, the Complaint on its face asserts facts as to the immunized nature of defendants' discussion of fuel surcharges at the July 2003 IATA Tariff Conference. (See Compl. PP 33-34, 37, 67.) It is undisputed that during the relevant time period, defendants' attendance at and participation in the IATA trade association meetings enjoyed limited antitrust immunity under federal law so long as the defendants submitted any proposed resolutions and agreements to the DOT for approval and received approval prior to implementation. (See Compl. PP 33-34, 37; see also Pls. Mem. at 11 (" . . . Defendants' IATA participation immunity is predicated on the submission and approval of all agreements reached at IATA to the U.S. Department of Transportation prior to their implementation.").) It is also undisputed that here, the IATA and defendants followed that mandatory protocol when discussing and voting on Resolution 001w and then submitting it to DOT for approval prior to its contemplated implementation. (See Compl. P 67.) Thus, the Complaint itself recites defendants' adherence to the protocols which **[**35]** are the predicates to a finding of immunity, and the court concludes as a matter of law that defendants' *discussions* of fuel surcharges at the IATA tariff conferences prior to June 30, 2007 were immunized. (See generally U.S. DOT Order 2007-3-23 at 1-3, attached as Ex. B to Scoville Decl. (discussing exemption under United States antitrust laws for IATA tariff conferences occurring prior to June 30, 2007).)

Therefore, the allegations that defendants discussed fuel surcharges in connection with Resolution 001w at an IATA meeting do not plausibly suggest an illegal agreement because such immunized conduct cannot be the basis for antitrust liability. See *Pani, 152 F.3d at 74-75* (permitting immunity defense to be asserted on a *Rule 12(b)(6)* motion to dismiss because the facts supporting the defense "appeared on the face of the complaint"); see **[*150]** also *Green, 722 F.2d at 1018* (finding qualified immunity defense a proper basis for dismissal on *Rule 12(b)(6)* motion).

Third, even assuming that defendants secretly agreed at the July 2003 IATA Tariff Conference to implement Resolution 001w without DOT approval - a notion which is rendered even more implausible by the fact that the Complaint nowhere **[**36]** alleges that any actual facility was implemented - plaintiffs fail to make any allegations tending to show that such an agreement could constitute an illegal agreement to fix prices under the Sherman Act as alleged in the Complaint. Rather, as plaintiffs' Complaint makes clear, Resolution 001w was an "air passenger surcharge facility." (See Compl. P 60.) As such, Resolution 001w proposed a means for airlines on interline (multi-carrier) fares to prorate existing or future fuel surcharges implemented by individual airlines. (See DOT Resolution 001w Application (describing Resolution 001w as a means to "facilitate[] the application of interline fares worldwide applying surcharges that have been adopted by member airlines").) Indeed, IATA documents reveal that Resolution 001w did not set or adjust fuel surcharge rates or amounts, or even set a process for determining uniform surcharge amounts. (See id. (noting that Resolution 001w "is by no means a limitation on airlines").) Accordingly, even if defendants were sufficiently alleged to have agreed to implement Resolution 001w without DOT approval in violation of the defendants' limited antitrust immunity, plaintiffs have failed to allege **[**37]** facts establishing how such an agreement would constitute a price-fixing agreement in violation of *Section 1 of the Sherman Act*. [19]

In short, after sweeping away the conclusory allegations of conspiracy forbidden by *Twombley* and *Iqbal*, as well as the allegations involving defendants' immunized conduct, what remains of plaintiffs' direct evidence allegations is insufficient to state a plausible claim for conspiracy and survive a *Rule 12(b)(6)* motion to dismiss.

2. Allegations of Parallel Conduct

In the alternative, plaintiffs contend that the Complaint states a viable claim based upon allegations of parallel conduct supported by a factual context giving rise to an inference of illegal agreement to fix prices. (See Pls. Mem. at 18-22.) Twombly made clear that "[a]n allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief." *Twombly, 550 U.S. at 557* (internal quotation and citation omitted). Indeed, as the Court noted, "[a] statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further **[*151]** circumstance pointing toward a meeting **[**39]** of the minds, an account of a defendant's commercial efforts stays in neutral territory." Id.

Thus, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a *context* that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." Id. (emphasis added); see also *Starr, 592 F.3d at 328* (Newman, J. concurring) (noting that "[i]t is the context in which the defendants' parallel conduct occurred" which caused the "rejection of the complaint in Twombly"). Yet, despite the need to show some factual context supporting a plausible inference of conspiracy, at

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[19] Plaintiffs' analogy to *United States v. Columbia Pictures Indus., 507 F. Supp. 412 (S.D.N.Y. 1980)*, fails to correct this deficiency and show that implementation of Resolution 001w would be "an illegal price restraint" even if it "did not set specific prices." (See Pls. Mem. at 20-21.) The Columbia Pictures court found that defendants' agreement to use a "rather complex allocation formula" to value films they had contributed to a joint venture constituted an illegal price restraint under the Sherman Act. See *Columbia Pictures, 507 F. Supp. at 420* ("The movie companies have thus agreed on the price for their motion pictures, replacing the prices that would normally be set by the marketplace with a transaction between themselves and [the joint venture] that places a value on each film within a minimum and maximum range, and allocates revenues to the movie companies for their pictures by a formula."). Here, the Complaint does not allege the use of a common pricing formula, or any formula to set fuel surcharges. Therefore, *Columbia Pictures* is factually **[**38]** distinct and inapplicable to this case.

the motion to dismiss stage a plaintiff need not allege facts that fully exclude "independent self-interested conduct as an explanation for defendants' parallel behavior." See *Starr, 592 F.3d at 325*.

Rather, to allow an inference of conspiracy to arise from allegedly parallel conduct, Twombly contemplates a "factually suggestive" context involving some sort of anomalous behavior on the part of defendants. See *Twombly, 550 U.S. at 557 n.5* ("to enter the realm of plausible liability" an allegation of parallel conduct requires some factual **[**40]** enhancement that crosses it from "the factually neutral" to "the factually suggestive"). For example, the Twombly court catalogued various factual contexts which could create such an inference of conspiracy including: (i) "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties"; (ii) "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement"; and (iii) "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason" other than collusion. See *id. at 557 n.4* (internal citations and quotations omitted).

Here, it is dubious at the outset as to whether the conduct alleged in the Complaint can accurately be characterized as "parallel." (See Defs. Mem. at 15-17; Defs. Reply Mem. at 6-8.) Defendants contend that "when corrected for currency differences, the surcharges alleged in the Complaint are divergent (in some instances varying by a factor of three), not parallel and were not **[**41]** imposed in tandem, but in some instances weeks apart." (See Defs. Reply Mem. at 6-7 (citing Compl. PP 73-83).) Further, defendants note that contrary to plaintiffs' claims of "uniform" parallel behavior, in several instances plaintiffs plead disagreement among defendants, (see Compl. PP 73-86), action by only some defendants and no action by other defendants, (see id. PP 72-88, 81-82), or action by a solitary defendant, (see id. P 74). (See Defs. Mem. at 6-8.) Plaintiffs counter that "[a] finding of illegal price fixing . . . does not require a showing of perfectly synchronous conduct." (See Pls. Mem. at 20.)

The court agrees that illegal price fixing need not be exactly simultaneous and identical in order to give rise to an inference of agreement. See, e.g., *City of Moundridge v. Exxon Mobil Corp., No. 04-CV-940 (RWR), 2009 U.S. Dist. LEXIS 123954, at *20 (D.C. Cir. Sept. 30, 2009)* ("Price-fixing can occur even though the price increases are not identical in absolute or relative terms."); see also *In re Baby Food Antitrust Litig., 166 F.3d 112, 132 (3d Cir. 1999)* ("[P]arallel pricing does not require 'uniform prices,' and permits prices within an **[*152]** agreed upon range.") (quoting *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* **[**42]** ("Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible.")).

However, the court need not decide whether plaintiffs have sufficiently alleged parallel conduct, for even assuming, *arguendo*, that defendants' imposition of fare increases and surcharges was parallel, plaintiffs have failed to allege a factual context that supports an inference of conspiracy as required by Twombly. See id. *550 U.S. at 557*. Indeed, unlike the examples enumerated in *Twombly*, defendants' purportedly parallel behavior as alleged in the Complaint is not of the type that "would probably not result from . . . independent responses to common stimuli" nor does defendants' imposition of surcharges comprise "complex and historically unprecedented changes in pricing structures . . . made for no other discernible reason" than the presence of illegal agreement. See *Twombly, 550 U.S. at 557 n.4* (internal quotations and citations omitted).

Rather, as alleged in the Complaint itself, the factual context, and indeed defendants' actions therein, involved rapidly rising jet fuel prices - an obvious potential "stimuli" and "discernible reason" aside from collusion **[**43]** that plausibly could have instigated independent decisions by defendants to impose surcharges. (See Compl. PP 72, 74, 82.) Thus, the Complaint lacks the types of anomalous behavior identified by the Twombly court as strong indicia allowing an inference of conspiracy. See *Twombly, 550 U.S. at 557 n.4*; see also *In re Elevator Antitrust Litig., 502 F.3d at 51* (finding that allegations of parallel conduct including similarities in contractual language, pricing, and equipment design "do not constitute 'plausible grounds to infer an agreement' because, while that conduct is 'consistent with conspiracy, [it is] just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market'") (quoting *Twombly, 550 U.S. at 554*.)

For the same reasons the instant case is analogous to *Twombly* and *Elevator Antitrust Litigation* in failing to allege a factual context that plausibly gives rise to an inference of conspiracy, this action is different from *Starr, 592 F.3d 314*, in several crucial respects. In Starr, the Second Circuit reversed the dismissal of an antitrust case against major record labels finding that the "present complaint **[**44]** succeeds where Twombly's failed because the complaint alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants." *Starr, 592 F.3d at 323*. The Starr court first noted the array of non-conclusory allegations of defendants' parallel conduct including parallel pricing at unreasonably high levels, mandated customer adherence to unpopular Digital Rights Management ("DRMs") terms for music purchases through either joint ventures established by defendants or entities not controlled by defendants, failure to respond to dramatic cost reductions with price reductions as would be expected in a competitive market, enforcement of a wholesale price floor [20] through the use of Most Favored Nation ("MFN") clauses in **[*153]** their licenses, and a collective boycott against the number two internet music provider. *Id. at 318-19, 323*.

But "more importantly," the Starr court found that the complaint in that case succeeded because of allegations which, "taken together, place[d] the parallel conduct 'in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'" *Id. at 323* (quoting *Twombly, 550 U.S. at 557*). Specifically, the Starr court observed, *inter alia*, that the defendants' own conduct suggested the existence of a conspiracy because defendants attempted to conceal their MFNs in a "secret side letter" and also that the same alleged price-fixing conduct at issue in the complaint was the subject of investigations by the New York State Attorney General as well as the DOJ. *Starr, 592 F.3d at 324*. Further, the Starr court noted that some kind of illegal agreement could be inferred as the only rational explanation for defendants' adherence to such unreasonable prices and DRM conditions for customers that one industry commentator noted that "nobody in their right minds" would want to pay the fees and adhere to the DRM conditions in order to use the defendants' internet music services. Id. **[**46]** Moreover, the Starr court noted that defendants continued to charge unreasonably high prices despite substantial decreases in costs. Id. (citing Richard A. Posner, ***Antitrust Law*** 88 (2d ed. 2001) ("Simultaneous price increases . . . unexplained by any increases in cost may therefore be good evidence of the initiation of a price-fixing scheme.")). The factual allegations in Starr mirror the types of anomalous behavior also outlined in *Twombly, 550 U.S. at 557 n.4*, and are absent in the instant action.

Indeed, the facts here are plainly distinguishable. First, the questionable allegations of parallel conduct here do not match the brazen parallel pricing, price floors, lockstep price increases, and use of joint ventures linking each defendants' financial interest to all others, as found in Starr. See *Starr, 592 F.3d at 318-19, 323*. Additionally, and as defendants point out, rather than eliciting inferences from defendants' attempts to conceal their allegedly illicit activities behind the "thicket of 'secret' conspiracy-specific MFN agreements" as in Starr, plaintiffs here seek to draw inferences from defendants' open participation in regulated, recorded, antitrust-immunized trade association **[**47]** meetings such as the IATA tariff conferences. (See Defs. 2/8/10 Ltr.) Also, as discussed further below, unlike Starr, where defendants were simultaneously subject to multiple investigations for the very conduct at issue in the complaint, here the allegations regarding other investigations are generally inapposite.

Finally, and most importantly, unlike *Starr, 592 F.3d at 324*, or the examples provided in *Twombly, 550 U.S. at 557 n.4*, here plaintiffs' Complaint does not allege the type of anomalous actions giving rise to a strong inference of conspiracy because there could be no other "discernible reason" for such behavior. Rather, in the instant case plaintiffs themselves have alleged that defendants were "facing increased jet fuel costs" when they allegedly imposed surcharges, and that after fuel costs fell, some - but not all - defendants reduced their surcharges. (See Compl. PP 72, 74, 82.) This kind of independent and individualized rational response to common external stimuli does not suffice to create the factual context necessary to give rise to an inference of unlawful agreement. Cf. *Starr, 592 F.3d at 327* (given that "plaintiffs have alleged behavior that would plausibly contravene **[**48]** each defendant's self-interest 'in the absence of **[*154]** similar behavior by rivals'," rejecting defendants' argument that

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[20] The Starr court first noted that the allegation regarding defendants' adherence to a price floor was "obviously conclusory" (*Starr, 592 F.3d at 319 n.2*), but later listed defendants' use of MFNs to "enforce a wholesale price floor of about 70 cents per song" as an example of plaintiffs' "non-conclusory **[**45]** factual allegations of parallel conduct," (*id. at 323*).

agreement implausible on grounds that defendants' conduct "would be entirely consistent with independent, though parallel, action") (quoting 7 Areeda & Hovenkamp § 1415a (2d ed. 2003).

Thus, because plaintiffs' allegations of parallel conduct here are not "placed in a context that raises a suggestion of a preceding agreement, [but] merely [suggests] parallel conduct that could just as well be independent action," *Twombly, 550 U.S. at 557*, plaintiffs' allegations of parallel conduct fail to allege a plausible conspiracy claim under *Section 1* of the Sherman Act.

3. Allegations of Other Allegedly Anticompetitive Conduct

Finally, plaintiffs' host of allegations regarding other purportedly anticompetitive conduct by defendants and others are patently insufficient for several reasons.

First, the allegations regarding violations of the conditional immunities afforded to Global Alliance members, (Compl. PP 33, 44), even if true, would not give rise to a violation of *Section of the Sherman Act1* which is the basis of plaintiffs' Complaint. Second, plaintiffs' allegations regarding **[**49]** the air *cargo* surcharges at issue in Resolution 116ss occurred in August 1997, long before the class period here allegedly began in 2004, and plaintiffs fail to establish any probative connection between the air cargo surcharges in Resolution 116ss and the *passenger* fuel surcharges imposed during the class period at issue here. Similarly, the vague allegations regarding pending investigations based on interviews with unidentified individuals and a subpoena, (see Compl. PP 16, 89, 90), are not probative of the Sherman Act Section 1 violations alleged here because neither mere participation in an investigatory interview nor the receipt of a subpoena is necessarily probative of conspiracy. See, e.g., *In re Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1024 (N.D.Cal. 2007)* (investigation alone "carries no weight in pleading an antitrust conspiracy claim"). Third, public records reveal that the allegations involving actual guilty pleas referenced in the Complaint, (P 91), concerned unrelated markets (such as for flights between the United States and Korea) or only non-parties to this action (such as British Airways and Virgin Atlantic Airways).

Finally, none of the remaining **[**50]** allegations regarding antitrust investigations by various global authorities against defendants and other non-parties to this action even relate to the transatlantic passenger surcharges at issue in the Complaint. (See Compl. PP 92-93.) As such, there is no basis from which to infer that those localized investigations or proceedings involving other products (such as air cargo fares) implicate defendants in the conspiracy plaintiffs allege here with respect to passenger fares and surcharges in the transatlantic market alleged in the Complaint. See, e.g., *Elevator Antitrust Litig., 502 F.3d at 52* (rejecting conclusory "if it happened there, it could have happened here" logic based on allegations of anticompetitive wrongdoing in Europe absent any evidence of linkage between such foreign conduct and conduct here).

Thus, because the allegations in the Complaint, "however true," do not allow the court to infer any "more than the mere possibility of misconduct," dismissal here is required. See *Starr, 592 F.3d at 321* (quoting *Iqbal, 129 S. Ct. at 1950*); see also *Twombly, 550 U.S. at 570* (where plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint **[**51]** must be dismissed"). The court cannot sanction an enormously expensive and time-consuming **[*155]** discovery expedition involving "hundreds of thousands" of class members and flights on a mere possibility. See *Twombly, 550 U.S. at 558* (when, "however true," the allegations in a complaint "could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court") (internal quotation and citation omitted).

II. The Issue of Re-pleading

Plaintiffs have already twice amended the pleadings in this action. (See Doc. Nos. 1, Complaint; 6, Amended Complaint; Doc. No. 17, Second Amended Complaint.) After their third attempt to sufficiently plead a cause of action, plaintiffs have neither requested any further leave to re-plead nor suggested any additional facts that would merit an amended pleading. [21] Accordingly, this case is dismissed finally, with prejudice, and without leave to re-plead. See Horoshko v. Chase Manhattan Mortgage Co., 373 F.3d 248, 249 (2d Cir. 2004) (per curiam) (finding that absent any request for leave to amend and "'some indication as to what appellants might add to their complaint **[**52]** in order to make it viable,'" amendment is not warranted and the "District Court was under no obligation to provide [plaintiffs] with leave to amend their complaint, much less provide such leave *sua sponte*" and rejecting as "frivolous" claim that district court abused its discretion in not permitting an amendment that was never requested) (quoting *Nat'l Union of Hosp. & Health Care Employees v. Carey, 557 F.2d 278, 282 (2d Cir. 1977))*; see also *Trautenberg v. Paul, Weiss, Rifkind, Wharton, Garrison LLP, No. 08-2010-cv, 351 Fed. Appx. 472, 2009 U.S. App. LEXIS 22454, *4 (2d Cir. Oct. 13, 2009)* (finding that district court did not abuse its discretion by failing to grant plaintiff, *sua sponte*, leave to re-plead given that plaintiff did not move for leave to re-plead in opposition to defendant's motion to dismiss his original complaint with prejudice); *Anatian v. Coutts Bank (Switz.) Ltd., 193 F.3d 85, 89 (2d Cir. 1999)* ("we will not deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought") (internal quotation and citation omitted).

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss the Complaint is granted in its entirety and the action is dismissed without leave to re-plead. The Clerk of the Court is respectfully requested to enter judgment in favor of defendants and to close this case.

SO ORDERED.

Dated: April 5, 2010

Brooklyn, New York

/s/

KIYO A. MATSUMOTO

United States District Judge

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[21] Although, as noted *supra*, plaintiffs' motion papers raise certain allegations not contained in the Complaint, even **[**53]** if the Complaint were amended yet again to include such allegations, the Complaint would still fail to cure the deficiencies identified *supra* and state a plausible claim for relief sufficient to withstand defendants' motions to dismiss.

Compliance Mktg. v. Drugtest, Inc.

United States District Court for the District of Colorado

April 7, 2010, Decided; April 7, 2010, Filed

Civil Action No. 09-cv-01241-JLK

Reporter
2010 U.S. Dist. LEXIS 34315 *; 2011-1 Trade Cas. (CCH) P77,464; 2010 WL 1416795

COMPLIANCE MARKETING, INC.; COMPLIANCE SERVICES OF EAST TEXAS; CONNIE D. HAGEN, INC. D/B/A DATCS: DRUG & ALCOHOL TESTING COMPLIANCE SERVICES; DRUG TESTING, INC.; FLEETSCREEN, LTD.; KRISTINA CONSULTING GROUP, LLC; PANHANDLE EMPLOYERS SERVICES, INC; KIM JENON BALDWIN D/B/A ALLIANCE DRUG & ALCOHOL TESTING; AND PROFESSIONAL COMPLIANCE & TESTING, LLC, Plaintiffs, v. DRUGTEST, INC. D/B/A DISA INC.; DRUGTEST, INC. D/B/A DRUG INTERVENTION SERVICES OF AMERICA, INC.; BP PLC; CHS, INC.; CONOCOPHILlIPS COMPANY; MARATHON PETROLEUM COMPANY LLC; MARATHON OIL COMPANY; EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS US; TESORO COMPANIES, INC.; VALERO ENERGY CORPORATION; APACHE CORPORATION; ENCANA OIL & GAS (USA) INC.; ENCANA CORPORATION; AND SHELL EXPLORATION & PRODUCTION COMPANY, Defendants.

Core Terms

Plaintiffs', monopolize, relevant market, antitrust, Database, Energy, group boycott, Sherman Act, Defendants', competitors, tying arrangement, allegations, constitutes, commerce, anticompetitive conduct, monopoly power, courts, concerted action, rule of reason, products, tied product, interchangeability, conspiracy, Testing, claim for relief, anti trust law, tying product, Clayton Act, procompetitive, horizontal

Counsel: **[*1]** For Compliance Marketing, Inc., Panhandle Employers Services, Inc., Kristina Consulting Group, LLC, Fleetscreen, LTD, Drug Testing, Inc., Connie D. Hagen, Inc., doing business as DATCS: Drug & Alchohol Testing Compliance Services, Compliance Services of East Texas, Plaintiffs: Joseph Y. Ahmad, LEAD ATTORNEY, Ahmad, Zavitsanos & Anaipakos, P.C., Houston, TX; Laurence E. Stuart, LEAD ATTORNEY, Stuart & Associates P.C., Houston, TX; Dona Szak, Thomas Robert Ajamie, Ajamie LLP, Houston, TX; Frances A. Koncilja, Koncilja & Associates, P.C., Denver, CO.

For Roberta Marie Kern, doing business as Compliance Drug & Alcohol Testing Services, Plaintiff: Laurence E. Stuart, LEAD ATTORNEY, Stuart & Associates P.C., Houston, TX; Frances A. Koncilja, Koncilja & Associates, P.C., Denver, CO; Thomas Robert Ajamie, Ajamie LLP, Houston, TX.

For Kim Jenon Baldwin, doing business as Alliance Drug & Alcohol Testing, Plaintiff: Laurence E. Stuart, LEAD ATTORNEY, Stuart & Associates P.C., Houston, TX; Dona Szak, Thomas Robert Ajamie, Ajamie LLP, Houston, TX; Frances A. Koncilja, Koncilja & Associates, P.C., Denver, CO; Joseph Y. Ahmad, Ahmad, Zavitsanos & Anaipakos, P.C., Houston, TX.

For Professional Compliance **[*2]** & Testing, LLC, Plaintiff: Frances A. Koncilja, LEAD ATTORNEY, Koncilja & Associates, P.C., Denver, CO; Laurence E. Stuart, LEAD ATTORNEY, Stuart & Associates P.C., Houston, TX; Dona Szak, Thomas Robert Ajamie, Ajamie LLP, Houston, TX; Joseph Y. Ahmad, Ahmad, Zavitsanos & Anaipakos, P.C., Houston, TX.

For Drugtest, Inc., doing business as DISA, Inc., Defendant: Donald Bruce Hoffman, Ryan A. Shores, Hunton & Williams, LLP-DC, Washington, DC; Holly H. Williamson, Hunton & Williams, LLP-Houston, Houston, TX; James

Michael Lyons, Rothgerber Johnson & Lyons, LLP-Denver, Denver, CO; Michael L. Francisco, Rothgerber Johnson & Lyons, LLP-Colorado Springs, Colorado Springs, CO.

For Drugtest, Inc., doing business as Drug Intervention Services of America, Inc., Defendant: Michael L. Francisco, LEAD ATTORNEY, Rothgerber Johnson & Lyons, LLP-Colorado Springs, Colorado Springs, CO; Donald Bruce Hoffman, Ryan A. Shores, Hunton & Williams, LLP-DC, Washington, DC; Holly H. Williamson, Hunton & Williams, LLP-Houston, Houston, TX; James Michael Lyons, Rothgerber Johnson & Lyons, LLP-Denver, Denver, CO.

For BP America, Inc., Defendant: Jeffrey S. Vail, John Allen Francis, Michael John Gallagher, Davis Graham **[*3]** & Stubbs, LLP-Denver, Denver, CO.

For CHS, Inc., Defendant: Francine M. Mugge, Mark Evans Harris, Treece, Alfrey, Musat & Bosworth, P.C., Denver, CO.

For ConocoPhillips Company, Defendant: George S. Cary, Nicole A. Manara, Steven J. Kaiser, Cleary, Gottlieb, Steen & Hamilton, LLP-DC, Washington, DC.

For Marathon Petroleum Company LLC, Marathon Oil Company, Defendants: James Edward Hartley, M. Antonio Gallegos, Holland & Hart, LLP-Denver, Denver, CO.

For Equilon Enterprises LLC, doing business as Shell Oil Products US, Shell Exploration & Production Company, Defendants: Amy Pharr Hefley, Rufus W. Oliver, III, Baker Botts, LLP-Houston, Houston, TX.

For Sunoco, Inc., Defendant: Barbara T. Sicalides, Robert L. Hickok, Pepper Hamilton, LLP-Philadelphia, Philadelphia, PA; Richard G. Sander, Sander Ingebretsen & Wake, P.C., Denver, CO.

For Tesoro Companies, Inc., Defendant: Autum Leigh White, Gregory J. Kerwin, Katrina Casey Lewis, Gibson Dunn & Crutcher, LLP-Denver, Denver, CO.

For Valero Energy Corporation, Defendant: Jamie N. Cotter, Todd R. Seelman, Grimshaw & Harring, P.C., Denver, CO; Richard M. Butler, Sylvia A. Cardona, Langley & Banack, Inc., San Antonio, TX.

For Apache Corporation, Defendant: **[*4]** Michael Lance Beatty, Rebecca Hitchcock Noecker, Beatty & Wozniak, P.C., Denver, CO.

For EnCana Oil & Gas (USA), Inc., Defendant: Bobbee J. Musgrave, Meredith A. Johnston, Holme Roberts & Owen, LLP-Denver, Denver, CO.

For Stone Energy Corporation, Defendant: Heather Carson Perkins, Jeffrey S. Roberts, Faegre & Benson, LLP-Denver, Denver, CO; James A. Reeder, Jr., Stacey Neumann Vu, Vinson & Elkins, LLP-Houston, Houston, TX.

For Chevron USA Inc, a Pennsylvania corporation, Defendant: Kenneth B. Black, Lauren A. Shurman, Stoel Rives, LLP-Salt Lake City, Salt Lake City, UT; Thomas W. Snyder, Kutak Rock, LLP-Denver, Denver, CO.

Judges: John L. Kane, SENIOR U.S. DISTRICT JUDGE.

Opinion by: John L. Kane

Opinion

AMENDED MEMORANDUM OPINION AND ORDER

Kane, J.

Plaintiffs are a purported class of companies engaged in the business of developing, administering, and implementing drug and alcohol screening services and programs for corporate employers (referred to as "TPA Services"). They bring suit, seeking injunctive relief and treble damages for Defendants' alleged violations of *§§ 1* and *2* of the Sherman Act, § 3 of the Clayton Act, *15 U.S.C. § 14*, as well as a variety of state laws. This case is currently before me on Defendants' Motions **[*5]** to Dismiss (Docs. 104 and 133). [1] For the reasons stated below, pursuant to *Fed. R. Civ. P. 12(b)(6)*, Plaintiffs' Second Amended Class Action Complaint and Jury Demand, Doc. 130 ("Second Amended Complaint") is dismissed without prejudice for failure to state a claim upon which relief can be granted.

JURISDICTION AND VENUE

Plaintiffs have filed claims under §§ 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15* and *26*, alleging Defendants' violation of both *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, as well as § 3 of the Clayton Act. Plaintiffs also allege a variety of state law claims. I have jurisdiction over the federal claims pursuant to *28 U.S.C. §§ 1331* (Federal Question) and *1337* (Antitrust Jurisdiction); *15 U.S.C. § 4* (providing U.S. District Courts with jurisdiction over Sherman Act violations); and *15 U.S.C. §§ 15* and *26* (which both provide for a private cause of action in the U.S. District Courts for violations of the antitrust laws). As the state law claims "form part of the same case or controversy" as the federal claims, supplemental **[*6]** jurisdiction over them is proper pursuant to *28 U.S.C. § 1367*.

As all Defendants transact business in and are found within this district, one or more Plaintiffs have a principal place of business within this district, and a substantial portion of the events giving rise to this complaint occurred within this district, venue in the District of Colorado is proper pursuant to *15 U.S.C. §§ 15* and *22*, as well as *28 U.S.C. § 1391(b)* and *(c)*.

FACTS

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Defendants CHS, Inc.; ConocoPhillips Company; Marathon Petroleum Company LLC; Marathon Oil Company; Equilon Enterprises LLC d/b/a Shell Oil Products US; Tesoro Companies, Inc.; Valero Energy Corporation; Apache Corporation; EnCana Oil & Gas (USA) Inc.; EnCana Corporation; and Shell Exploration & Production Company [3] (collectively "Operator Defendants") are large national or international **[*7]** energy companies that own and/or operate oil and gas exploration, development, production, and refining facilities. To meet their needs for a specialized workforce in a highly cyclical industry, Operator Defendants often retain subcontractors, called "Service Companies," to provide specialized services and equipment at their various job sites and facilities. The individuals indirectly employed by Operator Defendants through the Service Companies are required to work around heavy machinery, with potentially dangerous chemicals, and at facilities where there is a risk of fire or explosion. Given the safety-sensitive nature of this work environment, employees who are under the influence of drugs and/or alcohol pose an undue risk not only to their own safety, but also to the safety of others. [4] [5]

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[1] Though these motions vary to a certain degree, most of the discussion overlaps. Where necessary, I will discuss the motions separately.

[2] For purposes of considering a motion to dismiss, "[a]ll well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Ruiz v. McDonnell, 299 F.3d 1173, 1181 (10th Cir. 2002)* (quoting *Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984))*. Accordingly, these facts are drawn exclusively from Plaintiffs' Second Amended Complaint, Doc. 130.

[3] Plaintiffs have voluntarily dismissed Defendants Sunoco, Inc., Doc. 144; B.P. America, Inc.; and Stone Energy Corporation, Doc. 158.

[4] As Operator Defendants note in their Reply Memorandum in Support of their Motion to Dismiss, Doc. 146, the magnitude of these risks is illustrated by "the enormous environmental damage and huge liability to the operator that resulted from alcohol abuse on the Exxon **[*8]** Valdez tanker . . .." *Id.* at 3.

Thus, as a condition of working on Operator Defendants' job sites, Operator Defendants require Service Companies performing work for them to implement and enforce substance abuse testing programs provided by drug screening companies. Compliance Marketing, Inc.; Compliance Services of East Texas; Connie D. Hagen, Inc. d/b/a DATCS: Drug & Alcohol Testing Compliance Services; Drug Testing, Inc.; Fleetscreen, LTD; Kristina Consulting Group, LLC; Panhandle Employers Services, **[*9]** Inc.; Kim Jenon Baldwin d/b/a Alliance Drug & Alcohol Testing; and Professional Compliance & Testing, LLC (collectively "Plaintiffs") and Defendants Drugtest, Inc. d/b/a DISA, Inc. and Drugtest Inc., d/b/a Drug Intervention Services of America, Inc. (collectively "DISA") are among hundreds of drug screening companies (referred to as "TPAs") competing to provide TPA Services to Service Companies in the Energy Industry. [6]

In the past, many TPAs, including Plaintiffs and DISA, competed to provide TPA Services to Service Companies in the Energy Industry based on price, convenience, quality, and service. By 2005, however, DISA had secured an advantage over its competitors through the establishment of the DISA Contractors Consortium ("DCC"). Through this consortium, DISA catalogs drug and alcohol test results for Energy Industry workers in a proprietary database (the "DCC Database"). Within the Energy Industry, the DCC Database is the only industry-wide database of individuals who have tested positive **[*10]** for drug or alcohol use in the past, or whose profiles have not been updated with recent results. Thus, it is a valuable tool for Operators wishing to preclude workers with unacceptable test histories from working on their job sites as employees of Service Companies. [7] [8]

Given the mobility of workers within the Energy Industry and each Operator's use of numerous Service Companies, however, the usefulness of the DCC database is dependent upon the participation of a significant number of Operators. Accordingly, DISA entered into a series of agreements with Operator Defendants, under the terms of which Operator Defendants require their Service Companies to use the DCC database to screen potential employees. [9] [10] As a result, before a Service Company's employee may come on to an Operator's job site, the Service **[*11]** Company must pay DISA a fee to search and retrieve the employee's drug and alcohol test result history from the DCC Database.

DISA has refused to populate the DCC Database with the drug-testing information collected by other TPAs, despite the fact that all providers use licensed and regulated collectors, breath alcohol technicians, medical record officers, and labs in conformance with state and federal testing guidelines. [11] Furthermore, DISA will not allow a company to use the DCC database unless it also uses DISA for TPA Services, and it has raised the prices of its drug and

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[5] In light of these safety concerns and in part because of the de-centralized nature of its workforce, one or more of the Operator Defendants (including, but not limited to, EnCana Oil & Gas, Marathon Oil Company, Shell, and others) have in the past supported and collaborated in efforts to "define the standard [for] health, safety, & environmental orientation for US upstream oil and gas industry." Plaintiffs' Second Amended Complaint, Doc. 130, p. 13 (quoting the SafeLandUSA website). Through these efforts, participating Operator Defendants sought to secure "reciprocal agreements" regarding acceptance of training certification and "access to orientation records through a common database." *Id.*

[6] TPA Services are a discrete type of service; no other services can be reasonably interchanged or substituted for the testing of employees or potential employees for their use of alcohol or drugs.

[7] The DCC database currently contains information on more than 1 million individuals and includes participation of more than thirty-eight hundred companies.

[8] This is similar to the "LA Clean Card" program created by DISA and several of Operator Defendants in the 1990s. Though Plaintiffs note the similarity, they do not specify which Operator Defendants participated in this program.

[9] Some of the Operator Defendants, however, do not themselves use DISA or the DCC database in administering drug and alcohol screening for their own employees, independent contractors, or consultants.

[10] As will be discussed *infra* at p. 14, n. 20, Plaintiffs have only offered proof that some of the Operator Defendants entered into agreements with DISA.

[11] The fungibility of these services is demonstrated by the fact that DISA has sub-contracted sample collection and testing back to some of the very TPAs who lost their Service Company clients to DISA after the implementation of the DCC Database.

alcohol screening and program administration services as a condition to using the DCC Database. [12] [13] Thus, in order to meet the requirements of Operator Defendants and gain access to the DCC database, Service Companies must also hire DISA as their TPA Service provider **[*12]** despite the fact that DISA charges higher prices for its TPA Services and fails to provide the full range of services supplied by competitors. [14]

Operator Defendants require use of the DCC Database knowing that DISA will not allow a Service Company to use the DCC Database without using DISA for TPA Services. As a result, Plaintiffs have been precluded from providing TPA Services to the Service Companies supplying services and equipment to Operator Defendants and DISA has acquired more than 75% of the market share for the provision of TPA Services to Service **[*13]** Companies in the Energy Industry. [15]

LEGAL STANDARD

Under *Fed. R. Civ. P. 8(a)(2)*, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. The Complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley, 355 U.S. at 45-46*.

As the Supreme Court recently clarified, however, "*Conley* . . . described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Twombly., 550 U.S. at 563* (emphasis added). **[*14]** Accordingly, as the court explained in *Twombly* and reiterated in *Ashcroft v. Iqbal, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)*, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 570*); *see also* *Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008)*. Significantly, though a court will accept as true all well-pleaded facts alleged for purposes of determining plausibility, it will not consider "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements . . .." *Iqbal, 129 S. Ct. at 1950*.

Plausibility does not require "detailed factual allegations," but it does require that a complaint have sufficient factual assertions "to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. [16] As this Circuit has held, "the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these **[*15]** claims." *Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007)*(emphasis in original).

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[12] Like Plaintiffs, DISA also provides its TPA Services on a stand-alone basis for its customers.

[13] The Service Companies pay all expenses associated with DISA's TPA Services and the DCC database. The Operators do not directly pay any of the costs of these services.

[14] For instance, unlike many of the Plaintiffs, DISA does not offer on-site sample collection and testing as part of its TPA Services.

[15] By means of illustration, Service Company representatives attending a meeting of the Association of Energy Service Companies repeatedly informed representatives of TPA Service providers that their Service Companies could not send TPA work to those providers because they had to use DISA.

[16] Significantly, in formulating this standard the *Twombly* court was particularly aware of and concerned with the unusually high cost of discovery in antitrust cases, such as the case at hand. *See* *550 U.S. at 559* (quoting *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005))* ("Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with 'no reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim").

DISCUSSION

Plaintiffs' federal claims are based primarily on alleged violations of the Sherman Act. *15 U.S.C. § 1 et seq.* [17] The Sherman Act, signed into law in 1890, "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*. The Act, **[*16]** therefore, focuses not on "the vindication of general 'notions of fair dealing,'" but on "the protection of competition or prevention of monopoly. . .." *Four Corners Nephrology Assocs. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1225 (10th Cir. 2009)*; *see also* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* ("The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market").

The Act is organized into two sections. *Section 1* specifically prohibits "contract[s], combination[s] . . ., or conspirac[ies] in restraint of trade or commerce among the several states . . .," *15 U.S.C. § 1*; it does not, however, apply to unilateral conduct, regardless of its impact on trade or commerce. *See* *Abraham v. Intermountain Healthcare, Inc, 461 F.3d 1249, 1256 (10th Cir. 2006)*. *Section 2* applies to "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of trade or commerce . . .." *15 U.S.C. § 2*. "The possession of monopoly **[*17]** power will not be found unlawful," however, "unless it is accompanied by an element of anticompetitive conduct." *Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

First Claim for Relief: Section 1 of the Sherman Act

Section 1 of the Sherman Act specifically prohibits "contract[s], combination[s] . . ., or conspirac[ies] in restraint of trade or commerce among the several states . . .." *15 U.S.C. § 1*. As a threshold matter, Plaintiffs must first establish their standing to bring an antitrust claim in order to assert a violation of *§ 1*.

A. Antitrust Standing

In order to establish Article III standing, Plaintiffs must allege that (1) they have suffered or imminently will suffer an injury; (2) the injury is fairly traceable to the conduct of the defendant; and (3) a favorable federal court decision is likely to redress the injury. *See* *Wilderness Soc'y v. Kane County, 581 F.3d 1198, 1209 (10th Cir. 2009)* (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. Antitrust standing, however, requires a heightened inquiry. Though "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, **[*18]** . . . the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006)*. Thus, Plaintiffs must show (1) an antitrust injury and (2) a causal connection between the defendant's antitrust violation and their alleged antitrust injury. *See id.* An antitrust injury is "an injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Abraham, 461 F.3d at 1267*.

Here, Plaintiffs allege that DISA and Operator Defendants have entered into agreements which have restrained competition for the provision of TPA Services to the Energy Industry. They further allege that they "have been injured in their business property as a result of these illegal contracts, combinations, agreements and conduct . . .." Plaintiffs' Second Amended Complaint, Doc. 130, p. 29. If proven, these allegations are sufficient basis for Plaintiffs' antitrust standing. They allege an injury, restraint of competition, which the Sherman Act is specifically designed to prevent, and that the injury flows from concerted action by the Defendants.

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[17] As will be briefly discussed *infra* at p. 34, Plaintiffs also allege violations of *§ 3* of the Clayton Act.

B. Concerted Action

In **[*19]** order to establish a violation of *§ 1*, a party must show the existence of "a contract, combination, or conspiracy [('concerted action)] that unreasonably restrains trade in the relevant market." *Full Draw Prods. v. Easton Sports, Inc., 182 F.3d 745, 756 (10th Cir. 1999)* (quoting *TV Commc'ns Network, Inc. v. Turner Network Television, 964 F.2d 1022, 1027 (10th Cir. 1992))*. Concerted action involves "two or more entities that previously pursued their own interests separately . . . combining to act as one for their common benefit." *Abraham, 461 F.3d at 1256* (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. "When two formerly separate entities combine for their common benefit, their activity is 'fraught with anti-competitive risk' because it 'deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.'" *Id.* (quoting *Copperweld, 467 U.S. at 768-69*).

Concerted action may be shown either by direct or circumstantial evidence. Direct evidence is evidence "that is explicit and requires no inferences to establish the proposition or conclusion being asserted . . .." *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1083 (10th Cir. 2006)*(quoting **[*20]** *In re Baby Food Antitrust Litg., 166 F.3d 112, 118 (3rd Cir. 1999))*. Circumstantial evidence is, by contrast, evidence that requires some inference on the part of the fact-finder. ***Antitrust law***, however, "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Abraham, 461 F.3d at 1257* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*

C. Unreasonable Restraint on Trade

A party seeking to establish a violation of *§ 1* must also show that the alleged concerted action imposes an unreasonable restraint on trade. *Full Draw Prods., 182 F.3d at 756*; *see also* *Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998)* ("Because nearly every contract that binds the parties to an agreed course of conduct 'is a restraint of trade' of some sort, the Supreme Court has limited the restrictions contained in *section 1* to bar only 'unreasonable restraints of trade'"). Generally, courts evaluate the reasonableness of a restraint on trade based on a "rule-of-reason" analysis. Under the rule of reason **[*21]** analysis, the fact-finder is required to "weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1203 (10th Cir. 2006)* (quoting *Diaz v. Farley, 215 F.3d 1175, 1182 (10th Cir. 2000))*. As the 10th Circuit explained in *Law v. NCAA:*

> Courts have imposed a consistent structure on rule of reason analysis by casting it in terms of shifting burdens of proof. Under this approach, the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition. If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner. Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge **[*22]** whether the challenged behavior is, on balance, reasonable.

134 F.3d at 1019 (citations omitted). Significantly, "rule of reason" analysis requires a court to "analyze the relevant market power of the defendants and therefore requires the plaintiff to allege a valid market." *Campfield v. State Farm Mut. Auto Ins. Co., 532 F.3d 1111, 1119 (10th Cir. 2008)*. In most cases, this analysis is an intensive, time-consuming inquiry.

In recognition of the burden the rule of reason analysis places on the fact-finder, courts have applied a *per se* illegality standard where "the challenged action falls into the category of 'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985). Once conduct is deemed *per se* unreasonable, "a court need not examine the practice's impact on the market or the procompetitive justifications for the practice advanced by a defendant before finding a violation **[*23]** of ***antitrust law***." Law, 134 F.3d at 1016. Most relevant for purposes of this case, courts have found that, in some situations, tying and group boycotts are *per se* violations of the Sherman Act.

Here, Plaintiffs explicitly allege that DISA has engaged in two types of anticompetitive conduct constituting unreasonable restraint of trade in violation of § 1: exclusive dealing with Operator Defendants to the exclusion of Plaintiffs and "tying" the DCC Database to DISA's TPA Services. Further, Plaintiffs implicitly allege Operator Defendants have engaged in an illegal group boycott which unreasonably restrains trade in violation of § 1. [18] I will begin by analyzing Plaintiffs' exclusive dealing claim before turning my attention to the tying and group boycott claims.

D. Plaintiffs' ***[*24]*** *§ 1 Arguments*

1. Exclusive Dealing

Plaintiffs allege agreements exist between DISA and Operator Defendants requiring "Service Companies who wish to perform services for the Operators . . . to retain DISA to input and store records of their employees' drug and alcohol tests in the DCC Database." [19] *Second Amended Complaint,* Doc. 130, p. 7. As a threshold matter, Plaintiffs' generalized allegations of agreements between Operator Defendants and DISA do not provide sufficient factual basis to demonstrate concerted action between each Operator Defendant and DISA. Plaintiffs do, however, offer evidence that (1) EnCana, Conoco, SEPCO, Marathon, and Apache required their Service Companies to enroll in the DCC Database; (2) these Operator Defendants used similar language in notifying their Service Companies of this requirement; and (3) DISA directly contacted the Service Companies working with these Operator Defendants to remind them of the requirement. *Id.* at 17-20. [20] This circumstantial evidence is sufficient to establish concerted action between DISA and, individually, EnCana, Conoco, SEPCO, Marathon, and Apache. As Plaintiffs do not adequately allege concerted action between DISA and CHS, **[*25]** Equilon, Tesoro, or Valero, however, any claim of exclusive dealing between DISA and these parties must be dismissed. Even accepting these pleadings as adequate, however, Plaintiffs have failed to establish the plausibility of their claim that the alleged arrangements constitute unlawful exclusive dealing.

Arrangements between parties at different levels of the distribution chain are referred to as "vertical agreements." *See* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). A vertical agreement in which firms agree that they will deal only with each other (or not deal with each others' competitors) is considered an "exclusive dealing arrangement." Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 473 n.2 (3rd Cir. 1992). **[*26]** Exclusive dealing arrangements, like other non-price vertical restraints, are generally considered procompetitive and are judged under the rule of reason. *See* Business Elecs. Corp., 485 U.S. at 724; Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 44-45, 104 S. Ct. 1551, 80 L.

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[18] As Operator Defendants note in their Reply Memorandum in Support of Their Motion to Dismiss, Doc. 146, the Plaintiffs do not even use the word "boycott" in their Second Amended Complaint. *Id.* at 9. I will, nevertheless, analyze whether Plaintiffs have adequately pled an unlawful group boycott for purposes of these Motions to Dismiss. *See generally,* F. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice").

[19] In their Response to Drugtest, Inc.'s Motion to Dismiss, Doc. 142, Plaintiffs claim that they have also sufficiently alleged a horizontal agreement among Operator Defendants which constitutes a *per se* unlawful group boycott. *Id.* at 14. That claim is analyzed in the context of my analysis of the group boycott claim, *infra* at pp. 23-27.

[20] With respect to the other four Operator Defendants (CHS, Equilon, Tesoro, and Valero), there are no specific allegations whatsoever.

Ed. 2d 2. In order to establish that an exclusive dealing arrangement is an unreasonable restraint on trade in violation of § 1, the Plaintiffs must plead a relevant market and that the agreement substantially forecloses their ability to compete in the relevant market. *C.f.,* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (discussing exclusive dealing in the context of a Clayton Act § 3 violation). Here, Plaintiffs have failed on both counts.

a. Relevant Market

The Plaintiffs bear the burden of defining the relevant market. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3rd Cir. 1997)*. In defining the relevant market, Plaintiffs must allege both a relevant product market and a relevant geographic market. *Id. at 435*. "The geographic market is 'the narrowest market which is wide enough so that products from adjacent areas . . . cannot compete on substantial parity with those included in the market.'" *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1222 (10th Cir. 1986)*. **[*27]** The parties do not contest, nor do I find lacking, Plaintiffs' definition of the relevant geographic market as the United States. [21] Accordingly, my analysis focuses on the Plaintiffs' definition of the relevant product market.

The Plaintiffs must specifically define the product market by reference to the "reasonable interchangeability of use or the cross-elasticity of demand between the product [in question] and substitutes for it." *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *see also* *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124, 1131 (10th Cir. 2002)*. "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively." *Queen City Pizza, 124 F.3d at 437*. Factors to be considered include price, use, and qualities. *Id.* "Cross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers. More technically, **[*28]** it measures the responsiveness of the demand for one product to changes in the price of a different product." *Id.* (citing E. Thomas Sullivan and Jeffrey L. Harrision, *Understanding Antitrust and its Economic Implications* 217 (1994)).

Though the Plaintiff is responsible for defining the relevant market, it cannot "artificially create antitrust claims by narrowly defining the relevant market to create the appearance of an antitrust injury." *Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1512 (D. Colo. 1992)*. The relevant market must "reflect[] the total market demand for plaintiffs' product, not just defendants' demand . . .. When there are numerous sources of interchangeable demand, the plaintiff cannot circumscribe the market to a few buyers in an effort to manipulate those buyers' market share." *Campfield, 532 F.3d at 1119* (emphasis added). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, **[*29]** the relevant market is legally insufficient and a motion to dismiss may be granted." *Id. at 1118* (quoting *Queen City Pizza, Inc., 124 F.3d at 436*).

Plaintiffs allege that, for purposes of analyzing its claims, the relevant product market is "the provision of TPA Services to Service Companies in the Energy Industry." [22] Plaintiffs' Second Amended Complaint, Doc. 130, p. 12. In support of their definition of the relevant market, Plaintiffs assert that jobs in the Energy Industry are unique, safety in the industry is of paramount importance, drug and alcohol testing is necessary to ensure safety, and

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[21] Though Plaintiffs make passing reference to geographic sub-markets in the Rocky Mountain and Gulf Coast regions, they do not offer any evidence in support of those markets.

[22] Plaintiffs also allege "[a]n additional relevant market exists for the services of a database holding the results of the drug and alcohol screenings" **[*30]** -- essentially the DCC Database. Plaintiffs' Second Amended Complaint, Doc. 130, p. 14. Even if this was accepted as the relevant market, however, Defendant DISA "does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product." *TV Commc'ns Network, Inc., 964 F.2d at 1025*. Though in *Eastman Kodak Co. v. Image Technical Servs., Inc.* the Supreme Court found that a single brand of a product or service can, in limited circumstances, constitute the relevant market, that finding was based on the fact that the service at issue was not interchangeable. *504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. As Plaintiffs have failed to address either the interchangeability or cross-elasticity of demand for a market defined as a DCC-type database, *Eastman Kodak* is inapposite.

Operator Defendants have collaborated in the past to standardize safety training. *Id.* at 12-14. Plaintiffs also allege that "TPA Services are a discrete type of service." *Id.* at 14. Though Plaintiffs allege sufficient facts to support a relevant market consisting of the provision of TPA Services generally, Plaintiffs fail to address the interchangeability or cross-elasticity of the provision of TPA Services to Service Companies in the Energy Industry.

Plaintiffs' references to the uniqueness of the Energy Industry and past efforts to coordinate safety training do not support a finding that TPA Services provided to the Energy Industry differ in any material way from TPA Services provided to other industries. To the contrary, Plaintiffs' arguments suggest that TPA Services provided to the Energy Industry are interchangeable with TPA Services in general. Plaintiffs' **[*31]** lone reference to "interchangeability" merely reinforces this conclusion. *See id.* ("No other services reasonably can be interchanged or substituted for the testing of employees or potential employees for their use of alcohol or drugs"). Plaintiffs' failure to plead the relevant market adequately is fatal to their exclusive dealing claim. [23]

b. Anticompetitive Effects

In addition to alleging a relevant market, Plaintiffs must show anticompetitive effects resulting from a substantial foreclosure of their ability to compete in the relevant market in order to establish a violation of *§ 1* in the context of an exclusive dealing arrangement. *C.f., Tampa Elec. Co., 365 U.S. at 327* (discussing exclusive dealing in the context of a Clayton Act *§ 3* violation). In light of the above conclusion that Plaintiffs have failed to plead the relevant market adequately, it is impossible for them to prove substantial foreclosure. Even if this market definition was adequately pled, however, Plaintiffs fail to allege **[*32]** facts which could support a finding of substantial foreclosure.

In order to show substantial foreclosure, Plaintiffs must demonstrate that "the competition foreclosed by the [exclusive dealing arrangements] . . . constitute[s] a substantial share of the relevant market." *Id. at 328*. "To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein." *Id. at 329*. Plaintiffs have failed to plead any facts demonstrating the total volume of commerce involved in the provision of TPA services to Service Companies in the Energy Industry as a whole. [24] In light of this failure, it is impossible to determine the extent to which DISA's conduct has foreclosed Plaintiffs' ability to compete. Accordingly, Plaintiffs have not adequately alleged substantial foreclosure.

Given Plaintiffs' failure to allege adequately either the relevant product market or substantial foreclosure of their ability to compete in the relevant market, dismissal of their exclusive dealing claim is appropriate.

2. Tying

Plaintiffs also allege that DISA unlawfully ties the sale of its TPA Services to use of its proprietary DCC Database. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak, 504 U.S.at 461* **[*34]** (quoting *N. Pacific R.. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. "[T]he essential characteristic of an invalid tying arrangement lies in the seller's

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[23] As is discussed *infra,* Plaintiffs' failure to plead the relevant product market adequately is also fatal, under a rule of reason analysis, to its group boycott claim, as well as to its § 2 claims.

[24] As Defendant DISA notes in its Memorandum **[*33]** of Law in Support of its Motion to Dismiss the First Amended Class Action Complaint, Doc. 105, Plaintiffs "acknowledge there are other, unnamed companies in the 'Energy Industry' . . .." *Id.* at 12. Further, Plaintiffs fail to suggest that "DISA had exclusive agreements with any of the unnamed energy companies, including massive energy companies like ExxonMobil." *Id.* Perhaps even more significant, in their Response to Drugtest Inc.'s Motion to Dismiss, Doc. 142, the Plaintiffs make no effort to demonstrate that they have pled any facts which could support a finding of substantial foreclosure.

exploitation of its control over the tying product to force the buyer into the purchase of the tied product." *Jefferson Parish, 466 U.S. at 12*. Though historically the Supreme Court considered all tying arrangements to be *per se* illegal under *§ 1* of the Sherman Act, *see* *Standard Oil Co. v. United States, 337 U.S. 293, 305, 69 S. Ct. 1051, 93 L. Ed. 1371 (U.S. 1949)* (assuming that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition"), the Court began applying rule of reason analysis in some instances where it acknowledged the theoretical validity of some tying arrangements. *See* *Jefferson Parish, 466 U.S. at 12*. Recently, the Court confirmed that market factors must be evaluated in analyzing tying claims and pro-competitive benefits may justify tying arrangements. *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 33-46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. The Court stated unequivocally, "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Id. at 46*. As Plaintiffs have failed **[*35]** to plead the relevant market adequately, any attempt to argue that Defendants' conduct constitutes an illegal tying arrangement necessarily fails under a rule of reason analysis. [25] Thus, I will focus my analysis on whether Defendants' conduct constitutes a *per se* illegal tying arrangement.

As a preliminary matter, the Complaint makes no allegations that Operator Defendants have market power in the DCC Database. Defendants in this action include both DISA, a competitor of Plaintiffs in the tied market, and Operator Defendants, direct customers of the tying product and secondary customers of the tied product. While DISA has a clear economic interest as the purveyor of both the tying and the tied product, the economic interest of Operator Defendants is less clear. "[W]here a third party is involved in selling the tied product to the plaintiff, most courts have required that the tying product seller have a direct economic interest in the sale of the tied product before an illegal tying arrangement will be found." *Sports Racing Servs. v. Sports Car Club of Am., 131 F.3d 874, 888 (10th Cir. 1997)*. **[*36]** The Tenth Circuit has held that absent an economic interest, a tying claim cannot succeed. *Abraham, 461 F.3d at 1266*. Though Plaintiffs' Second Amended Complaint alleges that there is no economic detriment to the Operators as the additional cost of the tied services is borne by the Service Companies (Compl. 107, 109), it fails to allege any economic benefit to Operator Defendants. Without an economic interest in the sale of TPA Services, Operator Defendants cannot be liable for tying.

Though DISA has the requisite economic interest in the provision of both the tying and the tied products, Plaintiffs fail to allege all four elements of tying sufficiently. In order to establish the existence of an illegal tying arrangement, Plaintiffs must adequately plead the existence of: "(1) two separate products, [26] (2) a tie -- or conditioning of the sale of one product on the purchase of another, (3) sufficient economic power in the tying product market, and (4) a substantial volume of commerce affected in the tied product market." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'n, Inc., 63 F.3d 1540, 1546 (10th Cir. 1995)*.

a. Two Separate Products

As a threshold matter, Plaintiffs must adequately plead the existence of two distinct products. The existence of distinct products "turns not on the functional relation between [the products] but rather on the character of the demand for the two items." *Jefferson Parish, 466 U.S. at 19*. In the instant case, the two alleged products are drug testing services and a database containing the results of the drug tests. Though it seems unlikely that there is any demand for an unpopulated database, for purposes of this motion I assume that Plaintiffs could establish that the DCC Database, the tying product, is distinct from the TPA Services, the tied product, and that each constitutes a separate product or service.

b. The Existence of a "Tie"

It is self-evident that Plaintiffs must allege the existence of a "tie" in order to plead tying adequately. A "tie" exists where a party coerces or conditions the sale of one product on the purchase of another. *Multistate Legal Studies,*

[25] For more discussion of Plaintiffs' failure to plead the relevant market, *see* discussion *supra* at pp. 15-17.

[26] In the context of a Sherman Act § 1 claim, **[*37]** the term "products" includes services and is not limited to goods. *See* *Eastman Kodak Co., 504 U.S. at 461-62 (1992)*.

63 F.3d at 1546. I find Plaintiffs' allegations that DISA conditions access to its **[*38]** database on the use of DISA for TPA Services and that DISA charges separate fees for TPA Services and database access adequately establish the existence of a tie in this case.

c. Sufficient Economic Power in the Tying Market

In order to establish their tying claim, Plaintiffs must also show that DISA has market power in the tying product market. Illinois Tool Works Inc., 547 U.S. at 36. "The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market." Eastman Kodak, 504 U.S. at 464. I find Plaintiffs' allegations that DISA maintains the only industry-wide database and that the DCC program is the largest screening program in existence constitutes sufficient evidence of economic power in the tying product market.

d. Substantial Volume of Commerce Affected

Finally, Plaintiffs must show that the tying arrangement affects a substantial volume of commerce in the tied product market. Multistate Legal Studies, 63 F.3d at 1546. The product market may be further developed after discovery, but a legally cognizable product market must be present in the pleadings. Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008). As discussed **[*39]** previously, Plaintiffs fail to adequately allege the existence of a market for the provision of TPA Services to Service Companies in the Energy Industry. Furthermore, Plaintiffs fail to assert facts suggesting that the tying arrangement complained of has a substantial affect on the general market for TPA Services.

In order to survive a motion to dismiss under FRCP 12(b)(6), Plaintiffs must plead factual allegations establishing each element of their tying claim. As Plaintiffs fail to adequately allege that the complained of tying arrangement affects a substantial volume of commerce in the market for the provision of TPA Services, their tying claim must be dismissed.

3. Group Boycott

As noted above, group boycotts may be found to be unreasonable restraints of trade in violation of § 1 under either a rule of reason analysis or a *per se* illegality standard. Nw. Wholesale Stationers, 472 U.S. at 293. As Plaintiffs have failed to plead the relevant market adequately, any attempt to argue that Defendants' conduct constitutes an illegal group boycott necessarily fails under a rule of reason analysis. [27] Thus, I will focus my analysis on whether Defendants' conduct constitutes a *per se* illegal **[*40]** group boycott.

In the context of group boycotts, reviewing courts usually find conduct to be *per se* illegal where there are "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" Id. at 294. Such conduct usually takes one of three forms:

1. Horizontal agreements among traders to exclude direct competitors;
2. Vertical combinations that are "widespread" in nature to exclude competitors of some members of the combination; and
3. Combinations designed to influence trade practices of boycott victims rather than to eliminate them as competitors.

Genetic Sys. Corp. v. Abbott Labs., 691 F. Supp. 407, 416 (D.D.C. 1988). Presumably, Plaintiffs assert that the group boycott was of the second type -- a vertical group boycott -- consisting of Plaintiffs' direct competitor DISA and the indirect purchasers of Plaintiffs' product, Operator Defendants. The case law and the facts do not, however, support Plaintiffs' allegations that the Defendants' **[*41]** conduct constitutes a *per se* illegal group boycott.

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[27] For more discussion of Plaintiffs' failure to plead the relevant market, *see* discussion *supra* at pp. 15-17.

To the extent Plaintiffs allege vertical agreements between DISA and Operator Defendants, these do not, standing alone, constitute a *per se* illegal group boycott. [28] In order to establish that a group boycott is *per se* illegal, "there must be an agreement among conspirators whose market positions are horizontal to each other." *Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992)*(quoting *Westman Comm'n Co., 796 F.2d at 1224, n.1* (emphasis added)). Accordingly, in order to prove the complained of conduct constitutes a *per se* illegal group boycott, Plaintiffs must prove that there exists some agreement among the Operator Defendants.

As a threshold matter, Plaintiffs fail to specifically allege the existence of an agreement among the Operator Defendants to mandate that Service Company workers be cleared through DISA as a condition of working on Operator Defendants' job sites. [29] As in *Twombly,* Plaintiffs "complaint leaves no doubt that [they] rest their [group boycott] claim on descriptions of parallel conduct and not on any independent **[*42]** allegation of actual agreement among the [Operator Defendants]." *550 U.S. at 564*. And, again, as in *Twombly,* Plaintiffs' Second Amended Complaint fails to "mention[] [a] specific time, place, or person involved in the alleged conspiracies." *Id. at 565, n. 10*; *see also* *Robbins, 519 F.3d at 1248*. At most, the few allegations related to specific Operator Defendants in Plaintiffs' Second Amended Complaint suggest that some (but not all) Operator Defendants required Service Companies to use DISA-cleared workers at various points over a five-year period (starting in 2003 and ending in 2009), which in itself refutes the idea of some overarching agreement to impose such a requirement.

Instead of direct evidence of a horizontal agreement, Plaintiffs suggest past collaboration by some Operator Defendants on similar initiatives involving employee training and workplace management constitutes a "track **[*43]** record" of cooperation giving rise to an inference of such cooperation in the instant case. Such "track record" allegations, however, do not give rise to an inference of agreement under *Twombly. See, e.g.,* *In re Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 444 (S.D.N.Y. 2008)*.

Plaintiffs also seek to establish the existence of a horizontal agreement by providing evidence of conscious parallelism. Standing alone, circumstantial evidence such as conscious parallelism "falls short of 'conclusively establishing agreement or itself constituting a Sherman Act offense.'" *Twombly, 550 U.S. at 553* (quoting *Theatre Enter., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*. "[I]f the defendants had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Abraham, 461 F.3d at 1257-58* (quoting *Rossi v. Standard Roofing, 156 F.3d 452, 466 (3rd Cir. 1998))*. A party may, however, support an inference of concerted action by producing evidence that "the parties are acting against their own individual business interests, or that there is motivation to **[*44]** enter into an agreement requiring parallel behavior." *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass'n of Kansas, 891 F.2d 1473, 1481 (10th Cir. 1989)*.

As evidence of conscious parallelism, Plaintiffs cite statements by representatives of Operator Defendants acknowledging that they have a common workforce and common interests as well as a "striking" similarity between letters sent by Conoco, SEPCO, Marathon, and Apache notifying their Service Companies of the requirement to use DISA. [30] Finally, Plaintiffs assert that "[t]he DCC Database would not accomplish its stated purpose unless as many Service Companies as possible are compelled to sign up for DISA's database service." Plaintiffs' arguments

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[28] Nor do they, as discussed *supra* at pp. 13-19, constitute illegal exclusive dealing arrangements.

[29] Though Plaintiffs make passing reference to agreements between and among DISA and Operator Defendants, they fail to discuss with any particularity any agreement among the Operator Defendants. Such conclusory assertions of agreements are ignored for purposes of *Rule 12(b)(6)*. *Twombly, 550 U.S. at 557*.

[30] Plaintiffs specifically cite correspondence from EnCana (requiring compliance **[*45]** by March 2004), ConocoPhillips (requiring compliance by January 1, 2008), SEPCO (requiring compliance by August 4, 2008), Marathon (requiring compliance by September 29, 2008), and Apache (requiring compliance by May 1, 2009). Each of these letters was followed by correspondence from DISA reiterating the requirement to enroll in the DCC program. Plaintiffs also generally allege similar correspondence from the other Operator Defendants.

necessarily fail to establish conclusively the existence of a horizontal agreement, however, as they acknowledge plausible explanations for the conscious parallelism noted by Plaintiffs -- namely that each Operator Defendant would have a powerful incentive to require its Service Companies to use only workers cleared through the DCC Database whether or not any Operator Defendants did so. [31]

Even if Plaintiffs adequately pled the existence of a horizontal agreement between Operator Defendants, I find it likely that the procompetitive effects of those agreements outweighs any potential repugnance. Plaintiffs' Second Amended Complaint cites many reasons why the supposed agreement to require Service Companies to use only DISA-cleared workers would benefit occupational health and safety and, thus, be procompetitive. *See, e.g., Diaz, 215 F.3d at 1183-84* (rejecting *per se* analysis to group boycott in question and holding that "*Northwest Wholesale* explicitly allows courts to consider plausible arguments concerning procompetitive effects in determining whether the *per se* rule or the rule of reason should apply to a **[*46]** horizontal group boycott").

As Plaintiffs fail to plead an adequate relevant market or adequately allege the existence of a horizontal agreement between the Operator Defendants, their group boycott claim must be dismissed.

Second and Third Claims for Relief: Section 2 of the Sherman Act

Section 2 of the Sherman Act applies to "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of trade or commerce . . .." *15 U.S.C. § 2*. Plaintiffs allege that Defendants have monopolized, attempted to monopolize, or in the alternative conspired to monopolize the provision of TPA Services to the Energy Industry. [32] As noted above, Plaintiffs must first establish their antitrust standing to bring claims under *§ 2* of the Sherman Act.

A. Antitrust Standing

As noted above, to establish antitrust standing Plaintiffs must show (1) an antitrust injury and (2) a causal connection between **[*47]** Defendant's antitrust violation and its alleged antitrust injury. Here, Plaintiffs allege that DISA and Operator Defendants have engaged in conduct which has resulted in the monopolization of the market for the provision of TPA Services to the Energy Industry; that DISA and Operator Defendants have attempted to monopolize the market for the provision of TPA Services to the Energy Industry; or, in the alternative, that DISA and Operator Defendants have conspired to monopolize the market for the provision of TPA Services to the Energy Industry. They further allege that they have been injured as a result of DISA's and Operator Defendant's actions. If proven, these allegations provide sufficient basis for Plaintiffs' antitrust standing in relation to their monopolization and attempted monopolization claims against DISA and their conspiracy claim against DISA and Operator Defendants. They fail, however, to establish standing for their monopolization and attempted monopolization claims against Operator Defendants.

As a matter of law, a party cannot monopolize or attempt to monopolize a market in which it is not a supplier. *See, e.g., Pastore v. Bell Tel. Co., 24 F.3d 508, 513 (3rd Cir. 1994)* **[*48]** (Dismissing a claim of attempted monopolization as "[w]ithout any share in the relevant market *as described by plaintiffs,* there can be no inference that defendants hold sufficient economic power in that market to create a dangerous probability of monopoly" (emphasis in original)); *Genetic Sys. Corp., 691 F. Supp. at 421* (dismissing § 2 claims because the plaintiff was "[u]nable to allege or show that the [defendant] had a specific intent to monopolize a market in which it does not participate"). Therefore, as Operator Defendants are not suppliers of TPA Services, they cannot monopolize or attempt to monopolize the market pled by the Plaintiffs and their conduct is not an actionable antitrust injury. [33]

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[31] See discussion *supra,* pp. 3-6.

[32] Plaintiffs' Second Amended Complaint does not explicitly include a claim of conspiracy to monopolize. As with the group boycott claim, however, I undertake analysis of this claim in the interest of judicial efficiency and in an abundance of caution.

Accordingly, Plaintiffs' monopolization and attempted monpolization claims against Operator Defendants must be dismissed for lack of standing.

B. Relevant Market

As a threshold matter, Plaintiffs "must define a relevant market within which the defendants allegedly engaged in anticompetitive behavior." *Campfield, 532 F.3d at 1117*; *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* ("Without a definition of the relevant market there is no way to measure a defendant's ability to lessen or destroy competition"). "Failure to allege a legally sufficient market is cause for dismissal of the claim." *Campfield, 532 F.3d at 1118* (citing *TV Commcn's Network Inc., 964 F.2d at 1025-26*)).

As discussed above in relation to Plaintiffs' § 1 claims, Plaintiffs have **[*50]** failed to allege the relevant product market adequately. [34] This failure is fatal to its § 2 claims. Even if Plaintiffs adequately alleged a relevant product market, however, their claims against DISA and Operator Defendants are still subject to dismissal.

C. Monopolization

In order to plead monopolization adequately, the Plaintiffs must allege possession of monopoly power in the relevant market and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Verizon Commcn's, Inc., 540 U.S. at 407*; *see also* *Campfield, 532 F.3d at 1117*. Accordingly, "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Id. at 407*. Plaintiffs have failed to adequately **[*51]** allege the existence of either monopoly power or anticompetitive conduct.

1. Monopoly Power

Monopoly power requires proof of both the power to control price and the power to exclude competition. *Full Draw Prods., 182 F.3d at 757* (citing *Reazin v. Blue Cross & Blue Shield of Kansas, 899 F.2d 951, 967 (10th Cir. 1990))*. In order for monopoly power to be meaningful for antitrust purposes, it must be durable. *Reazin, 899 F.2d at 968*. Durability is demonstrated by the existence of entry barriers, such as high capital costs or regulatory or legal requirements. *Id.* Plaintiffs simply allege that there exist substantial entry barriers, without providing any facts as to the nature of those barriers. Second Amended Complaint, Doc. 130, p. 31. Such a conclusory allegation is insufficient to withstand a motion to dismiss under *Rule 12(b)(6)*.

2. Anticompetitive Conduct

Even if Plaintiffs had adequately pled a relevant market and the existence of monopoly power, their claim would still be subject to dismissal for failure to adequately allege anticompetitive conduct. Plaintiffs allege three types of

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[33] This restriction is not absolute, as courts have applied § 2 protections in cases of monopsony. *Campfield, 532 F.3d at 1118*. As the 10th Circuit recognized in *Campfield,* "A monopsony is different from the usual form of monopolistic control in which suppliers utilize market power to restrict output and thereby raise prices. In a monopsony, the **[*49]** buyers have market power to decrease market demand for a product and thereby lower prices." *Id. at 1118* (emphasis added). In this case, however, Plaintiffs do not allege that the Operator Defendants have exercised their market power to reduce demand and lower prices. To the contrary, Plaintiffs allege that (1) Operator Defendants are not buyers and (2) as a result of Operator Defendants' conduct, prices have actually increased. As a result, Plaintiffs have alleged no grounds for finding Operator Defendants liable under *§ 2* for monopsonistic behavior.

[34] *See supra* pp. 15-17. The analysis under *§ 1* is directly applicable to my analysis under *§ 2*. *See* *Queen City Pizza Co., 124 F.3d at 442 n.18* ("Monopoly power under *§ 2* requires something greater than the market power under *§ 1* . . . this does not imply, however, that the analyses employed in the two types of cases to define relevant markets differ").

anticompetitive conduct: exclusive dealing between DISA and Operator Defendants, tying of the DCC database **[*52]** to DISA's TPA service, and DISA's refusal to deal with Plaintiffs regarding the DCC Database.

a. Exclusive Dealing and Tying

For the reasons discussed above, Plaintiffs' exclusive dealing and tying claims are insufficiently pled. [35]

b. Refusal to Deal

Plaintiffs allege that DISA's refusal to populate the DCC Database with the drug-testing information collected by other TPAs constitutes an unlawful refusal to deal. They argue that there is no discernible difference between the validity of the information collected by regulated TPAs and that the only reason for DISA's refusal to deal is its desire to gain a competitive advantage over its competitors. Even accepting these claims as true, Plaintiffs fail to allege adequately that DISA's refusal to deal constitutes anticompetitive conduct within the meaning of the Sherman Act.

Generally, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1194 (10th Cir. 2009)* (quoting *Verizon Commc'ns, 540 U.S. at 408*). **[*53]** As the Supreme Court has recognized, "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Verizon Commc'ns, Inc., 540 U.S. at 407-08*. Accordingly, the Supreme Court has found a duty to deal in only one limited circumstance: where a monopolist terminates a pre-existing profitable relationship with a competitor without a lawful business purpose if that termination has an anticompetitive effect. *See id. at 409* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Plaintiffs do not allege any prior course of dealing between themselves and DISA. DISA has, therefore, no duty to deal.

Though Plaintiffs fail to establish a duty to deal, they also claim that the DCC Database is an "essential facility." "The [essential facilities] doctrine generally applies in situations in which the plaintiff is unable to compete in the relevant market . . . without access to a facility controlled by another." *Gregory, 448 F.3d at 1204*. "In order to establish antitrust liability based **[*54]** on the essential facilities doctrine, a plaintiff must show: '(1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.'" *Id.* Here, Plaintiffs have failed to allege that they are unable to create their own version of the DCC Database. Accordingly, Plaintiffs fail to allege anticompetitive conduct in the form of denial of access to an "essential facility."

As Plaintiffs have failed to adequately allege a relevant product market, monopoly power, or anticompetitive conduct, their monopolization claim must be dismissed.

D. Attempted Monopolization

To plead attempted monopolization adequately, Plaintiffs must allege a dangerous probability of success in monopolizing the relevant market, specific intent to monopolize, and conduct in furtherance of such attempt. *Full Draw Prods., 182 F.3d at 756*. As discussed above, Plaintiffs have failed to allege a relevant market or any form of anticompetitive conduct. Further, Plaintiffs have failed to adequately allege a dangerous probability of success in monopolizing the market.

In order to demonstrate **[*55]** dangerous probability of success, Plaintiffs must plead facts sufficient to establish the durability of DISA's market power. *See United States v. Microsoft Corp., 253 F.3d 34, 82, 346 U.S. App. D.C. 330*

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[35] *See* discussion, *supra* at pp. 13-22.

(D.C. Cir. 2001) ("Because a firm cannot possess monopoly power in a market unless that market is also protected by significant barriers to entry . . . it follows that a firm cannot threaten to achieve monopoly power in a market unless that market is, or will be, similarly protected"). Just as Plaintiffs failed to allege durability in relation to their claim of actual monopolization, they fail to do so in relation to their claim of attempted monopolization. In light of Plaintiffs' failure to adequately allege a relevant market, a dangerous probability of success, or anticompetitive conduct, their claim of attempted monopolization must be dismissed.

E. Conspiracy to Monopolize

Even if Plaintiffs' Second Amended Complaint is liberally interpreted to include a claim that Operator Defendants conspired with DISA to monopolize in violation of *§ 2*, such a claim must be dismissed for failure to state a claim. In order to establish a conspiracy to monopolize, a plaintiff must offer proof of, "(1) the existence of a combination **[*56]** or conspiracy to monopolize; (2) overt acts done in furtherance of the combination or conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize." *TV Commc'ns Network, Inc., 964 F.2d at 1026* (quoting *Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 438 (10th Cir. 1983))*. As discussed above in relation to Plaintiffs' group boycott claim, the Second Amended Complaint fails to plead facts adequately which would support an inference of a conspiracy between DISA and Operator Defendants. [36] Even if Plaintiffs had pled the existence of a conspiracy, agreements that do not harm the competitive process do not amount to a conspiracy to monopolize. *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 139, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. As Plaintiffs have insufficiently pled that Defendants' conduct has harmed the competitive process under *§ 1*, this is additional grounds for dismissing any potential conspiracy to monopolize claim. *See Gregory, 448 F.3d at 1206*.

Fourth Claim for Relief: Section 3 of the Clayton Act

Plaintiffs allege that both DISA and Operator Defendants have engaged in unlawful tying and exclusive dealing. *Section 3* **[*57]** of the Clayton Act, however, only applies to "goods, wares, merchandise, machinery, supplies, or other commodities." *15 U.S.C. § 14*. As Plaintiffs claims relate to the provision of TPA Services, *§ 3* of the Clayton Act provides no remedy. *See Sports Racing Servs., 131 F.3d at 880 n.8*.

Fifth, Sixth, and Seventh Claims for Relief: Violations of State Antitrust Statutes

Plaintiffs allege monopolization, attempted monopolization, and restraint of trade in violation of state antitrust laws, including those of California, Colorado, Louisiana, Oklahoma, and Texas. As a threshold matter, these claims are predicated on the same alleged conduct as Plaintiffs' federal antitrust claims, and the states apply their antitrust laws in harmony with federal ***antitrust law***. [37] Thus, for the reasons stated above in relation to Plaintiffs' Sherman Act claims, their state law claims are appropriately dismissed.

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[36] *See* discussion *supra,* pp. 24-26.

[37] *See Chicago Title Ins. Co. v. Great W. Fin. Corp., 69 Cal. 2d 305, 70 Cal. Rptr. 849, 444 P.2d 481, 487 (Cal. 1968)* ("The California law of antitrust, commonly known as the Cartwright Act, is patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable **[*58]** with respect to the Cartwright Act."); *Colo. Rev. Stat., Art. 4, § 6-4-105*; *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1074 (D. Colo. 2004)* ("Because Colorado ***antitrust law*** mirrors federal ***antitrust law*** under the Sherman Act, the court will solely examine plaintiffs' claims under federal law as dispositive of plaintiffs' state law claims."); *Tuban Petroleum, L.L.C. v. SIARC, Inc., 11 So. 3d 519, 523 (La. App. 2009)* ("The Louisiana Supreme Court has . . . looked to the federal jurisprudence for guidance because the federal and state antitrust statutes are virtually identical."); Oklahoma Antitrust Reform Act, *79 OSA § 212*; *Inergy Propane, LLC v. Lundy, 2009 OK CIV APP 8, 219 P.3d 547, 2008 WL 5726461, at *7 n.3 (Okla. Civ. App. 2008)*; *Tex. Bus. & Com. Code; § 15.04*; *In re Memorial Hermann Healthcare Sys., 274 S.W.3d 195, 200 (Tex. App. 2008)*

Eighth Claim for Relief: Unfair Competition

Plaintiffs claim that Defendants have engaged in unlawful business practices **[*59]** in violation of California law. As Plaintiffs have failed to adequately allege that Defendants' conduct is unlawful under either federal or state antitrust statutes, its claim of unfair competition must be dismissed. *See, e.g.,* *LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. Appx. 554, 2008 WL 5341843, at *3 (9th Cir. 2008)* ("Where . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition"). Furthermore, Plaintiffs' failure to allege specifically that the complained of conduct occurred in California provides additional basis for dismissal. *See, e.g.,* *Norwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 222, 227, 85 Cal. Rptr. 2d 18 (Cal. App. 1999)* (explaining that the California UCL "contains no express declaration that it was designed or intended to regulate claims of nonresidents arising from conduct occurring entirely outside of California").

Ninth and Tenth Claims for Relief: Tortious Interference with Contractual and Prospective Business Relations

Plaintiffs allege that Defendants, though their violations of the Sherman **[*60]** Act and state antitrust statutes, have tortiously interfered with their existing contractual relations and prospective business relations. In order to establish tortious interference with contractual relations, Plaintiffs must show: "(1) [they] had a contract with a third party; (2) defendants knew of the contract's existence; (3) defendants intentionally induced the third party to breach the existing contract; (4) defendants acted improperly; and (5) defendants' actions caused plaintiff[s] to incur damages." *Campfield, 532 F.3d at 1122* (quoting *Steinbach v. Dillon Cos., Inc., 253 F.3d 538, 540 (10th Cir.2001))*. "Tortious interference with prospective business relations requires identical elements, with the exception that an existing contract need not be alleged. Rather, [Plaintiffs] must show that there was a reasonable likelihood that a contract would have resulted but for the wrongful interference." *Id.* (quoting *Klein v. Grynberg, 44 F.3d 1497, 1506 (10th Cir. 1995))*.

As discussed above, Plaintiffs have failed to allege adequately that Defendants have violated the Sherman Act or any state antitrust statute. As Plaintiffs assert no other grounds that Defendants acted improperly, they **[*61]** have failed to allege adequately claims for tortious interference with either existing contractual relations or prospective business relations and these claims must be dismissed. Additionally, Plaintiffs fail to plead adequately either the existence of contracts between themselves and the Service Companies or that any contract was breached. This pleading deficiency provides further grounds for dismissing Plaintiffs' claim that Defendants tortiously interfered with their contractual relations. Finally, Plaintiffs' failure to allege specifically the business lost as a result of Defendants' conduct requires dismissal of their claim that Defendants tortiously interfered with their prospective business relations.

CONCLUSION

Though Plaintiffs' claim may have been sufficient under the more permissive "no set of facts" standard which long constituted the pleading standard in federal courts, the Supreme Court has explicitly directed lower courts to dismiss claims which fail, on their face, to state a plausible claim for relief. As detailed above, Plaintiffs have failed to set forth sufficient facts to support any of their ten asserted claims for relief. As I find that Plaintiffs' Second Amended **[*62]** Complaint fails to state a plausible claim for relief, Defendants' Motions to Dismiss, Docs. 104 and 133, are GRANTED. Plaintiffs' Second Amended Class Action Complaint and Jury Demand, Doc. 130, is dismissed without prejudice.

Dated: April 7, 2010

("The Act instructs courts to construe its provisions 'in harmony with federal judicial interpretations of comparable federal antitrust statutes' to the extent consistent with the Act's purpose.").

/s/ John L. Kane

SENIOR U.S. DISTRICT JUDGE

In re Evanston Northwestern Healthcare Corp. Antitrust Litig.

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

April 12, 2010, Decided; April 12, 2010, Filed

No. 07 CV 4446; No. 07 CV 4523; No. 07 CV 5275; No. 08 CV 2343; No. 08 CV 2658

Reporter

268 F.R.D. 56 *; 2010 U.S. Dist. LEXIS 36488 **; 76 Fed. R. Serv. 3d (Callaghan) 859; 2010-1 Trade Cas. (CCH) P77,001

IN RE: EVANSTON NORTHWESTERN HEALTHCARE CORPORATION ANTITRUST LITIGATION

Subsequent History: Vacated by, Remanded by *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 2012 U.S. App. LEXIS 731 (7th Cir. Ill., Jan. 13, 2012)*

Prior History: *In re Evanston Northwestern Healthcare, 2008 U.S. Dist. LEXIS 42437 (N.D. Ill., May 29, 2008)*

Core Terms

prices, contracts, increased price, class member, insurer, merger, control group, patients, Payor, inpatient, entities, plaintiffs', predominance, overcharge, argues, class certification, named plaintiff, provisions, reliable, calculate, changes, methodologies, rates, reply, outpatient services, proposed class, price change, indicates, damages, uniform rate

LexisNexis® Headnotes

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

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

HN1[] **Class Actions, Certification of Classes**

A party seeking to certify a class action must meet two conditions. First, the movant must show the putative class satisfies the four prerequisites of *Fed. R. Civ. P. Rule 23(a)*: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Fed. R. Civ. P. 23(a)*. Second, the action must qualify under at least one of the three subsections of *Rule 23(b)*. *Fed. R. Civ. P. 23(b)*.

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

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

HN2[] **Prerequisites for Class Action, Predominance**

Fed. R. Civ. P. 23(b)(3) requires a finding that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3).

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

Evidence > Burdens of Proof > Allocation

Governments > Courts > Rule Application & Interpretation

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

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

HN3[] Class Actions, Certification of Classes

Courts retain broad discretion in determining whether a proposed class meets the Fed. R. Civ. P. 23 certification requirements. While the requirements of Rule 23 should be liberally construed to support the policy favoring the maintenance of class actions, a moving party bears the burden of showing that the requirements for class certification have been met.

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

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

HN4[] Class Actions, Certification of Classes

To meet the typicality requirement, the named plaintiffs' claims or defenses must be typical of the class. Fed. R. Civ. P. 23(a)(3). The typicality requirement focuses on the class representatives; indeed, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. Typical does not mean identical, and the typicality requirement is liberally construed. Factual distinctions between the named plaintiffs' claims and those of other class members do not necessarily undermine typicality. The typicality requirement presents a low hurdle, which requires neither complete co-extensivity or even substantial identity of claims.

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

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

HN5[] Class Actions, Certification of Classes

The issue of typicality requires a court to determine whether the named plaintiffs' claims are typical of those of the class, not whether their claims will ultimately be meritorious. A court may not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits.

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

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

HN6[] Class Actions, Certification of Classes

Whether the named plaintiffs' claims have the same essential characteristics as the claims of other class members for purposes of the *Fed. R. Civ. P. 23(a)(3)* typicality requirement depends on whether all such claims arise from the same course of conduct and are based on the same legal theories. The fact that a class member may have a claim concerning a service that no named plaintiff received does not indicate a lack of typicality.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

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

HN7[] Prerequisites for Class Action, Adequacy of Representation

To meet *Fed. R. Civ. P. 23*'s adequacy of representation requirement, a representative must be able to fairly and adequately protect the interests of the class. *Fed. R. Civ. P. 23(a)(4)*). Under *Rule 23(a)(4)*, the adequacy determination has two parts: the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest of the class members. A class is not fairly and adequately represented if class members have antagonistic or conflicting claims.

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

Evidence > Burdens of Proof > Allocation

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

HN8[] Class Actions, Certification of Classes

At the class certification stage, it is plaintiffs' burden to come forward with evidence to demonstrate that all requirements for class certification are satisfied.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

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

HN9[] Prerequisites for Class Action, Adequacy of Representation

The *Fed. R. Civ. P. 23(a)(4)* adequacy requirement evaluates whether the claims and interests of the named plaintiffs conflict with the claims and interests of other putative class members.

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

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

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

HN10[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(b)(3) provides that a class can be maintained if questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Fed. R. Civ. P. 23(b)(3)*. To determine whether predominance and superiority are satisfied, courts examine the substantive elements of plaintiffs' claims, the proof necessary for those elements, and the manageability of trial on those issues.

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

Evidence > Burdens of Proof > Allocation

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

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

HN11[] **Class Actions, Certification of Classes**

Although related to *Fed. R. Civ. P. 23(a)*'s commonality requirement, the predominance inquiry is far more demanding. To satisfy this aspect of *Rule 23(b)(3)*, a plaintiff must show that common issues not only exist but outweigh the individual questions. The common questions must be central to all claims. If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.

Antitrust & Trade Law > Clayton Act > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Sherman Act > Claims

HN12[] **Clayton Act, Claims**

To prevail on each of their antitrust claims, plaintiffs must prove (1) a violation of ***antitrust law***; (2) individual injury, or impact, caused by that violation; and (3) measurable damages.

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

Evidence > Burdens of Proof > Allocation

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

HN13[] **Class Actions, Certification of Classes**

For class certification, plaintiffs need only show that common proof will predominate with respect to each element of their claims.

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

Governments > Legislation > Statute of Limitations > General Overview

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

HN14[] **Class Actions, Certification of Classes**

The mere fact that individualized statute of limitations determinations may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under *Fed. R. Civ. P. 23(b)(3)*. Challenges based on the statutes of limitations will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of a defendant's liability.

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

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

Evidence > Burdens of Proof > Allocation

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

HN15[] **Private Actions, Remedies**

Individual injury, also known as antitrust impact, is an element of an antitrust cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. In antitrust cases, impact often is critically important for the purpose of evaluating *Fed. R. Civ. P. 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, rather, it is to demonstrate that the element of antitrust impact is capable of common proof at trial through evidence that is common to the class rather than individual to its members. Where impact cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats *Rule 23(b)(3)* predominance.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses

HN16[] **Expert Witnesses, Daubert Standard**

Fed. R. Evid. 702 governs the admissibility of expert witness testimony. To admit expert testimony, a court must find that (1) the expert is proposing to testify to valid scientific, technical, or other specialized knowledge, and (2) her testimony will assist the trier of fact to understand or determine a fact in issue.

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

Evidence > Admissibility > Expert Witnesses

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN17[] **Class Actions, Certification of Classes**

Resolving expert disputes to determine whether a class certification requirement has been met is always a task for the court--no matter whether a dispute might appear to implicate the credibility of one or more experts, a matter resembling those usually reserved for a trier of fact.

Counsel: **[**1]** For In re: Evanston Northwestern Healthcare Corporation Antitrust Litigation, In Re: Duane M. Kelley, LEAD ATTORNEY, David Edward Dahlquist, Scott C. Walton, Thomas Aquinas Reynolds , III, Winston & Strawn LLP, Chicago, IL.

For Jeffrey Porter, on his own behalf and on behalf of all others similarly situated, Plaintiff: Mary Jane Fait, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL; Theodore Beloyeannis Bell, LEAD ATTORNEY, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL.

For Steven J. Messner, Plaintiff: David A. Balto, PRO HAC VICE, Law Office of David Balto, Washington, DC; Mary Jane Fait, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL; Michael D. Yanovsky, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL.

For Amit Berkowitz, Henry W Lahmeyer, Plaintiffs: David A. Balto, PRO HAC VICE, Law Office of David Balto, Washington, DC; John E Tangren, Michael D. Yanovsky, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL; Mary Jane Fait, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL.

For Painters District Council No. 30 Health & Welfare Fund, Plaintiff: Lori Ann Fanning, Marvin Alan Miller, Matthew **[**2]** E Van Tine, LEAD ATTORNEYS, Miller Law LLC, Chicago, IL; Mary Jane Fait, LEAD ATTORNEY, Wolf, Haldenstein, Adler, Freeman & Herz LLC (Chicago), Chicago, IL; John E Tangren, Wolf Haldenstein Adler Freeman & Herz LLC, Chicago, IL.

Illinois Health Facilities Planning Board, Plaintiff, Pro se, Springfield, IL.

For Northshore University HealthSystem, Defendant: Dane A. Drobny, David James Doyle, Duane M. Kelley, Winston & Strawn LLP, Chicago, IL.

For First Health Group Corporation, deponent: Jeffrey C. Clark, LEAD ATTORNEY, McGuireWoods LLP, Chicago, IL.

For Illinois Health Facilities Planning Board, deponent: Katherine Harvie Laurent, Illinois Attorney General's Office, Chicago, IL.

For Unicare Health Plans of the Midwest, Inc., deponent: Elizabeth Gwynn Doolin, LEAD ATTORNEY, Michael Brian Galibois, Chittenden, Murday & Novotny, LLC, Chicago, IL.

Judges: JOAN HUMPHREY LEFKOW, United States District Judge.

Opinion by: JOAN HUMPHREY LEFKOW

Opinion

[*59] **OPINION AND ORDER (REDACTED)**

Defendant, Evanston Northwestern Healthcare Corporation ("ENH"), [1] merged with Highland Park Hospital on January 1, 2000. Plaintiffs, Amit Berkowitz, Steven Messner, Henry Lahmeyer, and Painters District Council No. 30 Health & Welfare Fund ("Painters **[**3]** Fund") (collectively, "plaintiffs"), filed a consolidated amended class action complaint on November 11, 2008, alleging two alternative counts under Section 2 of the Sherman Act, *15 U.S.C. § 2*, for unlawful monopolization or attempt to monopolize, and one count of unlawful monopolization under Section 7 of the Clayton Act, *15 U.S.C. § 18*. Before the court are plaintiffs' motion for class certification [# 240], plaintiffs'

[1] ENH is now known as NorthShore University HealthSystem.

motion to strike the report of Dr. Monica Noether [# 317], and ENH's motion to strike the reply report of Dr. David Dranove [# 321]. For the reasons set forth below, plaintiffs' motion for class certification [# 240] is denied. Plaintiffs' motion to strike [# 317] and ENH's motion to strike [# 321] are both denied.

FACTUAL BACKGROUND

ENH is a not-for-profit corporation that consists of three hospitals located in the suburbs just north of Chicago: Evanston Hospital, Glenbrook Hospital, and Highland Park Hospital. ENH merged with Highland Park Hospital on January 1, 2000. Since that date, ENH has operated the three hospitals as a single, integrated entity.

I. FTC Proceeding

On February 10, 2004, the Federal Trade Commission **[**4]** ("FTC") filed an administrative complaint against ENH, alleging that the merger between ENH and Highland Park Hospital substantially lessened competition and enabled ENH to raise its prices of inpatient services to private payers [2] above the prices that the hospitals would have charged absent the merger, in violation of Section 7 of the Clayton Act, *15 U.S.C. § 18*. The complaint also alleged that the manner in which ENH contracted for physician services on behalf of its independent physicians constituted unfair methods of competition in violation of *Section 5* of the Federal Trade Commission Act, *15 U.S.C. § 45*.

On October 20, 2005, a FTC Administrative Law Judge ("ALJ") found ENH to be in violation of Section 7 of the Clayton Act and ordered ENH to divest the acquired assets of Highland Park Hospital. On appeal, the full Commission affirmed the ALJ's finding of liability, but reversed the divestiture order. *See In re Evanston Northwestern Healthcare, No. 9315, 2007 FTC LEXIS 95, 2007 WL 2286196 (F.T.C. Aug. 6, 2007)* **[**5]** (order). Instead, the Commission ruled that a conduct remedy (rather than a structural remedy such as divestiture) was appropriate and ordered ENH to establish two separate and independent teams for negotiating contracts with payors -- one team for Evanston Hospital and Glenbrook Hospital and another for Highland Park Hospital.

[*60] II. Background to this Proceeding

Plaintiffs are direct purchasers of healthcare services from ENH. There are four named plaintiffs: (1) Berkowitz, an individual who received outpatient services from ENH; (2) Messner, an individual who received outpatient services from ENH; (3) Lahmeyer, an individual who received outpatient services from ENH; and (4) Painters Fund, a not-for-profit trust established and maintained to provide comprehensive healthcare benefits to participants, including workers employed under various collective bargaining agreements, and to their dependents. Plaintiffs allege that "[b]y virtue of [the merger] on or about January 1, 2000, ENH acquired monopoly power in the marketing of Healthcare Services in the relevant geographic market and has abused and continues to abuse that power to maintain and enhance its market dominance in the marketing **[**6]** and sale of Healthcare Services by unreasonably restraining trade, thus artificially and anti-competitively raising the price of Healthcare Services sold to Plaintiffs and the Class." Compl. P 43.

Plaintiffs have moved for an order certifying this case as a class action pursuant to *Rule 23(b)(3) of the Federal Rules of Civil Procedure*. They seek to certify the following class:

> All persons or entities in the United States of America and Puerto Rico, except those who solely paid fixed amount co-pays, uninsureds who did not pay their bill, Medicaid and Traditional Medicare patients, governmental entities, defendant, other providers of healthcare services, and the present and former parents,

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[2] In the FTC proceeding, "private payers" was limited to managed care organizations ("MCO") that contracted with ENH during the relevant time period. A MCO is an organization that combines the functions of health insurance, delivery of care, and administration.

> predecessors, subsidiaries, and affiliates of defendant and other providers of healthcare services, who purchased or paid for inpatient hospital services or hospital-based outpatient services directly from NorthShore University Healthcare (formerly known as Evanston Northwestern Healthcare), its wholly-owned hospitals, predecessors, subsidiaries, or affiliates other than those acquired as a result of the merger with Rush North Shore Medical Center (the "Class") from at least as early as January 1, 2000 **[**7]** (the "Class Period").

Id. P 17.

LEGAL STANDARD

HN1[] A party seeking to certify a class action must meet two conditions. First, the movant must show the putative class satisfies the four prerequisites of *Rule 23(a)*: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Fed. R. Civ. P. 23(a)*; *Oshana v. Coca-Cola Co., 472 F.3d 506, 513 (7th Cir. 2006)*; *Rosario v. Livaditis, 963 F.2d 1013, 1017 (7th Cir. 1992)*. Second, the action must qualify under at least one of the three subsections of *Rule 23(b)*. *Fed. R. Civ. P. 23(b)*; *Rosario, 963 F.2d at 1017*; *Hardin v. Harshbarger, 814 F. Supp. 703, 706 (N.D. Ill. 1993)*. Here, plaintiffs seek certification under ***HN2***[] *Rule 23(b)(3)*, which requires a finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*.

HN3[] Courts retain broad discretion in determining whether a proposed class meets the Rule 23 certification requirements. *Keele v. Wexler, 149 F.3d 589, 592 (7th Cir. 1998)*. While the requirements of *Rule 23* **[**8]** should be liberally construed to support the policy favoring the maintenance of class actions, *King v. Kansas City S. Indus., 519 F.2d 20, 25-26 (7th Cir. 1975)*, the moving party bears the burden of showing that the requirements for class certification have been met. *Hardin, 814 F. Supp. at 706*.

ANALYSIS

The parties agree that plaintiffs have satisfied the requirements of numerosity and commonality. [3] They disagree, however, as to **[*61]** the remaining requirements of typicality, adequacy of representation, predominance, and superiority. ENH argues that plaintiffs fail to establish each of the four remaining requirements and, as a result, that plaintiffs' motion for class certification must be denied.

I. *Rule 23(a)* Requirements

A. Typicality

HN4[] To meet the typicality requirement, the named plaintiffs' claims or defenses must be typical of the class. *Fed. R. Civ. P. 23(a)(3)*; *Keele, 149 F.3d at 594*. The typicality requirement focuses on the class representatives; indeed, "[a] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele, 149 F.3d at 595* (citations omitted) (internal quotation marks omitted); *De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 232 (7th Cir. 1983)* (citations omitted) (internal quotation marks omitted). "Typical does not mean identical, and the

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[3] ENH does not agree that plaintiffs have established commonality but states that "whether Plaintiffs can establish commonality is not important because they cannot meet the higher standard of predominance." Def.'s Resp. at 11 n.4. As defendant does not offer any argument disputing commonality, the court finds plaintiffs have satisfied their burden with respect to this requirement. *See Vaughn v. King, 167 F.3d 347, 354 (7th Cir. 1999)* ("It is not the responsibility of this court to make arguments **[**9]** for the parties.")

typicality requirement is liberally construed." *Gaspar v. Linvatec Corp., 167 F.R.D. 51, 57 (N.D. Ill. 1996)*. Factual distinctions between the named plaintiffs' claims and those of other class members do not necessarily undermine typicality. *De La Fuente, 713 F.2d at 232*; *Owner-Operator Indep. Ass'n, Inc. v. Allied Van Lines, Inc., 231 F.R.D. 280, 282 (N.D. Ill. 2005)* (stating that the typicality requirement presents a "low hurdle . . . , which requires **[**10]** neither complete coextensivity or even substantial identity of claims.").

Plaintiffs argue that they have satisfied the requirement of typicality because the claims of the named plaintiffs arise from the same conduct -- "ENH's common practice or course of conduct in charging inflated prices to various MCOs and their insureds for medical services" -- and are based on the same legal theories -- antitrust violations -- as the claims of all class members. Pls.' Reply at 28.

ENH offers several arguments in response. First, ENH argues that plaintiffs cannot demonstrate typicality because none of the named plaintiffs is a MCO or "remotely resemble[s]" a MCO. Def.'s Resp. at 38. ENH notes that while MCOs engage in sophisticated contract negotiations to generate prices, none of the named plaintiffs participated in any pricing negotiations. As a result, ENH argues, the named plaintiffs do not have claims that are typical of those of any MCO. For support, ENH relies on *In re Graphics Processing, 253 F.R.D. 478, 490 (N.D. Cal. 2008)*, an antitrust case involving a proposed class of individuals and wholesalers that purchased computer graphics products at allegedly inflated prices. Because each named **[**11]** plaintiff was an individual purchaser (and none was a wholesaler), the court found their claims to be atypical of the class. *Id.* ("[W]holesale purchasers [] came to the negotiating table in a fundamentally different position than the representative plaintiffs."). Indeed, while the individuals in *Graphics Processing* paid retail prices and the terms of their purchases were not negotiable, the wholesalers purchased products at a variety of prices on individually-negotiated terms. *Id. at 489*. As a result, the proof needed to establish the individuals' claims differed from the proof required for the wholesalers' claims. *See id. at 490*.

Plaintiffs argue that *Graphics Processing* is distinguishable from the case at bar because here, the named plaintiffs' claims are derivative of the MCO's claims because the prices charged to the named plaintiffs were determined by the pricing structures negotiated by the MCOs, whereas in *Graphics Processing,* the claims of (and prices charged to) the individual purchasers were entirely independent of the claims of (and prices charged to) the wholesalers. The court agrees. Unlike the circumstances in *Graphics Processing*, here, the named plaintiffs' claims are **[**12]** based on the same course of conduct as the claims of the MCOs. That is, the proof needed to establish the named plaintiffs' claims is the same proof needed to establish their MCO's claims. For example, to prove that Painters Fund, a self-insured entity, paid an anti-competitive price for a given service, plaintiffs must prove that Blue Cross Blue Shield of Illinois ("BCBSI"), the MCO that passed on its negotiated rates to **[*62]** Painters Fund, was charged that same anti-competitive price. [4] The fact that none of the named plaintiffs is a MCO does not, therefore, demonstrate that plaintiffs failed to establish typicality, as the MCOs and the named plaintiffs seek to hold ENH liable for the same allegedly inflated prices.

Second, ENH argues that the typicality requirement is not satisfied because self-insured entities do not have a legitimate named representative. Although Painters Fund is a self-insured entity, ENH argues that its claims "cannot be typical of any member of the proposed class because it has no claim." Def.'s Resp. at 38. To support its argument that Painters Fund has no claim, **[**13]** it relies on a declaration of Joseph Arango, a BCBSI executive, stating that "[f]rom 1990 to the present, BCBSI paid [ENH] . . . fair and reasonable prices for health care services," that "BCBSI did not pay artificially inflated prices," and finally that "BCBSI declines to be included as a class member in any class that may be certified." Arango Decl. at PP 1, 2, and 4. Because Painters Fund's claim is derivative of BCBSI's, and because the Arango declaration states that BCBSI did not pay anti-competitive prices, ENH argues that Painter's Fund's claims are without merit and therefore cannot be typical of the class.

HN5[] The issue of typicality requires the court to determine whether the named plaintiffs' claims are typical of those of the class, not whether their claims will ultimately be meritorious. *See Loeb Indus., Inc. v. Sumitomo Corp., 306 F.3d 469, 480 (7th Cir. 2002)* ("[A] court may not refuse to certify a class on the ground that it thinks the class

[4] *See infra* at 30 for a discussion of the structure of a contract between a MCO and a self-insured entity.

will eventually lose on the merits."). Accordingly, the court cannot say with certainty that BCBSI did not suffer injury, as it will not consider the Arango declaration to be conclusive evidence of this fact at this time. Moreover, the **[**14]** Arango declaration does not indicate that Painters Fund's claims are atypical of claims of other self-insured entities within the proposed class. As a result, ENH's second argument is unavailing.

Finally, ENH argues that plaintiffs cannot demonstrate typicality because the named plaintiffs do not share "essential characteristics" of the proposed class, as proof of their claims would not prove the claims of any other class member. *See* *Retired Chi. Police Ass'n v. City of Chi., 7 F.3d 584, 596-97 (7th Cir. 1993)*. "For example, if Plaintiff Messner proved that he was overcharged for one visit under his Unicare plan, it would not prove that Plaintiff Lahmeyer was overcharged for any visits while he was covered by Cigna." Def.'s Resp. at 39. [5] ENH then, for the second time, analogizes this case to *Graphics Processing,* arguing that the "overwhelming disparities" separating named plaintiffs (individual patients) from MCOs and self-insured entities also demonstrate that their claims do not share the same "essential characteristics." *See* *Graphics Processing, 253 F.R.D. at 490*. They highlight the fact that of ENH's 6,200 outpatient services, Berkowitz received four, Messner received six, and **[**15]** Lahmeyer received five. [6]

HN6[] Whether the named plaintiffs' claims have the same "essential characteristics" as the claims of other class members depends on whether all such claims **[**16]** arise from the same course of conduct and are based on the same legal theories. *See* *Retired Chi. Police Ass'n, 7 F.3d at 589-97*. Here, all class members' claims involve allegations that **[*63]** ENH charged anti-competitive prices for healthcare services. The fact that the named plaintiffs did not receive the same services as all other class members does not render their claims atypical. Rather, all of the claims and allegations involve an evaluation of ENH pricing and arise from an alleged course of conduct in charging anti-competitive prices. The fact that a class member may have a claim concerning a service that no named plaintiff received, therefore, does not indicate a lack of typicality. *See Elias v. Ungar's Food Prods., Inc., 252 F.R.D. 233, 243-44 (D.N.J. 2008)* (holding that claims of named plaintiffs were typical though they bought three of the five products included in the class definition).

For these reasons, the court finds that the claims of the named plaintiffs are typical of the claims of the proposed class.

B. Adequacy of Representation

HN7[] To meet Rule 23's adequacy of representation requirement, "the representative must be able to 'fairly and adequately protect the interests of the **[**17]** class.'" *Keele, 149 F.3d at 594* (quoting *Fed. R. Civ. P. 23(a)(4)*). Under *Rule 23(a)(4)*, the adequacy determination has "two parts: 'the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest' of the class members." *Retired Chi. Police Ass'n, 7 F.3d at 598* (quoting *Sec'y of Labor v. Fitzsimmons, 805 F.2d 682, 697 (7th Cir. 1986)* (en banc)). "A class is not fairly and adequately represented if class members have antagonistic or conflicting claims." *Rosario, 963 F.2d at 1018* (internal citation omitted).

ENH does not contest that plaintiffs' counsel is adequate. ENH argues, however, that the named plaintiffs are not adequate representatives of the putative class because (1) Painters Fund cannot be a class representative; (2) the

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[5] As discussed *supra,* the proof required to establish the named plaintiffs' claims will also serve to establish the claims of other class members. In other words, the proof required to establish that Messner was overcharged may not prove that another named plaintiff was overcharged, but it would prove that Unicare, the MCO through which he received healthcare coverage and a class member, was overcharged.

[6] Defendant further argues that "[t]he prices that [named] Plaintiffs paid to ENH depend on too many individualized facts to even determine if there was impact," including list prices of services, whether the service was covered by an individual's health plan, whether an individual carried coinsurance or was subject to a co-pay, an out-of-pocket maximum, or an annual deductible limit, or whether ENH improved quality of care for that service during the class period. Def.'s Resp. at 39. This is an argument pertaining to the requirement of predominance; the court will not consider it within the context of typicality.

individual named plaintiffs cannot represent any class of inpatient claims; and (3) irreconcilable conflicts of interest exist within the proposed class.

First, ENH argues that Painters Fund "simply has no claim relating to the merger and cannot represent the proposed class [because] . . . . the Painters Fund health insurance plan contracted through Blue Cross." Def.'s Resp. **[**18]** at 26; *see* *Robinson v. Sheriff of Cook County, 167 F.3d 1155, 1157 (7th Cir. 1999)* ("If when class certification is sought it is already apparent . . . that the class representative's claim is extremely weak, this is an independent reason to doubt the adequacy of his representation."). As discussed *supra,* the question of whether BCBSI and, by association, Painters Fund, suffered injury is left undecided. It is not clear, however, that BCBSI did *not* suffer injury such that the court should doubt the ability of Painters Fund to provide adequate representation.

Second, ENH argues that "[o]nce Painters Fund is set aside, Plaintiffs lack a class representative not only for any entities that are not individual patients (including self-insured), but also for any claims related to inpatient services." Def.'s Resp. at 28. Because the court will not disqualify Painters Fund as a class representative, and further because Painters Fund offered an insurance plan covering inpatient and outpatient services, however, ENH's argument is moot.

Finally, ENH argues that "several" inconsistencies between the interests of the named plaintiffs and the members of the proposed class render the named plaintiffs **[**19]** inadequate representatives. Def.'s Resp. at 28. First, ENH states that the claims of the named plaintiffs are antagonistic to those of individuals who received services that improved in quality as a result of the merger. It argues that these individuals suffered no antitrust impact because they actually benefitted from the merger. Due to the fact that some putative class members benefitted and some were harmed by the merger, ENH argues, the claims of the proposed class members necessarily conflict and prohibit this court from certifying the proposed class. ENH relies on several cases, all of which stand for the proposition that class certification is inappropriate where some class members derived benefit from the allegedly wrongful conduct. *See, e.g., Bieneman v. City of Chi., 864 F.2d 463, 465 (7th Cir. 1988)* (affirming denial of class certification in airport noise case where **[*64]** some putative class members "undoubtedly" benefitted from increased airport traffic in the form of increased land value and business opportunities). Plaintiffs agree that case law prohibits certification where class members were both helped and harmed by the relevant conduct, however, they argue that here, ENH **[**20]** cannot demonstrate that any class members, even those who received services of higher quality, benefitted from the merger. They argue that the improvement in the quality of services was not the result of the merger but, rather, due to other, non-merger-specific factors. As support, plaintiffs rely on the FTC's finding that "the quality improvements asserted by ENH are not properly credited as benefits of the merger because Highland Park could, and likely would, have made similar improvements without a merger." *In re Evanston Northwestern Healthcare, 2007 FTC LEXIS 95, 2007 WL 2286196, at *38*.

HN8[] At the class certification stage, it is plaintiffs' burden to come forward with evidence to demonstrate that all requirements for class certification are satisfied. *Oshana, 472 F.3d at 513*; *Retired Chi. Police Ass'n, 7 F.3d at 596*. Here, plaintiffs have met their burden. While the FTC's finding is not binding on this court, it is strong evidence that increases in the quality of services at ENH were not a consequence of the merger. Because ENH proffered no evidence to dispute or discredit this finding, the court is satisfied that the interests of the putative class members who received services of increased quality **[**21]** after the merger will not conflict with the interests of those individuals who paid higher prices for services of pre-merger quality. Further, even if the increase in quality for some services was attributable to the merger, it is not clear that this fact would put the interests of putative class members into conflict. Unlike *Bieneman,* where some putative class members "undoubtedly" benefited from the alleged wrongful conduct such that they likely would have opposed the class action, here, the court is not convinced that class members who received services of increased quality due to the merger would oppose the instant action. *See Bieneman, 864 F.2d at 465*.

Finally, ENH states that the named plaintiffs' interests will likely conflict with those of the MCOs covered by the class definition because of the "inherent conflict of interest between insurer and insured." Def.'s Resp. at 30-31 ("Wherever there is cost-sharing among purported class members, there will be conflict."). ENH states that this conflict will emerge at the damages allocation stage of the litigation, as each party will want to demonstrate that it bore the brunt of the overcharge. As a final point, it highlights the difference **[**22]** between MCOs -- "sophisticated businesses motivated by generating profits" -- and typical patients -- "more motivated by receiving quality health care" -- and argues that these differences defeat adequacy. *Id.* at 31. Plaintiffs argue that this alleged conflict is an insufficient reason to deny certification because it pertains to the allocation of damages, an issue that is not proper to consider at the class certification stage. *See Kohen v. Pac. Inv. Mgmt. Co., 244 F.R.D. 469, 476 (N.D. Ill. 2007)*, *aff'd, 571 F.3d at 677* ("Inquiry into matters of damage is not ordinarily made at the class certification stage."); *Katz v. Comdisco, Inc., 117 F.R.D. 403, 412 (N.D. Ill. 1987)* ("Traditionally . . . the courts have not allowed individual questions of damages to prevent class certification.").

The legal principles cited by plaintiffs are not specific to the adequacy requirement. Nonetheless, the court agrees that because a conflict between insurers and insured individuals will arise (if at all) at the damages allocation stage, it does not preclude a finding of adequacy. ***HN9***[] The adequacy requirement evaluates whether the claims and interests of the named plaintiffs conflict with the claims and **[**23]** interests of other putative class members. *See Rosario, 963 F.2d at 1018*. Though insurers and insured individuals may disagree as to the calculation of damages, their respective claims and interests are exactly aligned. Both insurers and insured individuals seek to hold ENH liable under the same antitrust laws for charging the same anti-competitive prices for the same healthcare services. Moreover, the relationship between insurer and insured is governed by contract -- whatever disagreement the parties may have over damage allocation can be **[*65]** resolved with reference to the relevant contractual provisions.

For the reasons discussed above and because the court finds plaintiffs' counsel to be adequate, plaintiffs have satisfied the adequacy of representation requirement.

II. *Rule 23(b)(3)* Requirements

HN10[] *Rule 23(b)(3)* provides that a class can be maintained if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*. To determine whether predominance and superiority are satisfied, **[**24]** courts examine "the substantive elements of plaintiffs' claims, the proof necessary for those elements, and the manageability of trial on those issues." *Reed v. Advocate Health Care, No. 06-c-3337, 268 F.R.D. 573, 2009 U.S. Dist. LEXIS 89576, 2009 WL 3146999, at *4 (N.D. Ill. Sept. 28, 2009)* (citing *Simer v. Rios, 661 F.2d 655, 672-73 (7th Cir. 1981))*.

A. Predominance

HN11[] "Although related to *Rule 23(a)*'s commonality requirement, 'the predominance inquiry is far more demanding . . .' To satisfy this aspect of *Rule 23(b)(3)*, 'the plaintiff must show that common issues not only exist but outweigh the individual questions. The common questions must be central to all claims.'" *Pavone v. Aegis Lending Corp., No. 05-c-1529, 2006 U.S. Dist. LEXIS 62157, 2006 WL 2536632, at *4 (N.D. Ill. Aug. 31, 2006)* (citing, *inter alia*, *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24, 117 S. Ct. 2231, 2250, 138 L. Ed. 2d 689 (1997))*. Indeed, "[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)* (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001))*.

HN12[] To prevail on each of their claims, **[**25]** plaintiffs must prove (1) a violation of ***antitrust law***; (2) individual injury, or impact, caused by that violation; and (3) measurable damages. *Reed, 2009 U.S. Dist. LEXIS 89576, 2009 WL 3146999, at *5* (citing *Hydrogen Peroxide, 552 F.3d at 311*; *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007))*. ***HN13***[] For class certification, plaintiffs need only show that common proof will predominate with respect to each element of their claims. *Id.* Each party advances several arguments with respect to the predominance requirement. These arguments focus on whether plaintiffs can prove with common evidence two elements of their antitrust claims: (1) a violation of ***antitrust law*** and (2) impact.

1. Violation of *Antitrust Law*

ENH argues that plaintiffs cannot establish a violation of ***antitrust law*** with common evidence because individualized issues predominate with respect to the applicability of (1) the alternative dispute resolution ("ADR") provisions contained in the insurance contracts of several putative class members and (2) ENH's statute of limitations defense.

a. Alternative Dispute Resolution Provisions

ENH first argues that plaintiffs cannot establish predominance because "nearly all" of **[**26]** the MCOs within the proposed class have ADR provisions in their contracts with ENH, the applicability of which requires individualized analysis. Def.'s Resp. at 24 ("The individual issues implicated by determining the extent to which each purported MCO class member has a claim that is arbitrable predominates over any common issues."). Specifically, ENH argues that the presence of materially different contract provisions (such as dispute resolution provisions) across class members defeats a finding of predominance, relying on *Christie Clinic* for this proposition. *See Christie Clinic, P.C. v. MultiPlan, Inc., No. 08-c-2065, 2009 U.S. Dist. LEXIS 5750, 2009 WL 175030, at *11 (C.D. Ill. Jan. 26, 2009)* ("This court concludes that Defendants have conclusively shown that the contracts between [defendants] and the proposed class members are materially different from the contract between [defendants] and [named] Plaintiff. Therefore, . . . the issues common to the class members do not predominate.").

[*66] Plaintiffs argue that the enforceability of the ADR provisions is an issue of fact and law common to the class and therefore that the presence of such provisions does not defeat a finding of predominance. They also argue that **[**27]** ENH's reliance on *Christie Clinic* is unavailing, as the ADR provisions here are not materially different, but materially the same. Finally, they rely on this court's decision to reserve ruling on arbitrability until after the class certification decision as evidence that the issue of arbitrability does not threaten to predominate over common issues in this matter.

Whether the ADR provisions are enforceable is an issue common to all MCOs that have such provisions in their contracts. Further, it is an issue that can be resolved with the same evidence for every affected MCO. Indeed, in its motion to compel arbitration, ENH moved to compel arbitration for *all* MCOs. It did not make individualized arguments regarding any MCO or specific contract; rather, it stated that "[t]hough the specific language may vary, in general, the arbitration clauses cover all controversies, disputes, or claims 'arising out of or relating to' the private payor's agreement with ENH. . . . In substance, *all* contemplate the arbitration of the type of claims in this suit." Def.'s Mot. to Compel Arb. at 4. This statement undermines ENH's reliance on *Christie Clinic,* which found a lack of predominance where individual **[**28]** class members had materially *different* contracts. *See Christie Clinic, 2009 U.S. Dist. LEXIS 5750, 2009 WL 175030, at *11*.

In fact, *Christie Clinic* helps to illustrate why the presence of these ADR provisions do not undermine predominance. *Christie Clinic* involved, in relevant part, a breach of contract claim. The proposed class was comprised of individuals who each had a different contract with the defendant and, as a result, the court found that individual issues with respect to their claims predominated. Here, by contrast, the viability of plaintiffs' claims do not rest on specific (or different) contractual provisions. Rather, the viability of plaintiffs' claims (and the issues underlying those claims) is entirely separate from the contractual ADR provisions at issue.

Because the applicability of the ADR provisions is an issue divorced from plaintiff's substantive claims and can be determined for all affected potential class members with common evidence, the court finds that the possible arbitration of some class members claims does not destroy predominance in the case at bar. *See Lerner v. Haimsohn, 126 F.R.D. 64, 66 (D. Colo. 1989)* ("[T]he possible arbitration of some class members claims will not, by itself, **[**29]** defeat class certification."); *Shankroff v. Advest, Inc., 112 F.R.D. 190, 194 (S.D.N.Y 1986)* (same).

b. Statute of Limitations

ENH next argues that an evaluation of its statute of limitations defense will require individualized, claim-by-claim analysis and that, as a result, individual issues predominate in the instant case. It states that "Rule 23(b)(3) prohibits certification in cases where individual statute of limitations determinations are required," Def.'s Resp. at 31, relying on *Broussard* for support. *See* Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331(4th Cir. 1998). In *Broussard,* the Fourth Circuit held that "when the defendant's 'affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff's case,' class certification is erroneous." Id. at 342 (quoting In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 853 (9th Cir. 1982)). [7] Plaintiffs, by contrast, argue that ENH's statute of limitations defense does not automatically prohibit class certification. They rely on Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 296 (1st Cir. 2000), which rejected the Fourth Circuit's holding in *Broussard,* **[**30]** stating that "to the extent that [*Broussard*] purports to establish a per se **[*67]** rule, [the holding] contradicts the weight of authority and ignores the essence of the predominance inquiry." *Id.* They further argue that, contrary to ENH's assertion, an evaluation of its statute of limitations defense involves a determination of several issues of fact and law common to the class.

Though the Seventh Circuit has not opined on the issue, the First Circuit, in *Waste Mgmt. Holdings,* held that individualized statute of limitations determinations do not automatically preclude class certification:

> ***HN14***[] [T]he mere **[**31]** fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3).

Id. at 296; *see also* In re Linerboard Antitrust Litig., 305 F.3d 145, 162 (3d Cir. 2002) ("Challenges based on the statutes of limitations . . . have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability."). The Northern District of Illinois has also adopted this reasoning. *See* Saltzman v. Pella Corp., 257 F.R.D. 471, 486 (N.D. Ill. 2009) ("[T]his Court has rejected the per se prohibition against certification based upon statute of limitations differences . . . .") (citing Sparano v. Southland Corp., No. 94-c-2098, 1996 U.S. Dist. LEXIS 17485, 1996 WL 681273, at *4 (N.D. Ill. Nov. 21, 1996) ("[T]he presence of unresolved individual issues of compliance with the statute of limitations does **[**32]** not prevent class actions from proceeding.") (citation omitted)).

In light of this case law and because an examination of the parties' respective arguments indicates that common issues (supported by common evidence) underlie a determination of the applicability of ENH's statute of limitations defense, the presence of ENH's statute of limitations defense does not defeat a finding of predominance. ENH's primary argument in support of its defense is that plaintiffs' claims accrued as a matter of law on January 1, 2000, the date on which the merger was finalized, more than four years before plaintiffs filed this suit. It argues that all putative class members had knowledge -- actual, imputed or constructive -- of the merger either on or before that date. Specifically, it argues that (1) MCOs, self-insured, and fully-insured entities had actual knowledge because ENH sent letters to these organizations announcing the merger; (2) the entities' knowledge is imputed to all insured individual class members under principles of agency law; and (3) all class members had constructive notice of the merger as a result of its large amount of coverage in the media. In response, plaintiffs argue that **[**33]** (1) ENH engaged in a continuing violation of ***antitrust law*** such that the statute of limitations begins to run anew with each injury; (2) there are only three dates on which individual plaintiffs could have learned of their injury and all three are within the statute of limitations period; and (3) ENH engaged in fraudulent concealment such that the statute of limitations should be tolled.

[7] ENH also argues that "[e]ven if the Court entertains such individualized evidence, the record will show that no MCO or self- or fully-insured entity has an actionable claim. Moreover, none of the Named Plaintiffs have a claim." Def.'s Resp. at 31. This argument conflates the issue of whether common issues predominate the merits decision with the merits decision itself. *See* Loeb Indus., Inc., 306 F.3d at 480; Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12. Accordingly, the court will not consider either party's arguments with respect to the merits of ENH's statute of limitations defense.

Underlying these arguments are issues of fact and law common to all class members. These common issues include (1) whether the statute of limitations was triggered by knowledge of the merger or at some other time; (2) whether ENH engaged in a continuing violation of ***antitrust law***; (3) whether the letters sent from ENH to various entities put them on notice of the merger; (4) whether such letters provide evidence of fraudulent concealment; (5) whether the knowledge of a MCO, self-insured entity, or fully-insured entity can be imputed to insured individuals under the principles of agency law.

Despite the presence of these common issues, ENH argues that an individual class member would have to resort to highly individualized evidence to challenge any of its arguments and that, as a result, individual issues **[**34]** predominate. For example, to challenge ENH's contention that a MCO's knowledge is imputed to its insured customers, a customer would have to present "highly-individualized evidence -- e.g., evidence concerning the scope of a particular agent's duties to its principal." Def.'s. Resp. at 35. This argument is unsound. The applicability of the **[*68]** statute of limitations will turn on the resolution of the above-described common issues and will not likely be affected by any such (highly unlikely) individualized evidence.

2. Antitrust Impact and Damages

The Third Circuit recently articulated the standards for the element of antitrust impact and the requirements imposed on plaintiffs at the class certification stage of litigation:

> ***HN15***[] [I]ndividual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation. In antitrust cases, impact often is critically important for the purpose of evaluating *Rule 23(b)(3)*'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. Plaintiffs' burden at the class certification **[**35]** stage is not to prove the element of antitrust impact, . . . [rather, it] is to demonstrate that the element of antitrust impact is capable of common proof at trial through evidence that is common to the class rather than individual to its members.

Hydrogen Peroxide, 552 F.3d at 311-12. "[W]here [impact] cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats *Rule 23(b)(3)* predominance." *Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003)*.

Here, with respect to the issue of impact, the parties have presented competing opinions of expert economists. Plaintiffs have submitted two reports prepared by Dr. David Dranove, Ph.D., a health industry management professor at Northwestern University's Kellogg School of Management. Dranove concludes that the Difference-in-Difference ("DID") methodology can demonstrate impact on a classwide basis, and plaintiffs rely on his conclusion to support their position that common issues predominate the impact analysis.

ENH's expert is Dr. Monica Noether, an executive vice president at Charles River Associates International, a consulting firm **[**36]** that offers economic, financial, and business expertise. Noether disagrees with Dranove's conclusion. ENH relies on her report to support its arguments that plaintiffs cannot prove classwide impact because (1) the proposed class includes several members who were not impacted at all; (2) Dranove's method impermissibly relies on averages; and (3) Dranove's method relies on an invalid control group. [8]

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[8] In its response, ENH also argues that plaintiffs' proposed method for demonstrating impact does not satisfy the "rigorous analysis" requirement of *Rule 23(b)(3)*. It argues that Dranove's report contained mere promises to perform an analysis. *See* Def.'s Resp. at 20-24. In his reply report, however, Dranove does perform his own analysis. In ENH's motion to strike Dranove's reply report or in the alternative, to file a sur-response, ENH requested that his new analysis be stricken, as it was presented for the first time on reply. The court denied the motion, but held oral arguments to allow ENH to respond to the new analysis. Accordingly, ENH's arguments regarding Dranove's failure to perform an analysis are moot.

Before evaluating plaintiffs' proposed method for proving classwide impact, the **[**37]** court will summarize the contents of the three expert reports as well as the expert testimony given during oral argument, which took place on February 23, 2010.

a. First Dranove Report

Dranove opines that DID regression analysis provides a reliable method of proving classwide impact. DID regression "examines the change in an outcome of interest for a group of individuals or firms affected by an event such as a merger (the 'treatment' group) while controlling for the contemporaneous change in outcome for an otherwise similar group that was not affected by that event (the 'control' group)." Expert Report of David Dranove, Feb. 12, 2009, at 23 (hereinafter "Dranove Rep."). DID analysis has two steps: (1) compute the difference in the outcome before and after the event for both the control and treatment groups; and (2) compute the difference between the differences across the two groups (the "DID estimate"). A researcher will also often include additional control variables to account for **[*69]** other factors that may affect the outcome. The DID estimate indicates whether there is any additional difference in the outcome for the treatment group beyond what occurred for the control group.

Dranove **[**38]** indicates that he will perform DID analysis for each insurer that contracted with ENH during the relevant time. He explains that here, the "outcome" is the price of healthcare services, the treatment group is the three ENH hospitals, and the control group is a set of hospitals that did not merge during the relevant time period but that are otherwise similar to ENH. He also explains that he will implement additional control variables to account for, *inter alia,* changes in patient medical conditions and in hospital characteristics (*i.e.* teaching status). The DID estimates will represent the increase (if any) in the price of healthcare for the average ENH patient covered by a given insurer. Dranove refers to this estimate as the amount of "overcharge." He acknowledges that, in theory, an increase in average price charged an insurer does not imply that all patients covered by that insurer paid higher prices for healthcare services; he states, however, that the nature of contracting between ENH and insurers allows for this conclusion. Indeed, his review of the healthcare industry and of the structure and nature of contracts between insurers and hospitals shows that "if [ENH] overcharged **[**39]** an insurer by a certain percentage, all or substantially all class members covered by that insurer will be overcharged by approximately the same percentage. This is equally true across all types of fully and self-funded plan sponsors covered by an insurer, and it also applies to those uninsured who paid their hospital charges in full or approximately in full." *Id.* at 2.

I. Pricing Methodologies Used in ENH Contracts

Dranove first reviews the three pricing methodologies used by ENH to charge for inpatient care, outpatient care, and uninsured individuals. He then describes how each set of methodologies allows for a finding of common impact from increases in average prices.

A. Inpatient Services

ENH implements three pricing methodologies within its contracts for inpatient services: (1) case rate pricing, (2) per diem pricing, and (3) discount-off pricing. Case rate pricing calculates the price of services by using the Diagnosis Related Group ("DRG"), which is both a descriptor of and a numerical value assigned to a patient admission. Computer software assigns patients to DRGs based on diagnosis, comorbidities, age, applicable procedure(s), and discharge status. [9] For each contract, there **[**40]** are also "relative value weights" assigned to each DRG, which measure the cost of treating a particular patient relative to the cost of an average patient within that DRG nationwide. An average value weight is 1, and values range from .15 to 23.67. Each patient who is admitted to a

[9] For example, DRG 135 represents "Cardiac Congenital & Valvular Disorders Age > 17 [With complicating Condition];" DRG 136 represents "Cardiac Congenital & Valvular Disorders Age > 17 [Without complicating Condition];" and DRG 137 represents "Cardiac Congenital & Valvular Disorders Age 0-17." Dranove Rep. at 29 n.73.

hospital is assigned to a DRG and is assigned a relative value weight. The DRG value and the relative value weight are multiplied to generate the "DRG weight" for that admission. To derive the price of an admission, a patient's DRG weight is multiplied by a base rate, which is determined during contract negotiations. Case rate prices are therefore a function of two variables: (1) DRG weight and (2) an insurer's negotiated base rate.

Dranove states that as a consequence of this pricing structure, any negotiated price increase takes the form of an increase in the base rate because DRG weights do **[**41]** not fluctuate. He states that it is possible to determine the increase in the base rate charged an insurer by looking at the overall increase in average payments from that insurer. If DID analysis demonstrates that the base rate charged an insurer increased at a statistically significant rate (compared to increases in base rates at control hospitals), Dranove states that this will allow for a conclusion that prices for all or substantially all patients covered by that insurer increased by a significant **[*70]** amount. Dranove therefore concludes that the DID method is able to determine, for case rate contracts, whether an insurer and all of its customers were commonly impacted by price increases.

Per diem pricing requires patients to pay a fixed price for each day spent in the hospital. Prices are therefore a function of the length of a patient's stay. Some per diem contracts specify a uniform per diem rate applicable to all inpatient care, while some specify different rates based on the kind of inpatient admission. Because of this pricing structure, Dranove concludes that an increase in per diem rates charged an insurer will result in a common percentage increase in the price of services for **[**42]** all patients covered by that insurer. He will calculate whether per diem rates increased for an insurer by examining the overall increase in average payments from that insurer. If DID analysis demonstrates that an increase in an insurer's per diem rates was statistically significant, Dranove concludes that this will prove common impact across all or substantially all individuals covered by that insurer.

Discount-off pricing calculates price by taking a fixed percentage discount from a service's list price. [10] Price increases can take several forms; the two most common are a decrease in the negotiated discount and an across-the-board increase in list prices. [11] Dranove concludes that common impact is inherent in this pricing structure because if list prices increase by a certain percentage, the price charged each patient will increase by that same percentage. Similarly, if an insurer's discount rate decreases by a certain percentage, each patient covered by that insurer will pay the same increased price for services across the board. Dranove notes that he will be able to determine whether such price increases occurred for an insurer by looking at the overall increase in average payments **[**43]** from that insurer. If DID analysis indicates that average payments from an insurer increased by a statistically significant amount, Dranove concludes that this will prove common impact -- that all patients covered by that insurer were impacted by the price increase.

B. Outpatient Services

The most common methodology used for outpatient care contracts is discount-off pricing, which is described above. According to Dranove, common impact is inherent in this system because if list prices increase or an insurer's discount rate decreases, prices for all patients covered by that insurer will increase by the same percentage. Dranove will rely on DID analysis to determine if there is a statistically significant increase in payments for outpatient services.

C. Uninsured Individuals

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[10] Hospitals refer to their price lists as chargemasters.

[11] There is no meaningful mathematical distinction between a decrease in discount and an increase in price.

Uninsured patients are typically billed at full list prices. [12] Dranove will perform DID analysis on actual payments by the uninsured to determine whether these patients paid statistically significant higher prices. Because he believes that common impact is inherent **[**44]** for all discount-off contracts, he states that he can demonstrate common impact across uninsured individuals, whom he treats as using a discount-off pricing system in which the discount is zero.

ii. Potential Variations in Pricing Methodologies

Dranove acknowledges that some of ENH's contracts may contain variations of the above-described pricing methodologies. He specifically considers "whether a departure from the most basic forms of implementation could reasonably undermine [his] finding of common impact. For example, it is possible that a lack of common impact would result from [ENH's] raising prices for one set of inpatient services but not another." *Id.* at 33. Dranove concludes that such disparate effects will not likely pose a problem **[*71]** because (1) ENH most commonly adopts payment rules across the board, and rules apply to all or nearly all inpatient and outpatient services; (2) research **[**45]** shows that hospitals do not limit their exercise of market power to certain inpatient services or ailments; and (3) DID analysis can be adjusted to calculate damages at a contract-specific level and can include "dummy variables" to control for these adjustments.

Dranove first considers the possibility that ENH increased list prices for different services at substantially different rates, which would affect his analysis of discount-off contracts. If this occurred, [13] he concludes that ENH's exercise of market power would still have a common impact on class members but notes that the magnitude of that impact (*i.e.* the amount of damages) could differ across class members. Dranove indicates that he would take the following steps to address and calculate such variance: "(1) identify the service classes subject to different percentage increases by reviewing ENH billing documents that report charges and DRGs, (2) include in the DID analysis dummy variables for those services that faced a differential increase, and (3) obtain an estimate of the overcharges that reflects the differential increase." *Id.* at 35.

Second, he considers the possibility that a contract employed multiple per diem rates, all of which increased at different rates. If this occurred, [14] he concludes that ENH's exercise of market power would still have a common impact on class members, but notes that the magnitude of the overcharge may differ across patients. To calculate differential overcharges, Dranove will conduct a DID analysis using dummy variables to account for differing classes of service. [15]

Third, Dranove considers the possibility that a contract used multiple pricing methods. If prices increased by the same percentage, he concludes that the combination of multiple methods would not affect DID analysis, as

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[12] In many cases, uninsured individuals do not pay their hospital bills. These individuals are excluded from the class definition. Dranove believes that those who do pay (in full or approximately in full) can be "readily identified by data that either are or are likely to be available." *Id.* at 25.

[13] To determine whether ENH increased list prices in its chargemaster at substantially **[**46]** different rates for different services, Dranove indicated that he would need to perform "a review of [ENH]'s strategic documents, contracts with insurers, and the chargemaster itself." *Id.* at 35. At the time he authored his first expert report, he had not conducted any such analysis.

[14] Dranove states that if a particular contract employed multiple per diem rates and ENH increased such rates by substantially different amounts, "any such differential increase will be readily apparent in both the relevant contracts and in [ENH]'s billing data ([ENH]'s billing data records the payment and the length of stay, so the per diem rate can be recovered directly)." *Id.* at 35-36.

[15] Dranove explains how dummy variables will correct for **[**47]** variation in price increases: "The applicable contract will likely identify the classes of services that should have a dummy variable. For example, if a contract specifies one per diem rate for maternity stays and another for general medical/surgical stays, then a dummy variable that equals one if the patient is a maternity patient will suffice to estimate any differential effect for these patients. The most likely basis upon which to define classes of service is the patient's [DRG]." *Id.* at 36 n. 82.

increases would still be evenly distributed across services and customers. If percentage increases differed, Dranove will account for the differentiation by including suitably defined dummy variables. [16] He states that "[t]his approach generalizes in a straightforward fashion to encompass more complicated possibilities," including the possibility of a single contract with all three pricing methods. *Id.* For more complicated possibilities, he will incorporate dummy variables **[**48]** to control for variations in the data.

Fourth, Dranove considers the possibility of outlier payments. Outlier provisions specify that when list charges associated with a patient exceed a predetermined threshold, payment will be made on a discount-off basis rather than a per diem or case rate basis. Conceptually, this is very similar to the possibility of the mixed-methodology scenario; however, the difference is that in the mixed-methodology scenario, the form of payment is determined by the class of service, whereas with outlier payments, the form of payment is determined by the level of list charges. Dranove will use dummy variables **[*72]** to control for outlier provisions as they appear. [17]

Finally, Dranove considers the possibility that pricing methods in a contract will change over time. Because DID **[**49]** analysis focuses on price rather than form of payment, the only required adaptation is that the analysis be performed at the level of services, rather than the insurer level.

iii. Summary of Findings

In short, Dranove's initial report states that DID analysis provides a reliable framework to determine impact on a classwide basis. His research shows that the impact of overcharges is intrinsically common to all categories of private healthcare payers, so that any overcharges would result in impact to all or substantially all class members, regardless of the pricing methodology used in the relevant contract. DID analysis reports overcharges as percentage increases, which form the basis for all damage calculations for all class members. If a contract contains variations on the standard pricing methodologies, such variations are readily identifiable and DID analysis can easily accommodate them. Finally, he believes that the data he needs for his DID analysis is either already available or is likely to be available.

b. Noether Report

In support of its response, ENH filed its own expert report authored by Monica Noether. Noether disputes many of Dranove's conclusions and offers four main responses: **[**50]** (1) it is not possible to define a class with members who were all impacted by ENH's actions without performing substantial analysis of the circumstances facing each individual member; (2) several individuals within the proposed class did not suffer impact; (3) Dranove's proposed DID analysis cannot demonstrate impact across all (or even most) class members; and (4) the named plaintiffs are not typical or adequate members of the proposed class.

i. MCO Contracting With ENH is Complex and Requires Individualized Analyses to Determine Impact

Noether's examination of ENH contracts with MCOs leads her to conclude that payment terms are "substantially more heterogeneous" than Dranove assumes. Expert Report of Monica Noether, June 9, 2009, at 5 (hereinafter "Noether Rep."). She finds that contracts often use multiple pricing mechanisms, contain multiple "price terms" (*i.e.* multiple discounts), and employ multiple carve-out and stop-loss provisions. She further finds that contract terms are often modified according to unique, contract-specific rules. Her report identifies potential variations across the standard payment methods for inpatient services and highlights additional complexities that **[**51]** arise within MCO-entity and entity-employee contractual relationships.

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[16] "In this case, including a dummy variable that equals 1 for all classes of services that are reimbursed under a per diem rate will identify the differential overcharges under the two systems." *Id.* at 36.

[17] "Incorporating a dummy variable into the DID analysis that equals 1 if list charges exceed the outlier threshold will estimate any differential overcharge for outlier patients." *Id.* at 38.

A. Pricing Methodologies for Inpatient and Outpatient Services

Noether points out that case rate contracts often contain multiple pricing methodologies that may apply multiple base rates to a single stay and may not increase base rates by uniform percentages or simultaneously. She further notes that per diem contracts often apply multiple per diem rates that may not increase uniformly over time. With respect to discount-off contracts, Noether notes that (1) payors negotiate a variety of discounts for different services that may change over time; (2) it is common to have multiple discounts in a single contract; (3) changes in list prices vary across services; [18] and (4) there are other complexities in the ways in which MCOs reimburse hospitals, including contractual terms such as stop-loss provisions, which cover varying percentages of total charges and may only apply to certain services, and carve-out provisions, which exempt services from a given pricing method. Finally, with respect to pricing for outpatient services, **[*73]** Noether states that contracts often employ multiple pricing methodologies.

To illustrate the complexities in a given contract, Noether reviews a 2005 Payor B contract, which she describes as fairly typical. The contract employs per diem, case rate, and discount-off pricing for inpatient services. There are 11 inpatient services subject to per diem pricing and 8 unique per diem amounts. There are 3 inpatient services subject to case rate pricing and 3 unique base rates. There are 37 inpatient services subject to carve-out provisions and 37 unique carve-out prices. There are two inpatient services subject to discount-off pricing. There are 11 outpatient services subject to case rate pricing with 7 unique prices. Within these services exist 9 subcategories of services that are subject to carve-out provisions, and within those 9 subcategories, there are 7 unique prices. Finally, there are 5 outpatient services subject to discount-off pricing. These 5 services have subcategories subject to carve-out provisions; 4 subcategories are subject to unique discount percentages and **[**53]** one is subject to a maximum payment cap. Noether concludes that Dranove is incorrect to assume that payment terms were most commonly adopted across-the-board by ENH.

B. Relationship Between a MCO and its Customers

Noether explains that contracts between MCOs and their customers are "complex and varied" and states that Dranove "overlook[s] these contract features and their impact on class definition and damage allocation entirely." *Id.* at 11. She explains that a group can either self-insure or purchase a fully-insured contract and opines that the distinction bears directly on the viability of plaintiffs' class definition and the issue of damage allocation.

If an entity self-insures, it bears the risk for all medical costs and a MCO will act as a third party administrator ("TPA"). The MCO negotiates pricing with ENH, pays ENH for any healthcare services used by the entity, and then passes those charges along to the entity. The entity fully reimburses the MCO for the services it consumes and pays an administrative fee, which is either flat or varied depending on the discount rate negotiated by the MCO. Noether states that MCOs acting as TPAs "would not generally have been harmed" by a price **[**54]** increase because they pass along costs to the self-insured groups. *Id.* at 11.

If an entity is fully-insured, it pays a MCO a premium, which covers medical costs, administrative costs, and the cost of bearing the risk associated with the uncertainty of the entity's medical claims. Noether states that it is difficult to determine how the premium is calculated, but notes that "it is likely that at least the majority of the medical cost increases that affect all MCOs are passed on to the MCO's customers." *Id.* at 12. She explains that "[w]hile during the life of existing contracts with fully-insured customers a MCO probably cannot pass on provider cost increases, when those contracts come up for renewal, it is likely to pass on most or all of any cost increases." *Id.* at 21.

Finally, Noether states that the available ENH data (on which Dranove intends to rely) does not identify which payments were made on behalf of self-insured entities and which were made on behalf of fully-insured entities. The

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[18] Noether's analysis **[**52]** found that in a given year at ENH, most chargemaster prices did not change. For the prices that did increase, she found the pattern of increase to be highly varied. *See* Noether Rep. at 17-18.

ENH data only identifies the direct payor (the MCO) of a particular service. To determine which payments came from which entities, Dranove would have to investigate every single contract from each **[**55]** MCO and Expectation of Benefit ("EOB") forms, which list transaction prices, for each visit by a covered individual. This would require plaintiffs to issue discovery (at least) on every self-funded entity whose members received services at ENH.

C. Relationship Between Employers and Covered Employees

Noether also examines the relationship between an entity and its enrollees and states that benefit packages "vary along a number of dimensions that affect the impact any anti-competitive activity could have had on different individual members of the proposed class." *Id.* at 12. She argues that the variety of factors to be considered implies that any assessment of impact must be done on an individual basis, as no single model can accommodate all relevant factors.

[*74] She first notes that many individuals are subject to cost-sharing provisions such as co-pays and coinsurance. Coinsurance generally covers a percentage of a bill and thus generally can be expected to rise proportionately with the bill. Coinsurance rates, however, can vary across different services within a given plan. Noether also points out that both co-pays and coinsurance are further affected by deductibles and out-of-pocket maximums. **[**56]** She states that there is variation in the way deductibles are applied, as some services may be exempt, while others may be subject to a separate deductible. She notes that individuals enrolled in a plan as part of a family likely share a deductible amount with other family members. With respect to out-of-pocket maximums, she notes that some services may be exempt and that maximums are shared within families. In light of these complexities, Noether concludes that substantial individual analysis is needed to determine whether any individual patient suffered impact.

ii. "No-Impact" Class Members

Noether criticizes (1) plaintiffs' proposed class definition, because it includes individuals and entities that were not impacted by ENH price increases, and (2) Dranove's proposed method of determining impact, because it provides no mechanism to exclude class members who did not suffer impact. These "no-impact" class members include (1) MCOs acting as TPAs; (2) rental networks; (3) self-insured entities with stop-loss coverage; (4) individuals subject to out-of-pocket maximums or supplemental or secondary insurance; (5) Blue Cross Blue Shield of Illinois ("BCBSI"); (6) individuals who received **[**57]** services that were (a) not subject to price increases, (b) of increased quality proportionate to any price increase, and (c) administered after the FTC remedy, which was designed to restore competitive pricing; and (7) uninsured individuals who paid for services using ENH's charity care policy.

A. MCOs Acting as TPAs and Rental Networks

Noether states that MCOs acting as TPAs "would not generally have been harmed" by a price increase because they pass along costs to self-insured entities. [19] *Id.* at 11. She makes a similar point with respect to rental networks, such as Preferred Healthcare Systems ("PHCS"), which assemble provider networks by negotiating rates with a set of payers in the area and then "rent" such networks to self-insured employers, TPAs, and other MCOs. Because rental networks fully pass on medical costs for an administrative fee, Noether argues that they could not have been injured by ENH price increases.

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[19] Noether also appears to argue that MCOs not acting as TPAs also might be no-impact members. She notes that "it is likely that at least the majority of the medical cost increases that affect all MCOs are passed on to the MCO's [fully insured] customers." *Id.* at 12. "While **[**58]** during the life of existing contracts with fully-insured customers, a MCO probably cannot pass on provider cost increases, when those contracts come up for renewal, it is likely to pass on most or all of any cost increases." *Id.* at 21.

B. Self-Insured Entities with Stop-Loss Coverage; Individuals with Out-of-Pocket Maximums or Supplemental Insurance

Noether states that individuals subject to cost-sharing provisions such as co-pays [20] and coinsurance were likely not impacted by ENH price increases because these provisions likely precluded individuals from paying out-of-pocket for healthcare services. She further states that once a patient reaches an out-of-pocket maximum or an entity reaches its stop-loss threshold, neither can be harmed by an ENH price increase.

C. Blue Cross Blue Shield of Illinois

Noether relies on the Arango declaration (stating that BCBSI suffered no impact and paid reasonable prices) to demonstrate that BCBSI did not suffer impact.

iii. Dranove's Proposed Method Cannot [59] Adequately Address Individual Damages**

Noether identifies two main flaws in Dranove's proposed DID analysis: (1) there is no **[*75]** appropriate control group and (2) his analysis impermissibly relies on averages.

A. No Appropriate Control Group

Noether states that for DID analysis to be reliable, the control group must be "identical to the merging facilities in all dimensions that affect prices both before and after the merger." *Id.* at 25. "The methodology relies critically on the ability to define an appropriate comparison or control group that is matched in every way with the studied firm except the merger." *Id.* Noether argues that because hospitals are "all unique" in terms of service quality, range of services, medical staff, locations, amenities, and market, "it is not possible to identify an ideal control group, and therefore it is not possible to be certain that the results of a DID analysis can in fact be attributed to the merger." *Id.* at 26. She states that because Dranove did not identify a method for selecting a control group, it is not certain whether his DID analysis will be reliable.

B. DID Analysis Impermissibly Relies on Averages

Next, she states that DID analysis is not a reliable **[**60]** method because it is unable to account for the specific circumstances of a given plaintiff. "The most that even the ideal DID analysis can measure is the average change in prices over time." *Id.* at 27. To reliably assess impact and allocate damages, Noether states that "at the very least, the impact of the alleged anti-competitive price increases should be expected to vary across payors, type of plan (HMO/PPO), patient cost-sharing arrangements, and type of service. It is not possible to design a DID analysis that comprehensively reflects all these sources of variation." *Id.* Though Dranove will correct for variations across pricing methodologies and price terms by conducting the DID analysis at the service-level if necessary, Noether states that this still ignores other sources of variation and could require Dranove to conduct over 18,000 separate analyses. [21]

Noether next argues that Dranove's analysis rests on an assumption that when average prices increased, the price of each service increased by the same **[**61]** amount for each patient. She notes that Dranove performed no analysis to test or support this assumption and conducts her own DID analysis to discredit it. She again uses the 2005 Payor B contract as an example. Her DID analysis indicates that average prices for the contract increased at

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[20] She states that individuals with fixed co-pays could not have been harmed by ENH price increases. Plaintiffs concede this and have excluded such individuals from their class definition. *See infra* at 3.

[21] She notes that there are over 18 MCOs that contract with ENH, that many MCOs have two or three different plans, and that there are over 500 DRGs applicable to admissions at ENH.

a higher rate than average prices at control hospitals across all DRGs, while the prices of several individual DRGs either decreased or did not increase at a statistically significant rate. [22]

Noether further notes that DRGs are not homogeneous. Dranove assumes that all patients within a DRG experience the same price increase because (1) under **[**62]** a discount-off plan, the discount percentage is uniform, and (2) price increases in the chargemaster occur across the board. Though ENH does not retain data on individual list items, Noether states that the underlying composition of list items within a DRG varies widely. She further states that there is also enormous variation in the amount of billed charges within a single DRG. She states that "[s]ince changes to ENH chargemaster prices are not uniform or common, whether a specific patient is impacted by an increase to some ENH chargemaster prices will depend on which chargemaster items were included in the patient's bill. However, even observationally equivalent patients (same DRG, same year) are billed for very different combinations of chargemaster line items. The impact from changes in ENH chargemaster prices is not common across all class members **[*76]** who paid based on these prices." *Id.* at 31.

C. Dranove's Methodology Cannot Account for the Complex Relationships Among Class Members

Noether states that Dranove's proposed methodology is insufficient because it cannot account for the interrelationships between different class members and that, as a result, it will not be able to reliably **[**63]** allocate damages across class members. She notes that Dranove does not explain how, for example, he plans to assess the damages that have accrued to a self-funded employer-sponsored plan from an increase in average MCO contract prices. "One cannot assume that a self-funded plan will experience the same percentage change in prices as the average percentage change in prices experienced by the MCO/TPA of that self-funded plan." *Id.* at 39. In a given year, a self-funded plan will only consume a few services, whereas a MCO will consume many. It is Noether's position, therefore, that whether and by how much a self-insured entity was affected will depend critically on which services its members received.

Noether also notes that in the context of the MCO/TPA-self-insured entity relationship, "additional administrative fees distort the simple relationships between what the MCO/TPA pays and what the self-funded group pays." *Id.* Indeed, the formula for calculating administrative fees, which affects the total price that a self-insured entity pays a MCO, differs across contracts. Therefore, she reasons, "the impact of changes in the ENH contract price with a MCO/TPA will not be common to the self-funded **[**64]** employer groups who contract with that MCO/TPA." *Id.*

iv. Named Plaintiffs are Not Typical of the Proposed Class

Finally, Noether opines that "[t]he claims of the named class members, and economic proof of these claims, is not typical of the claims of the broader proposed class." *Id.* at 40. She states that the vast majority of plaintiffs' claims are on behalf of MCOs that directly negotiated with ENH, and finds problematic the fact that none of the named plaintiffs is a MCO. She further notes that the individual named plaintiffs received a narrow range of services and that none of them received any outpatient services. Finally, she states that Painters Fund is "very different" from a MCO because it never actually negotiated with ENH and notes that it could not have suffered impact because of its contractual relationship with BCBSI. *Id.* at 41.

v. Summary of Conclusions

In short, Noether's report states that Dranove's proposed method for proving classwide impact is fatally flawed. She highlights the complexity and diversity of payment arrangements between MCOs and hospitals, on the one hand, and between MCOs and their customers, on the other, to argue that a highly specific and individualized

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[22] She states that between 1998 and 2002, there were 101 DRGs in the data from Payor B. DID analysis indicated that average prices across all DRGs increased; however, for 47% of the DRGs, ENH prices post-merger increased less than control hospital prices. In 28% of all admissions, the price of the DRGs that corresponded to those admissions have a negative DID estimate (meaning that prices post-merger increased less than control hospital prices). Finally, 33% of all payments were made to compensate for admissions that correspond to DRGs with negative DID estimates.

[65]** analysis of each ENH customer's unique circumstances is required to reliably assess impact and damages. She states that because Dranove did not analyze any MCO contracts, he incorrectly concluded that pricing terms within such contracts are relatively uniform and ignored all complexities associated with contractual cost-sharing arrangements. As a result, Dranove further incorrectly concluded that DID analysis would produce a reliable estimate of the damages suffered by each individual class member and that it would be able to easily identify "no-impact" class members. Finally, she opines that even with the requisite data, which could only be obtained through extensive and costly discovery, Dranove's proposed methodology would still be unreliable.

vi. Plaintiffs' Motion to Exclude the Noether Report

Plaintiffs have moved to exclude Noether's report on the grounds that it does not satisfy the standards for admissibility of expert opinion under *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. [23] ***HN16***[] *Rule 702* governs **[*77]** the admissibility of expert witness testimony. *See Daubert, 509 U.S. at 588*; *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. **[**66]** To admit expert testimony, the court must find that (1) the expert is proposing to testify to valid scientific, technical, or other specialized knowledge, and (2) her testimony will assist the trier of fact to understand or determine a fact in issue. *Durkin v. Equifax Check Servs., Inc., 406 F.3d 410, 420 (7th Cir. 2005)* (citing *Ammons v. Aramark Unif. Servs., Inc., 368 F.3d 809, 816 (7th Cir. 2004))*. In the court's view, as discussed *infra,* Noether's report does include some misleading information and analysis. In its analysis below, the court gives Noether's report the weight it believes it is due. Accordingly, the court will not undertake a *Daubert* analysis at this procedural juncture. *See Reed, 2009 U.S. Dist. LEXIS 89576, 2009 WL 3146999, at *65-66*. Moreover, plaintiffs had two opportunities -- in their reply brief and at oral argument -- to respond to the conclusions contained in Noether's report; the court understands its limitations. Accordingly, plaintiffs' motion to exclude Noether's report is denied.

c. Second Dranove Report

Plaintiffs submitted a second report authored by Dranove in support of their reply. In his reply report, Dranove responds to each of Noether's four points.

I. Contract Complexity is Irrelevant to Common Impact

Dranove acknowledges that ENH contracts generally employ a variety of pricing methods, however, he states that his review of such contracts demonstrates that prices increase at the same rate across nearly all services, regardless of such complexities. It is his opinion that "ENH almost invariably increases prices at the same rate for all or nearly all service categories." Expert Reply Report of David Dranove, Dec. 8, 2009, at 2 (hereinafter "Dranove Reply Rep.").

A. Contract Examination and Analysis

Dranove examined ENH contracts with seven major MCOs. His results, **[**68]** outlined in Appendix D of his report, indicate that the majority of contracts consistently apply a common price increase across all or substantially all service categories. [24] For example, with respect to the 2005 Payor B contract highlighted by Noether, Dranove's

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[23] They specifically argue that Noether's report suffers from "a number of fatal flaws:" (1) it contains irrelevant and misleading analysis of the structure of MCO contracts; (2) its analysis of changes to **[**67]** the ENH chargemaster is incomplete and inaccurate; (3) it "erroneously claims numerous class members . . . were not injured without conducting any economic analysis;" (4) it asserts, without support, that ENH never exercised market power; (5) it offers legal conclusions; and (6) it contains DID analysis that is "fundamentally defective, thus invalidating her opinions." Pls.' Mot. to Strike at 2.

[24] Dranove also reviewed communications (letters, business documents) between ENH and the seven MCOs. From this review, he concluded that the norm was to speak of a single price increase

results indicate that the prices of 92 of the 93 service categories increased at the same rate. [25] Appendix D contains a chart for each MCO stating the percentage of prices in a given contract that increased at a uniform rate within a given year. As an example of Dranove's analysis, below is the chart describing price increases within the relevant Payor A contracts.

D.4. Payor A contracts

Figure 20. Uniformity of price increases in Payor A contracts: [69] inpatient services**

			*2*Standard Groups		*2*Carve-out Groups			Percentage
			Dollar		Dollar		Total	common
Plan	**Start**	**End**	**prices**	**% rates**	**prices**	**% rates**	**rates**	**rates**
HMO	2000	2001	17-0			1-0	18-0	100.0%
HMO	2001	2002	17-0			1-0	18-0	100.0%
HMO	2002	2003	15-0	2-0		1-0	18-0	100.0%
HMO	2003	2004	15-1	2-0		1-0	18-1	94.4%
HMO	2004	2005	15-2	2-0		1-0	18-2	88.9%
PPO	2000	2001		1-0			1-0	100.0%
PPO	2001	2002		1-0			1-0	100.0%
PPO	2002	2003		1-0			1-0	100.0%
PPO	2003	2004		1-0			1-0	100.0%
PPO	2004	2005		1-0			1-0	100.0%

[*78]

Note: In contracts, stop-loss applies to any "admission." This is interpreted to apply to inpatient admissions only.

Sources: Contract between Payor A and ENH effective September 15, 2000 (ENHCA-012-00-007233-007235), Contract between Payor A and ENH effective September 15, 2002 (ENHCA-012-007243-007246).

Figure 21. Uniformity of price increases in Payor A contracts: outpatient services

			*2*Standard Groups		*2*Carve-out Groups			Percentage

[25] Each of these 92 services experienced either a 10.6% or a 10.7% price increase. Dranove "do[es] not view there being a material difference in rates of increase of 10.6% or 10.7%. This difference appears to be the result of rounding, because the contract specifies whole dollar amounts." *Id.* at 11 n.46

			Dollar		Dollar		Total	common
Plan	**Start**	**End**	**prices**	**% rates**	**prices**	**% rates**	**rates**	**rates**
HMO	2000	2001	1-0	2-0			3-0	100.0%
HMO	2001	2002	1-0	2-0			3-0	100.0%
HMO	2002	2003		4-0			4-0	100.0%
HMO	2003	2004		4-0			4-0	100.0%
HMO	2004	2005		4-0			4-0	100.0%
PPO	2000	2001		1-0			1-0	100.0%
PPO	2001	2002		1-0			1-0	100.0%
PPO	2002	2003	2-0	4-0			6-0	100.0%
PPO	2003	2004	2-0	4-0			6-0	100.0%
PPO	2004	2005	2-0	4-0			6-0	100.0%

Sources: Contract between Payor A and ENH effective **[**70]** September 15, 2000 (ENHCA-012-007233-007235), Contract between Payor A and ENH effective September 15, 2002 (ENHCA-012-007243-007246).

This chart indicates that the prices in the Payor A contracts increased at a uniform rate for all (100% of) outpatient services. It further indicates that all Payor A PPO contracts increased the prices of all inpatient services at a uniform rate. Finally, it indicates that between 2000 and 2003, all Payor A HMO contracts increased the prices of all inpatient services at a uniform rate. Between 2003 and 2004, price increases were not entirely uniform. Dranove has derived a method to adjust DID analysis to accommodate for variable price increases, however, as discussed below.

In light of these uniform price increases across services, Dranove concludes that the estimate of average price increases for an insurer is also a valid and reliable estimate of the price increases applicable to every patient covered by that insurer. In turn, he concludes that DID analysis, which relies on and calculates average price increases, provides a valid and reliable method for proving classwide impact.

B. DID Analysis Can Accommodate Variable Price Increases

If the evidence **[**71]** eventually demonstrates that prices did not increase at a uniform rate for a MCO or a particular contract, Dranove reiterates that he can perform DID analysis at the service level. For a mixed-model contract with individualized price increases, for example, he will identify all service categories included in the contract and organize them by the rate at which their prices increase. If Dranove determines that there are 10 different rates of increase, he will conduct 10 separate DID analyses. He explains that category-level analysis works because by contract, ENH receives the same reimbursement for all patients in an appropriately **[*79]** defined service category. To the extent that the average patient visit within a service category faced an overcharge, he believes all patient visits within the service category faced the same overcharge.

Dranove acknowledges that "[t]here are exceptions to the rule that ENH contracts exhibit identical or nearly identical price increases across all service categories. These exceptions arise, on occasion, when ENH contracts redefine service categories." *Id.* at 20. He notes an "industry-wide pattern of periodically restructuring payment systems" and states that **[**72]** it is "a mistake to conclude that differential price changes of this sort are evidence of a lack of common impact from the exercise of market power. The correct conclusion is that ENH restructured price increases (in some instances) *independently of* its exercise of market power." *Id.* at 22-23.

To demonstrate impact for price increases that result from restructuring, Dranove will perform DID analysis at the service level. He relies on an underlying assumption (borne out of his conclusion that ENH increases prices at a uniform rate and across services) that price changes due to the merger would be distributed uniformly across all categories, regardless of variance in individual service pricing. To prove impact, he proposes a four-step calculation: (1) calculate the average price increase across all variable categories; (2) calculate what the price for each service would have been but for the merger (divide the new contract price by 1 plus the average price increase); (3) subtract the "but-for-merger price" from the new price to get the dollar amount by which ENH increased prices due to the merger; and (4) from this dollar amount, calculate how much the percentage increase in price was **[**73]** due to the merger. Dranove opines that this percentage provides a reliable estimate of the overcharge to all patients who received services that experienced variable price increases.

ii. DID Method is Reliable and Establishes BCBSI Impact

Dranove vigorously disputes Noether's assertion that his proposed DID analysis is not a reliable method of proving impact. To prove otherwise, he conducts a DID analysis of recently produced data from BCBSI to demonstrate that (1) DID analysis is a reliable method of proving common impact and damages and (2) BCBSI suffered impact as a result of the merger.

First, Dranove reiterates his position that from the available data sources, he can conduct a reliable DID analysis. In his list of available data sources in his reply report, however, he includes a new data source. The "BCBSI PPO" data set, which BCBSI provided to plaintiffs after ENH filed its response, contains (for BCBSI PPO plans) counts of inpatient and outpatient cases per year, total contractual payments, total discounts, total inpatient days, average case mix index, length of stay, and yearly gross payments per diem and per case.

Dranove performs a DID analysis on the BSBCI PPO data using the **[**74]** control group and time period used by ENH's expert in the FTC proceeding. His analysis demonstrates that BCBSI was injured; specifically, that BCBSI paid a 14% overcharge for outpatient services, a -2.5% overcharge for inpatient services, and a 7.7% overcharge overall. When Dranove extended the analysis through 2008, the analysis demonstrates that BCBSI paid a 17.9% overcharge for outpatient services, a 1.1% overcharge for inpatient services, and an 11.5% overcharge overall.

Dranove performs one additional round of DID analysis on the BCBSI PPO data using his own control group. He disagrees with Noether's assertion that a reliable control group must contain hospitals that are identical to ENH. He states that "[t]he economics profession has long understood that exact matching is not remotely necessary for a reliable DID regression analysis, as evidenced by even a cursory examination of the published literature." *Id.* at 5. Accordingly, he developed his own "systematic method" to select control hospitals. *Id.* at 42. First, he applies five exclusion criteria. He excludes hospitals that (1) are located outside of Cook, DuPage, and Lake counties, because market conditions outside these areas **[**75]** will likely differ from those that face ENH; (2) have less than 100 beds, because small hospitals face **[*80]** different supply and demand conditions; (3) are state and county-owned or are navy or veteran's affairs hospitals; (4) do not have comparable shares of inpatient charges to those of ENH; and (5) were party to a merger or acquisition that took place around the same time as the ENH merger. Next, he conducts a statistical test to select and validate control group hospitals. [26] Using a control group of 21 hospitals, Dranove's DID analysis demonstrates that BCBSI paid a 12.1% overcharge for outpatient services, a 6.2% overcharge for inpatient services, and a 9.8% overcharge overall.

Summarizing his results, Dranove states that he is "not claiming that there is common **[**76]** impact solely because prices to BCBSI increased *on average* as a result of ENH's merger with [Highland Park Hospital]. . . . To be entirely

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[26] Inpatient prices at a control hospital should respond to changes in market factors in ways similar to ENH. If changes in length of stay or case mix have a similar effect on pricing at ENH and a potential control hospital, this suggests that the process generating pricing at the two hospitals is similar. Dranove will use a F-test to statistically test whether a candidate's pricing and ENH's pricing respond in a similar manner.

clear, [there are] two distinct sets of analyses that establish both common impact and injury." *Id.* at 49. The analysis that establishes impact is that which relates to contract structure: "A review of ENH's contracts shows that, with minor variations, ENH increases its inpatient and outpatient prices across the board. . . . [W]hen the average price of inpatient services increases, . . . the prices to insurers and patients" will increase by that same percentage. *Id.* at 50. The analysis that establishes injury (or damages) is the DID analysis. That is, according to Dranove, common impact is a consequence of contract structure, and damages are quantified through the use of the DID analysis. He will calculate damages by first computing overcharges and then multiplying actual payments by the overcharge percentage.

iii. Noether's DID Analysis is Highly Flawed

Dranove states that Noether's DID analysis is "uninformative as a test of common impact" due to two conceptual errors and several technical errors. *Id.* at 52. The first conceptual error is that she **[**77]** failed to account for contract restructuring in her analysis, which led her to "misleadingly conclude" that prices for some services decreased over time. *Id.* He again notes that variable price increases were likely the result of routine contract restructuring separate from the merger. He further notes that including such variable changes in a calculation of averages (such as the DID analysis) will skew the results.

Noether's second conceptual error is that she conducted her analysis at the DRG level, without reference to the relevant contract structures. For example, even if a contract specified a single per diem rate across all DRGs, Noether performed her analysis at the DRG level. As a result, many of her analyses were performed on very few admissions and generated statistically insignificant results. Depending on the payer, between 32% and 78% of the individual DRGs she analyzed had three or fewer admissions in either the pre- or the post-merger period. Further, between 6% and 36% of the DRGs she analyzed had more than ten admissions in either the pre-or post- merger periods (or both). Dranove states that "[t]his is a thin basis upon which to identify statistically significant price **[**78]** changes, whether negative or positive." *Id.* at 54.

iv. Noether's "No-Impact" Class Members

Lastly, Dranove takes issue with Noether's conclusion that several members of the proposed class suffered no impact as a result of the ENH merger. With respect to BCBSI, he states that Noether's reliance on Arango's declaration is unwarranted because Arango is not an economist and because Dranove's own analysis demonstrates that BCBSI suffered impact.

With respect to MCOs acting as TPAs, Dranove states that "[a]lthough [he] [is] not an expert in the law, [he] understand[s] that considerations associated with pass-on and pass-through are not relevant in this matter." *Id.* at 59. With respect to individuals with **[*81]** supplemental insurance, [27] individuals subject to out-of-pocket maximums, [28] and entities with stop-loss insurance, [29] Dranove states that the issue of whether these individuals and entities were injured "involves claims allocation and does not affect the total amount of incurred damages." *Id.* at 60.

v. Summary of Conclusions

Throughout his report, Dranove disputes Noether's main argument that complexities within ENH's contracts and within the relationships of the potential class members preclude the application of DID analysis to prove common

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[27] Dranove also points out that the majority of individuals who purchase secondary coverage are traditional Medicare patients, who are excluded from the class. Further, his analysis of ENH contracts **[**79]** demonstrates that 1% of all non-government patients at ENH involve multiple commercial insurers.

[28] Dranove's analysis of ENH contracts demonstrates that out-of-pocket maximums affect 2% of visits

[29] Dranove states that economic theory "suggests that if a self-funded group reached its stop-loss threshold in a given year, an event made more probable by an ENH price increase, the cost to that group of obtaining stop-loss insurance would increase." *Id.* at 60.

impact. He states that such complexities do not preclude the use of a common framework to study the rate at which prices increase over time. Because contracts between insurers and hospitals consistently apply uniform price increases, and because prices that change at variable rates usually do so as a result of contract restructuring, Dranove opines that all customers covered by a given insurer will be impacted in the same way. He reiterates his thesis from his initial report that DID analysis **[**80]** is a reliable method to calculate the amount of damages incurred by commonly-impacted customers and relies on his recent DID analysis of BCBSI claims as evidence of this fact.

vi. ENH's Motion to Exclude the Dranove Reply Report

ENH has moved to exclude Dranove's reply report because it contains new analysis not included in his original report. *See* *TAS Distrib. Co. v. Cumming Engine Co., 491 F.3d 625, 630-31 (7th Cir. 2007)*. ENH argues that by including new analyses in the reply, plaintiffs deprived ENH of its right to respond to all of their arguments. Because the court afforded ENH an opportunity to respond at oral argument and with Noether's supplemental report, however, ENH's argument is moot and its motion to exclude Dranove's reply report is denied.

d. Oral Argument

The court held oral argument on February 23, 2010 to allow ENH to respond to the new issues and analyses contained in Dranove's reply report, specifically Dranove's examination of ENH contracts, his DID analysis of BCBSI data, and his method for selecting a control group.

I. Noether's Testimony

Noether testified to three main conclusions: (1) Dranove's DID analysis cannot identify "no-impact" class members; (2) Dranove's **[**81]** contract review is incomplete because it focuses on price changes *within* contracts rather than changes *across* contracts; and (3) Dranove's analysis of BCBSI's injury is unreliable because his control group is unreliable.

Noether's testimony regarding "no-impact" groups repeated the conclusions contained in her response report. Regarding Dranove's contract analysis, she testified that it was incomplete because it only examined price changes *within* contracts, which are usually attributable to escalator clauses, rather than price changes *across* contracts, which are more likely to be due to, *inter alia,* an exercise of market power at the time of contract renegotiation. Tr. 67:1-5. She testified that each of the MCOs examined by Dranove went through at least one contract renegotiation, and that many went through several, during the relevant time period. *Id.* 77:17-20.

Noether further testified that she performed her own contract examination to assess the validity of Dranove's conclusion with **[*82]** respect to changes across contracts. She testified that her examination indicated there were "several examples" of variable price increases after a contract renegotiation. *Id.* 84:17. Specifically, she **[**82]** noted that a "large proportion of the contract renewals that [she] looked at showed non-uniform changes in prices from one contract to the next. It's really quite common. . . . [It] [cannot] be ignored." *Id.* 85:2-15. She highlighted three examples. First, she noted the difference between the 2000 and 2002 Payor A contracts. In 2002, the prices of the nine cardiac services listed in the contract increased and decreased at seven different rates. Second, she noted the differences between the three BCBSI contracts. The second BCBSI contract instituted uniform price increases across all services, but the third contract had different price increases for each of the ten included services. Finally, she examined the relevant Payor B contracts. She first noted that Dranove's analysis of the contracts only identified price increases within contracts; that is, he reported on the effects of escalator clauses, which are usually uniform and apply across services. She then noted that she actually "looked at what happened when contracts were renewed . . . . [T]he patterns were, as varied as they are, for the ENH contracts." *Id.* 89:9-13. Based on these three examples and her overall examination of MCO **[**83]** contracts, Noether testified that "by focusing exclusively on within contract price changes, Dr. Dranove was unable to find the fairly widespread variation in price changes when contracts were renewed and therefore his conclusion that a use of average in his [DID] methodology is . . . not correct." *Id.* 89:21-90:1.

Noether also testified about the viability of Dranove's control DID analysis, focusing on his analysis of BCBSI's purported injury. She testified that she performed her own analysis to test the reliability of his control group, whereby she "did a simple switch of each hospital in the control group with ENH . . . . to see what [Dranove's] model would do if [she] pretended that one of his control group hospitals was the hospital of interest." *Id.* 90:14-18. Her analysis indicated that of the 21 control hospitals, for inpatient services, 17 of them had overcharges in at least one year during the relevant time period and that 9 had overcharges in at least as many years as ENH did. *Id.* 92:10-18. She testified that the results were similar for outpatient services and that such results cast "great suspicion on [Dranove's] model because . . . it's suggesting that these . . . control **[**84]** group hospitals in fact also had market power and [were] . . . overcharging." *Id.* 92:21-24. She testified that his model generated a lot of "false-positives," which occur when a test "indicates that something of interest has happened even when it really hasn't." *Id.* 93:21-22. Noether concluded that Dranove's control group is "inadequate" because it "isn't really measuring what it was supposed to be measuring." *Id.* 99:10-12.

ii. Dranove's Testimony

Dranove offered two rebuttal points. First, he testified that he "did, in fact, look at both within contract changes and changes across contracts." *Id.* 103:24-25. He stated that two of the three contracts highlighted by Noether help prove his thesis that, on the whole, ENH increased prices at uniform rates across services. For the Payor A contract, he pointed out that the prices of the eight non-cardiac services in the contract increased at a uniform rate of 6.1%. For the Payor B contract, he noted that the first renegotiation produced a uniform price increase across all services. More generally, he testified that across the contracts he examined, there was "at least a 75 percent commonality in price increase across the elements. So at least **[**85]** 75 percent of the services had exactly the same price increase." *Id.* 105:8-12. He noted that for several MCOs, the percent of common price increases was even higher than 75.

Dranove further testified his control group is valid. He stated that Noether's analysis and argument regarding his control group would allow her to conclude that all published research using DID analysis is wrong, "which suggests that either the entire field has got it wrong or there's something wrong with what Dr. Noether has done that requires a little further inquiry." *Id.* 106:4-8. He reiterated the purpose of DID analysis: to compare the pricing at ENH against the **[*83]** average pricing of a large control group. Each of the hospitals in the control group is supposed to provide "some representation of what would have happened [at ENH] but for the merger." *Id.* 106:12-13. He testified that "naturally in a group of 20 hospitals, they're not all going to have exactly the same price increase . . . . [P]rices tend to increase by different amounts at different hospitals. And naturally, one of those hospitals is going to have the biggest increase versus the other 19." *Id.* 106:17-23.

He testified that Noether's analysis proved **[**86]** only that "in a group of 20, some hospitals grew faster than average and others grew less fast[]." *Id.* 107:2-3. He criticized Noether of engaging in "ex-post data picking," stating that "if [she] want[ed] to single out [a hospital] for testing, [she] better have a reason before [she] looked at the data to do that. [Noether] offered no such reason." *Id.* 107:6, 16-19. He explained that his control group is "calibrated to match the economic environment that ENH was facing." *Id.* 109:12-13. As a final point, he stated that "DID analysis is a very, very commonly used methodology," and that "[t]he notion that DID methodology is unreliable would be surprising to someone in mainstream economics who uses this as a matter of course." *Id.* 111:2-3, 9-11.

e. Noether's Supplemental Report

On March 4, 2010, ENH submitted a supplemental report prepared by Noether supporting her testimony that variable price increases were common at ENH. Subsequent to oral argument, Noether completed an analysis of price changes across contracts, which led her to conclude that "[i]n *every instance* during the class period where a contract between ENH and a MCO was renegotiated, a majority of the price changed at a non-uniform **[**87]** rate." Supplemental Report of Monica Noether, March 4, 2010, at 2 (hereinafter "Noether Supp. Rep."). Her report states that Dranove's contract analysis focused almost exclusively on price changes within contracts, "effectively ignoring nearly all instances of contract renegotiations . . . . [and] exaggerat[ing] substantially the extent of uniformity of price changes over the class period." *Id.*

Noether examined the same contracts that Dranove examined in his Appendix D and determined that during the class period, 56 contract renegotiations took place. In her report, she performs an analysis of the prices contained in the relevant contracts before and after each renegotiation. For each renegotiation, she identifies the services that were included in both the old and new contracts ("comparable services") and then calculates the corresponding percentage change in price for each comparable service. She next calculates the percentage of services with prices that changed at a uniform rate and, for each contract, reports her results in a table. [30] Her results indicate that "in 55 of the 56 renegotiations[,] prices change non-uniformly," the lone exception being the 2004-2005 BCBSI contract **[**88]** highlighted at oral argument. *Id.* at 3-4.

Her report highlights the 2005 Payor B contract, which both she and Dranove address in their reports. *See* Noether Rep. at 16; Dranove Reply Rep. at 11. Dranove's analysis indicates that prices for 92 of the 93 inpatient services increased at a uniform rate; however, Noether states that his analysis fails to analyze the change between the prices in the 2005 contract and the prices in the previous contracts **[**89]** and instead focuses solely on price changes within contracts. Noether performs this analysis, which indicates that "prices changed a very non-uniform rates between the previous contract and the contract that Dranove analyzed, with many prices declining." Noether Supp. Rep. at 5. Indeed, her comparison of the 2002 **[*84]** Payor B HMO contract and the 2005 Payor B contract indicates that the 11 comparable inpatient services each increased at a unique rate. *Id.* at Table 8a. Her comparison of the 2002 Payor B POS contract and the 2005 Payor B contract indicates that the 9 comparable inpatient services also each increased at a unique rate. *Id.* at Table 8b.

Noether's report also highlights the 2000 and 2002 Payor A contracts, which she addressed at oral argument. The report indicates that of the 18 comparable services, the prices for 10 of them increased at non-uniform rates; this stands in contrast to Dranove's conclusion that all prices increased as a uniform rate. *See supra* at 40-41, Dranove Reply Rep. at Appendix D. It further states that the percentage of uniform changes across these two contracts was 44.4%. Her Payor A chart is replicated below:

***7*Table 4. Price Changes Between [Payor A] Contracts**

***7*Each line in the table represents a between-contract comparison**

Plan	**Contract 1 End Date**	**Contract 2 Start Date**	**Total Unique Prices [a]**	**Comparable Prices [b]**	**Percent Uniform Price Changes - Comparable [c]**	**Percent Uniform Price Changes**

[30] Noether excluded from her analysis services that were priced using discount-off or case rate pricing, classifying these services as having non-uniform price increases. *See* Noether Supp. Rep. at 9 ("[E]ven if the discount or base rate changes uniformly . . . the price . . . does not change uniformly because changes in DRG weights and charges are not uniform."). She also excluded services that were subject to different pricing methodologies in the new and old contracts, classifying such services as having non-uniform price increases as well. *See id.* ("[I]t is completely reasonable to assume that these price changes are non-uniform, since it would be completely fortuitous if changing methodologies led to uniform increases across services.").

						- Total
						[d]
Inpatient						
HMO	9/14/2002	9/15/2002	18	18-10	44.4%	44.4%
PPO	9/14/2002	9/15/2002	1	1-1	0.0%	0.0%
Outpatient						
HMO	9/14/2002	9/15/2002	4	3-3	0.0%	0.0%
PPO	9/14/2002	9/15/2002	6	2-2	0.0%	0.0%

*7*Sources and Notes:

*7*Backup to Dranove Reply Report, [Payor A] Modal Changes.xls and contracts cited in Dranove Appendix D.4.

7[a] Total number of unique prices between the two contracts, not double counting overlapping items.

7[b] Number of prices for items that appear in both contracts - Number of prices that change at a non-uniform rate.

7[c] Percentage uniform price changes out of the total number of comparable prices.

7[d] Percentage uniform price changes out of the total number of

unique
prices.

Based **[**90]** on her findings, Noether concludes that Dranove's analysis could not have looked at changes across contracts, but rather, only at changes within contracts. She is able to find only two examples of changes across contracts within his analysis and claims that both examples are deficient: "One of these examples is well outside of the relevant class period, and is for a very minor payor . . . . [while] [t]he other example is for PHCS, which is exclusively a [TPA], which as Plaintiffs now acknowledge, cannot be a member of the class." *Id.* at 6. Accordingly, she concludes that Dranove's analysis "does not contain *any* example of price changes between contracts for any class member" and that, as a result, it grossly exaggerates the number of uniform price increases within the relevant contracts. *Id.*

f. Common Impact Analysis

In the antitrust context, "impact is often critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." Hydrogen Peroxide, 552 F.3d at 311 (citing, *inter alia,* Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003)). Here, plaintiffs **[**91]** argue that Dranove's proposed method for proving impact -- a combination of his conclusions about contract structure and his proposed DID analysis -- can establish classwide impact by using evidence **[*85]** common to the class. The viability of his method turns on four issues: (1) whether Dranove's control group is reliable; (2) whether ENH increased prices at a uniform rate across services; (3) whether the data needed to perform Dranove's analysis exists; and (4) whether Dranove's method can identify and exclude class members that were not impacted.

i. Dranove's Control Group

ENH argues that Dranove's method is flawed because, *inter alia,* his control group is unreliable. As support, ENH relies on the analysis in Noether's report and on her testimony, both of which indicate that the majority of the hospitals in Dranove's control group had overcharges during the relevant time period. ENH argues that these "false-positives" prove that Dranove's control group is unreliable. Plaintiffs rely on Dranove's responsive testimony that Noether's analysis and accompanying arguments, if accepted, would invalidate the majority of published DID analysis. Specifically, they rely on his testimony that, within **[**92]** every control group, there will be hospitals that grow at a faster rate than others. He testified that this fact does not undermine the validity of a control group, which is designed to generate an average growth rate.

The court finds Dranove's responsive testimony persuasive. The control group exists to provide a measure of the average growth rate of prices at hospitals similar to ENH. The fact that prices at a large number of Dranove's control hospitals grew at a rapid rate may have the effect of increasing the average growth rate, but it does not invalidate the average.

Noether's analysis and ENH's corresponding argument rest on an assumption that the control hospitals must be virtually identical to ENH. *See* Noether Rep. at 25 (stating that the control group must be "identical to the merging facilities in all dimensions that affect prices both before and after the merger"). This assumption, however, is inconsistent with the purpose and design of DID analysis. At the most basic level, DID analysis is a comparison of averages -- the average prices at ENH are compared with the average prices hospitals similar to ENH. If DID analysis required control hospitals to be identical to ENH, **[**93]** it would not make sense to have more than one hospital in the control group, as they would all provide the exact same data. Of course, the court acknowledges that the control group must be composed of hospitals sufficiently similar to ENH. Because the court is satisfied that here, Dranove's five exclusion criteria and test for robustness are able to identify such hospitals, it finds his control group to be valid and reliable.

Finally, to the extent Noether's analysis and supporting testimony attacks the soundness of DID analysis as a statistical method, the court finds it to be incredible. DID analysis is a respected statistical regression model that, in the current context, will provide a reliable estimate of the difference (if any) between the *average* price increases at a treatment hospital and the *average* price increases at a control hospital. Nevertheless, as discussed below, the court cannot rely on DID analysis to prove classwide impact in the instant case, as neither Dranove nor plaintiffs have demonstrated that an increase in average prices at ENH is also a reliable estimate of the price increases (if any) that each individual class member faced.

ii. Price Increases at ENH

Dranove's **[**94]** method of proving classwide impact -- a combination of his conclusions about contract structure and DID analysis -- rests on an assumption that ENH increased prices at a uniform rate across services. *See* Dranove Reply Rep. at 50 ("[Dranove] [is] not claiming that there is common impact solely because prices . . . increased *on average* as a result of ENH's merger . . . . Instead, the compelling evidence of common impact stems from [his] separate analyses of contracts between ENH and insurers."). The parties agree that the viability of his method depends on this assumption, however, they disagree as to its correctness. Plaintiffs argue that ENH did increase prices at a uniform rate across services, relying on the contract analysis in Appendix D of Dranove's reply report as evidence of this fact. Dranove testified that his analysis shows that for each contract, at least 75% of the prices increased **[*86]** at a uniform rate. He further testified that this conclusion was with respect to changes within contracts and across contracts.

By contrast, ENH argues that the majority of ENH's price increases were non-uniform. It relies on Noether's testimony and supplemental report, which both claim that Dranove's **[**95]** analysis focuses only on price changes within contracts rather than changes across contracts, to discredit Dranove's analysis. Noether testified that ENH had the opportunity to exercise market power not within a contract period, but only at the time of renegotiation. She further testified that any price increases within a contract were not due to an exercise of market power, but rather were the result of escalator clauses. As a result, she testified that Dranove's analysis, which focuses on within-contract price changes, greatly exaggerates the frequency of uniform price increases. Noether's supplemental report corroborates her testimony; it indicates that across contracts, the majority of price increases were non-uniform.

HN17[] "Resolving expert disputes to determine whether a class certification requirement has been met is always a task for the court -- no matter whether a dispute might appear to implicate the 'credibility' of one or more experts, a matter resembling those usually reserved for a trier of fact." *Hydrogen Peroxide, 552 F.3d at 324*; *see also* *Reed, 2009 U.S. Dist. LEXIS 89576, 2009 WL 3146999, at * 21* (rejecting plaintiffs' argument that "the battle of the experts is strictly for the jury.") (internal **[**96]** quotation marks omitted). While both Dranove's Appendix D and Noether's supplemental report rely on assumptions that are, in the court's opinion, of questionable validity, [31] both reports evaluated the prices of the same 18 services within the 2002 Payor A contract, a contract that the court also had the opportunity to review.

Dranove's analysis indicates **[**97]** that between the years 2001 and 2002, the Payor A contract listed 18 prices, all of which increased at the same rate. It further indicates that between the years 2002 and 2003, each of these 18 prices again increased at a uniform rate. By contrast, Noether's analysis indicates that on September 22, 2002, a new contract went into effect and, as a result, 10 of the 18 prices increased at variable rates. The court's own examination of the contract indicates that of the 18 prices listed in the renegotiated September 22, 2002 contract, 6 increased at a uniform rate, 9 increased at variable rates, and 3 changed pricing methodologies from the previous contract, making it difficult to draw a comparison.

Despite the weaknesses of Noether's presentation in other respects, Noether's analysis here does cast doubt on Dranove's representation that his contract analysis encompassed both within and across contract price changes. If

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[31] For example, Dranove's Appendix D "excludes contracts that restructure payment categories from prior contracts." Dranove Reply Rep. at 6. While the court understands his point with respect to restructuring, it is not convinced that *every* variable price increase was due to restructuring such that it should have been excluded from the analysis. Additionally, Noether's supplemental report classifies services that were subject to (1) case rate pricing, (2) discount-off pricing, and (3) different pricing methodologies across contracts as being subject to non-uniform price increases because they are not capable of comparison. *See* Noether Supp. Rep. at 9. The court is not convinced that no reliable comparison can be drawn between these services such that an automatic classification as being subject to non-uniform price increases is warranted.

he had examined both within and across contract price changes, he could not have reported a 100% uniform price increase across all 18 services between 2002 and 2003. Indeed, even a cursory examination of the 2000 Payor A contract and the September 22, 2002 Payor A contract **[**98]** makes clear that the prices of some services changed at a variable rate. This fact, coupled with the assertions in Noether's supplemental report, suggest to the court that Dranove's analysis focused primarily on price changes within contracts -- changes that are usually attributable to escalator clauses. Indeed, both the old and the new Payor A contracts contained escalator clauses, which increased prices by a certain percentage each year the contracts were in effect. Accordingly, the court cannot accept Dranove's contract analysis contained in Appendix D as credible evidence that ENH increased prices **[*87]** across contracts at uniform rates across services.

The court acknowledges that in his reply report, Dranove presents a method for adjusting DID analysis to accommodate variable price increases. Dranove outlines a two-step approach: (1) calculate the average percentage increase (or decrease) across all variably priced services and (2) calculate how much of a service's new price (if any) was the result of this average increase. He acknowledges, however, that this calculation rests on an assumption that any price increase due to the merger was distributed evenly across services, which is **[**99]** borne out of an assumption that ENH increased prices at uniform rates across services. *See* Dranove Reply Rep. at 23 ("[A] uniform increase is not the exception but rather the rule . . . . [T]his is compelling evidence that a price change that is due to the merger would be distributed uniformly over all service categories."). Because plaintiffs have not put forth credible evidence to validate these assumptions, the court does not find this two-step approach to be a reliable method of proving classwide impact in those instances where ENH increased prices at a variable rate.

At the class certification stage, the burden of proof rests with plaintiffs. *See* *In re Sulfuric Acid Antitrust Litig., No. 03-c-4576, 2007 U.S. Dist. LEXIS 20380, 2007 WL 898600, at *1 (N.D. Ill. March 21, 2007)* (citing *Gen. Tel. Co. v. Falcon, 457 U.S. 147, 162, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. With respect to the issue of predominance, therefore, plaintiffs must present affirmative evidence to demonstrate that there is a method of proving classwide impact. Because plaintiffs' proposed method relies on an assumption that they have not been able to validate, the court finds that they have failed to meet this burden. [32] As a result, plaintiffs **[**100]** fail to establish predominance and cannot meet the requirements for class certification. Plaintiffs' motion, therefore, must be denied.

CONCLUSION AND ORDER

For the reasons discussed above, plaintiffs' motion for class certification [# 240] is denied. Plaintiffs' motion to strike the report of Dr. Monica Noether [# 317] and ENH's motion to strike the reply report of Dr. David Dranove [# 321] are also denied

Dated: April 12, 2010

Enter: /s/ Joan Humphrey Lefkow

JOAN HUMPHREY LEFKOW

United States District Judge

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[32] Because plaintiffs have not shown that ENH increased prices at a uniform rate across services, the court need not consider the parties' arguments with respect to the two remaining issues. Furthermore, because plaintiffs fail to establish predominance, the court need not undertake an analysis of whether they have satisfied superiority, the second requirement of *Rule 23(b)(3)*.

Kilgore v. KeyBank, N.A.

United States District Court for the Northern District of California

April 12, 2010, Decided; April 12, 2010, Filed

NO. C08-2958 TEH

Reporter

712 F. Supp. 2d 939 *; 2010 U.S. Dist. LEXIS 35592 **

MATTHEW C. KILGORE, et al., Plaintiffs, v. KEYBANK, NATIONAL ASSOCIATION, et al., Defendants.

Subsequent History: Appeal dismissed by, As moot *Kilgore v. KeyBank, N.A., 673 F.3d 947, 2012 U.S. App. LEXIS 4736 (9th Cir. Cal., 2012)*

Vacated by, Remanded by *Kilgore v. KeyBank, N.A., 2013 U.S. App. LEXIS 7312 (9th Cir. Cal., Apr. 11, 2013)*

Prior History: *Kilgore v. Keybank Nat'l Assoc., 2009 U.S. Dist. LEXIS 122776 (N.D. Cal., Dec. 16, 2009)*

Core Terms

Notice, Holder, Holder Rule, Plaintiffs', unfair, preempted, national bank, promissory note, loans, prong, seller, state law, aiding and abetting, regulation, consumer credit, powers, consumer, motion to dismiss, unfair competition, service contract, cause of action, allegations, preemption, violations, contracts, lender, purchase money, incidental, proceeds, terms of credit

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

Dismissal is appropriate under *Fed. R. Civ. P. 12(b)(6)* when a plaintiff's allegations fail to state a claim upon which relief can be granted. In ruling on a motion to dismiss, the court must accept all material allegations of fact as true and construe the complaint in a light most favorable to the non-moving party. Courts are not, however, bound to accept as true a legal conclusion couched as a factual allegation.

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

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

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

A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief, *Fed. R. Civ. P. 8(a)(2)*, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. A *Fed. R. Civ. P. 12(b)(6)* dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. To survive a motion to dismiss, a plaintiff must plead enough facts to state a claim to relief that is plausible on its face. Plausibility does not equate to probability, but it requires more than a sheer possibility that a defendant has acted unlawfully. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Dismissal of claims that fail to meet this standard should be with leave to amend unless it is clear that amendment could not possibly cure the complaint's deficiencies.

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN3[] **Contract Conditions & Provisions, Forum Selection Clauses**

Fed. R. Civ. P. 12(b)(3) governs a motion to dismiss for improper venue. When resolving motions to dismiss based on a forum selection clause, the pleadings are not accepted as true, as would be required under a *Rule 12(b)(6)* analysis. To the contrary, it is consistent with the U.S. Supreme Court standard for resolving forum selection clause cases for the district court to consider facts outside of the pleadings.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN4[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

The so-called "Holder Rule" was adopted by the Federal Trade Commission (FTC) in 1975 to stem the unfair practice of separating the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised in the financing of consumer sales. *40 Fed. Reg. 53,522 (Nov. 18, 1975)*. The Holder Rule makes it an unfair or deceptive act or practice under § 5 of the FTC Act, *15 U.S.C.S. § 45*, for a seller, directly or indirectly, to: (a) take or receive a consumer credit contract which fails to contain the Holder Notice; or (b) accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the Holder Notice. *16 C.F.R. § 433.2*. The Holder Notice must be written in at least ten point, bold face, type and read as follows: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED [PURSUANT HERETO OR] WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Governments > Legislation > Statutory Remedies & Rights

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN5[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

The onus is placed on the seller to ensure the inclusion of the Holder Rule notice under *16 C.F.R. § 433.2* in consumer credit contracts, either by refusing a contract that omits the notice, or by refusing proceeds of a loan made pursuant to such a contract. When the Holder Notice appears in a consumer credit contract, a debtor can assert the same defenses against his lender as he could against the seller. For example, if a used car dealer who fraudulently sells a lemon also arranges the buyer's financing through a bank, the buyer may rely on the dealer's fraud as a defense against repaying the bank loan. No private right of action exists to enforce the Holder Rule, violations of which can only be pursued by the Federal Trade Commission. *15 U.S.C.S. § 45(a)(2)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN6[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

For purposes of the Holder Rule under *16 C.F.R. § 433.2*, a "seller" is a person who, in the ordinary course of business, sells or leases goods or services to consumers, *16 C.F.R. § 433.1(j)*, and a "consumer credit contract" is any instrument which evidences or embodies a debt arising from a Purchase Money Loan transaction or a financed sale as defined in *§ 433.1(d)* and *(e)*. *16 C.F.R. § 433.1(i)*. A "purchase money loan" is a cash advance which is received by a consumer in return for a Finance Charge within the meaning of the Truth in Lending Act and Regulation Z, which is applied, in whole or substantial part, to a purchase of goods or services from a seller who (1) refers consumers to the creditor or (2) is affiliated with the creditor by common control, contract, or business arrangement. *16 C.F.R. § 433.1(d)*. "Financing a sale" means extending credit to a consumer in connection with a Credit Sale within the meaning of the Truth in Lending Act and Regulation Z. *16 C.F.R. § 433.1(e)*.

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

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

HN7[] Trade Practices & Unfair Competition, State Regulation

The California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, characterizes any unlawful, unfair or fraudulent business act or practice as "unfair competition." *Cal. Bus. & Prof. Code § 17200*. The UCL's coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law. The UCL allows civil actions for injunctions to be brought by any person who has suffered injury in fact and has lost money or property as a result of the unfair competition, *Cal. Bus. & Prof. Code § 17204*, against any person who engages, has engaged, or proposes to engage in unfair competition, *Cal. Bus. & Prof. Code § 17203*. Available relief may include orders necessary to restore to any person in interest any money or property acquired by means of such unfair competition. *Cal. Bus. & Prof. Code § 17203*. Since *Cal. Bus. & Prof.*

Code § 17200 is written in the disjunctive, it establishes three varieties of unfair competition--acts or practices which are unlawful, or unfair, or fraudulent.

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

HN8[] **Trade Practices & Unfair Competition, State Regulation**

By proscribing "any unlawful" business practice, *Cal. Bus. & Prof. Code § 17200* borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. Violations of federal as well as state and local law may serve as the predicate for an unlawful practice claim under *§ 17200*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN9[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

The Holder Rule under *16 C.F.R. § 433.2* imposes obligations only on the seller. Its language is explicit in stating the consequences of a failure to include the notice and notably incur a penalty is solely visited upon the seller. The clear and unambiguous language contained in the regulation places no liability on the part of a lender for failing to include the term in its loan documents. Although a seller violates the Holder Rule by taking a consumer credit contract--or by accepting proceeds of a purchase money loan made pursuant to a contract--that omits the notice, the same cannot be said of a lender or creditor.

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

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

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

HN10[] **State Regulation, Claims**

California courts have held only that a claim under *Cal. Bus. & Prof. Code § 17200* cannot be predicated on vicarious liability, which is based on an agency relationship. Aiding and abetting a *§ 17200* violation is actionable and assessed using the same standard for aiding and abetting an intentional tort. Liability may be imposed if the defendant knows the other's conduct constitutes a breach and gives substantial assistance or encouragement to the other to so act.

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

HN11[] **Trade Practices & Unfair Competition, State Regulation**

Violations of federal regulations may constitute "unlawful" activity under the California Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

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

HN12[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

Recognizing the difficulty of determining whether the challenged conduct is unfair within the meaning of the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, the California Supreme Court devised a more precise test to avoid reliance on purely subjective notions of fairness. The California Supreme Court drew guidance from § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45(a)*, based on the similarity of language and obvious identity of purpose between that statute and the UCL. Requiring that any finding of unfairness to competitors under *§ 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition, the California Supreme Court found conduct to be "unfair" if it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. In a footnote, however, the California Supreme Court limited the application of its test to actions by a competitor alleging anticompetitive practices. Its newly articulated standard expressly did not relate to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law.

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

HN13[] **Trade Practices & Unfair Competition, State Regulation**

The California Supreme Court's decision in Cel-Tech has produced confusion among the California appellate courts over whether the clarified definition of "unfair" is properly applied to consumer cases. Since the test Cel-Tech prescribed was, by the California Supreme Court's own admission, not intended for consumer actions, the natural question was what test to apply in such cases under the Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.* To resolve the conflict, the Second Appellate Division turned to § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45*, which the California Supreme Court had identified in Cel-Tech as a source of guidance for interpreting the UCL--and adopted its three-factor test for determining unfairness. For conduct to be unfair under the UCL: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. The California Court of Appeal has continued to endorse that standard since its first articulation in Camacho.

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

HN14[] **State Regulation, Claims**

The fraudulent business practice prong of the California Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.* has been understood to be distinct from common law fraud. A UCL claim need not plead the elements of common law fraudulent deception, which must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. What does need to be pled is the existence of a duty to disclose. Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL. There are four circumstances under which nondisclosure or concealment may constitute actionable fraud: (1)

when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. Under the last three circumstances that may constitute fraud, some relationship must exist between the parties to give rise to a duty to disclose such known facts. Such a relationship can only come into being as a result of some sort of transaction between the parties.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN15[] Actual Fraud, Elements

Predictions as to future events are ordinarily non-actionable expressions of opinion under basic principles of the tort of fraudulent misrepresentation.

Banking Law > Consumer Protection > State Law > Federal Preemption

Banking Law > ... > Banking & Finance > Federal Acts > National Bank Act

Banking Law > ... > National Banks > Bank Powers > General Overview

HN16[] State Law, Federal Preemption

Congress enacted the National Bank Act (NBA), *12 U.S.C.S. § 1 et seq.*, in 1864, establishing the system of national banking still in place today. The NBA vested in nationally chartered banks enumerated powers and all such incidental powers as shall be necessary to carry on the business of banking. *12 U.S.C.S. § 24* (Seventh). The U.S. Supreme Court has, in the years since the NBA's enactment, repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation. While states are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers, state regulations must give way when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA. Among their incidental powers, national banks are charged with discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt. *12 U.S.C.S. § 24* (Seventh).

Banking Law > ... > Banking & Finance > Federal Acts > National Bank Act

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN17[] Federal Acts, National Bank Act

If a plaintiff's state law claims would significantly impair a national bank's exercise of its enumerated or incidental powers under the National Bank Act, *12 U.S.C.S. § 1 et seq.*, state law must give way to federal law because the *Supremacy Clause* enshrines the Constitution, and the Laws of the United States, as the supreme Law of the Land. *U.S. Const. art. VI, cl. 2*. In determining whether a state statute is pre-empted by federal law and therefore invalid under the *Supremacy Clause of the Constitution*, the court's sole task is to ascertain the intent of Congress. If Congress, in enacting a federal statute, intended to exercise its constitutionally delegated authority to set aside the laws of a state, then the *Supremacy Clause* requires courts to follow federal, not state, law.

Constitutional Law > Supremacy Clause > Federal Preemption

HN18[] Supremacy Clause, Federal Preemption

State law can be preempted by federal law in three contexts: where (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field. For purposes of conflict preemption, the court considers whether federal and state law are in irreconcilable conflict. Such a conflict may arise where compliance with both statutes is a physical impossibility or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Banking Law > ... > Banking & Finance > Federal Acts > National Bank Act

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN19[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act

The Office of the Comptroller of the Currency (OCC), as the agency charged by Congress with supervision of the National Bank Act (NBA), *12 U.S.C.S. § 1 et seq.*, oversees the operations of national banks and their interactions with customers. In its regulations, the OCC attempts to delineate the boundaries of NBA preemption. State laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks. *12 C.F.R. § 7.4008(d)(1)*. Specifically, a national bank may make non-real estate loans without regard to state law limitations concerning the terms of credit, including the schedule for repayment of principal and interest, payments due, minimum payments, or terms to maturity of the loan. *12 C.F.R. § 7.4008(d)(2)(iv)*. However, the regulations are explicit that state laws governing contracts, torts, and criminal activity are not preempted, nor are state laws whose effects are incidental to the non-real estate lending operations of national banks. *12 C.F.R. § 7.4008(e)*. National banks are expressly barred from engaging in unfair or deceptive practices within the meaning of § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45*. *12 C.F.R. § 7.4008(c)*.

Constitutional Law > Supremacy Clause > Federal Preemption

HN20[] Supremacy Clause, Federal Preemption

Federal regulations have no less pre-emptive effect than federal statutes. That preemptive effect may only be disturbed if the regulation is not one that Congress would have sanctioned.

Banking Law > ... > National Banks > Bank Powers > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Banking Law > ... > Banking & Finance > Federal Acts > National Bank Act

HN21[] **National Banks, Bank Powers**

States have the power to regulate national banks where doing so does not prevent or significantly interfere with the national bank's exercise of its powers. States cannot, on the other hand, significantly impair a national bank's exercise of authority, enumerated or incidental under the National Bank Act, *12 U.S.C.S. § 1 et seq.* Grants of both enumerated and incidental powers to national banks are grants of authority not normally limited by, but rather ordinarily preempting, contrary state law.

Banking Law > Consumer Protection > State Law > Federal Preemption

Constitutional Law > Supremacy Clause > Federal Preemption

HN22[] **State Law, Federal Preemption**

California courts have long held that consumer protection laws of general application are not preempted by federal banking laws.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

HN23[] **Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

A consumer's rights come into existence only when the Holder Notice under *16 C.F.R. § 433.2* is in fact included in the consumer credit contract.

Banking Law > Consumer Protection > State Law > Federal Preemption

Banking Law > ... > National Banks > Bank Powers > General Overview

HN24[] **State Law, Federal Preemption**

State law cannot obstruct or impair a national bank's ability to fully exercise its Federally authorized non-real estate lending powers. *12 C.F.R. § 7.4008(d)(1)*. States are explicitly barred from imposing limits on the "terms of credit" extended by a national bank. *12 C.F.R. § 7.4008(d)(2)(iv)*.

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

Banking Law > Consumer Protection > State Law > Federal Preemption

Banking Law > ... > National Banks > Bank Powers > General Overview

HN25[] **Deceptive & Unfair Trade Practices, State Regulation**

The duty to refrain from misrepresentation falls on all businesses. Barring a national bank from making misrepresentations to customers does not in any way impair the exercise of its enumerated or implied powers; rather, it is precisely the kind of generally applicable duty that cannot be preempted.

Counsel: **[**1]** For Matthew C. Kilgore, William Bruce Fuller, Kevin Wilhelmy, Plaintiffs: Andrew A. August, Kevin Francis Rooney, LEAD ATTORNEYS, Pinnacle Law Group LLP, San Francisco, CA; James C. Sturdevant, Monique Olivier, Whitney Huston, The Sturdevant Law Firm, A Professional Corporation, San Francisco, CA.

For Keybank, National Association, Successor in interest to Keybank USA, N.A., Defendant: Todd C. Toral, LEAD ATTORNEY, Stephanie Ann Karnavas, Nixon Peabody LLP, San Francisco, CA; Courtney Erin Quinn Brooks, Nixon Peabody LLP, Manchester, NH; W. Scott O'Connell, PRO HAC VICE, Nixon Peabody LLP, Manchester, NH.

For Key Education Resources, a division of Keybank National Association, Defendant: W. Scott O'Connell, PRO HAC VICE, Nixon Peabody LLP, Manchester, NH.

For Great Lakes Education Loan Services, Inc., Defendant: John Noble Giftos, LEAD ATTORNEY, PRO HAC VICE, Michael Best & Friedrich, LLP, Madison, WI; Todd C. Toral, LEAD ATTORNEY, Stephanie Ann Karnavas, Nixon Peabody LLP, San Francisco, CA; Courtney Erin Quinn Brooks, W. Scott O'Connell, Nixon Peabody LLP, Manchester, NH.

For Student Loan Xpress, Defendant: Christine Kim Son, LEAD ATTORNEY, Roll International Corporation, Los Angeles, **[**2]** CA; Robert Mark Stone, LEAD ATTORNEY, Jennifer Altfeld Landau, Sean Ashley Commons, Sidley Austin LLP, Los Angeles, CA.

For American Education Services, Defendant: Ann G. Grimaldi, LEAD ATTORNEY, Deborah Lorraine Cote, McKenna Long & Aldridge LLP, San Francisco, CA.

Judges: THELTON E. HENDERSON, UNITED STATES DISTRICT JUDGE.

Opinion by: THELTON E. HENDERSON

Opinion

[*944] ORDER GRANTING MOTION TO DISMISS THIRD AMENDED COMPLAINT

This matter came before the Court on March 29, 2010, on the motion to dismiss filed by Defendants KeyBank, National Association and Great Lakes Educational Loan Services, Inc. For the reasons set forth below, the motion is GRANTED.

BACKGROUND

Plaintiffs and putative class representatives Matthew C. Kilgore and William Bruce Fuller ("Plaintiffs") are California residents who enrolled in a helicopter flight academy operated in Oakland, California by Silver State Helicopters, LLC ("Silver State"). The Third Amended Complaint alleges that Plaintiffs -- and the class of student loan borrowers they seek to represent -- paid Silver State nearly $ 60,000 in tuition to be trained as commercial helicopter pilots, but failed to complete the educational program before Silver State filed for bankruptcy on February **[**3]** 4, 2008. Plaintiffs financed their tuition by obtaining student loans from KeyBank, National Association and its education lending division, Key Education Resources (collectively "KeyBank"). Plaintiffs allege that KeyBank defied its own risk management policies to partner with Silver State, ignoring red flags -- including the school's recent founding, deficient credentials, and poor student placement rates -- that should have signaled Silver State's risk of failure.

Plaintiffs now seek to enjoin KeyBank and Great Lakes Educational Loan Services, Inc. ("Great Lakes") -- which services their loans -- from collecting the loans or reporting the loan balances to credit reporting agencies.

Plaintiffs instituted this putative class action in Alameda County Superior Court on May 12, 2008, against KeyBank and Great Lakes. Student Loan Xpress, Inc. ("SLX") and American Education Services ("AES") -- which allegedly made and serviced loans to Silver State students -- were added as defendants in a First Amended Complaint filed four days later. After Plaintiffs filed a Second Amended Complaint ("SAC"), KeyBank removed the action to federal court, and a settlement with SLX led to its and AES's dismissal **[**4]** on October 27, 2009.

After an unsuccessful mediation, KeyBank and Great Lakes (collectively "Defendants") responded to the SAC on April 24, 2009 by moving to dismiss and to compel arbitration. The Court denied the motion to compel arbitration on July 8, 2009 -- a ruling Defendants have appealed to the Ninth Circuit -- and continued the motion to dismiss. On August 17, 2009, this matter was stayed except for document discovery and the motion to dismiss. Defendants filed a new motion to dismiss on October 5, 2009, in response to which Plaintiffs amended the complaint. Defendants moved to dismiss the Third Amended Complaint ("TAC") pursuant to *Federal Rules of Civil Procedure 12(b)(6)* and *12(b)(3)* on January 11, 2010. Plaintiffs opposed the motion.

LEGAL STANDARD

HN1[] Dismissal is appropriate under *Federal Rule of Civil Procedure 12(b)(6)* when a plaintiff's allegations fail "to state a claim upon which relief can be granted." In ruling on a motion to dismiss, the Court must "accept all material allegations of fact as true and construe the complaint in a light most favorable to the non-moving party." *Vasquez v. L.A. County, 487 F.3d 1246, 1249 (9th Cir. 2007)*. Courts are not, however, "bound to **[**5]** accept as true a legal conclusion couched as a factual allegation." ***[*945]*** *Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*.

HN2[] A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," *Fed. R. Civ. P. 8(a)(2)*, in order to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*. A *Rule 12(b)(6)* dismissal "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*. Plausibility does not equate to probability, but it requires "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 129 S. Ct. at 1949*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for **[**6]** the misconduct alleged." *Id*. Dismissal of claims that fail to meet this standard should be with leave to amend unless it is clear that amendment could not possibly cure the complaint's deficiencies. *Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1296 (9th Cir. 1998)*.

HN3[] *Rule 12(b)(3)* governs a motion to dismiss for improper venue. When "resolving motions to dismiss based on a forum selection clause, the pleadings are not accepted as true, as would be required under a *Rule 12(b)(6)* analysis." *Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996)*. To the contrary, it "is consistent with the Supreme Court standard for resolving forum selection clause cases" for "the district court to consider facts outside of the pleadings." *Id*.

DISCUSSION

Plaintiffs bring six causes of actions under California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200*. The claims are all premised on the Federal Trade Commission's "Holder Rule," *16 C.F.R. § 433.2*, which "requires purchase money loan agreements (loans supplying money for the purchase of goods or services) arranged by sellers to contain a notice to all loan holders that preserves the borrower's ability to raise claims and defenses **[**7]** against the lender arising from the seller's misconduct." *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc., 168 F.3d 1362, 1365, 335 U.S. App. D.C. 62 (D.C. Cir. 1999)*. Defendants argue that all six of Plaintiffs' causes of action fail to state a claim for relief, and are preempted by the National Bank Act. They also urge the Court to dismiss pursuant to a forum selection clause that calls for an Ohio venue, and argue that Plaintiffs' claims are barred by the economic loss doctrine.

The Court begins by examining the Holder Rule and determining whether any of Plaintiffs' six causes of action state plausible claims for relief under the *Rule 12(b)(6)* standard. For any claims that overcome that hurdle, the Court will then assess whether they must nevertheless be dismissed due to federal preemption. Since the Court finds that all of Plaintiffs' causes of action falter at one of those two steps, it is unnecessary to address KeyBank's other arguments. [1]

[*946] I. Plaintiffs' Claims Under the [8] Holder Rule and California's Unfair Competition Law**

HN4[] The so-called "Holder Rule" was adopted by the Federal Trade Commission ("FTC") in 1975 to stem the "unfair practice" of separating "the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised" in the financing of consumer sales. *40 Fed. Reg. 53,522 (Nov. 18, 1975)*. The Rule makes it an "unfair or deceptive act or practice" under *section 5 of the FTC Act* "for a seller, directly or indirectly, to":

> (a) Take or receive a consumer credit contract which fails to contain the [Holder Notice], or,
>
> (b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the [Holder Notice].

16 C.F.R. § 433.2. [2] The "Holder Notice" must be written "in at least ten point, bold face, type" and read as follows:

> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED [PURSUANT HERETO OR] WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE **[**9]** DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. [3]

Id. ***HN5***[] The onus is therefore placed on the seller to ensure the Holder Notice's inclusion in consumer credit contracts, either by refusing a contract that omits the Notice, or by refusing proceeds of a loan made pursuant to such a contract. [4] When the Holder Notice appears in a consumer credit contract, a debtor can assert the same

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[1] Defendants also argue that Great Lakes must be dismissed because Plaintiffs fail to allege any facts concerning it. The Court need not address this argument as all claims are to be dismissed on other grounds.

[2] ***HN6***[] A "seller" is a "person who, in the ordinary course of business, sells or leases goods or services to consumers," *16 C.F.R. § 433.1(j)*, and a "consumer credit contract" is any "instrument which evidences or embodies a debt arising from a 'Purchase Money Loan' transaction or a 'financed sale' as defined in paragraphs (d) and (e) of this section," *id*. *§ 433.1(i)*. A "purchase money loan" is a "cash advance which is received by a consumer in return for a 'Finance Charge' within the meaning of the Truth in Lending Act and Regulation Z, which is applied, in whole or substantial part, to a purchase of goods or services from a seller who (1) refers consumers to the creditor or (2) is affiliated with the creditor by common control, contract, or business arrangement." *Id*. *§ 433.1(d)*. "Financing a sale" means "[e]xtending credit to a consumer in connection with a 'Credit Sale' within the meaning of the Truth in Lending Act and Regulation Z." *Id*. *§ 433.1(e)*.

[3] The bracketed language -- "pursuant hereto or" -- appears only in the Holder Notice required by *16 C.F.R. § 433.2(a)*, but not in *§ 433.2(b)*. Aside from that difference, the language required by **[**11]** *subsections (a)* and *(b)* is identical.

[4] On the same day the Holder Rule was officially promulgated, the FTC also proposed an amendment that would have applied the rule to lenders, as well. *See Heastie v. Cmty. Bank of Greater Peoria, 727 F. Supp. 1133, 1137 (N.D. Ill. 1989)* (reviewing history of amendment). However, the proposed amendment was never adopted.

defenses against his lender as he could against the seller. "For example, if a used car dealer who fraudulently sells a lemon also arranges the buyer's financing through a bank, the buyer may rely on the dealer's fraud as a defense against repaying the bank loan." *Armstrong, 168 F.3d at 1365*. No private right of action exists to enforce the Holder Rule, violations of which can only be pursued by the FTC. *See* *15 U.S.C. § 45(a)(2)* (*section 5 of the FTC Act*, empowering the FTC "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition **[*947]** in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce"); *Holloway v. Bristol-Myers Corp., 485 F.2d 986, 987, 158 U.S. App. D.C. 207 (D.C. Cir. 1973)* ("[P]rivate actions to vindicate rights asserted under the Federal **[**10]** Trade Commission Act may not be maintained.").

Plaintiffs allege that they and every member of the proposed class executed a "service contract" with Silver State, in which the school "agreed to provide specific education and training for each student to become a commercial helicopter pilot within a specified period of time." TAC P 9. Class members financed all or part of Silver State's nearly $ 60,000 per-student tuition by executing promissory notes with KeyBank. Silver State filed for bankruptcy and shuttered before any of them had completed their promised training, but after KeyBank had disbursed their loans in their entirety. Plaintiffs contend that the service contracts and the promissory notes are both "consumer credit contracts" under the Holder Rule, and that Silver State was a "seller" required to comply with the Rule. However, neither the service contracts nor the promissory **[**12]** notes included the Holder Notice, an omission that underlies this action.

As the Holder Rule provides no private right of action, Plaintiffs bring their claims under ***HN7***[] the UCL, which characterizes "any unlawful, unfair or fraudulent business act or practice" as "unfair competition." *Cal. Bus. & Prof. Code § 17200*. The statute's coverage is "sweeping, embracing 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *Rubin v. Green, 4 Cal. 4th 1187, 1200, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993)* (quoting *Barquis v. Merchants Collection Assn., 7 Cal. 3d 94, 113, 101 Cal. Rptr. 745, 496 P.2d 817 (1972))*. The UCL allows civil actions for injunctions to be brought by any "person who has suffered injury in fact and has lost money or property as a result of the unfair competition," *Cal. Bus. & Prof. Code § 17204*, against "[a]ny person who engages, has engaged, or proposes to engage in unfair competition," *id*. *§ 17203*. Available relief "may include orders necessary 'to restore to any person in interest any money or property … acquired by means of such unfair competition.'" *Wells v. One2One Learning Found., 39 Cal. 4th 1164, 1189, 48 Cal. Rptr. 3d 108, 141 P.3d 225 (2006)* (quoting *Cal. Bus. & Prof. Code § 17203*).

Since *section 17200* is "written in **[**13]** the disjunctive," it "establishes three varieties of unfair competition -- acts or practices which are unlawful, or unfair, or fraudulent." *Podolsky v. First Healthcare Corp., 50 Cal. App. 4th 632, 647, 58 Cal. Rptr. 2d 89 (1996)*. Plaintiffs bring claims under each of the prongs. They claim that KeyBank directly violated both parts of the Holder Rule by omitting the Holder Notice from their promissory notes (Claims 1 and 2), and that it is also liable for aiding and abetting Silver State's violation of the Rule (Claims 3 and 4). Plaintiffs' last two causes of action invoke the unfair and fraudulent prongs of the UCL. Defendants argue that none of the six causes of action succeed in stating a claim.

A. "Unlawful" Prong: Direct Violation of the Holder Rule

HN8[] "By proscribing 'any unlawful' business practice, *section 17200* 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tele. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)* (internal citations and quotation marks omitted). "Violations of federal as well as state and local law may serve as the predicate for an unlawful practice claim under" *section 17200*. **[**14]** **[*948]** *Munson v. Del Taco, Inc., 46 Cal. 4th 661, 676, 94 Cal. Rptr. 3d 685, 208 P.3d 623 (2009)*. Plaintiffs contend that KeyBank breached both parts of the Holder Rule, by "taking" the promissory notes that omitted the Holder Notice, *16 C.F.R. § 433.2(a)*, and by providing Silver State with purchase money loan proceeds despite that omission from the notes and service contracts, *id*. *§ 433.2(b)*. Defendants respond that KeyBank cannot have directly violated the Holder Rule, which applies only to "sellers."

The Holder Rule has never been subject to close scrutiny by the Ninth Circuit, and other circuits have likewise had little opportunity to explore its scope. As a result, both parties draw support from opinions by federal district and state courts outside the Ninth Circuit, none of which are binding on this Court. Plaintiffs rely on *Gonzalez v. Old Kent Mortgage Co*., where a court in the Eastern District of Pennsylvania -- after concluding that "contract terms may be implied where public policy so requires" -- read the Holder Notice into a contract that omitted it. *No. 99-5959, 2000 U.S. Dist. Lexis 14530, at *13 (E.D. Pa. Sept. 19, 2000)*. The court found that "it would turn the law on its head to allow [the defendant mortgage **[**15]** company] to avoid the consequences of [the Holder Notice] by its own failure" to include the notice in its loan documents. *Id*. However, the *Gonzalez* court did not acknowledge that the Holder Rule, by its own language, makes only sellers responsible for the inclusion of the notice in contracts. The court also never concluded that the defendant mortgage company's failure to include the notice was unlawful; it only decided to proceed as though the Holder Notice had been included in the loan documents. *Gonzalez* is therefore not only unpersuasive, but also unsupportive of Plaintiffs' position.

Plaintiffs' other authorities fare no better. The Common Pleas Court of Allegheny County, Pennsylvania, recognized that the creditor bank had committed "no violation" of the Holder Rule because "the rule, as presently drafted, places a duty only on the seller to insure that the preservation of defenses provisions is included within the loan agreement." *Iron & Glass Bank v. Franz, 9 Pa. D. & C. 3d 419, 427 (Pa. C.P. 1978)*. Although the court still refused to insulate the creditor "from the seller's wrongdoing," it did so despite its conclusion that no direct violation of the Holder Rule had occurred. **[**16]** *Id. Heastie v. Community Bank of Greater Peoria* suffers the same infirmity: the court acknowledged that "part 433 does not apply by its terms to lenders," but found that a lender's addition of a non-responsibility provision contrary to the Holder Notice -- which was included in the contract -- could be an unfair or deceptive practice under Illinois' Consumer Fraud Act. *727 F. Supp. 1133, 1138 (N.D. Ill. 1989)*. *Heastie* does not demonstrate that KeyBank's conduct was unlawful.

HN9[] The Holder Rule imposes obligations only on the seller. Its language is "explicit in stating the consequences of a failure to include the notice and notably incur a penalty is solely visited upon the seller." *In re Vincent Crisomia, Sr., No. 00-35085DWS, 2001 Bankr. Lexis 1469, at *11 (E.D. Pa. Bankr. 2001)*. "[T]he clear and unambiguous language contained in the regulation places no liability on the part of a lender for failing to include the term in its loan documents." *Abel v. KeyBank USA, N.A., No. 1:03 CV 524, 2003 U.S. Dist. Lexis 27175, at *26-27 (N.D. Ohio Sept. 24, 2003)*. Although a seller violates the Holder Rule by taking a consumer credit contract -- or by accepting proceeds of a purchase money loan made **[**17]** pursuant to a contract -- that **[*949]** omits the notice, the same cannot be said of a lender or creditor. With no obligation to include the Holder Notice in its promissory notes, KeyBank has not contravened any law. KeyBank's actions therefore cannot, by themselves, satisfy the "unlawful" prong of the UCL. These claims are DISMISSED without leave to amend, as Plaintiffs cannot -- as a matter of law -- allege that KeyBank directly violated the Holder Rule.

B. "Unlawful" Prong: Aiding and Abetting Silver State's Violation of the Holder Rule

Plaintiffs' third and fourth claims are also brought under the UCL's "unlawful" prong, but the Holder Rule violation alleged is that of Silver State, with KeyBank's liability premised on aiding and abetting that violation. Defendants contend -- incorrectly -- that California law precludes actions for "aiding and abetting" under *section 17200*. ***HN10***[] California courts have held only that a *section 17200* claim "cannot be predicated on *vicarious* liability," which is based on an agency relationship. *Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960, 116 Cal. Rptr. 2d 25 (2002)* (emphasis added). Aiding and abetting a *section 17200* violation is actionable and assessed using the same **[**18]** standard for aiding and abetting an intentional tort. *Schulz v. Neovi Data Corp., 152 Cal. App. 4th 86, 93, 60 Cal. Rptr. 3d 810 (2007)*. Liability may be imposed if the defendant "'knows the other's conduct constitutes a breach . . . and gives substantial assistance or encouragement to the other to so act.'" *Id.* (quoting *Fiol v. Doellstedt, 50 Cal. App. 4th 1318, 1325, 58 Cal. Rptr. 2d 308 (1996))*.

Plaintiffs allege that Silver State violated both parts of the Holder Rule by receiving the service contracts and accepting the proceeds of KeyBank's loans when neither the service contracts nor the promissory notes included the Holder Notice. *See 16 C.F.R. § 433.2(a)-(b)*. ***HN11***[] Violations of federal regulations may constitute "unlawful" activity under the UCL. *Smith v. Wells Fargo Bank, N.A., 135 Cal. App. 4th 1463, 1480, 38 Cal. Rptr. 3d 653 (2005)*. For KeyBank to be liable on an aiding and abetting theory, it must have not only known about the alleged Holder Rule violations, but also provided substantial assistance or encouragement. First, however, Plaintiffs must have stated a plausible claim that *Silver State* violated the Holder Rule -- which they do. The TAC alleges that the Plaintiffs' service contracts with Silver State, and their promissory notes with KeyBank, **[**19]** are both "consumer credit contracts" -- defined by regulation as "[a]ny instrument which evidences or embodies a debt arising from a 'Purchase Money Loan' transaction," *16 C.F.R. § 433.1(i)* -- and that the Holder Notice was omitted from both. [5] Silver State therefore would have violated the Holder Rule by receiving the service contracts, and by accepting the proceeds of KeyBank's purchase money loans. *See id*. *§ 433.2(a)-(b)*.

[*950] The Court therefore turns its attention to whether KeyBank's conduct, as alleged, meets the standard for aiding and abetting. In *Schulz*, the California Court of Appeal ruled that a plaintiff had properly pleaded an aiding and abetting claim under *section 17200*. *152 Cal. App. 4th at 88*. The *Schulz* plaintiff alleged that two defendants aided and abetted an illegal online lottery by performing credit card processing and billing services for its operator. The court found the knowledge requirement satisfied by the allegations that the defendants had "reviewed EZ's Web site and 'recognized that the site was an illegal lottery, but also realized that it generated substantial revenue and could be very profitable for [them].'" *Id. at 94*. The defendants also provided "substantial assistance or encouragement" by authorizing "EZ to configure its site to display their respective logos so that consumers could link directly to their sites to process credit card payments." *Id*. The complaint alleged that the defendants realized their **[**21]** participation would not only enable "more persons . . . to participate in the illegal lottery" -- thus increasing their revenue -- but that it would also "lend an aura of respectability and further encourage participation." *Id*.

Plaintiffs' allegations meet *Schulz's* threshold for pleading an aiding and abetting claim under the UCL. The TAC alleges that KeyBank was "keenly aware that . . . if it permitted the Holder Rule Notice to be included in the consumer credit transaction documentation, KeyBank would be unable to sell the loans into the secondary market and would necessarily be obligated to return those unused funds to the students if the school closed prior to the students obtaining all of the promised education." TAC P 27. Plaintiffs characterize KeyBank as a sophisticated player, well aware of the Holder Rule and consciously seeking to avoid it. They claim that KeyBank developed strategies to enhance "its ability to aggressively pursue collection of loans made to students scammed by vocational schools," such as "omitting the Holder Rule Notice from its promissory notes" and "ensuring that the contracts between the vocational school partner and its students omitted" the notice. **[**22]** *Id*. P 25. KeyBank had specific knowledge of Silver State's violations because, according to the TAC, it reviewed and approved exemplar copies of its service contract, and disbursed loans to Silver State despite the omission of the Holder Notice. The knowledge requirement is therefore satisfied.

As for substantial assistance, the TAC alleges that KeyBank was Silver State's "preferred lender," and that "KeyBank's marketing and sales personnel helped create, review, approve and ratify [Silver State's] marketing and sales presentation, at least as it related to KeyBank's Key Alternative Loan program." TAC P 32. Silver State could not have violated *section 433.2(b)* -- accepting loan funds despite omission of the Holder Notice -- had KeyBank not disbursed the loans. The TAC likewise alleges that KeyBank encouraged the violation of *section 433.2(a)*, by reviewing and approving exemplar copies of the service contract, and ensuring the Holder Rule's omission. TAC PP 25, 49. The pleading establishes substantial assistance or encouragement.

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[5] Defendants argued for the first time at hearing that Silver State's service contracts are not consumer credit contracts. At the motion to dismiss stage, the Court finds Plaintiffs' allegation that the service contracts constitute consumer credit contracts to be sufficient without examining the contract to determine whether it "evidences or embodies a debt." *16 C.F.R. § 433.1(i)*. Defendants also asserted -- for the first time -- that KeyBank's promissory notes are not consumer credit contracts, because education loans above $ 25,000 were exempt from the Truth in Lending Act ("TILA") and Regulation Z at the time Plaintiffs' loans were made. *See* *15 U.S.C. § 1603(3)*. The Court agrees with Plaintiffs that the Holder Rule merely borrows the definitions of "finance charge" **[**20]** and "credit sale" from TILA and Regulation Z; it does not import the restrictions to which Defendants refer. *See* note 2, *supra* (quoting provisions of OCC regulations).

By alleging that KeyBank knew of and encouraged Silver State's violations of the Holder Rule, Plaintiffs have stated plausible claims for aiding and abetting **[**23]** Silver State's "unlawful" activity under the UCL.

C. "Unfair" Prong

Plaintiffs allege, in their fifth claim, that KeyBank violated the "unfair" prong of the UCL by omitting the Holder Notice from its own promissory notes, by facilitating **[*951]** Silver State's violation of the Holder Rule, and by partnering with Silver State despite numerous red flags about the school's viability. Defendants argue that KeyBank's conduct cannot satisfy the unfair prong because it did not violate the provisions of any statute, regulation, or case law.

The parties advance different standards for determining what is unfair, a discrepancy arising from conflicting California authority on this question. ***HN12***[] Recognizing the difficulty of determining "whether the challenged conduct is unfair within the meaning of the unfair competition law," the California Supreme Court devised a "more precise test" to avoid reliance on "purely subjective notions of fairness." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tele. Co., 20 Cal. 4th 163, 184-85, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The court drew guidance from *section 5 of the FTC Act*, *15 U.S.C. § 45(a)*, based on "the similarity of language and obvious identity of purpose" between that statute and the UCL. *Cel-Tech, 20 Cal. 4th at 185*. **[**24]** Requiring "that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition," the court found conduct to be "unfair" if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 186-87*. In a footnote, however, the court limited the application of its test to actions "by a competitor alleging anticompetitive practices." *Id. at 187 n.12*. Its newly articulated standard expressly did not relate "to actions by consumers or by competitors alleging other kinds of violations of the unfair competition law." *Id*.

HN13[] *Cel-Tech* has produced confusion among the California appellate courts over whether the clarified definition of "unfair" is properly applied to *consumer* cases. *Compare* *Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845, 854, 128 Cal. Rptr. 2d 389 (Cal. App. 1st Dist. 2002)* (reading *Cel-Tech* "to require that the public policy which is a predicate to the action must be 'tethered' to specific constitutional, **[**25]** statutory or regulatory provisions" in consumer cases), *with* *Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 700, 720 n.23, 113 Cal. Rptr. 2d 399 (Cal. App. 2d Dist. 2001)* ("[W]e are not to read *Cel-Tech* as suggesting that such a restrictive definition of 'unfair' should be applied in the case of an alleged *consumer* injury[.]"). Since the test *Cel-Tech* prescribed was, by the California Supreme Court's own admission, not intended for consumer actions, the natural question was what test to apply in such cases.

To resolve the conflict, the Second Appellate Division turned to *section 5 of the FTC Act* -- which the California Supreme Court had identified in *Cel-Tech* as a source of guidance for interpreting the UCL -- and adopted its three-factor test for determining unfairness. For conduct to be unfair under the UCL, "(1) [t]he consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Camacho v. Auto. Club of S. Cal., 142 Cal. App. 4th 1394, 1403, 48 Cal. Rptr. 3d 770 (Cal. App. 2d Dist. 2006)*. The California Court of Appeal has continued to endorse that standard **[**26]** since its first articulation in *Camacho, see* *Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 596-98, 101 Cal. Rptr. 3d 697 (Cal. App. 2d Dist. 2009)*, and this is the standard advanced by Plaintiffs. Defendants seek to **[*952]** apply the *Cel-Tech* standard, arguing that unfair conduct must be tethered to a specific statutory, regulatory, or case authority. Since the California Supreme Court declared that its *Cel-Tech* standard does not apply in consumer actions, this Court will follow the Court of Appeal's approach in *Camacho*.

Plaintiffs are able to satisfy this standard. Their injury is substantial: Plaintiffs owe tens of thousands of dollars to KeyBank but, due to the omission of the Holder Notice, cannot assert Silver State's failure to provide the bargained-for education as a defense to the collection of their debt. On oral argument, Defendants suggested that requiring lenders to include the Holder Notice would cause lenders to exit the student loan market for vocational schools and limit the availability of credit to Plaintiffs and similarly situated individuals. Under Defendants' theory, KeyBank's conduct offers a countervailing benefit by making credit more available. However, the Court cannot conclude **[**27]** on motion to dismiss that such a benefit *outweighs* Plaintiffs' injury. Finally, Plaintiffs could not have reasonably done anything to avoid this injury, which was brought on by Silver State's closure -- a turn of events they could not have anticipated. Plaintiffs therefore state a plausible claim under the unfair prong of the UCL.

D. "Fraud" Prong

Plaintiffs' sixth and final cause of action alleges a violation of the "fraud" prong of *section 17200* based on KeyBank's failure to disclose material facts about Silver State's risk of failure. Plaintiffs allege that KeyBank intentionally concealed information from loan customers because it relied on the Silver State loans to offset losses from other failed partner schools and to create publicly offered securities backed by education loans. Defendants argue that Plaintiffs fail to state a claim because KeyBank had no duty to disclose, and the "facts" that went undisclosed were not material.

HN14[] "The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud." *In re Tobacco II Cases, 46 Cal. 4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*. A UCL claim need not plead the elements of common law fraudulent deception, which "must be actually **[**28]** false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages." *Id*. What does need to be pled is the existence of a duty to disclose. "Absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL." *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1557, 62 Cal. Rptr. 3d 177 (2007)*. There are four circumstances under which "[n]ondisclosure or concealment may constitute actionable fraud":

> (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.

Heliotis v. Schuman, 181 Cal. App. 3d 646, 651, 226 Cal. Rptr. 509 (1986).

Plaintiffs do not contend that they and KeyBank had any type of fiduciary relationship. Even under the remaining three circumstances that may constitute fraud, "some relationship" must exist "between the parties [to] give[] rise to a duty to disclose such known facts." *LiMandri v. Judkins, 52 Cal. App. 4th 326, 337, 60 Cal. Rptr. 2d 539 (1997)*. Such a relationship **[**29]** "can only come into being as a result of some sort of transaction between the parties." **[*953]** *Id*. Plaintiffs and KeyBank, as "parties entering into [a] contractual agreement," had such a relationship. *Id*. Plaintiffs' theory is that material facts about the viability of Silver State were in KeyBank's exclusive knowledge, thereby triggering KeyBank's obligation to disclose them.

This claim falters on two fronts. First, none of the facts that Plaintiffs allege as the basis for fraud could plausibly have been in the "exclusive knowledge" of KeyBank. Such "red flags" as Silver State's lack of affiliation with a college or university, its failure to obtain certification from the Federal Aviation Administration, or its relatively recent founding are not facts known only to KeyBank. Plaintiffs had a relationship with Silver State itself, which could have disclosed such details or responded to inquiries by Plaintiffs. Nor is it plausible that Silver State and KeyBank were the only sources of this information. Such basic facts as the existence of government certifications or the date a corporation began operating are matters of public record. Although the Court recognizes that KeyBank is the more sophisticated **[**30]** party, Plaintiffs cannot establish fraud by alleging facts that could not plausibly have been in KeyBank's exclusive knowledge.

Second, other "facts" on which Plaintiffs premise their fraud allegations are not facts at all, but rather opinions about Silver State's viability. For example, Plaintiffs allege that KeyBank was aware that an aviation school expert had predicted Silver State's failure. ***HN15***[] "[P]redictions as to future events are ordinarily non-actionable expressions of opinion under basic principles of the tort of fraudulent misrepresentation." *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692, 698 (9th Cir. 2004)*. The failure to disclose predictions or other opinions about Silver State's viability cannot be actionable because they are not facts and therefore do not trigger a duty to disclose. Plaintiffs therefore fail to state a claim under the UCL's fraud prong, which is DISMISSED. As Plaintiffs previously augmented their fraud allegations in response to Defendants' prior motion to dismiss, the Court concludes that further amendment would be futile and denies leave to amend.

II. Preemption by the National Bank Act

Three of Plaintiffs' six causes of action **[**31]** -- two claims for aiding and abetting under the UCL's "unlawful" prong, and one claim under the "unfair" prong -- state plausible claims under the *Rule 12(b)(6)* standard. However, Defendants further argue that those claims must be dismissed as preempted by federal law, which exclusively governs the terms of credit extended by a national bank such as KeyBank. Plaintiffs respond that preemption does not reach as far as KeyBank suggests, as laws of general application -- like those invoked here -- are not preempted by federal law.

KeyBank is a national bank created and operated under the National Bank Act ("NBA"), *12 U.S.C. § 1 et seq.* ***HN16***[] Congress enacted the NBA in 1864, "establishing the system of national banking still in place today." *Watters v. Wachovia Bank, N.A., 550 U.S. 1, 10, 127 S. Ct. 1559, 167 L. Ed. 2d 389 (2007)*. "The Act vested in nationally chartered banks enumerated powers and 'all such incidental powers as shall be necessary to carry on the business of banking.'" *Id. at 11* (quoting *12 U.S.C. § 24* (Seventh)). The Supreme Court has, in "the years since the NBA's enactment, . . . repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Id.* **[**32]** While states "are permitted to regulate the activities of national banks where doing so does **[*954]** not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers," state regulations "must give way" when "state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA." *Id. at 12*. Among their incidental powers, national banks are charged with "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." *12 U.S.C. § 24* (Seventh).

HN17[] At issue here is whether Plaintiffs' state law claims would "significantly impair" KeyBank's exercise of its "enumerated or incidental" powers under the NBA. If that is so, state law must give way to federal, because the *Supremacy Clause* enshrines the "Constitution, and the Laws of the United States," as "the supreme Law of the Land." *U.S. Const. art. VI, cl. 2*. "In determining whether a state statute is pre-empted by federal law and therefore invalid under the *Supremacy Clause of the Constitution*, our sole task is to ascertain the intent of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987)*. If Congress, **[**33]** in enacting a federal statute, intended "to exercise its constitutionally delegated authority to set aside the laws of a State," then "the *Supremacy Clause* requires courts to follow federal, not state, law." *Barnett Bank of Marion County, N. A. v. Nelson, 517 U.S. 25, 30, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996)*.

HN18[] State law can be preempted by federal law in three contexts: where "(1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field." *Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist., 498 F.3d 1031, 1039 (9th Cir. 2007)*. The parties agree that only conflict preemption is in play here: whether federal and state law are "in 'irreconcilable conflict.'" *Barnett Bank, 517 U.S. at 31* (quoting *Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982))*. Such a conflict may arise where compliance with both statutes is a "'physical impossibility,'" *id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963))*, or where the state law "'stand[s] as an obstacle to the accomplishment **[**34]** and execution of the full purposes and objectives of Congress,'" *id.* (quoting *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941))*.

HN19[] The Office of the Comptroller of the Currency ("OCC"), as "the agency charged by Congress with supervision of the NBA," "oversees the operations of national banks and their interactions with customers." *Watters,* *550 U.S. at 6*. In its regulations, the OCC attempts to delineate the boundaries of NBA preemption. [6] "[S]tate laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks." *12 C.F.R. § 7.4008(d)(1)*. Specifically, a "national bank may make non-real estate loans without regard to state law limitations concerning . . . [t]he terms of credit, including the schedule for repayment of principal and interest, . . . payments due, **[*955]** minimum payments, or terms to maturity of the loan[.]" *Id*. *§ 7.4008(d)(2)(iv)*. However, the regulations are explicit that state laws governing contracts, torts, and criminal activity are *not* preempted, nor are state laws whose effects are "incidental to the non-real estate lending operations of national banks." *Id*. *§ 7.4008(e)*. **[**35]** National banks are expressly barred from engaging in "unfair or deceptive practices within the meaning of section 5" of the FTC Act. *Id*. *§ 7.4008(c)*.

The broad contours of NBA preemption are not in dispute. ***HN21***[] States have "the power to regulate national banks" where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank, 517 U.S. at 33*; *see also* *Bank of Am. v. City & County of S.F., 309 F.3d 551, 558-59 (9th Cir. 2002)* ("[S]tates retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."). States cannot, on the other hand, "significantly impair" a national bank's "exercise of authority, enumerated or incidental under the NBA." *Watters, 550 U.S. at 12*. "[G]rants of both enumerated **[**36]** and incidental 'powers' to national banks" are "grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank, 517 U.S. at 32*.

Defendants do not contend that California's UCL is preempted by the NBA. As this Court has previously noted, ***HN22***[] "California courts have long held that consumer protection laws of general application are not preempted by federal banking laws." *Jefferson v. Chase Home Finance, No. C06-6510 TEH, 2008 U.S. Dist. LEXIS 101031, at *29 (N.D. Cal. April 29, 2008)*. Rather, Defendants argue that Plaintiffs' *application* of the UCL -- which they are wielding to "modify federal law" and "impose a non-existent obligation on KeyBank with regard to the FTC Holder Notice" -- is preempted. Defs.' Mot. at 17. The injunctive relief demanded by Plaintiffs would effectively read the Holder Notice into KeyBank's promissory notes, thereby -- according to Defendants -- imposing a "state law limitation[]" on its "terms of credit." *12 C.F.R. § 7.4008(d)(2)(iv)*. Plaintiffs respond that they are simply predicating the violation of "a state consumer protection statute of general application" on "a federal consumer protection regulation of general **[**37]** application," neither of which are preempted. Pls.' Opp'n at 20.

The Court has already concluded that the Holder Rule does not directly apply to KeyBank; the regulation provides only that a *seller* commits an unfair business practice by omitting the Holder Notice from a consumer credit contract, or by accepting loan proceeds made pursuant to such a contract. KeyBank was not required to include the Holder Notice in its promissory notes. However, Plaintiffs' surviving claims -- which are all premised on KeyBank's complicity in Silver State's alleged Holder Rule violation -- would compel KeyBank to add the Holder Notice to its consumer credit contracts. For example, Plaintiffs allege that KeyBank aided and abetted Silver State's violation by dispersing loan funds to Silver State -- which was therefore "[a]ccept[ing] . . . the proceeds of a[] purchase money loan" made pursuant to a "consumer credit contract" that did not contain the Holder Notice. *16 C.F.R. § 433.2(b)*. KeyBank could only avoid aiding and abetting liability under that theory by including the Holder Notice in its promissory notes, or by not making the loan in the first place.

The *relief* Plaintiffs request would also, in effect, **[**38]** read the Holder Notice into KeyBank's **[*956]** promissory notes. Plaintiffs seek to enjoin KeyBank from enforcing its promissory notes with Plaintiffs, or from reporting Plaintiffs to credit reporting agencies. Had KeyBank included the Holder Notice in its promissory notes, Plaintiffs could have defended against KeyBank's collection efforts by claiming Silver State had breached their contract -- as inclusion of the Holder Notice "preserves the borrower's ability to raise claims and defenses against the lender arising from the seller's misconduct." *Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc., 168*

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[6] ***HN20***[] "Federal regulations have no less pre-emptive effect than federal statutes." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)*. That preemptive effect may only be disturbed if the regulation "is not one that Congress would have sanctioned." *Id. at 154*. Neither party disputes the force of the OCC regulations here.

F.3d 1362, 1365, 335 U.S. App. D.C. 62 (D.C. Cir. 1999). The basis for Plaintiffs' claims is their obligation to pay KeyBank for an education that Silver State never delivered. Enjoining KeyBank from collecting on Plaintiffs' loans would impose on KeyBank a remedy premised on Silver State's failure to perform -- which, again, amounts to reading the Holder Notice into KeyBank's promissory notes. **HN23**[] A consumer's rights "come into existence only when the [Holder Notice] is in fact included in the consumer credit contract." *Vietnam Veterans of Am., Inc. v. Guerdon Indus., Inc., 644 F. Supp. 951, 964 (D. Del. 1986)*. **[**39]** Although the Holder Notice was not in KeyBank's promissory notes, Plaintiffs demand a remedy that would grant them the same rights as if it had been.

HN24[] State law cannot obstruct or impair "a national bank's ability to fully exercise its Federally authorized non-real estate lending powers." *12 C.F.R. § 7.4008(d)(1)*. States are explicitly barred from imposing limits on the "terms of credit" extended by a national bank. *Id*. *§ 7.4008(d)(2)(iv)*. KeyBank's promissory notes embody the terms of credit extended to Plaintiffs to finance their education at Silver State. Plaintiffs' theory would deploy state law to alter those terms of credit and bar KeyBank from collecting on Plaintiffs' debts. It is difficult to conceive how Plaintiffs' action can survive in light of its clear interference with powers conferred on KeyBank by federal law.

Plaintiffs contend that this Court's decision in *Jefferson v. Chase Home Finance, No. C06-6510 TEH, 2008 U.S. Dist. LEXIS 101031 (N.D. Cal. April 29, 2008)*, dictates that there is no preemption here. [7] The plaintiff in *Jefferson* alleged that Chase Home Finance, which serviced the loan he obtained to refinance his home, had misrepresented how it would credit prepayments **[**40]** to his account. Although Chase stated on its payment coupons that undesignated funds would "first pay outstanding late charges and fees, then principal," Chase consistently failed to apply Jefferson's prepayments to the loan principal, placing the prepaid amount instead in "suspense." *Id. at *5-6*. Jefferson asserted, among other causes of action, that Chase's misrepresentation violated all three prongs of the UCL. Chase argued that Jefferson's claims were preempted by the NBA, relying on OCC **[*957]** regulations that permit banks to "make real estate loans without [regard to] state law limitations [concern]ing terms of credit, disclosure and advertising, processing and servicing of mortgages, repayments, and rates of interest on loans." *Id. at *28-29* (citing *12 C.F.R. § 34.4(a)(4)*, *(9)*, *(10)*, *(11)*, and *(12)*).

The Court found that the plaintiff's claims were not preempted, holding that "laws of general application, which merely require all businesses (including banks) to refrain from misrepresentations and abide by contracts and representations to customers do not impair a bank's ability to exercise its lending powers." *Id. at *29*. In reaching that conclusion, the Court observed that "California courts have long held that consumer protection laws of general application are not preempted by federal banking laws." *Id. at *29*. Plaintiffs highlight this language to argue that their claims -- brought under the UCL, a "consumer protection law[] of general application" -- **[**42]** cannot be preempted.

However, the result in *Jefferson* hinged on the nature of the claim asserted: misrepresentation. **HN25**[] "The duty to refrain from misrepresentation falls on all businesses." *Id. at *37*. Barring a national bank from making misrepresentations to customers does not in any way impair the exercise of its enumerated or implied powers; rather, it is precisely the kind of generally applicable duty that cannot be preempted. Indeed, the Court contrasted the misrepresentation claim from others that *would be preempted*:

> Plaintiff does not claim that California consumer protection laws require Chase to service or process loans, include specific content in its disclosures, or handle repayment of loans in any particular manner --

[7] Plaintiffs also contend that the Supreme Court's decision in *Cuomo v. Clearing House Ass'n, __ U.S. __, 129 S. Ct. 2710, 174 L. Ed. 2d 464 (2009)*, is supportive. However, the Court in *Cuomo* addressed an unrelated provision of the National Bank Act, which provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law" and other limited circumstances. *12 U.S.C. § 484(A)*. **[**41]** The Court found only that the OCC erred in "extending the definition of 'visitorial powers' to include 'prosecuting enforcement actions' in state courts." *129 S. Ct. at 2721* (quoting *12 C.F.R. § 7.4000*). The term properly refers, the Court held, "to a sovereign's supervisory powers over corporations," including "any form of administrative oversight that allows a sovereign to inspect books and records." *Id*. Since a state's visitorial powers are not at issue here, this Court does not see how *Cuomo* is controlling or even relevant.

> requirements that would be preempted. *See* 12 C.F.R. § 34.4(a). Instead Plaintiff claims that the laws require Chase to refrain from misrepresenting the manner in which it *does* service loans.

*Id. at *36*. The hypothetical claims that this Court suggested would be preempted -- those requiring that "specific content" be included, or that repayment be handled in a "specific manner" -- look remarkably similar to the claims Plaintiffs are now asserting.

In *Martinez v. Wells* ***[**43]*** *Fargo Bank, N.A.*, a sister court dismissed the plaintiffs' section 17200 claims alleging improprieties in the fees charged by a national bank for the plaintiffs' home mortgage refinancing. *No. C06-03327 RMW, 2007 U.S. Dist. LEXIS 58758 (N.D. Cal. July 31, 2007)*. The court found that determinations of charges and fees were "incidental powers to the express power of engaging in real estate lending" conferred by the NBA, and that claims challenging such fees were therefore preempted. *Id. at *10, 16*. Allowing the section 17200 claims to advance "would essentially be allowing the superimposition of state law requirements upon the OCC's exclusive superintendence of [the national bank's] exercise of its federally-conferred powers." *Id. at *16*. The court stressed that it was not concluding "that § 17200 claims are per se preempted by the NBA and regulations thereunder," but found preemption only "to the extent a § 17200 claim seeks to contest the exercise of a national bank's enumerated or incidental authority." *Id. at *16-17 n.6*.

That is precisely the type of claim before this Court. Plaintiffs are not asking **[*958]** that KeyBank be held liable for defying its own contracts or committing a tort, nor **[**44]** are they alleging the violation of a state law that directly infringes on its powers as a national bank. Rather, Plaintiffs' theory would deploy the UCL to require KeyBank to comply with a federal regulation that does not itself require KeyBank's compliance. Abiding by the Holder Rule would directly affect the terms of credit extended by KeyBank, infringing on a power that national banks are meant to exercise free from state authority. The Court therefore concludes that Plaintiffs' remaining claims are preempted by the National Bank Act. The remaining causes of action are DISMISSED without leave to amend, as Plaintiffs cannot plead around federal preemption.

CONCLUSION

Defendants' motion to dismiss is GRANTED. Plaintiffs' first, second, and sixth causes of action are dismissed for failure to state a claim, and their third, fourth, and fifth claims are dismissed based on federal preemption. The TAC is DISMISSED without leave to amend.

The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: 4/12/10

/s/ Thelton E. Henderson

THELTON E. HENDERSON, JUDGE

UNITED STATES DISTRICT COURT

Perinatal Med. Group, Inc. v. Children's Hosp. Cent. Cal.

United States District Court for the Eastern District of California

April 14, 2010, Decided; April 14, 2010, Filed

CASE NO. CV F 09-1273 LJO GSA

Reporter
2010 U.S. Dist. LEXIS 36694 *; 2010-1 Trade Cas. (CCH) P77,078; 2010 WL 1493624

PERINATAL MEDICAL GROUP, INC., KRISHNAKUMAR RAJANI, M.D., and STEPHEN ELLIOT, M.D., Plaintiffs, vs. CHILDREN'S HOSPITAL CENTRAL CALIFORNIA, SPECIALTY MEDICAL GROUP CENTRAL CALIFORNIA, INC., and CENTRAL CALIFORNIA NEONATOLOGY GROUP, Defendants.

Subsequent History: Motion granted by *Perinatal Med. Group Inc. v. Children's Hosp. Cent. Cal. Inc., 2011 U.S. Dist. LEXIS 55620 (E.D. Cal., May 11, 2011)*

Prior History: *Perinatal Med. Group v. Children's Hosp. Cent. Cal., 2009 U.S. Dist. LEXIS 103515 (E.D. Cal., Nov. 5, 2009)*

Core Terms

Sherman Act, patients, antitrust, conspire, allegations, motion to dismiss, conspiracy, supplemental jurisdiction, amended complaint, entities, competitor, regional, admit, state court action, state law claim, purposes, neonatologists, referrals, former shareholder, facilities, specialty, monopoly, economic interest, antitrust claim, medical staff, anti-competitive, privileges, staff

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss pursuant to *Fed R. Civ. P. 12(b)(6)* is a challenge to the sufficiency of the pleadings set forth in the complaint. A *Fed. R. Civ. P. 12(b)(6)* dismissal is proper where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations of the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor.

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

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

To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, the plaintiff must allege enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility for entitlement to relief.

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

HN3[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Thus, bare assertions amounting to nothing more than a formulaic recitation of the elements are not entitled to an assumption of truth. A court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.

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

HN4[] Motions to Dismiss, Failure to State Claim

A court will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action. In practice, a complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.

Antitrust & Trade Law > Sherman Act > Claims

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

HN5[] Sherman Act, Claims

To state an antitrust claim, the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of *Fed. R. Civ. P. 8(a)(2)* that the plain statement possess enough heft to show that the pleader is entitled to relief. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As judicial precedent indicated over 20 years ago, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

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

HN6[] Sherman Act, Scope

The purpose the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against the conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. To protect the public from anticompetitive conduct, *15 U.S.C.S. § 1* of the Sherman Act prohibits every contract, combination, or conspiracy in restraint of trade or commerce among the several states. *15 U.S.C. § 2* of the Sherman Act prohibits antitrust activity of a single entity to monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several states.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN7[] **Scope, Monopolization Offenses**

15 U.S.C.S. § 2 prohibits a single entity from combining or conspiring with other entities. "y making a conspiracy to monopolize unlawful, *§ 2* does reach both concerted and unilateral behavior.

Antitrust & Trade Law > Sherman Act > Claims

HN8[] **Sherman Act, Claims**

15 U.S.C.S. § 1, like the tango, requires multiplicity: A company cannot conspire with itself. Judicial precedent rules that a parent corporation and its wholly-owned subsidiary are incapable of conspiring for antitrust purposes because the two entities are not separate economic actors pursuing separate economic interests. Since that precedent, the single-entity rule has been extended beyond the parent corporation and wholly-owned subsidiary context. In considering whether the defendants are a single entity or capable of conspiring for *§ 1* purposes, the crucial question is whether the entities alleged to have conspired maintain an economic unity, and whether the entities were either actual or potential competitors.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] **Sherman Act, Claims**

Physicians, including members of an independent practice association, are independent entities who can conspire with each other and others for antitrust purposes.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Sherman Act, Claims**

In the context of an antitrust claim, whether a hospital and a group of physicians have divergent economic interests to allow a conspiracy is a question of fact.

Antitrust & Trade Law > Sherman Act > Claims

HN11[] **Sherman Act, Claims**

Where at least some participants in the alleged conspiracy may have had economic interests that were different from a hospital and the physician group were not employees or officers of the hospital but rather independent contractors, then the court draws the inference in favor of the nonmoving party that the members of the physician group may have had an independent personal stake in any decision by the hospital. Under these circumstances, the court cannot decide, as a matter of law, that the members of the physician group are incapable of forming a contract, combination, or conspiracy for *15 U.S.C.S. § 1* purposes.

Antitrust & Trade Law > Sherman Act > Claims

HN12[] **Sherman Act, Claims**

Although *15 U.S.C.S. §§ 1* and *2* of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, differ, both sections require allegations of anticompetitive activity to state a claim.

Antitrust & Trade Law > Sherman Act > Claims

HN13[] **Sherman Act, Claims**

The United States Court of Appeals for the Tenth Circuit ruled that a hospital's refusal to deal with a physician who ran a competing nephrology clinic does not constitute anticompetitive conduct within the meaning of *15 U.S.C.S. § 2* of the Sherman Act, *15 U.S.C.S. § 1 et seq.* The Tenth Circuit based its conclusion on the well-settled rule that the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN14[] **Sherman Act, Claims**

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices, at least for a short period, is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

HN15[] **Sherman Act, Claims**

A competitor's right to refuse to deal with a competitor is not without limits. The high value that judicial precedent places on the right to refuse to deal with other firms does not mean that the right is unqualified.

Antitrust & Trade Law > Sherman Act > Claims

HN16[] **Sherman Act, Claims**

A state law or regulation that imposes a duty on a party is inapposite to a court's analysis of a Sherman Act, *15 U.S.C.S. § 1 et seq.*, claim. For example, although a regulation required a party to deal with a competitor, judicial precedent ruled that the party had no duty to deal with the competitor under the Sherman Act. Any such duty to deal arises only from FCC regulations, not from the Sherman Act. Thus, a duty to deal arising from state law does not establish a duty to deal for antitrust purposes.

Antitrust & Trade Law > Sherman Act > Claims

HN17[] **Sherman Act, Claims**

Antitrust law requires a court to consider the specific industry and regulatory framework, if any, to consider whether a party's actions harm competition. Thus, the United States Court of Appeals for the Tenth Circuit's direct application of business cases to a health care industry dispute is questionable without further analysis: The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act, *15 U.S.C.S. § 1 et seq.* It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN18[] **Sherman Act, Claims**

Ordinarily, whether particular concerted action violates *15 U.S.C.S. § 1* of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is determined through case-by-case application of the so-called rule of reason, that is, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN19[] **Actual Monopolization, Claims**

The offense of monopoly has two factual elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN20[] **Sherman Act, Claims**

Under certain factual circumstances, an exclusive contract between a hospital and specialty group of physicians, that requires every patient treated at the hospital to use the services of that firm of physicians, may violate *15 U.S.C.S. § 1* of the Sherman Act, *15 U.S.C.S. § 1 et seq.* In addition, group boycotts of individual physicians are against antitrust doctrine. Finally, certain restrictive rules incorporated in a hospital's bylaws may also violate the Sherman Act.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN21[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Pursuant to *28 U.S.C.S. § 1367(c)*, district courts may decline to exercise supplemental jurisdiction over a claim if, inter alia, (1) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (2) the district court has dismissed all claims over which it has original jurisdiction, or (3) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. Supplemental jurisdiction is a doctrine of discretion, not of plaintiff's right. Congress intended the exercise of discretion to be triggered by the court's identification of a factual predicate that corresponds to one of the *§ 1367(c)* categories. Once the factual predicate identified, the exercise of discretion, of course, is still informed by whether remanding the pendent state claims comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity. The ultimate inquiry for the courts is whether the assertion of pendent jurisdiction is best accommodates the values of economy, convenience, fairness, and comity.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN22[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Generally, a related state court action that cannot be removed would justify a decline of supplemental jurisdiction based on the principles of comity and fairness.

Counsel: **[*1]** For Perinatal Medical Group, Inc., Stephen Elliot, M.D., Krishnakumar Rajani, M.D., Plaintiffs: Stephen G. Auer, LEAD ATTORNEY, Christensen & Auer, Pasadena, CA; Darryl J. Horowitt, Coleman & Horowitt, LLP, Fresno, CA; Vicki C. Gadbois, Christensen and Ayer, Pasadena, CA.

For Children's Hospital Central California, Inc., a California Corporation, Defendant: Douglas Corlett Ross, PHV, LEAD ATTORNEY, PRO HAC VICE, Davis Wright Tremaine LLP, Seattle, WA; Thomas R. Burke, LEAD ATTORNEY, Davis Wright Tremaine LLP, San Francisco, CA; William C. Hahesy, LEAD ATTORNEY, Law Offices of William C. Hahesy, Fresno, CA.

For Specialty Medical Group Central California, Inc., a California professional medical corporation, Defendant: William M. Woolman, LEAD ATTORNEY, Atkinson, Andelson, Loya, Ruud & Romo, Fresno, CA.

For Central California Neonatology Group, Inc., a California professional medical corporation, Defendant: Charles L. Doerksen, LEAD ATTORNEY, DOERKSEN TAYLOR LLP, Fresno, CA.

Judges: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

ORDER ON DEFENDANT'S MOTION TO DISMISS (Doc. 41)

INTRODUCTION

Defendant Central California Neonatology Group, Inc. ("CCNG") moves to dismiss two antitrust **[*2]** asserted by plaintiffs Perinatal Medical Group, Inc., ("PMG"), Krishnakumar Rajani, M.D. ("Dr. Rajani"), and Stephen Elliot, M.D. ("Dr. Elliot") (collectively "Plaintiffs"), pursuant to *Fed. R. Civ. P. 12(b)(6)*. CCNG contends that because defendants cannot conspire with each other for antitrust purposes and have no duty to deal with Plaintiffs, Plaintiffs' *15 U.S.C. § 1* ("*Section 1*") and *15 U.S.C. § 2* ("*Section 2*") claims must be dismissed. In addition, CCNG argues that this Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims pursuant to *28 U.S.C. § 1367(c)*. For the following reasons, this Court DENIES CCNG's motion to dismiss.

BACKGROUND

Factual Allegations

[1]

Dr. Rajani and Dr. Elliot are neonatologists who have practiced neonatology in the Fresno area for 30 and 25 years, respectively. Dr. Rajani and Dr. Elliot **[*3]** are shareholders in PMG, a professional medical corporation that has provided services in and for various Fresno and Madera county hospitals since 1980. Dr. Rajani is the PMG President. Dr. Vinod Bansal, Dr. Chetan Patel, and Dr. Kajori Thusu ("former shareholders") were also PMG shareholders.

Until February 28, 2009, Dr. Rajani was the Medical Director of the Neonatal Intensive Care Unit ("NICU") at defendant Children's Hospital Central California ("Children's"). Children's is a nonprofit corporation that serves pediatric patients from approximately 35 cities in a geographic area of approximately 45,000 square miles. Children's NICU has a "regional" designation, the highest of three designations under California law. Certain critically ill infants must be treated at a regional facility. Through February 2009, PMG had a contract with Children's to provide 24/7 coverage at, and administrative services for, Children's NICU. Through this contract, Plaintiffs maintained staff privileges at Children's.

Dr. Rajani and Dr. Elliot also enjoy privileges at Community Medical Center ("Community"), the local teaching hospital. In December 2008, Community, with the assistance of Drs. Rajani and Elliot, **[*4]** opened a new 65 bed NICU. Community's NICU does not have a "regional" designation. Critically ill infants with certain medical conditions, therefore, must be transferred from Community to Children's for treatment.

While Drs. Rajani and Elliot were assisting with the development of Community's NICU, Children's and defendant Specialty Medical Group Central California, Inc. ("SMG") [2] complained about two doctors. First, Children's disapproved of Dr. Rajani's referral of pediatric surgery cases to Dr. David Hodge, who had left SMG to practice independently, because SMG doctors lost business when referrals were made to him. Children's asked Dr. Rajani to restrict his specialty referrals to physicians affiliated with the Hospital. Second, Children's criticized Dr. Virdina Meade for spending time at Community rather than Children's. Because Children's contributed funds toward recruiting this neonatologist to the area, the hospital believed it had a superior right to her services.

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[1] The facts from the amended complaint are taken as true. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. Despite this well-settled rule, CCNG injects multiple "facts" outside of the amended complaint in its statement of facts and argument. The Court shall not consider facts outside of the complaint for this motion.

[2] SMG is a professional medical corporation of approximately 70 specialty physicians who practice medicine in the area. SMG and Children's have a contractual relationship in which SMG provides physician services and **[*5]** Children's provides facilities and patient support services.

In addition to these complaints, Children's was concerned that Community was building a "flagship NICU" that would compete with Children's NICU. To address these concerns, Children's and CCNG conspired to close Children's NICU to neonatologists who were not affiliated with CCNG or SMG. Specifically, defendants conspired to exclude Plaintiffs from admitting or treating their patients at Children's.

According to the amended complaint, the conspiracy began in mid-2008. Children's approached PMG's former shareholders and promised to assist the former shareholders in the transition of their practices if they would leave PMG. In late 2008, Children's told Dr. Rajani that if PMG did not agree to practice exclusively through Children's, and in particular not at Community, then Children's would not renew PMG's contract. Children's demanded that PMG sign an amendment to their contract to prohibit the physicians from admitting or treating patients at competing hospitals. In addition, the contract amendment prohibits a physician from referring a patient to any specialist who is not a member of SMG. Plaintiffs refused to sign the amended **[*6]** contract. PMG's contract with Children's expired in February 2009. The former shareholders agreed to the amendment, and left PMG to form CCNG when PMG's contract with Children's expired. CCNG then entered into an exclusive contract with Children's to provide Medical Director and related services at Hospital's NICU. Under the terms of the agreement between CCNG and Children's, CCNG physicians make all specialty referrals to SMG physicians and practice exclusively at, and admit all of their patients to, Children's NICU.

After Children's terminated PMG's contract, beginning March 2009, Plaintiffs made numerous unsuccessful attempts to admit and care for patients in Children's NICU. Each time, notwithstanding Plaintiffs' privileges, Plaintiffs were told that they could not admit patients unless either they, or another physician, was present physically in Children's NICU during the entire hospital stay of each patient, 24 hours a day, 7 days a week. Children's Medical Executive Committee formalized this rule and regulation on March 21, 2009 to require an admitting neonatologist, or a substitute, to provide 24/7 coverage for all patients admitted ("24/7 rule") .

Plaintiffs contend that the **[*7]** 24/7 rule presents a financial obstacle to them and forces them to relinquish care of their patients to CCNG, the group of neonatologists that "runs" Children's NICU. Plaintiffs maintain that the 24/7 rule effectively means that no neonatologist who is not a member of CCNG can admit patients to Children's NICU. The 24/7 rule further deprives patients of the right to choose a physician. In addition to the 24/7 rule, Children's continues to refuse to enter into a coverage contract with Plaintiffs. The 24/7 rule and Children's refusal to deal with PMG have caused Plaintiffs harm in the form of lost patients, revenue, and physician referral base.

State Court Action

PMG initiated a state court action against its former shareholders on April 29, 2009 in the Fresno County Superior Court, Case No. 09 CE CG 01478 DSB ("state court action"). In the state court action, PMG alleges that the defendants "engaged in discussions and/or negotiations with [Children's], Kaiser, and other entities or individuals designed to divert business, assets and corporate opportunities of Plaintiff to Defendant for their personal benefit and profit." [3] In its first amended complaint, PMG asserts the following claims: **[*8]** (1) breach of fiduciary duty; (2) breach of "corporate provider agreements"; (3) breach of employment agreement; (4) intentional interference with economic advantage; and (5) negligent interference with economic advantage.

Procedural History

Plaintiffs initiated this action on July 21, 2009. In the amended complaint, Plaintiffs assert eight causes of action defendants: (1) Violation of Sherman Antitrust Act *§ 1*; (2) Violation of Sherman Antitrust Act *§ 2*; (3) Intentional Inference with Economic Relation (Physician Contract); (4) Intentional Interference with Economic Relation (Kaiser

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[3] The Court takes judicial notice of the first amended complaint filed in the state court action and submitted as an exhibit to CCNG's motion.

Contract); (5) Intentional Interference with Economic Relation (Physician Referral Base); (6) Violation of Cartwright Act; (7) Interference with Right to Practice Profession; and (8) Unfair Competition.

CCNG moved to dismiss Plaintiffs' amended complaint on March 12, 2010. [4] Plaintiffs opposed the motion on March 29, 2010. CCNG replied on April 5, 2010. This Court found this motion suitable for a decision without oral argument, vacated the April 13, 2010 hearing pursuant **[*9]** to *Local Rule 230(g)*, and issues the following order.

DISCUSSION

Motion to Dismiss Antitrust Claims

Pleading And *Fed. R. Civ. P. 12(b)(6)* Motion Standards

HN1[] A motion to dismiss pursuant to *Fed R. Civ. P. 12(b)(6)* is a challenge to the sufficiency of the pleadings set forth in the complaint. A *Fed. R. Civ. P. 12(b)(6)* dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations of the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*.

HN2[] To survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)*. "A claim **[*10]** has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly, 550 U.S. at 556*). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility for entitlement to relief." *Id.* (quoting *Twombly, 550 U.S. at 557*).

HN3[] "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. 554, 127 S. Ct. 1955, 1964-65* (internal citations omitted). Thus, "bare assertions…amounting to nothing more than a 'formulaic recitation of the elements'…are not entitled to an assumption of truth." *Iqbal, 129 S. Ct. at 1951* **[*11]** (quoted in *Moss v. United States Secret Serv., 572 F.3d 962, 2009 U.S. App. LEXIS 15694, *14 (9th Cir. 2009))*. A court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Farm Credit Services v. American State Bank, 339 F.3d 764, 767 (8th Cir. 2003)* (citation omitted).

Moreover, ***HN4***[] a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998)*. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562, 127 S.Ct. at 1969* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*.

HN5[] To state an antitrust claim, "the need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of *Rule 8(a)(2)* that the 'plain statement' possess

[4] SMG and Children's filed answers to Plaintiffs' amended complaint on March 12, 2010 and March 25, 2010 respectively.

enough heft to 'show that the pleader is **[*12]** entitled to relief.'" *Id. at 1966*. In *Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1966-67, 167 L. Ed. 2d 929*, the Court further ruled

> [I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago…a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed (internal citations and quotations omitted).

With these standards in mind, this Court turns to the CCNG's challenges to Plaintiffs' antitrust claims.

Sherman Act Antitrust Claims

HN6[] The purpose the Sherman Act, *15 U.S.C. § 1 et seq.*, "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*. "The law directs itself not against the conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Id.* To protect the public from anti-competitive conduct, *Section 1* of the Sherman Act prohibits "[e]very contract, combination…or conspiracy in restraint of trade or **[*13]** commerce among the several States." *15 U.S.C. § 1*. *Section 2* of the Sherman Act prohibits antitrust activity of a single entity to "monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several states."

CCNG presents two arguments to support its motion to dismiss Plaintiffs' Sherman Act claims. First, CCNG argues that Plaintiffs' *Section 1* claim fails because defendants are not "separate entities pursuing different economic goals, capable of conspiring for Sherman Act purposes." *Jack Russell Terrier Network v. Am. Kennel Club, Inc., 407 F.3d 1027, 1035 (9th Cir. 2005)*. [5] In response, Plaintiffs maintain that the amended complaint contains sufficient allegations to support a conspiracy. Second, CCNG contends that under ***antitrust law***, Children's has no duty to make its facilities available to Plaintiffs and ***antitrust law*** "is not concerned with the kind of injury that plaintiff PNG is claiming." To oppose this position, Plaintiffs cite *California Welfare & Institutions Code section 14087.28* to argue that Children's has a duty to make available its facilities to Plaintiffs. Moreover, Plaintiffs maintain **[*14]** that the amended complaint sufficiently alleges a vertical agreement proscribed by the Sherman Act. The Court considers each argument below.

Conspiracy

HN8[] "*Section 1*, like the tango, requires multiplicity: A company cannot conspire with itself." *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147 (9th Cir. 2005)* (citing *Copperweld Co. v. Independence Tube Co., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. In *Copperweld*, the United States Supreme Court ruled that a parent corporation and its wholly-owned **[*15]** subsidiary are incapable of conspiring for antitrust purposes because the two entities are not "separate economic actors pursuing separate economic interests." *467 U.S. at 768*. Since *Copperweld,* the "single-entity" rule has been extended beyond the parent corporation and wholly-owned subsidiary context. *Freeman, 322 F.3d at 1147-48*. In considering whether the defendants are a "single entity" or capable of conspiring for *Section 1* purposes, the "crucial question" is "whether the entities alleged to have conspired maintain an 'economic unity,' and whether the entities were either actual or potential

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[5] Additionally, CCNG argues that because Plaintiffs' *Section 2* claim alleges a conspiracy rather than a unilateral action, the *Section 2* claim necessarily fails. This Court previously rejected this argument in its Order on Children's Motion to Dismiss (Doc. 19), explaining that although the Sherman Act contains a "basic distinction between concerted and independent action," *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, ***HN7***[] *Section 2* prohibits a single entity from combining or conspiring with other entities. "By making a conspiracy to monopolize unlawful, *§ 2* does reach both concerted and unilateral behavior." *Copperweld, 467 U.S. at 768 n. 13*. Accordingly, CCNG's argument is incorrect.

competitors." *Jack Russell Terrier Network, 407 F.3d at 1034*. CCNG argues that the "provision of the neonatal unit and the provision of physician services are complementary, not competitive." Therefore, CCNG concludes that Plaintiffs do not satisfy the pleading requirements to state an antitrust claim for conspiracy.

HN9[] Physicians, including members of an independent practice association, are independent entities who can conspire with each other and others for antitrust purposes. *Capital Imaging Assocs. v. Mokawk Valley Med. Assocs., 996 F.2d 537, 544 (2d Cir.)*, *cert. denied, 510 U.S. 947, 114 S. Ct. 388, 126 L. Ed. 2d 337 (1993)* **[*16]** (member physicians of an independent practice association are legally capable of conspiring among themselves); *Nanavati v. Burdette Tomlin Mem'l Hosp., 857 F.2d 96 (3rd Cir. 1988)*, *cert. denied, 489 U.S. 1078, 109 S. Ct. 1528, 103 L. Ed. 2d 834 (1989)*; *Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 819 (11th Cir.)*, *cert. denied, 495 U.S. 924, 110 S. Ct. 1960, 109 L. Ed. 2d 322 (1990)*, *vacated, in part, remanded,* *980 F.2d 1381*, *reh'g en banc denied, 988 F.2d 1220 (11th Cir. 1993)* ("*Bolt*") ("Each member practices medicine in his individual capacity; each is a separate economic entity potentially in competition with other physicians."). Accordingly, CCNG can conspire legally within the group and with co-defendant SMG to satisfy Plaintiffs' *Section 1* claim.

Whether physicians and a hospital can conspire for antitrust purposes is an unresolved question among the circuits. Some courts have ruled that medical staff members cannot conspire with a hospital. *Weiss v. York Hosp., 745 F.2d 786 (3rd Cir. 1984)*, *cert. denied, 470 U.S. 1060, 105 S. Ct. 1777, 84 L. Ed. 2d 836 (1985)* (medical staff empowered to make decisions regarding staff privileges "operated as an officer of a corporation would in relation to the corporation. Although the members of the medical staff had independent economic interests **[*17]** in competition with each other, the staff as an entity had no interest in competition with the hospital."); *Oksanen v. Page Memorial Hosp., 945 F.2d 696 (4th Cir. 1991)*, *cert. denied, 502 U.S. 1074, 112 S. Ct. 973, 117 L. Ed. 2d 137 (1992)* (hospital and medical staff enjoyed "unity of interest" in peer review process and, thus, unable to conspire). Others have concluded that "a hospital and the members of its medical staff are all legally capable of conspiring with one another." *Bolt, 891 F.2d at 819*; *Boczar v. Manatee Hosps. & Health Sys.., Inc., 993 F.2d 1514, 1517-18*, *reh'g denied, 11 F.3d 169 (11th Cir. 1993)* (hospital capable of conspiring with physicians to boycott a physician).

Based on the law and allegations of the amended complaint, this Court rejects CCNG's position that it is unable to conspire with Children's as a matter of law. ***HN10***[] Whether a hospital and a group of physicians have divergent economic interests to allow a conspiracy is a question of fact. *Bhan v. NME Hospitals, Inc., 669 F. Supp. 998, 1016 (E.D. Cal. 1987)*, *aff'd,* *929 F.2d 1404 (9th Cir. 1991)*, *cert. denied, 502 U.S. 994, 112 S. Ct. 617, 116 L. Ed. 2d 639 (1991)*; *Boczar, 993 F.2d at 1518*. Plaintiffs allege that CCNG and Children's have different economic interests; namely, the Hospital's **[*18]** interest is to protect the market share of its regional NICU, whereas CCNG's interest is to benefit from restricted specialty neonatology. In addition, and significantly, CCNG is an independent organization that contracts its services to Children's. The facts distinguish this matter from cases in which the physicians are members of a hospital's medical staff "operating as an officer of a corporation would in relation to the corporation." *Weiss, 745 F.2d 786*. ***HN11***[] Where, as here, "at least some participants in the alleged conspiracy may have had economic interests that were different from the Hospital" and the physician group "were not employees or officers of the hospital but rather independent contractors," then the Court draws the inference in favor of the nonmoving party that the defendants "may have had an independent personal stake in any decision by the Hospital." *Bhan, 669 F.Supp. at 1016-17*. Under these circumstances, this Court cannot decide, as a matter of law, that defendants are incapable of forming a contract, combination, or conspiracy for *Section 1* purposes. *Id.* Accordingly, CCNG's motion to dismiss is denied on these grounds.

Antitrust Injury

Next, the Court determines whether **[*19]** ***antitrust law*** prohibits the type of activity alleged in Plaintiffs' amended complaint. ***HN12***[] Although *Section 1* and *Section 2* of the Sherman Act differ, both sections require allegations of anti-competitive activity to state a claim. *15 U.S.C. § 15*; *see also,* *Business Electronics v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (*Section 1*); *Pac Bell Tel. Co. v. Linkline Communs., Inc., 129 S.Ct. 1109, 1115, 172 L. Ed. 2d 836 (2009)* ("*Linkline*") (*Section 2*). Thus, if Plaintiffs' fails to allege a "restraint of trade," Plaintiffs' fail to state Sherman Act claims.

Plaintiffs allege that from approximately mid-2008 through the present, Children's, SMG, and CCNG have combined, conspired, and agreed to retrain trade by prohibiting neonatologists who will not agree to practice exclusively at Children's and who will not agree to make all specialty referrals exclusively to SMG physicians from practicing neonatology in the region. To further the conspiracy, defendants have: (1) unlawfully required, as a condition of renewal of PMG's contract with Children's, that PMG's physicians agree to refer patients to SMG for specialist services; (2) unlawfully required, as a condition of contract renewal, that PMG physicians **[*20]** practice exclusively at Children's; (3) induced the former shareholders of PMG to form CCNG; (4) granted CCNG an exclusive NICU contract under which CCNG agreed to work exclusively at Children's and refer patients exclusively to SMG physicians; and (5) attempted to prevent, and did prevent, non-CCNG physicians from admitting patients to, and treating patients in, Children's NICU unless they agreed to the 24/7 rule.

Plaintiffs contend that the alleged conspiracy between the defendants has harmed competition in a number of ways. According to Plaintiffs, other physicians and health plans in the region, including Kaiser Permanente, that would otherwise refer patients to non-CCNG physicians, are now reluctant to refer their patients to non-CCNG physicians given the possibility that such patients may require services that can be provided only at Children's regional NICU. In addition, the ability of non-CCNG and non-SMG physicians to practice their profession has been limited unlawfully and their ability to provide services in the relevant market has been restrained. As a further consequence, certain critically ill infants have been deprived of the advantage of free and open competition in **[*21]** the purchase of physician services. Moreover, both patients and referring physicians in the region have been deprived of the right to a choice of physician providers. Plaintiffs allege that defendants' conspiracy has negatively impacted competition regarding the price and quality of physician services in the region.

CCNG relies on *Four Corners Nephrology Assocs. v. Mercy Medical Center of Durango, 582 F.3d 1216 (10th Cir. 2009)* ("*Four Corners*") to argue that a hospital's refusal to share its facilities with a doctor is insufficient to sustain a *Section 1* or *Section 2* claim. In *Four Corners,* ***HN13***[] the United States Court of Appeals for the Tenth Circuit ruled that a hospital's refusal to deal with a physician who ran a competing nephrology clinic "does not constitute anticompetitive conduct within the meaning of *Section 2* of the Sherman Act. *582 F.3d at 1221* (emphasis in original). The *Four Corners* court based its conclusion on the well-settled rule that the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*; **[*22]** *Linkline, 129 S.Ct. at 1115 (2009)* (A business has "no antitrust duty to deal with its rivals at all"). As the United States Supreme Court explained in *Verizon Communs., Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* ("*Trinko*"):

> ***HN14***[] The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

In rejecting claims that a refusal to deal runs afoul of ***antitrust law***, the *Trinko* court explained that a competitor's right to deal freely promotes innovation while protecting against true antitrust activity such as collusion. *Trinko, 540 U.S. at 407-08*. [6]

Plaintiffs' reliance on *California Welfare and Institutions Code section 14087.28* to oppose CCNG's argument is unavailing. ***HN16***[] A state law or regulation that imposes a duty on Children's is inapposite to a court's analysis of Sherman Act claims. For example, although a regulation required a party to deal with a competitor in *Trinko,* the

[6] ***HN15***[] A competitor's right to refuse to deal with a competitor is not without limits. "The high value that [the Supreme Court has] placed on the right to refuse to deal **[*23]** with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985)*. *Aspen Skiing,* the exception to this century-old rule, "is at or near the outer boundary" of Sherman Act liability. *Trinko, 540 U.S. at 409*.

Court ruled that the party had no duty to deal with the competitor under the Sherman Act. *129 S.Ct. at 1119*. The Court reasoned that "any such duty [to deal] arises only from FCC regulations, not from the Sherman Act." *129 S.Ct. at 1119*. Thus, a duty to deal arising from state law does not establish a duty to deal for antitrust purposes.

Similarly, the Court finds CCNG's reliance on *Four Corners* misplaced, as the non-binding decision is distinguishable on both factual and legal grounds. Factually, the parties in *Four Corners* were direct competitors. **[*24]** The physician, who operated a private nephrology clinic, sought to require the hospital to share its newly-built nephrology clinic facilities with him. Based on this fact, the *Four Corners* court ruled that the hospital "was entitled to recoup its investment [in the competing nephrology clinic] without sharing its facilities with a competitor." *582 F.3d at 1223*. In addition, the court found that requiring the hospital to share its facilities with a direct competitor would threaten competition, rather than promote it. *Id.* Here, Plaintiffs do not allege that they are direct competitors with Children's or its NICU. Because Plaintiffs and Children's are not competitors, the refusal to deal doctrine--upon which the *Four Corners* ruling was based--is inapplicable. [7]

The procedural posture of this matter provides a further distinction. The Tenth Circuit decided *Four Corners* on a fully-developed record, and based its decision on the evidence or lack thereof. Development of the record is important, because each element of each Sherman Act claim presents a question of fact. ***HN18***[] "Ordinarily, whether particular concerted action violates *§ 1* of the Sherman Act is determined through case-by-case application of the so-called rule of reason--that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Similarly, ***HN19***[] the offense of monopoly has two factual elements: (1) the possession of monopoly power in **[*26]** the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. CCNG leaves unaddressed the elements of the Sherman Act claims in this motion.

Having considered the applicable standards and allegations, this Court finds that Plaintiffs' amended complaint sufficiently and plausibly alleges its Sherman Act claims. Plaintiffs allege that defendants have entered into a vertical agreement that, when considered with inferences drawn in favor of Plaintiffs, is proscribed by the Sherman Act. ***HN20***[] Under certain factual circumstances, an exclusive contract between a hospital and specialty group of physicians, that requires every patient treated at the hospital to use the services of that firm of physicians, may violate *Section 1* of the Sherman Act. *Jefferson Parish Hospital Dist. No. 2 v Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (superseded by statute as stated in *Texas Instruments, Inc. v Hyundai Elecs. Indus., 49 F Supp 2d 893 (E.D. Tex 1999))*; *see also, Bhan, 669 F. Supp. at 1016*. In addition, group boycotts of individual **[*27]** physicians are against antitrust doctrine. *Jefferson Parish, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2*.; *United States v. Columbia Steel Co., 334 U.S. 495, 522-23, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948)*. Finally, certain restrictive rules incorporated in a hospital's bylaws may also violate the Sherman Act. *Quinn v Kent General Hospital, Inc., 673 F Supp 1367 (D.C. Del. 1987)* (physician states a claim in antitrust action challenging nonprofit hospital bylaw that required active staff members with privileges to admit patients must reside within 12 miles of

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[7] ***HN17***[] ***Antitrust law*** requires a court to consider the specific industry and regulatory framework, if any, to consider whether a party's actions harm competition. *Trinko, 540 U.S. at 412-13*. Thus, the Tenth Circuit's direct application of business cases to a health care industry dispute is questionable without further analysis:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant **[*25]** in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17, 95 S. Ct. 2004, 44 L. Ed. 2d 572, *reh'g denied, **423 U.S. 886, 96 S. Ct. 162, 46 L. Ed. 2d 118 (1975)***.

hospital). Because Plaintiffs' amended complaint contains allegations which plausibly state a claim for *Section 1* and *Section 2* of the Sherman Act, CCNG's motion to dismiss is denied.

Motion to Decline Supplemental Jurisdiction Over State Law Claims

CCNG argues that this Court should decline to exercise supplemental jurisdiction over the state law claims in this action. ***HN21***[] Pursuant to *28 U.S.C. § 1367(c)*, "district courts may decline to exercise supplemental jurisdiction over a claim…if …(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or **[*28]** (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Supplemental jurisdiction is a "doctrine of discretion, not of plaintiff's right[.]" *City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 172, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997)* (internal quotations omitted). "Congress intended the exercise of discretion to be triggered by the court's identification of a factual predicate that corresponds to one of the *section 1367(c)* categories. Once the factual predicate identified, the exercise of discretion, of course, is still informed by whether remanding the pendent state claims comports with the underlying objective of 'most sensibly accommadat[ing] the values of economy, convenience, fairness, and comity." *Executive Software No. America, Inc. v. United States Dist. Ct., 24 F.3d 1545, 1557 (9th Cir. 1994)* (overruled on other grounds in *Cal. Dept. of Water Resources v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008))*. The "ultimate inquiry for the courts [is] whether the assertion of pendent jurisdiction is best accommodate[s] the values of economy, convenience, fairness, and comity." *Id. at 1556*.

None of the *28 U.S.C. § 1367(c)* factors justifies a decline of supplemental **[*29]** jurisdiction over the state law claims. This Court does not agree with CCNG's characterization that Plaintiffs' Sherman Act claims are merely the "tail of the dog" in this action. The federal and state law claims arise out of the same underlying facts, and the claims are closely tied. As the allegations focus on the defendants' alleged anti-competitive activities, the state law claims do not "predominate" this action. Thus, this Court will not decline supplemental jurisdiction pursuant to *28 U.S.C. § 1367(c)(2)*. As set forth above, this Court does not grant CCNG's motion to dismiss the federal claims from this action. Accordingly, *28 U.S.C. § 1367(c)(3)* is inapplicable. Finally, this Court is not persuaded that "compelling reasons" and "exceptional circumstances" exist to decline supplemental jurisdiction pursuant to *28 U.S.C. § 1367(c)(4)*. ***HN22***[] Generally, a related state court action that cannot be removed would justify a decline of supplemental jurisdiction based on the principles of comity and fairness. However, defendants point out that the state court action is based on distinct facts and legal claims. Whereas Plaintiffs' challenge the defendants' alleged antitrust activities in this **[*30]** federal action, they challenge the former shareholders' decision to break away from PMG in the state court action. In addition, the state court action is against one of three defendants. Even if this Court dismissed the state law claims against CCNG, those claims--which are based on the same allegations as the federal claims and involve CCNG--would continue in the federal action against the other two defendants. Based on these considerations, dismissal of the state law claims against one defendant would not promote judicial economy, convenience, fairness, and comity. Accordingly, this Court denies CCNG's motion to decline the exercise of supplemental jurisdiction over Plaintiffs' state law claims as to CCNG.

CONCLUSION AND ORDER

For the foregoing reasons, this Court DENIES CCNG's motion to dismiss.

IT IS SO ORDERED.

Dated: April 14, 2010

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

Cottage Emporium, Inc. v. Broadway Arts Ctr., L.L.C.

Superior Court of New Jersey, Appellate Division

March 15, 2010, Argued; April 16, 2010, Decided

DOCKET NO. A-0048-07T2, A-4415-07T2, A-4415-07T2

Reporter

2010 N.J. Super. Unpub. LEXIS 835 *; 2010 WL 1526045

COTTAGE EMPORIUM, INC., t/a RAINBOW LIQUORS, GOPAL PANDAY, KAVITA PANDAY, [1] THE LIGHTHOUSE INSTITUTE FOR EVANGELISM d/b/a THE LIGHTHOUSE MISSION, REVEREND KEVIN BROWN, CGR HOLDING CORP., L.L.C. and CARLOS RIVERA, M.D., Plaintiffs-Appellants, v. BROADWAY ARTS CENTER, L.L.C., a New Jersey Limited Liability Company, CITY OF LONG BRANCH, a Municipal Corporation of the State of New Jersey, MAYOR AND COUNCIL FOR THE CITY OF LONG BRANCH, and STATE OF NEW JERSEY, Defendants-Respondents. CITY OF LONG BRANCH, Plaintiff-Respondent, v. LIGHTHOUSE MISSION, INC., LIGHTHOUSE INSTITUTE FOR EVANGELISM and KEVIN BROWN, individually, Defendants-Appellants, and CITY OF LONG BRANCH, MICHELE FARR DELISA, ARLENE JEAN KEARLY, FIRST UNION NATIONAL BANK, GERARDO ERKALINO, MOORING TAXASSET GR, L.L.C., STATE OF NEW JERSEY, and LONG BRANCH SEWERAGE AUTHORITY, Defendants. CITY OF LONG BRANCH, Plaintiff-Respondent, v. GOPAL PANDAY, KAVITA PANDAY, and COTTAGE EMPORIUM, INC., [2] Defendants-Appellants, and CITY OF LONG BRANCH and LONG BRANCH SEWERAGE AUTHORITY, Defendants.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket Nos. L-1786-06, L-4778-07 and L-0307-08.

Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70, 2004 U.S. App. LEXIS 10566 (3d Cir. N.J., May 28, 2004)
City of Long Branch v. Anzalone, 2008 N.J. Super. Unpub. LEXIS 2204 (App.Div., Aug. 7, 2008)

Core Terms

redevelopment, blight, properties, conditions, ordinance, redevelopment plan, appellants', condemnation, Oceanfront, municipality, designation, deterioration, dilapidation, discovery, declaration, stagnant, residential, remoteness, ownership, church, rights, zone, statutory criteria, criterion, vacant, blighted area, study area, religious, diverse, parcels

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[1] Cottage Emporium, Inc. t/a Rainbow Liquors, and its shareholders Gopal Panday and Kavita Panday, have resolved their dispute with the City and have submitted a stipulation that dismisses their claims in A-0048-07T2.

The claims of the remaining appellants are unaffected by this stipulation of dismissal.

[2] Cottage Emporium, Inc., Gopal Panday and Kavita Panday have dismissed their claims in A-4416-07T2 and consent to a remand for trial as to valuation of their property.

Counsel: Peter H. Wegener argued the cause for appellants in A-0048-07T2 and A-4415-07T2 (Bathgate, Wegener & Wolf, attorneys; Michael S. Kasanoff, on the brief).

Jessica Pyatt argued the cause for respondent Broadway Arts Center, LLC (Wilentz, Goldman & Spitzer, P.A., attorneys; Willard C. Shih, of counsel and on the brief).

Hussam Chater argued the cause for respondents City of Long Branch and Mayor and Council of the City of Long Branch (Ansell Zaro Grimm & Aaron, P.C., attorneys; James G. Aaron, of counsel; Mr. Chater, on the brief).

Julie Cavanagh, Deputy Attorney General, argued the cause for respondent State of New Jersey (Paula T. Dow, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Daniel P. Reynolds, Senior Deputy Attorney General, on the brief).

Judges: Before Judges Lisa, Baxter and Alvarez.

Opinion

PER CURIAM

Appellants are owners and tenants of commercial properties in the Broadway Corridor, which is a section of the City of Long Branch (the City) that, in 1996, the City's governing body (Council) declared to be in need of redevelopment. **[*2]** Later that year, the City adopted a redevelopment plan that included the Broadway Corridor. The City took no further action toward redevelopment of the area until 2002, when it adopted a superseding ordinance, which again included the Broadway Corridor. In 2005, the City named defendant Broadway Arts Center (BAC) as the redeveloper.

After the Law Division upheld the validity of the blight designation and the redevelopment plan for the Broadway Corridor in 2007, the City filed condemnation actions against appellants' properties in 2008. The judge again upheld the validity of the blight designation and redevelopment plan and appointed condemnation commissioners.

Appellants argue that the trial court erred by (1) finding substantial evidence to support the City's determination that the area was in need of redevelopment; (2) finding that the condition of the zone in question (study area) satisfied the requirements of *N.J.S.A. 40A:12A-5(a)*, *(c)*, *(d)* and *(e)*; (3) finding that appellants' challenges to the blight designation and redevelopment plan were time-barred; (4) denying their requests for pretrial discovery concerning the allegedly conflict-ridden relationship between the City and its **[*3]** chosen redeveloper, BAC; (5) failing to find a violation of appellant The Lighthouse Mission's rights under the Federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA); and (6) failing to find that the inclusion of their properties in the redevelopment zone violated their civil rights and tortiously interfered with their contractual rights and prospective economic advantage. [3]

We conclude that the City's designation of the study area properties as in need of redevelopment does not satisfy the heightened standard made applicable to such determinations by the Supreme Court's decision in *Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344, 924 A.2d 447 (2007)*. Therefore, because the record does not contain substantial evidence to support the City's findings under any of the subsections upon which it relied, we reverse the judgment appointing condemnation commissioners and vacate the declarations **[*4]** of taking.

We recognize, as we will discuss in this opinion, that the redevelopment study on which the City relied in 1996 when it declared the area in question blighted was prepared long before *Gallenthin* was decided. Although we attribute to these cases pipeline retroactivity of the *Gallenthin* holding, we conclude that the City should be afforded

[3] At appellate oral argument, appellants abandoned their additional claim that the Local Redevelopment and Housing Law, *N.J.S.A. 40A:12A-1 to -49* (the LRHL), upon which the City had relied, is unconstitutional, as the Court had, in the interim, held to the contrary.

the benefit of a remand to permit it to amplify the record in an effort to meet the *Gallenthin* standard. *Harrison Redev. Agency v. DeRose, 398 N.J. Super. 361, 420, 942 A.2d 59 (App. Div. 2008)*. As to appellants' remaining claims, we reject The Mission's contention that the trial court committed reversible error in its findings regarding RLUIPA. We decline to consider appellants' contentions regarding the denial of pretrial discovery and their claims of conflict of interest, tortious interference and violation of civil rights, as our disposition of this appeal renders such issues moot.

I.

The first group of appellants is the Lighthouse Institute for Evangelism, which is located at 162 Broadway, and which operates under the name of The Lighthouse Mission under the auspices of its minister, Reverend Kevin Brown, who resides on the premises. The second group **[*5]** of appellants consists of CGR Holding Corporation, L.L.C., which owns a property at 9 Memorial Parkway, just south of Broadway, in which appellant Carlos Rivera, M.D. operates his medical practice.

Appellants' properties are located in the portion of the redevelopment zone known as the Broadway Corridor. Spanning an area of eighty-six acres, and consisting of 134 commercial properties and 154 residential properties, the Broadway Corridor is dissected by Broadway, one of the City's principal commercial thoroughfares. Broadway runs in an east-west direction.

The Broadway Corridor is bordered on the east by Second Avenue and Long Branch Avenue, on the north in an irregular fashion in part by Lewis Alley, and then continuing in a westerly direction to Seventh Avenue and ending at the abandoned Conrail railroad tracks. The abandoned railway tracks are outside the Broadway Corridor, but are immediately adjacent to its westernmost edge. At its southern edge the Broadway Corridor's boundary is in an irregular shape and traverses Jane Street and Chelsea Avenue. At its eastern edge, the Broadway Corridor does not abut the shoreline, but is instead adjacent to areas designated Oceanfront North **[*6]** and Oceanfront South. We shall discuss the City's treatment of Oceanfront North and Oceanfront South later in this opinion.

On July 26, 1994, Council adopted a report prepared by the City's Planning Department, in which the Planning Department re-examined the City's Master Plan. The 1994 report noted that the 1988 Master Plan had established as a goal for the Central Business District (CBD), which included Broadway, the "removal of deterioration and overall upgrading of physical environment" by using a "combined public-private action program [that would] secure new stores in the CBD." The 1994 report observed that the stated need to remove deteriorated buildings from the business district, and to upgrade the overall physical environment, was necessitated by the CBD's "unattractive and deteriorating physical condition," a "linear pattern of stores along Broadway with less than optimum clustering of compatible shops," and a "lack of stores with strong regional drawing power."

After Council completed its 1994 re-examination of the City's Master Plan, on August 8, 1995, the City adopted a resolution authorizing its Planning Board to conduct a preliminary investigation to determine whether **[*7]** all or part of the City's waterfront property should be designated as an area in need of redevelopment pursuant to *N.J.S.A. 40A:12A-6(a)*. The study area included properties from Seven Presidents Park to South Takanassee Lake and Broadway.

In accordance with Council's resolution, the Planning Board directed the City's Planning Department to commence an investigation of the study area, in conjunction with the planning firm Thompson and Wood and an urban development consulting firm known as The Atlantic Group. Their resulting January 1996 report (1996 Report) divided the study area into three sections: (1) Oceanfront South; (2) Oceanfront North; and (3) The Broadway Corridor. The 1996 Report described the Broadway Corridor in the following terms:

> This area suffers from its historic location near the blighting effects of the abandoned Jersey Southern railroad right-of-way, the shift of traffic to Ocean Boulevard, the shift of shopping to Route 36 locations out-of-town and decades of public and private neglect and inadequate reinvestment. Similarly, the nearby industrial area, with obsolete buildings oriented to the abandoned rail right-of-way, deters residential development and discourages **[*8]** maintenance in nearby blocks.

The 1996 Report concluded that the Broadway Corridor satisfied the statutory criteria for "an area in need of redevelopment" and "should be designated as same." The 1996 Report also concluded that the "Oceanfront North" residential area met the statutory criteria for an area in need of redevelopment, while the "Oceanfront South" residential area did not.

Before analyzing each of the subsections of *N.J.S.A. 40A:12A-5(a)*, *(c)*, *(d)* and *(e)*, the Planning Department and its consultants prepared a survey of the condition of the 237 parcels of land within the Broadway Corridor. [4] To accomplish that task, the Planning Department used the city and state building codes to devise six assessment criteria:

. Broken windows
. Deteriorating paint
. Falling, rotten, exterior columns
. Cracked, chipped masonry veneer
. Siding, walls, roof, stairs, porches, balconies and other structural parts showing evidence of deterioration
. Gutters, leaders, drains, window frames and doors showing evidence of apparent defects.

Based on visual inspection, which was conducted only from the exterior of the buildings, and which was recorded by a photographic inventory, the structures were assigned a condition of "good" if the building was free from all forms of deterioration listed above, "fair" if the building had no more than two deficiencies, or "poor" if the building had three or more.

Applying that rating system, forty-eight buildings in the Broadway Corridor (or 20%) were assigned a rating of "good"; seventy-four (or 31%) were found to be in "fair" condition; and sixty-eight (or 29%) were found to be in "poor" condition. The remaining forty-seven properties (or 20%) were vacant land. Of the 237 parcels in the Broadway Corridor, the City owned twenty-four, eight of which were vacant parcels. Many of the remaining sixteen were in poor condition.

Turning to the statutory criteria, the 1996 Report made findings to support its conclusion that *subsections (a)*, *(c)*, *(d)* and *(e) of N.J.S.A. 40A:12A-5* were satisfied. In particular, on the basis of the six assessment criteria and the photographic survey we have described, the 1996 Report concluded that the Broadway Corridor satisfied the *subsection (a)* **[*10]** redevelopment criterion that "[t]he generality of buildings" were in sufficiently "substandard" or "dilapidated" condition "as to be conducive to unwholesome living or working conditions." The Report justified that finding by pointing to the survey's conclusion that only twenty percent of the buildings in the Broadway Corridor were in "good condition."

In its analysis of *subsection (c)*, the 1996 Report focused on "unimproved vacant land that has remained so for a period of ten years prior to the adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of such municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital." The Report observed that land vacant for ten or more years in the Broadway Corridor totaled 12.79 acres, or fifteen percent of the total area. The Report observed that "[t]his large amount of long term vacant land in a moderate size city is a very clear and significant indicator" that private capital alone was unlikely to develop that land. The 1996 Report did not determine the reasons for the vacancy rate, such as remoteness, **[*11]** topography, or soil conditions, nor did the Report distinguish between "vacant" properties that consisted merely of an undeveloped parcel of land and "vacant" properties that consisted of an empty building. The Report made no effort to address the requirement of *subsection (c)* that such vacancy be attributable to the specific causes mentioned there. Instead, the 1996 Report merely commented that:

> Industrial properties which once were adequately served by the now abandoned Jersey Southern Railroad are today confined to use by trucks in a series of residential and commercial streets unsuited to today's standards for manufacturing and distribution facilities. Direct highway access is required to save time. Large trucks require abundant roadway to make turns. Special zoning to encourage this type of development was adopted

[4] Although there were 134 commercial buildings and 154 residential structures, which totals 289, due to common ownership and garden apartments, the actual number of parcels **[*9]** was only 237.

> several years ago and proved unsuccessful. The entire HTLI Zone is unsuitable for private development because of inadequate road access, i.e. "remoteness" and "lack of means of access."

For the *N.J.S.A. 40A:12A-5(d)* criterion of conditions that are "detrimental to the safety, health, morals, or welfare of the community," the 1996 Report noted the dilapidation of the buildings **[*12]** and the obsolete location of the Broadway Corridor. It described the obsolescence and dilapidation as follows:

> The Broadway Corridor was an historic route to the oceanfront, the ferry piers, amusements and hotels. With the passage of time, public investments in Route 36 and Ocean Boulevard took vehicular traffic away from Broadway. Stores closed, buildings were demolished, and the strength of the businesses remaining diminished, reducing Broadway's commercial strip as a destination. Moreover, many of the buildings with retail space are obsolete in terms of their physical arrangements, in contrast to the requirements of modern merchandising. Chain stores and strong independents want high traffic counts, which Broadway no longer has. Today's retail renters want stores with more window space, rather than the long narrow stores built 75 or more years ago.

The Report commented that the Broadway Corridor's notably poor showing in the photographic survey, also described as the "commercial area image analysis," reflected "major problems in terms of parking lots, facades, vacant lots and buildings, street trees [sic], sidewalk conditions, and graffiti." Those conditions kept the area from being **[*13]** "the kind of commercial environment that a prospective business operator will consider for running a profitable enterprise." The study declared that those conditions "have remained for more than five years, with the result that high vacancy rates and marginal enterprises predominate." The Report noted that "[l]ocal business operators believe that the negative image" of the study area tended to taint all of the City by association, in particular the other commercial areas.

The final statutory criterion that the 1996 Report analyzed was *N.J.S.A. 40A:12A-5(e)*, namely, a "growing lack" or "total lack" of proper land utilization due to "diverse ownership" or other conditions, with the result that land "potentially useful and valuable for contributing to and serving the public health, safety and welfare" is instead left "in a stagnant and unproductive condition." The Report declared the Broadway Corridor to be "very significantly under-productive" and "capable of improvement," as evidenced by average property taxes per square foot that were twenty percent lower than in Oceanfront North and more than four times lower than in Oceanfront South. The preponderance of small lots was "preventing **[*14]** the assemblage of land for development by private investors," as only two construction permits had been issued during the preceding six years in the proposed redevelopment area. The study cited no instance of an individual parcel with unclear title or otherwise problematic ownership.

On January 23, 1996, Council adopted a resolution in which it accepted the Planning Board's recommendation that Oceanfront North and the Broadway Corridor be deemed areas in need of redevelopment.

In April 1996, the Planning Department, along with Thompson and Wood, The Atlantic Group, and the City's redevelopment counsel, issued the "Oceanfront-Broadway Redevelopment Plan." The redevelopment plan's "overall goal [was] to bring about a compact and integrated ensemble of public and private places that support year-round uses related to living, working, and recreation and visitation."

The plan's general redevelopment objectives included the encouragement of greater density, "in order to create a walkable environment and an enlarged base population to sustain a lively, year-round retail and residential core on Long Branch's Oceanfront." The vehicle for doing so, and for increasing the value of "land and enterprise **[*15]** for public and private interests," would be "high-yield projects that exploit ocean views from residential and commercial development and public spaces." Narrower goals included "[i]mprov[ing] the City's image by replacing vacant lots and poorly maintained buildings with new, carefully designed buildings, both commercial and residential." In sum, the redevelopment plan was designed to "improve the total living and working conditions of the City through improvement of a blighted area, removal of structures in poor condition and the provision of land for new commercial and residential development."

The redevelopment plan thus "encouraged" commercial and retail uses in the Broadway Corridor with "larger square footage requirements." It proposed closing North Broadway and making South Broadway "the gateway to downtown," with "a four-building gateway complex that attracts daily commuters, shoppers, and residents."

The redevelopment plan noted the City's intention of directing its redeveloper to acquire necessary properties through negotiation with their owners, and the City's expectation that the need for relocation would be "moderate at most." However, the City reserved the right to exercise **[*16]** eminent domain for properties that "are judged essential to achieve objectives intended by the Plan," upon the redeveloper's request and "as a last resort after other means have been exhausted." The redevelopment plan did not specify or explain how the determination that a property was essential to the redevelopment project would be made.

On April 16, 1996, Council found "substantial evidence in support of a determination that the areas delineated as Oceanfront North and Broadway Corridor individually qualify as redevelopment areas and collectively also qualify as a redevelopment area." It accordingly passed a resolution that adopted the plan and declared Broadway Corridor, along with Oceanfront North, to be areas "in need of redevelopment pursuant to the statutory criteria set forth in" *N.J.S.A. 40A:12A-5(a)*, *(c)*, *(d)* and *(e)*. On May 14, 1996, Council codified the plan as Ordinance 15-96.

Six years later, in October 2002, the Planning Department, along with the Thompson Design Group, issued the "Broadway Redevelopment Plan" (the Broadway Plan), which incorporated the 1996 redevelopment plan. The Broadway Plan identified the subject properties, including appellants', by block and lot. **[*17]** The Broadway Plan repeated prior representations that the need for relocation would be minor, and that the City intended the subject properties to be acquired by negotiation, while reserving the use of condemnation "as a last resort."

The Broadway Plan included detailed "Design Guidelines" that named permitted primary and secondary uses. "Any uses not specifically listed" were prohibited. On the blocks fronting Broadway, the primary uses included performance, exhibition, and instructional and workshop spaces for theater, cinema, dance, music, art, and fashion design. The secondary uses included restaurants, clubs, bars, specialty retail, and small professional offices. Churches were not listed even among the tertiary and conditional uses.

On October 22, 2002, Council adopted Ordinance 47-02, which approved the Broadway Plan and declared it to be the superseding ordinance and standard for land use regulation in the Broadway Corridor. On June 28, 2005, Council authorized the City to enter into a redevelopment agreement with BAC for a portion of the Broadway Corridor. Thereafter, the Mission sought to be named as the redeveloper of its property. As we shall discuss further, the federal **[*18]** court upheld Council's rejection of The Mission's application on the ground that the Broadway Plan excluded church uses. *See* *The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 259 (3d Cir. 2007)*, *cert. denied*, *__ U.S. __, 128 S. Ct. 2503, 171 L. Ed. 2d 787 (2008)*. Specifically, the Third Circuit approved Council's finding that "'a storefront church would jeopardize' the development of" an area that was "envisioned as 'an entertainment/commercial zone with businesses that are for profit,'" and that a church would also "'destroy the ability of the block to be used as a high end entertainment and recreation area,'" due to the unavoidable operation of "a New Jersey statute which prohibits the issuance of liquor licenses within two hundred feet of a house of worship." *Ibid*.

On February 28, 2006, Council adopted Ordinance 5-06, which listed appellants' properties among those to be acquired and authorized the City to condemn them if necessary. Within weeks, Cottage Emporium, the Pandays, The Lighthouse Mission, and its minister, Reverend Kevin Brown, began the action denominated L-1786-06 by filing a complaint in lieu of prerogative writs against the City, the **[*19]** Mayor and Council of Long Branch and BAC. They sought revocation of the 2006 ordinance that gave the City authority to condemn their properties for redevelopment (count one), a declaration that the ordinance was invalid (count two), and a declaration that the redevelopment statutes were unconstitutional (count three). They also claimed that the inclusion of their properties in the redevelopment zone violated their civil rights, violated defendants' fiduciary duties, and tortiously interfered with their contractual rights and prospective economic advantage (counts four through seven, nine, and ten). In addition, The Mission sought a declaration that condemnation would violate RLUIPA, *42 U.S.C.A. §§ 2000cc to*

2000cc-5 (count thirteen). [5] On September 12, 2006, an amended complaint in lieu of prerogative writs was filed that named CGR Holding Corporation and one of its commercial tenants, Carlos Rivera, M.D. as additional plaintiffs.

The City and Council moved for summary judgment, and BAC and the State joined the motion. On December 19, 2006, the court issued its opinion, and on January 22, 2007, entered a judgment that dismissed all counts **[*20]** against the State. As to the City, Council and BAC, the judgment partially granted the motion by denying dismissal of count one, while dismissing count two without prejudice and dismissing the remaining counts with prejudice. Thus, portions of plaintiffs' complaint survived defendants' summary judgment motions.

On February 28 and July 28, 2007, the Law Division issued orders denying appellants' requests for discovery relating to the 1996 and 2002 ordinances, in which Council had found a need for redevelopment due to blight and adopted the redevelopment plan. The judge reasoned that appellants had not filed their challenge to the blight designation within the forty-five days prescribed by *Rule 4:69-6(a)*, and there was no basis for granting the "interest of justice" exception to the *Rule's* forty-five day limitations period. In particular, the judge concluded that because he had already upheld the validity of the City's redevelopment plans in *City of Long Branch v. Brower*, Docket No. L-4987 (Law Div. June 12, 2006), [6] there was "no reason to relax the forty-five day statute of limitations on bringing actions in lieu of prerogative writs." The judge held "that ship has sailed," and as such, **[*21]** he refused to entertain appellants' challenge to the 1996 and 2002 redevelopment plan or blight designations and refused to permit pretrial discovery as to those ordinances.

The judge then turned to the 2006 ordinance, Ordinance No. 5-06, which listed appellants' properties among those to be acquired, and authorized the City to condemn them if necessary. The judge concluded that appellants' challenge to the 2006 ordinance was, in reality, a challenge to the 1996 and 2002 redevelopment plan, and "once again, that ship has sailed." For that reason, he declined to permit appellants to conduct discovery on the 2006 ordinance either. Addressing appellants' challenge to the 2006 ordinance, the judge again relied on his opinion in *Brower* as a basis for concluding **[*22]** that the redevelopment plan was valid and that appellants had not satisfied their heavy burden of proving the contrary. The judge therefore upheld the City's 2006 decision to authorize the use of eminent domain against appellants' properties. On August 1, 2007, the judge entered a confirming order dismissing L-1786-06 with prejudice. The August 1, 2007 order removed all remaining impediments to the City's ability to file condemnation actions against the properties located in the Broadway Corridor.

Consequently, in October 2007, the City filed a condemnation action against The Mission (L-4778-07); in January 2008, it filed a similar action against Cottage Emporium and the Pandays (L-307-08). [7] On April 2, 2008, the Law Division issued an opinion, which we shall describe shortly, that upheld the City's authority in L-307-08 and L-4778-07 to condemn. On April 14, 2008, the judge entered confirming judgments appointing condemnation commissioners, after which the City filed declarations of taking. The Lighthouse and CGR Holdings filed separate appeals, which we have consolidated for purposes of disposition.

In his April 2, 2008 condemnation opinion, the judge found that the City's blight determination properly relied upon "an amalgamation of data outlined from various City agencies, including the Fire Marshal, Building Department, Code Enforcement, Tax Assessor, Tax Collector, Police Department, Health Department and Public Works." That data "included the vacancy rates of properties, the general conditions of all the individual properties located in the study area, and other information derived from on-site inspections and inspections of municipal records conducted by the Planning Department."

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[5] There were no counts eight, eleven, or twelve.

[6] The *Brower* litigation involved a residential section of the City which, like the Broadway Corridor, was part of the area the City deemed blighted and in need of redevelopment in 1996. We reversed the Law Division's June 12, 2006 order *sub nom City of Long Branch v. Anzalone, Nos. A-0067-06, A-0191-06, A-0192-06, A-0195-06, A-0196-06, A-0197-06, A-0198-06 and A-0654-06, 2008 N.J. Super. Unpub. LEXIS 2204 (App. Div. August 7, 2008)*, *certif. denied*, *199 N.J. 134, 970 A.2d 1050 (2009)*.

[7] As we have noted, Cottage Emporium and the Pandays subsequently submitted a stipulation **[*23]** of dismissal.

Specifically, the judge relied upon the site inspections conducted by the City's Fire Marshal and Planning Department to determine that only twenty percent of the buildings in the Broadway Corridor were in "good" condition, with the rest "fair" or "poor." In the judge's view, that assessment justified the finding of a need for redevelopment under the N.J.S.A. 40A:12A-5(a) criterion of a predominance of unwholesome conditions.

Turning to subsection (c) of N.J.S.A. 40A:12A-5, the judge found that the high proportion of land that was vacant for ten years, representing fifteen percent of **[*24]** the Broadway Corridor, satisfied the N.J.S.A. 40A:12A-5(c) criterion of vacant land that is unlikely to be developed privately "'by reason of its location, remoteness, [or] lack of means of access to developed sections or portions of the municipality.'" The court also noted that industrial properties formerly served by the railroad had become effectively remote because they lacked direct highway access.

The court then found that the unfavorable results of the commercial area image analysis, as contained in the photographic survey, established the commercial obsolescence and dilapidation needed to satisfy the requirements of N.J.S.A. 40A:12A-5(d), which requires a detriment to the community's safety or welfare due to dilapidated or obsolete conditions of the buildings, or to poor layout and land use. Finally, the conjunction of vacancies and low tax revenues compared to Oceanfront South established the stagnancy of land, thereby satisfying N.J.S.A. 40A:12A-5(e).

On that basis the court ruled that all the findings of a need for redevelopment were supported by substantial evidence. The judge distinguished *Gallenthin* on the grounds that his finding under N.J.S.A. 40A:12A-5(e) was not simply **[*25]** that land use in the Broadway Corridor was less than fully optimal, but rather that the area had become affirmatively stagnant, and that no improvement could occur without redevelopment.

II.

We turn first to Point II, in which appellants argue that the court erred by upholding the blight findings and redevelopment plan [8] affecting their properties. They argue that the blight findings were based solely on aesthetic concerns, with no evidence of additional elements that our case law requires, namely, structural dilapidation, degraded living conditions, or a threat to the health, safety, and welfare of neighboring areas.

The statute upon which the City relied in declaring the Broadway Corridor blighted, and in need of redevelopment, is N.J.S.A. 40A:12A-5, which is a portion of the Local Housing and Redevelopment Law (LRHL), N.J.S.A. 40A:12A-1 to -49. N.J.S.A. 40A:12A-5 **[*26]** provides as follows:

> A delineated area may be determined to be in need of redevelopment if, after investigation, notice and hearing as provided in [N.J.S.A. 40A:12A-6], the governing body of the municipality by resolution concludes that within the delineated area any of the following conditions is found:
> a. The generality of buildings are substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions.
> . . . .
> c. Land that is owned by the municipality, the county, a local housing authority, redevelopment agency or redevelopment entity, or unimproved vacant land that has remained so for a period of ten years prior to adoption of the resolution, and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital.
>
> d. Areas with buildings or improvements which, by reason of dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary **[*27]** facilities, excessive land coverage,

[8] As we have noted, the City's findings were made in 1996 and 2002, which led the Law Division to consider appellants' challenges time-barred. On appeal, the City concedes that appellants' challenges were timely under DeRose, supra, 398 N.J. Super. at 413, which had not yet been decided when the judge rendered his decision.

> deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community.
> e. A growing lack or total lack of proper utilization of areas caused by the condition of the title, diverse ownership of the real property therein or other conditions, resulting in a stagnant or not fully productive condition of land potentially useful and valuable for contributing to and serving the public health, safety and welfare.

A city's decision that a particular area is "blighted" is "invested with a presumption of validity." *Levin v. Twp. Comm. of Bridgewater, 57 N.J. 506, 537, 274 A.2d 1*, *appeal dismissed*, *404 U.S. 803, 92 S. Ct. 58, 30 L. Ed. 2d 35 (1971)*. It "will be upheld where any state of facts may reasonably be conceived to justify the action." *Vineland Constr. Co. v. Twp. of Pennsauken, 395 N.J. Super. 230, 255, 928 A.2d 856 (App. Div. 2007)*, *appeal dismissed*, *195 N.J. 513, 950 A.2d 902 (2008)*. Challengers have "the burden of overcoming that presumption and demonstrating that the blight determination was not supported by substantial evidence." *Levin, supra, 57 N.J. at 537*. *Accord* *Gallenthin, supra, 191 N.J. at 372*; **[*28]** *Concerned Citizens of Princeton, Inc. v. Mayor of Princeton, 370 N.J. Super. 429, 452-53, 851 A.2d 685 (App. Div.)* ("Redevelopment designations, like all municipal actions, are vested with a presumption of validity."), *certif. denied*, *182 N.J. 139, 861 A.2d 844 (2004)*. The Legislature has codified the "substantial evidence" standard. *ERETC, L.L.C. v. City of Perth Amboy, 381 N.J. Super. 268, 277-78, 885 A.2d 512 (App. Div. 2005)*.

However, our courts have cautioned that the "substantial evidence" standard requires "a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met." *Gallenthin, supra, 191 N.J. at 373*. That standard similarly prohibits a municipality from exercising eminent domain on findings that are "supported by only the net opinion of an expert." *Ibid*. Instead of simply describing the physical and financial status of the properties to be taken, the municipality or its expert must perform "an analysis of the statutory criteria as [they] applied to each of the properties in the designated" redevelopment area, and of how each property's condition reflected or contributed to the area's blight. *ERETC, supra, 381 N.J. Super. at 279-80*.

Furthermore, **[*29]** questions of law are reviewed de novo. *Gallenthin, supra, 191 N.J. at 372*; *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)*.

The New Jersey Constitution's general provision on eminent domain requires only a "public use" and "just compensation," *N.J. Const. art. I, P 20*, plus adherence to due process. *Gallenthin, supra, 191 N.J. at 356*. The provision that specifically addresses the taking of private property for redevelopment declares such takings to be a public purpose, and to be eligible for preferential tax treatment, as long as the property is "blighted":

> The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, **[*30]** ownership, management and control of such improvements shall be regulated by law.
>
> [*N.J. Const. art. VIII, § 3, P 1* ("the Blighted Areas Clause").]

Pursuant to the fundamental principle of giving effect to all constitutional provisions, *State v. Muhammad, 145 N.J. 23, 75-76, 678 A.2d 164 (1996)*, "the general provisions of the Constitution must give way to its particular provisions." *Kervick v. Bontempo, 29 N.J. 469, 479, 150 A.2d 34 (1959)*. *Accord* *Behnke v. N.J. Highway Auth., 13 N.J. 14, 31, 97 A.2d 647 (1953)*. The Blighted Areas Clause thus controls when redevelopment is the sole public purpose for a taking.

Gallenthin, supra, 191 N.J. at 360, explained that the ordinary meaning of "blight" did not extend to an area in which the only negative condition was suboptimal land use. Instead, the word "blight," and thus the Blighted Areas Clause, required the area to be characterized by physical or social deterioration that threatened to become intractable. *Ibid*. The clause could not allow a property to be declared "blighted" for the sole reason that it was being "operated in a less than optimal manner," because if it did, "most property in the State would be eligible for redevelopment." *Id. at 365*. The Court further illustrated **[*31]** the meaning of "blight" with similar language that the sponsor of the Blighted Areas Clause had used, after which the delegates to the 1947 Constitutional Convention passed the amendment containing the clause as proposed. *Id. at 360-61*; *Proceedings of the New Jersey Constitutional Convention of 1947*, vol. I at 744-45. On that basis, it held that the Blighted Areas Clause was intended to cover only "deterioration or stagnation that negatively affects surrounding areas." *Gallenthin, supra, 191 N.J. at 360*. [9]

The Blighted Areas Clause also had the related intent of ensuring the constitutionality of statutes that allowed local governments to use tax preferences as incentives for private companies to participate in redevelopment projects. *Id. at 360-62*; *Proceedings, supra*, vol. I at 743-44. In 1949, the Legislature substantially replaced those statutes with the Blighted Areas Act, which authorized local governments to find that an area was "blighted"; amendments to the Local Housing Authorities Law, authorizing local housing authorities to redevelop such areas; and the Redevelopment Agencies Law, which allowed local governments to create redevelopment authorities. L. 1949, c. 187; L. 1949, c. 300; L. 1949, c. 306; *Gallenthin, supra, 191 N.J. at 361-62*.

In both the Local Housing Authorities Law and the Redevelopment Agencies Law, the Legislature set out five subsections that were nearly identical to what would later appear as the first five alternative criteria in the current redevelopment statute, *N.J.S.A. 40A:12A-5*. **[*33]** L. 1949, c. 300, § 2, and L. 1949, c. 306, § 3. In 1951, it inserted those five subsections into the Blighted Areas Act as well, and deleted the provisions that had addressed only the kinds of conditions currently treated in *N.J.S.A. 40A:12A-5(a)* and *(d)*. L. 1951, c. 248, § 1; *Gallenthin, supra, 191 N.J. at 369-70*; *Forbes v. Bd. of Trs., 312 N.J. Super. 519, 527, 712 A.2d 255 (App. Div.)*, *certif. denied*, *156 N.J. 411, 719 A.2d 642 (1998)*.

In 1992, the Legislature replaced the Blighted Areas Act and the other enactments with the LRHL. *Gallenthin, supra, 191 N.J. at 369*. The five subsections that previously defined "blight" were included in the LRHL as *subsections (a) through (e) of N.J.S.A. 40A:12A-5*.

In addition to the general change of replacing the word "blight" with the term "in need of redevelopment," the LRHL made two changes in the fifth subsection. The first was that improper land utilization may now be found to arise from a title problem, diverse ownership, "or" other conditions, whereas previously it had to arise from a title problem or diverse ownership "and" other conditions. L. 1951, c. 248, § 1(e); *N.J.S.A. 40A:12A-5(e)*. The second was that the result of such conditions only has to be "a stagnant or **[*34]** not fully productive condition" of the land, rather than "a stagnant *and unproductive* condition." *Ibid*. (emphasis added). However, "the definitional standards were not changed in any material respect," which meant that those two changes, along with lesser changes in the other subsections, were "cosmetic only." *Forbes, supra, 312 N.J. Super. at 529, 526*.

Indeed, the Legislature expressly recognized that findings under the LRHL that an area was "in need of redevelopment," just like findings under the prior statutes that an area was "blighted," would be made "pursuant to

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[9] The sponsor's statement, which was delivered without challenge or criticism, included the following:

> Certain sections of [the older cities in the State] have fallen in value, and have [become] what [are] known as "blighted" or "depressed" areas. . . .
>
> These depressed areas go steadily down hill. . . . It's impossible to keep the properties in good condition, the houses deteriorate more and more, and what was once a good section of the town is on the way to becoming a slum.
>
> Naturally, this slump in value is not confined to the original area affected. It spreads to neighboring blocks. No one person . . . can counteract this spread, because no one can afford to sink money into a blighted **[*32]** area . . . because the improvement is so small that it cannot turn the tide of deterioration.
>
> [*Id. at 360-61* (quoting Proceedings, supra, vol. I at 742-43) (fourth and fifth alterations added).]

the authority of" the Blighted Areas Clause and "for the purposes of" satisfying its requirement of a "blighted area." N.J.S.A. 40A:12A-3, -6(c).

The municipality in Gallenthin, supra, 191 N.J. at 348, relied solely on N.J.S.A. 40A:12A-5(e) to find that an area including the plaintiffs' property was in need of redevelopment. The Court observed that the Legislature had intended that subsection's precursor to include more than just actual slum conditions, and then explained that the intention was constitutional because the precursor's use of the term "blight" still "retain[ed] its essential characteristic: deterioration or **[*35]** stagnation that negatively affects surrounding properties." Id. at 363. Under the presumption that the Legislature intended N.J.S.A. 40A:12A-5(e) to remain constitutional, the Court held that the provision was "reasonably susceptible" of the only construction that would preserve its validity: that the named conditions do not establish blight by themselves, but are among the recognized paths for an area to reach the level of degradation that the Blighted Areas Clause requires. Id. at 365-70.

In short, the Legislature relied on the Blighted Areas Clause as the authority for all of the statutes in the prior acts that it would later incorporate in the LRHL, including the provisions that were reenacted with only "cosmetic" changes as N.J.S.A. 40A:12A-5(a) through (e). While those five provisions might not be equally evocative of decay, they nonetheless share the "essential characteristic" of naming kinds of deterioration or other conditions by which an area can reach a degree of degeneration that threatens to degrade other areas, and which are unlikely to be remedied by private investment. We believe the Court would have used the same analysis and applied the Blighted Areas Clause in the **[*36]** same manner if the municipality had relied on N.J.S.A. 40A:12A-5(a), (b), (c), or (d) instead of (e).

This reading of Gallenthin, and thus of N.J.S.A. 40A:12A-5, requires a municipality to find that the physical condition of the properties at issue was contributing to social problems not only within the redevelopment area, but also in nearby areas. Even though redevelopment would be expected to result in higher property tax payments and more spending for local businesses, the difference between the actual level of economic activity in the redevelopment area and the level that might be achieved after its transformation does not amount to blight by itself. Eminent domain based solely on such a difference would instead amount to condemnation due to the area's perceived insufficiency of wealth, and it would exemplify the Court's fear that most property would be continuously subject to forced redevelopment if the threshold requirement were nothing more than the possibility of a more profitable use of the land. Gallenthin, supra, 191 N.J. at 365.

Focusing more specifically on the language in N.J.S.A. 40A:12A-5(e), the Court explained that the phrase "or not fully productive" could not justify **[*37]** a taking for redevelopment purposes because such a criterion by itself would not satisfy the constitutional requirement of actual blight. Id. at 367. Furthermore, to respect the statutory construction principles of *ejusdem generis* and to "avoid rendering any part of a statute meaningless," the Court deemed the specific condition of "stagnant" to be "the operative criterion." Id. at 367-68. The placement of the more general phrase "or not fully productive" after "stagnant" meant that the phrase can serve to elaborate "stagnant," but not to expand its meaning. Id. at 368. For similar reasons, the undesirable condition of a "growing lack or total lack of proper utilization" must be caused by one of the specific problems named in the preceding clause, which are "the condition of the title" and the "diverse ownership of the real property"; the subsequent generalized phrase "or other conditions" cannot serve as a catch-all that allows unnamed causes of improper land utilization to be an independent basis for finding that an area is in need of redevelopment. Id. at 367.

With these considerations serving as the framework for our analysis, we proceed to a review of the quality of the evidence **[*38]** underlying the City's findings concerning N.J.S.A. 40A:12A-5(a), (c), (d) and (e). The 1996 redevelopment study based its subsection (a) finding on a survey of the 237 properties in the Broadway Corridor conducted by the City's Planning Department in conjunction with Thompson and Wood and the Atlantic Group. That survey was based only on exterior observation. The criteria utilized, although purportedly drawn from city and state building codes, are of a nature that, in many instances, might well be deemed more cosmetic than substantial. In particular, the 1996 Report assigned a building a rating of "poor" condition if it presented deficiencies in three or more of the six assessment criteria the 1996 Report adopted. By that standard, a building could be tagged as in "poor" condition even if its deficiencies were entirely cosmetic and superficial in nature. For example, if a building had "broken windows," "deteriorating paint" and "cracked, chipped masonry veneer," those three cosmetic violations would result in a score of "poor." Additionally, only twenty-nine percent of the buildings in the Broadway Corridor were even in "poor" condition, which is not sufficient to satisfy subsection (a)'s **[*39]** standard of a "*generality* of buildings" (emphasis added).

Moreover, nothing in the City's evidence of claimed substandard and dilapidated buildings within the meaning of subsection (a) of N.J.S.A. 40A:12A-5 attempted, even in small part, to establish what Gallenthin requires, namely a degree of "deterioration or stagnation that negatively affects surrounding areas" by promoting conditions there that can develop into blight. Id. at 360. As we have noted, the survey of property conditions was limited to a visual inspection of their exteriors, with no indication that it included interior or structural inspections. There is also no indication that the survey was based on investigations by local officials in response to complaints about health or structural violations; indeed, the record does not even contain information on whether the properties in the Broadway Corridor had ever been so investigated. In that regard, the survey failed to satisfy even the *pre-Gallenthin* test of showing how each property in the redevelopment area reflected or contributed to the kind of blight in question. ERETC, supra, 381 N.J. Super. at 279-80.

The survey did not resemble the one in Lyons v. City of Camden, 52 N.J. 89, 95, 243 A.2d 817 (1968), **[*40]** which was a series of "exterior and interior investigations" conducted "structure-by-structure" by three engineers and an architect, who then applied "extensive testing criteria . . . to the critical or intermediate deficiencies" that they found before they decided whether the property was indeed in "substandard condition." The survey also did not resemble the one in Hirth v. City of Hoboken, 337 N.J. Super. 149, 162-63, 766 A.2d 803 (App. Div. 2001), in which the findings about building conditions were accompanied by findings of "the nature and level of the economic activity being conducted there," which were particularized and not simply general inferences from the vacancy rate or the decline in assessed value for the redevelopment zone as a whole.

The 1996 Report concluded with the net opinion that criterion (a) was satisfied because "[t]he generality of the buildings are substandard, unsafe, unsanitary, dilapidated or obsolescent, or possess any of such characteristics." This bland recitation of statutory criteria, with a net opinion that fails to explain its basis, was expressly disapproved in Gallenthin, supra, 191 N.J. at 373. Nowhere did the 1996 Report explain how the condition of the buildings **[*41]** contributed to the "unwholesome living or working conditions," as required by subsection (a). We thus conclude that the City's subsection (a) findings cannot survive constitutional scrutiny.

We turn to the City's findings under subsection (c), which requires not only a high proportion of land that was vacant for ten years, but also a finding that the impediment to a parcel's redevelopment by private capital was its remoteness or lack of access. The subsection (c) criterion was deemed satisfied based upon the vacancy of fifteen percent of the land area of the Broadway Corridor for at least ten years. The 1996 Report considered the vacancy rate to be the result of the Broadway Corridor being no longer suited "to today's standards for manufacturing and distribution facilities." This unsuitability was caused by a lack of "[d]irect highway access," which the 1996 Report found was necessary "to save time," and by a high proportion of streets too narrow to permit "large trucks . . . to make turns." The City found that this "inadequate road access" made the entire Broadway Corridor "unsuitable for private development."

However, the only evidence of this described condition concerned the industrial **[*42]** zone along the railroad tracks, which was west of the Broadway Corridor rather than inside it. Unquestionably, subsection (c) requires more. It must be shown that because of certain conditions the land is not likely to be developed through the instrumentality of private capital. Those conditions are "location, remoteness, lack of means of access to developed sections or portions of the municipality, or topography, or nature of the soil." N.J.S.A. 40A:12A-5(c). No basis was provided to satisfy that condition as the 1996 Report's findings on remoteness of location all pertained to the area surrounding the abandoned railroad right-of-way, which is located outside of the Broadway Corridor.

The 1996 Report addressed subsection (d) by describing standard aesthetic conditions that created a "negative image" adversely affecting the other commercial areas in the City. This is insufficient. Subsection (d) also requires that such dilapidation must be "detrimental to the safety, health, morals, or welfare of the community." N.J.S.A. 40A:12A-5(d). No basis was provided to satisfy that condition.

The evidence was also inadequate for subsection (e), a "stagnant or not fully productive condition of **[*43]** land." As *Gallenthin* explained, the land must be stagnant rather than simply at less than its highest possible use, and the stagnancy must be caused by either a problem with title or the "diverse ownership" of the parcels in question. Gallenthin, supra, 191 N.J. at 365, 367. There was no evidence that private redevelopment in the Broadway Corridor was being frustrated by diverse ownership of an individual property or other problems with its title. Thus the City's subsection (e) findings were also inadequate.

We thus agree with appellants' claim in Point II that the 1996 and 2002 redevelopment plans for the Broadway Corridor, upon which the 2006 ordinance was based, do not satisfy the substantial evidence standard that *Gallenthin, Hirth, Lyons and ERETC* require. Consequently, we invalidate the blight designation and the redevelopment plan for the Broadway Corridor, and reverse the August 1, 2007 order that upheld them.

The City based the 2006 ordinance authorizing the City to take appellants' properties by eminent domain on the same 1996 and 2002 ordinances that we have now invalidated. Therefore, our reversal of the August 1, 2007 order invalidates the predicate for the April 14, 2008 **[*44]** order that gave the City the authority to condemn. Consequently, we reverse the April 14, 2008 order and vacate the May 9, 2008 declarations of taking as to the remaining appellants.

We recognize that the 1996 Report upon which the City relied when it declared the Broadway Corridor blighted was prepared more than a decade before *Gallenthin* was decided. Appellants' appeal from the dismissal of their complaint in lieu of prerogative writs was pending at the time *Gallenthin* was decided. Consequently, we have afforded them the benefit of its holding. In fairness to the City, it should be afforded the opportunity for a remand to permit it to amplify the record in an effort to meet the *Gallenthin* standard. DeRose, supra, 398 N.J. Super. at 420. We thus remand to the Law Division for the entry of an order so providing.

III.

We turn next to The Mission's claim that the Law Division committed reversible error by rejecting its contention that the Broadway Plan violated the "equal terms" provision of RLUIPA. The Mission argues that the Broadway Plan discriminates against church uses by disfavoring "religious assemblies" while encouraging non-religious assemblies. A divided panel of the Third Circuit **[*45]** Court of Appeals ruled against The Mission on this claim. Lighthouse Inst., supra, 510 F.3d at 275-76.

Nonetheless, The Mission argues that the Law Division should have rejected the Third Circuit majority's statutory interpretation and reasoning, and should have refrained from applying the doctrine of res judicata.

The failure to regulate religious uses of land on "equal terms" with non-religious uses violates a section of RLUIPA, namely 42 U.S.C.A. § 2000cc(b)(1). The Third Circuit held that RLUIPA is violated only when a religious use is able to identify a "better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation." Lighthouse Inst., supra, 510 F.3d at 268.

A reviewing court considers only whether the regulation treats the religious use differently from the nonreligious use when both would have the same effect on what the regulation seeks to protect. Id. at 264-66. "Heightened scrutiny [is] warranted only when a principled distinction could not be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives." Id. at 266. Because the comparison is limited to **[*46]** uses, it is irrelevant whether the person or entity with the nonreligious uses resembles the party with the religious use in any other regard. Id. at 267.

The Third Circuit correctly observed that the Broadway Plan named theaters, restaurants, bars, and other nonreligious assemblies as permitted uses, while excluding churches. Id. at 270. It found that the "well documented" objective of the Broadway Plan was to make the Broadway Corridor the anchor of "a 'vibrant' and 'vital' downtown community centered on an entertainment and retail district." *Ibid*. It then observed that *N.J.S.A. 33:1-76* prohibited the issuance of a new liquor license to any establishment within 200 feet of a church or nonprofit schoolhouse, and found that "[i]t would be very difficult for Long Branch to create the kind of entertainment area envisaged by the Plan -- one full of restaurants, bars, and clubs -- if sizeable areas of the Broadway Corridor were not available for the issuance of liquor licenses." *Id. at 270-71*. The court added that the Broadway Plan "exhibits internal consistency" by excluding nonprofit schools along with churches. *Id. at 272*. The judges therefore concluded that "churches are not similarly **[*47]** situated to the other allowed assemblies with respect to the aims of the Plan," which made the "equal terms" provision inapplicable. *Id. at 270*.

While the decisions of the United States District Courts and Courts of Appeal on questions of federal law are not binding "per se" on New Jersey courts, they should nonetheless receive the "due respect" of appropriate observance of "the principle of 'judicial comity.'" *Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 78-80, 577 A.2d 1239 (1990)*. Comity includes res judicata and other doctrines of claim preclusion. *Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 532, 391 A.2d 899 (1978)*. We reject The Mission's contention that the Law Division's application of claim preclusion was error. The Third Circuit's decision was a final judgment on the merits; the City and The Mission, the only plaintiff with RLUIPA standing, were present in both the federal and state litigation; and the RLUIPA question was identical. *See Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 412, 591 A.2d 592 (1991)*.

We therefore affirm the Law Division's January 22, 2007 dismissal of the RLUIPA claim under the doctrine of res judicata.

IV.

In Point VI, appellants claim that the condemnation of their properties **[*48]** for redevelopment without sufficient evidence of blight violated their rights under federal and state civil rights statutes, tortiously interfered with their occupations, and violated their rights under the United States Constitution and state ***antitrust law*** to participate in interstate commerce. In light of our determination that the 1996 and 2002 ordinances are invalid, and in light of the remand we have ordered, these claims are moot and need not be decided. *See Hous. Auth. v. Suydam Investors, L.L.C., 177 N.J. 2, 28, 826 A.2d 673 (2003)*.

V.

Next, we analyze appellants' claim in Point I that the Law Division's July 20, 2007 order denying them the right to conduct discovery concerning the 1996 and 2002 ordinances was error. In light of our conclusion that the 1996 and 2002 ordinances cannot withstand the heightened scrutiny of *Gallenthin* and that a remand is required, the judge's denial of appellants' request for discovery as to the 1996 and 2002 ordinances has now become moot. Thus, we need not address the claim appellants have advanced in Point I concerning their right to discovery on those two ordinances.

Appellants also maintain that they were wrongly denied discovery to support their claim that **[*49]** the 2005 ordinance appointing BAC as the redeveloper was the result of political favoritism and not BAC's competence. They maintain that the Law Division wrongly held their challenge to the 2005 ordinance time-barred. In light of our conclusion that the 1996 and 2002 ordinances are invalid, the City will, on remand, be required to start anew if it chooses to redevelop the Broadway Corridor. If it does so, and again declares the area blighted, new ordinances will be needed to accomplish that result. Likewise, a new ordinance will be required to appoint a redeveloper.

If appellants file a challenge to such action by way of a complaint in lieu of prerogative writs, they will be entitled to discovery "in the same manner as other civil litigation." *Hirth, supra, 337 N.J. Super. at 166*. We therefore perceive no need to determine if the judge erred when he deemed appellants' discovery requests concerning BAC time-barred, as that issue too is now moot.

However, we note in passing that in *DeRose*, we vastly limited a municipality's ability to characterize as untimely a plaintiff's challenge to blight designation. *Supra, 398 N.J. Super. at 413*. *DeRose* had not yet been decided when, in

2007, the **[*50]** judge deemed appellants' challenges time-barred, and he therefore did not have the benefit of its reasoning when he rendered his decision.

VI.

Affirmed in part, reversed in part, and remanded.

Fayus Enters. v. BNSF Ry.

United States Court of Appeals for the District of Columbia Circuit

February 9, 2010, Argued; April 16, 2010, Decided

No. 09-7023

Reporter

602 F.3d 444 *; 390 U.S. App. D.C. 213 **; 2010 U.S. App. LEXIS 7864 ***; 2010-2 Trade Cas. (CCH) P77,161

FAYUS ENTERPRISES, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., APPELLANTS v. BNSF RAILWAY COMPANY, ET AL., APPELLEES

Subsequent History: US Supreme Court certiorari denied by *Fayus Enters. v. BNSF Ry., 2010 U.S. LEXIS 9776 (U.S., Dec. 13, 2010)*

Prior History: [*1]** Appeal from the United States District Court for the District of Columbia. (No. 1:07-mc-00489-PLF-JMF).

In re Rail Freight Fuel Surcharge Antitrust Litig., 2009 U.S. Dist. LEXIS 99187 (D.D.C., Oct. 23, 2009)

Core Terms

regulation, remedies, preemption, preempted, state law, plaintiffs', carriers, rail transportation, private contract, district court, railroads, freight, antitrust claim, anti trust law, antitrust, rates, exclusive jurisdiction, transportation, exclusive remedy, deference, state law claim, purchasers, contracts, economic regulation, surcharges, indirect, unfair, fuel, consumer protection, deregulation

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN1[] **Railroads & Rail Transportation, Rates & Tariffs**

See *49 U.S.C.S. § 10709(c)(1)*.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN2[] **Railroads & Rail Transportation, Rates & Tariffs**

The Surface Transportation Board has authority to regulate the rates of common carrier traffic if the railroad has "market dominance" with respect to such traffic, *49 U.S.C.S. §§ 10701(d)*, *10702(1)*, *10707*, and to regulate the reasonableness of the railroad's "rules and practices" regardless of market dominance, *49 U.S.C.S. § 10702(2)*.

The Board can also "exempt" a person, class of persons, or a transaction or service when it finds that application of the regulatory regime (1) is not necessary to carry out the transportation policy of *49 U.S.C.S. § 10101*; and (2) either -- (A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power. *49 U.S.C.S. § 10502(a)*.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN3[] **Railroads & Rail Transportation, Rates & Tariffs**

49 U.S.C.S. § 10501(b).

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

HN4[] **Standards of Review, Deference to Agency Statutory Interpretation**

Agencies have no special authority to pronounce on preemption absent delegation by Congress.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN5[] **Railroads & Rail Transportation, Rates & Tariffs**

See *49 U.S.C.S. § 10709(c)*.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

HN6[] **Railroads & Rail Transportation, Rates & Tariffs**

The Interstate Commerce Commission Termination Act of 1995 did add the exclusive remedies clause to *49 U.S.C.S. § 10501*, along with the caveat that it would apply "except as otherwise provided in this part." But, this provision was merely a reorganization of pre-1995 law, under which federal remedies with respect to rail transportation were already exclusive, subject to parties' rights to contract enforcement.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Governments > Legislation > Interpretation

HN7[] **Railroads & Rail Transportation, Rates & Tariffs**

There was no change, by virtue of the Interstate Commerce Commission Termination Act of 1995, in *49 U.S.C.S. § 10709(c)*'s provision that contract rail transport "shall not be subject" to the provisions of the Act, meaning that the 1995 Act did not effect any substantive change on that score.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Governments > Legislation > Interpretation

HN8[] **Railroads & Rail Transportation, Rates & Tariffs**

In one respect, with the Interstate Commerce Commission Termination Act of 1995, Congress explicitly expanded the scope of preemption: it deleted from the exclusive jurisdiction clause any reference to Interstate Commerce Commission-certified state authorities and the associated certification procedures. *49 U.S.C.S. § 10501(b)*. This of course was a deregulatory move -- not an invitation to states to fill the regulatory void created by federal deregulation.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Governments > Legislation > Interpretation

HN9[] **Railroads & Rail Transportation, Rates & Tariffs**

The Interstate Commerce Commission Termination Act of 1995, in *49 U.S.C.S. § 10501(b)*, does not preempt all state and local regulations. The Circuit Courts appear generally, for example, to find preemption of environmental regulations, or similar exercises of police powers relating to public health or safety, only when the state regulations are either discriminatory or unduly burdensome.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Governments > Legislation > Interpretation

HN10[] **Railroads & Rail Transportation, Rates & Tariffs**

49 U.S.C.S. § 10709(c)(1) explicitly makes actions in state or federal court the exclusive remedy for any alleged breach of a contract entered into under *§ 10709*. This provision for conventional contract enforcement obviously is an "exception otherwise provided in this part" contemplated by the exclusive remedies clause, the last sentence in *49 U.S.C.S. § 10501(b)*. And courts readily provide such remedies. By contrast, the Circuit Courts have found shippers' quests for non-contractual relief to be preempted as would-be invasions of the regulatory domain.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Governments > Legislation > Interpretation

HN11[] **Railroads & Rail Transportation, Rates & Tariffs**

Congress sought, in *49 U.S.C.S. §§ 10501(b)*, *10709(c)(1)*, to avert the sort of frustration of its deregulatory purpose potentially inflicted by state rights and remedies outside the specifically preserved realm of contract breach.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

HN12[] **Transportation, Railroads**

See *49 U.S.C.S. § 10706(a)(3)(B)(ii)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN13[] **Purchasers, Indirect Purchasers**

Allowing indirect purchasers to use an indirect purchaser theory offensively, while prohibiting railroads from using the theory defensively, would create a serious risk of multiple liability for the railroads. and the possibility of inconsistent adjudications. Full recovery for direct purchasers would generate more effective enforcement of the law. Application of state laws rejecting this reasoning would jeopardize the federal interest in protecting railroad regulation from inefficient norms and balkanization.

Counsel: Christopher Lovell argued the cause for appellants. With him on the briefs were Gary E. Mason, Jared B. Stamell, and Richard J. Schager, Jr.

Alan M. Wiseman argued the cause for appellees. With him on the brief were Thomas A. Isaacson, Peter A. Barile III, Tyrone R. Childress, David G. Meyer, John M. Nannes, Tara L. Reinhart, Saul P. Morgenstern, Richard J. Favretto, Robert M. Jenkins III, Gary A. Winters, Richard McMillan Jr., Kent Alan Gardiner, and Kathryn D. Kirmayer. Linda S. Stein entered an appearance.

Judges: Before: ROGERS and TATEL, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

Opinion by: WILLIAMS

Opinion

[*445] [214]** WILLIAMS, *Senior Circuit Judge*: Plaintiff-appellants are firms that have indirectly purchased rail freight service from one or more of the defendant railroads. The traffic moves under railroad-shipper contracts that, pursuant to *49 U.S.C. § 10709*, are generally not subject to challenge before the Surface Transportation Board

("STB" or "Board"). [1] Plaintiffs allege that since 2003 the railroads conspired to impose fuel surcharges on the **[***2]** freight in a way that raised the shipping rates above competitive levels. Plaintiffs seek a judicial remedy for contract traffic that would match--and extend-- the remedy that the Board gave common carrier traffic in *Rail Fuel Surcharges, Ex Parte No. 661, 2007 STB LEXIS 39, 2007 WL 201205 (S.T.B. Jan. 25, 2007)*, but which it explicitly withheld from contract traffic, see *2007 STB LEXIS 39, [WL] at *10*.

Plaintiffs' antitrust allegations are part of at least eighteen separate class actions, consolidated before the district court, involving various putative classes of direct and indirect purchasers of rail freight services. *In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d 29, 32 (D.D.C. 2008)*. (The direct purchasers raise only federal antitrust claims, which are still pending before the district court. *Id. at 35-36*.) The indirect purchasers sought injunctive relief for their antitrust claims under federal law; in addition, in order to secure damages precluded under federal law, see *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, **[***4]** they asserted various state law claims under theories of antitrust, consumer protection, unfair competition, and unjust enrichment and disgorgement of profits.

The district court dismissed the indirect purchasers' state law claims as preempted by the Interstate Commerce Commission Termination Act of 1995, *49 U.S.C. §§ 701-727*, *10101-16106* ("ICCTA"). [2] *In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d at 40*. In the district court's view, "permit[ting] plaintiffs to pursue their state [law claims] . . . would require the application of different state antitrust and consumer protection laws to decide what defendants' fuel surcharges should have been--creating just the patchwork of railroad regulation that ICCTA sought to preempt." *Id. at 38*. The district court allowed the indirect purchaser plaintiffs to pursue their federal antitrust claim for injunctive relief, *id. at 43*, a claim still pending along with that of the direct purchasers. At the request of the parties, the court entered a final judgment for **[*446]** **[**215]** defendants on the state law claims under *Fed. R. Civ. P. 54(b)*, thereby enabling an immediate appeal that would otherwise have been impermissibly interlocutory. This **[***5]** appeal duly followed.

The statute's express pre-emption clause obviously is the best available reflection of Congress's intent on the subject. *Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002)*. The section reads as follows:

> ***HN3***[] The jurisdiction of the Board over--
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

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[1] *49 U.S.C. § 10709(c)(1) (2006)* (***HN1***[] "A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part."). Shippers not wishing to enter into contracts can ship pursuant to common carrier rates that railroads must provide on request pursuant to *49 U.S.C. § 11101(b) (2006)*. ***HN2***[] The Board has authority to regulate the rates of common carrier traffic if the railroad has "market dominance" with respect to such traffic, *id*. *§§ 10701(d)*, *10702(1)*, *10707*, and to regulate the reasonableness of the railroad's "rules and practices" regardless of market dominance, *id*. *§ 10702(2)*. The Board can also "exempt" "a person, class of persons, or a transaction **[***3]** or service" when it finds that application of the regulatory regime "(1) is not necessary to carry out the transportation policy of [*49 U.S.C. § 10101*]; and (2) either--(A) the transaction or service is of limited scope; or (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power." *Id*. *§ 10502(a)*. Plaintiffs originally sought to challenge both *§ 10709* contract freight and *§ 10502(a)* exempt freight, but they abandoned their claims involving *§ 10502(a)* exempt freight in briefing before the district court and on appeal.

[2] There are also two sections not codified at the citation above, namely, *11 U.S.C. § 1162* and *45 U.S.C. § 797I*.

> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (2006). In this opinion, we will refer to the first sentence (ending with "is exclusive") as the exclusive **[***6]** jurisdiction clause, and to the second sentence (beginning with "Except as otherwise provided") as the exclusive remedies clause.

* * *

In an argument that would, if it were sound, likely apply to all elements of their statutory analysis, plaintiffs invoke the following sentence uttered by the Board: "When Congress removed rail transportation contracts from the Board's regulatory purview, it expressly stated that not only state contract laws but also federal and state antitrust laws would apply fully to those agreements." *Kan. City Power & Light Co. v. Union Pac. R.R. Co., No. 42095, 2007 STB LEXIS 137, 2007 WL 934378, at *3 (S.T.B. Mar. 26, 2007)*. Plaintiffs argue in a footnote that we should defer to this statement under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*.

Lest there be any confusion on the point, we note at the outset that Congress did *not* "expressly state" what the Board said it had. The Board in fact cited only the House committee report, which on the page referred to by the Board merely stated, "If anti-competitive behavior is alleged, under this section, the antitrust laws are the appropriate and only remedy available." Comm. on Interstate & Foreign Commerce, **[***7]** Staggers Rail Act of 1980, H.R. Rep. No. 96-1035, at 58 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3978, 4003.

In any event plaintiffs' conclusory assertion that we owe the statement *Chevron* deference encounters insuperable hurdles. First, we've several times noted that whether an agency decision against preemption of a state or local law receives *Chevron* deference is an open question in this circuit. See *Riffin v. Surface Transportation Bd., 592 F.3d 195, 197, 389 U.S. App. D.C. 142 (D.C. Cir. 2010)*; *Albany Eng'g Corp. v. FERC, 548 F.3d 1071, 1074-75, 383 U.S. App. D.C. 384 (2008)*. Yet plaintiffs offer no argument on the question; we commonly treat such an omission as a waiver. See, e.g., *United States v. Hughes, 514 F.3d 15, 18, 379 U.S. App. D.C. 332 (D.C. Cir. 2008)*. The Supreme Court's recent treatment of the issue in *Wyeth v. Levine, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)*, declaring that ***HN4***[] "agencies have no special authority to pronounce on pre-emption absent delegation by Congress," *id. at 1201*, which several circuits have invoked in declining deference, see, e.g., *Franks **[*447]** **[**216]** Inv. Co. v. Union Pac. R.R. Co., 593 F.3d 404, 414 (5th Cir. 2010)*; *Barrientos v. 1801-1825 Morton LLC, 583 F.3d 1197, 1214 (9th Cir. 2009)*, obviously puts the *Chevron* **[***8]** deference claim in further doubt.

But assuming in plaintiffs' favor that agencies are due *Chevron* deference for their rulings on preemption of state law, the Board's inaccurate remark in *Kansas City Power & Light* would not be due such deference. The Board was engaged in resolving whether it had jurisdiction over a shipper's complaint: it would if the rates in question were common carrier tariff rates subject to *49 U.S.C. § 10701(d)(1) (2006)*; *id*. *§ 10702*, but would not if they were "contract rates" under *§ 10709*. Because the rates fell into the common carrier classification under Board precedent, and the parties had reasonably relied thereon, it found jurisdiction but started a rulemaking to clarify the boundary between the two. It made the quoted observation about state antitrust claims only to illustrate the undisputed proposition that the classification had consequences. Such a dictum is plainly not entitled to *Chevron* deference. See *United States v. Mead Corp., 533 U.S. 218, 228, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001)*. What we have just said also disposes of any possible claim that we owe the remark deference under *Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)*.

Thus we address the parties' arguments de novo.

* **[***9]** * *

Plaintiffs object to the district court's preemption decision on two principal grounds. First, they say that *§ 10501(b)*'s preemption provisions do not apply at all to freight transported pursuant to private contracts that are not generally subject to challenge before the Board. Second, they say that even if those provisions apply to such transportation, the state law remedies they seek are not remedies "with respect to regulation of rail transportation" and are therefore not the sort of remedies that *§ 10501(b)* preempts.

Plaintiffs' argument that the preemption language of *§ 10501(b)* does not apply to freight transported under private rail contracts has two related aspects: First, in plaintiffs' view, only the exclusive remedies clause is relevant to ICCTA preemption analysis; they criticize the district court for relying on cases discussing the exclusive jurisdiction clause to support its preemption holding, noting that the clause does not use the word "preemption." Second, the exclusive remedies clause has an express provision for exceptions "as otherwise provided in this part," and plaintiffs argue that their state law claims fall within that exception. We will start with *§ 10709(c)*'s **[***10]** provision of an exception:

> ***HN5***[] (1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.
>
> (2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on *section 1331* or *1337 of title 28, United States Code*.

49 U.S.C. § 10709(c) (2006).

Plaintiffs read *§ 10709(c)(1)* as taking private contracts completely outside the federal regulatory regime *and* as permitting plenary state regulation of freight moving under such contracts. This is a **[**217]** plainly **[*448]** erroneous reading. The provision merely limits the *Board's* authority over the terms of private contracts. [3] The limitation was imposed as part of surface freight deregulation legislation adopted over the past several decades. It was not intended to restore any regulatory authority to the states.

Both the exclusive jurisdiction clause of the provision now found in *§ 10501(b)*, and the rule removing private contracts from federal regulation, were originally added to the U.S. Code as part of the Staggers Rail Act of 1980. See Pub. L. No. 96-448, § 208, 94 Stat. 1895, 1909 (originally codified at *49 U.S.C. § 10713(i) (1994)*, now codified as amended at *49 U.S.C. § 10709(c) (2006)*) (private contracts); *id*. § 214(c)(5), 94 Stat. at 1915 (originally codified at *49 U.S.C. § 10501(d) (1994)*, now codified as amended at *49 U.S.C. § 10501(b) (2006)*) (preemption). Contrary to plaintiffs' assertions that federal preemption of state remedies was first introduced in 1995, see Appellants' Br. at 29 (asserting that "[u]nder the Interstate Commerce Act remedies were not exclusive, but rather cumulative"), in fact the Staggers Act's exclusive jurisdiction clause gave preemption of state remedies an explicit statutory basis. *G. & T. Terminal Packaging Co. v. Consolidated Rail Corp., 830 F.2d 1230, 1234 (3d Cir. 1987)* **[***12]** (so holding, but noting that longstanding judicial interpretations of pre-Staggers Act legislation also had much preemptive effect).

Indeed, courts found many state laws respecting rail transportation to be preempted following the Staggers Act even though it contained only the exclusive jurisdiction clause and not a separate exclusive remedies clause such as exists today. Thus *G. & T. Terminal Packaging Co*. held, "Since *[§ 10501(d)* (1982)], as illuminated by legislative history, makes clear that the only remedies regarding rail rates are those provided by federal statutes, the savings clause, *49 U.S.C. § 10103 (1982)* [which preserved common law "[e]xcept as otherwise provided in this subtitle"], has no application to this case." *Id.; Gendron v. Chi. & N. W. Transp. Co., 139 Ill. 2d 422, 564 N.E. 2d 1207, 1218, 151 Ill. Dec. 545 (Ill. 1990)* (finding a state law challenge to a transfer of a rail line approved by the ICC as preempted where "granting plaintiffs the legal and equitable relief they seek would [have] impermissibly interfere[d] with the ICC's broad authority over rail line transactions" and citing *inter alia* former *49 U.S.C. § 10501(d)* for the proposition that "[t]he ICC's jurisdiction to approve or to condition **[***13]** approval of rail line transactions like the one challenged here is exclusive and plenary"); see also H.R. Rep. No. 104-422, at 167 (1995) (Conf. Rep.), *as*

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[3] A quite **[***11]** separate way in which Board authority may be curtailed is through the Board's exercise of its authority under *49 U.S.C. § 10502(a)* to "exempt a person, class of persons, or a transaction or service" on the making of certain findings.

reprinted in 1995 U.S.C.C.A.N. 850, 852 ("[S]ince 1980, former *section 10501(d)* [predecessor of the current exclusive jurisdiction clause] and 11501(b) [a provision dropped in 1995, providing for limited state regulation under strict ICC supervision], with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act."); cf. *People v. Consolidated Rail Corp.., 245 Ill. App. 3d 167, 613 N.E.2d 784, 793-94, 184 Ill. Dec. 467 (Ill. App. Ct. 1993)* (arguing that former *§ 10501(d)* "merely provides that *to the extent of the jurisdiction conferred by the Commerce Act*, the ICC and State authorities have exclusive jurisdiction with respect to transportation by rail carriers"; but the context was a claim that the Staggers Act preempted state environmental regulation, **[*449]** **[**218]** an issue which, as we explain below, is quite distinct from regulation of railroad-shipper relations).

This pulls both legs out from under plaintiffs' argument that *§ 10501(b)*'s **[***14]** exclusivity provisions do not apply to the contract traffic in question. The exclusive jurisdiction clause and the cases construing it *are* relevant to the present issue, and *§ 10709*'s exception, whatever its ultimate effect, *leaves* *§ 10501(b)* applicable to contract traffic.

The current provision largely removing private contracts from federal regulation (*§ 10709(c)*) also had its genesis in the Staggers Act. Railroads were authorized to enter into such contracts, and required to file them with the ICC, consistent with tariff rules to be developed by the Commission so as to make their essential terms available to the public. The Staggers Act directed the Commission to approve such contracts except in very limited circumstances. See Pub. L. No. 96-448, § 208, 94 Stat. at 1908-10 (originally codified as amended at *49 U.S.C. § 10713 (1994)*, now codified as amended at *49 U.S.C. § 10709 (2006)*). Once so approved, a contract could not be challenged for violation of "this subtitle [subtitle IV, governing economic regulation of railroads]." *Id*. at 1909 (originally codified at *49 U.S.C. § 10713(i)(1) (1994)*, now codified as amended at *49 U.S.C. § 10709(c)(1) (2006)*). Congress intended in 1980 **[***15]** to "clarif[y] the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements." H.R. Rep. No. 96-1430, at 98-99 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. at 4130-31. In its *Rail Fuel Surcharges* decision, the Board said that *§ 10709* left the ICC with "no authority to regulate rail rates and services that are governed by a contract." *2007 WL 201205, at *10*.

Summarizing the Staggers Act's impact on the overall role of state law, the conference report said: "The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other *federal* statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." H.R. Rep. No. 96-1430, at 106 (emphasis added), *as reprinted in* 1980 U.S.C.C.A.N. at 4138. Discussing the new private contracts provision, the report noted, "The existing Federal antitrust laws apply to this section," see *id*. at 101, *as reprinted in* 1980 U.S.C.C.A.N. at 4133, suggesting **[***16]** by negative inference that state antitrust laws generally did not apply. By that stage, then, Congress had clearly preempted *state* regulation of rail transportation, *both* for ICC-regulated freight and freight moving under private contracts.

We then must consider whether any of the changes wrought by the ICCTA itself reduced the scope of Staggers Act preemption. They did not. ***HN6***[] The ICCTA did add the exclusive remedies clause to *§ 10501*, along with the caveat that it would apply "[e]xcept as otherwise provided in this part." But, as we said earlier, this provision was merely a reorganization of pre-1995 law, under which federal remedies with respect to rail transportation were already exclusive, subject to parties' rights to contract enforcement. H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. at 852 ("[S]ince 1980, former *section 10501(d)* and *11501(b)*, with respect to rail transportation, had already replaced the former standard of cumulative remedies with an exclusive Federal standard, in order to assure uniform administration of the regulatory standards of the Staggers Act."). Plaintiffs' view would require us to infer that the addition of the general "[e]xcept **[*450]** **[**219]** as otherwise **[***17]** provided in this part" clause somehow converted *§ 10709(c)(1)*'s *pre-existing* provision for private contracts into a new source of state regulatory authority. See *49 U.S.C. § 10709(c)(1) (2006)* (originally codified prior to amendment at *49 U.S.C. § 10713(i)(1) (1994)*). They offer no reason supporting such a transformation.

The ICCTA, to be sure, altered the context slightly, but entirely in a deregulatory direction, making it most improbable that Congress intended to invite state regulatory authority into the picture. First, Congress further narrowed the authority of the regulatory agency (now the STB) to regulate private contracts, principally by eliminating certain procedures that allowed rather limited challenges before the old ICC. See H.R. Rep. No. 104-422, at 174, *as reprinted in* 1995 U.S.C.C.A.N. at 859 (describing the eliminated procedures as "very limited and seldom utilized"). But ***HN7***[] there was no change in *§ 10709(c)*'s provision that contract rail transport "shall not be subject" to the provisions of the Act, meaning that the 1995 Act did not effect any substantive change on that score. See Pub. L. No. 104-88, § 102(a), 109 Stat. at 817 (codified at *49 U.S.C. § 10709(c)(1) (2006)*).

Further, **[***18]** ***HN8***[] in one respect Congress explicitly expanded the scope of preemption: it deleted from the exclusive jurisdiction clause any reference to ICC-certified state authorities and the associated certification procedures. See Pub. L. No. 96-448, § 214(c)(5), 94 Stat. at 1915 (originally codified at *49 U.S.C. § 10501(d) (1994)*, now codified as amended at *49 U.S.C. § 10501(b) (2006)*) ("The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and *section 11501(b)* of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive."). This of course was a *deregulatory* move--not, as plaintiffs would have us believe, an invitation to states to fill the regulatory void created by federal deregulation. See, e.g., S. Rep. No. 104-176, at 6 (1995) ("The bill would also eliminate Federal certification and review procedures for State regulation of intrastate rail transportation. However, nothing in this bill should be construed to authorize States to regulate **[***19]** railroads in areas where Federal regulation has been repealed by this bill.").

In short, the ICCTA left the exclusive jurisdiction clause in full force, supplementing it with the exclusive remedies clause and its explicit exception, expressly alluding to the pre-existing *§ 10709(c)*'s provision for contract actions.

* * *

Plaintiffs' fallback argument is that their state law claims do not involve "regulation of rail transportation" and therefore are not preempted by *§ 10501(b)*. The district court discussed the state law claims of each type as a general class without discussing any state-to-state differences among the laws, see *In re Rail Freight Fuel Surcharge Antitrust Litig., 593 F. Supp. 2d at 37-39*, and on appeal both parties have generally followed the same approach. We therefore treat the plaintiffs as having waived any argument that unique aspects of certain states' law governing consumer protection, unjust enrichment, or antitrust might compel a different result for a class of plaintiffs whose claims would be governed by such laws. We will proceed, as the parties have, on the assumption that any differences in individual states' laws are immaterial to the preemption analysis.

[*451] [220]** Plaintiffs **[***20]** correctly point out that ***HN9***[] the ICCTA does not preempt all state and local regulations. The circuits appear generally, for example, to find preemption of environmental regulations, or similar exercises of police powers relating to public health or safety, only when the state regulations are either discriminatory or unduly burdensome. See, e.g., *Adrian & Blissfield R.R. Co. v. Village of Blissfield, 550 F.3d 533, 539 (6th Cir. 2008)*; *Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643-44 (2d Cir. 2005)* (including risk of permitting delay in assessment of burden); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007)*; *Friberg v. Kansas City S. Ry. Co., 267 F.3d 439 (5th Cir. 2001)* (finding common law nuisance preempted); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001))*; cf. *City of Auburn v. U.S. Gov't, 154 F.3d 1025, 1030 (9th Cir. 1998)* (seeming to apply a broader preemption rule). Several of the cases, in addressing these environmental regulations, note that the ICCTA "does not preempt only explicit economic regulation." *N.Y. Susquehanna & W. Ry. Corp., 500 F.3d at 252*; see also *City of Auburn, 154 F.3d at 1030* (similar). **[***21]** By implication, such cases recognize that the core of ICCTA preemption is "economic regulation," which we take to refer to regulation of the relationship before us here, that of shippers and carriers.

Railroad-shipper transactions indeed pose a problem quite different from environmental regulation. As we have seen, ***HN10***[] *§ 10709(c)(1)* explicitly makes actions in state or federal court the "exclusive remedy for any alleged breach of a contract entered into under this section." This provision for conventional contract enforcement obviously is an "[e]xcept[ion] . . . otherwise provided in this part" contemplated by the exclusive remedies clause. And courts readily provide such remedies. See *PCS Phosphate Co. v. Norfolk S. Corp., 559 F.3d 212 (4th Cir. 2009)* (affirming contract enforcement); *PCI Transp., Inc. v. Fort Worth & W. R.R. Co., 418 F.3d 535, 545-46 (5th Cir. 2005)* (recognizing propriety of state law contract claim but denying relief on the merits).

By contrast, the circuits have found shippers' quests for non-contractual relief to be preempted as would-be invasions of the regulatory domain. Thus in *Port City Props. v. Union Pac. R.R., 518 F.3d 1186 (10th Cir. 2008)*, the court preserved **[***22]** a shipper's contract claim against a railroad for ceasing service on a spur but found its tort claim to be completely preempted by ICCTA. *Id. at 1188-91*. And in *G. & T. Terminal Packaging Co*., the court found that, for shipments exempted from regulation, the Staggers Act had completely preempted state common law remedies for railroad price discrimination among shippers. *830 F.2d at 1233-36*.

The legislative history supports the courts' refusal to let non-contract state law intrude into the statutorily preserved shipper-carrier remedies. As the House Report on ICCTA said, "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive." H.R. Rep. No. 104-311, at 95-96 (1995) (emphasis in original), *as reprinted in* 1995 U.S.C.C.A.N. 793, 808; see also H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. at 852 (noting that some criminal statutes are not preempted by the ICCTA "because they do not generally collide with the scheme of economic regulation (*and deregulation*) of rail transportation" (emphasis added)); H.R. Rep. **[***23]** No. 96-1430, at 105, *as reprinted in* 1980 U.S.C.C.A.N. at 4137 (noting that the Staggers Act "reaffirms that where the commission has withdrawn its jurisdiction **[*452]** **[**221]** to regulate, the State could not assume such jurisdiction"). [4] As the legislative comments quoted above make clear, ***HN11***[] Congress sought to avert the sort of frustration of its deregulatory purpose potentially inflicted by state rights and remedies outside the specifically preserved realm of contract breach.

Congress also recognized that enforcement of state law outside the contract realm could easily lead to balkanization, with shipments subject to fluctuating rules as they crossed state lines. As the House Report on ICCTA said: "Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No. 104-311, at 96, *as reprinted in* 1995 U.S.C.C.A.N. at 808. [5] State antitrust claims obviously present a risk of balkanized legal norms, a risk not posed by federal ***antitrust law***.

As pitched in this litigation, plaintiffs' state law claims would directly interfere with the ICCTA's deregulatory objectives. Plaintiffs left the basis for many of these claims unclear in their complaint, asserting only conclusorily that the defendants had violated various state laws. E.g., Indirect Purchasers' Consol. Am. Compl. P 155 (alleging, without further elaboration, that "[d]efendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of *New York Gen. Bus. Law § 349 et seq*.; and New York common law against restraints of trade"). But the legal theories plaintiffs have presented in briefing make clear that these claims are designed as a

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[4] This Report is addressed to the original Senate proposal, which explicitly stated the point made in the report with language omitted from the ultimate version, but that in other respects did not go *as far as* the ultimate version in curtailing state regulatory authority. Compare S. Rep. No. 96-470, at 77-78 (1979) (Senate proposing that the statute contain a subsection making clear that "[f]ederal withdrawal from certain areas of regulation shall not be construed as relinquishing Federal jurisdiction"), with H.R. Rep. No. 96-1430, at 106, *as reprinted in* 1980 U.S.C.C.A.N. at 4138 (discussing House proposals, all adopted in the final version, that "only State authorities whose standards and procedures have been certified by the **[***24]** Commission may exercise jurisdiction over intrastate rail," that "[d]ecisions of State authorities may be appealed to the Commission," and that "where the Interstate Commerce Act provides an exclusive remedy, such remedy is not in addition to remedies under another law or at common law").

[5] Although the House Report is addressing a bill that lacks **[***25]** the phrase "with respect to rail transportation," there is no reason to suppose that inclusion of that phrase in the final bill reflected a congressional embrace of balkanization.

means of getting the district court to apply state law to assess the substantive "fairness" of the contracts the railroads entered into, including with reference to the manner in which the rates were computed. See Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 982 (11th Cir. 2008) (suggesting that if necessary a district **[***26]** court may use Rule 12(c) motions and the parties' memoranda to make sense of plaintiffs' allegations).

Thus, plaintiffs relied extensively before the district court on the argument that the Board, in *Rail Fuel Surcharges*, the proceeding that addressed fuel surcharges applied to common carrier freight, had found aspects of the rate computation "unfair" or "unreasonable." See Indirect Purchase Pls.' Mem. Opp'n Defs.' Joint Mot. Dismiss 40 ("[T]he STB has already determined that the fuel surcharges at issue **[*453]** **[**222]** here are 'unreasonable,' 'misleading' and 'unfair' as contemplated by the consumer protection laws."); *id*. at 21 (describing this litigation as "seek[ing] recovery for conspiratorial and *unfair* overcharges" (emphasis added)); *id*. at 42 (characterizing the plaintiffs' claims as "challeng[ing] only the *unfair* and/or misleading nature of Defendants' fuel surcharges" (emphasis added)). And plaintiffs made no bones about their goal of extending the remedies that the STB ordered for *regulated* freight to freight over which Congress deliberately stripped the STB--*and states*--of any regulatory authority. See *id*. at 40 ("By raising consumer protection claims, Plaintiffs merely seek to enforce **[***27]** the STB's ruling . . . for claims arising in private contract."); *id*. at 29 ("[T]he court is asked only to enforce the STB's finding of unreasonableness such that Plaintiffs may obtain adequate redress.").

The law applicable to § 10709(c) contracts, of course, may involve state common law doctrines such as fraud and consideration, doctrines that will in some cases cause a contract to be negated or even modified. But whatever the circumstances in which unjust enrichment, consumer protection, or antitrust claims may be unpreempted, they do not include those before us, where those claims are advanced as a means of challenging the substantive *reasonableness* of the rates charged under private contracts.

We should say a few additional words about plaintiffs' state law antitrust claims, because plaintiffs make one argument against preemption unique to such claims: They point out that a provision of the ICCTA, by creating a rule of evidence applicable to state law antitrust suits (as well as to federal ones), arguably contemplates preservation of state antitrust actions. The statute provides: ***HN12***[] "In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or **[***28]** combination in violation of a Federal [***antitrust] law*** . . . *or of any similar State law*, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more rail carriers acted together with respect to an interline rate . . . [approved in accordance with § 10706(a)(2)]." 49 U.S.C. § 10706(a)(3)(B)(ii) (2006) (emphasis added). Plaintiffs also point to legislative history that seemed to contemplate the applicability of at least some ***antitrust law***. For example: "The Conference provision retains this general rule, while clarifying that [§ 10501(b)'s] exclusivity is limited to remedies with respect to rail regulation--not State and Federal law generally. For example, criminal statutes governing antitrust matters not pre-empted by this Act, and laws defining such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation." H.R. Rep. No. 104-422, at 167, *as reprinted in* 1995 U.S.C.C.A.N. 850, 852.

Although the question is not before us, there is nothing in our reasoning inconsistent with the notion that **[***29]** some *subset* of state or federal antitrust claims might permissibly be brought against railroads, for price-fixing or other violations. The relevant question is not whether all potential antitrust suits are preempted, but rather whether *this* antitrust suit, as formulated by the plaintiffs, impermissibly infringes the federal deregulatory interests in the ICCTA.

There has been a tension--and in federal ***antitrust law*** a radical change over time--between the goal of increasing consumer welfare in the economic efficiency sense and contrasting goals such as protecting small competitors or preventing the concentration of economic or political **[*454]** **[**223]** power without regard to economic efficiency. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993); Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp., 79 F.3d 182, 192 (1st Cir. 1996). It is far from clear that state ***antitrust law*** has, as a general matter, made the transition that has marked federal law. See, e.g., Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 73-74 (Free Press 1993) (1978) (describing the movement to "consumer welfare orientation" under federal ***antitrust law***); *id*. at 74-77 (discussing **[***30]** early U.S. Supreme Court cases striking down state antitrust laws in which liability turned on the unreasonableness of prices); Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow* Leegin?, *27 Franchise L.J. 173, 173 (2008)* (noting that even states generally following federal decisional law in antitrust matters typically "leave themselves an escape route if federal law varies from state statute or putative state policy goals").

Illinois Brick, which plaintiffs' suit expressly seeks to avoid, represents the Supreme Court's judgment that ***HN13***[] allowing plaintiffs to use an indirect purchaser theory offensively, while prohibiting defendants from using the theory defensively, "would create a serious risk of multiple liability for defendants," and "the possibility of inconsistent adjudications." *431 U.S. at 730*. *Illinois Brick* also rested on the proposition that full recovery for direct purchasers would generate more effective enforcement of the law. *Id. at 734-35*. Application of state laws rejecting *Illinois Brick* would jeopardize the federal interest in protecting railroad regulation from inefficient norms and balkanization.

We are presented in **[***31]** this case with an antitrust claim that was unambiguously concerned not just with strict "economic efficiency" but also with resurrecting in a different form state-level regulation of railroads, by inviting judicial supervision of the reasonableness and fairness of rates charged to shippers. Allowing state law antitrust claims of *this* nature would undermine the deregulatory and anti-balkanization policies underlying the ICCTA. We need not address imaginable state antitrust claims that might not run afoul of either of those congressional policies.

The judgment of the district court is

Affirmed.

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Golden Gate Pharm. Servs. v. Pfizer, Inc.

United States District Court for the Northern District of California

April 16, 2010, Decided; April 16, 2010, Filed

No. C-09-3854 MMC

Reporter
2010 U.S. Dist. LEXIS 47896 *; 2010-1 Trade Cas. (CCH) P76,988; 2010 WL 1541257

GOLDEN GATE PHARMACY SERVICES, INC., d/b/a GOLDEN GATE PHARMACY, et al., Plaintiffs, v. PFIZER, INC., and WYETH, Defendants

Subsequent History: Affirmed by *Golden Gate Pharm. Servs. v. Pfizer, Inc., 2011 U.S. App. LEXIS 10266 (9th Cir. Cal., May 19, 2011)*

Prior History: *Golden Gate Pharm. Servs. v. Pfizer, Inc., 2009 U.S. Dist. LEXIS 111862 (N.D. Cal., Dec. 2, 2009)*

Core Terms

products, pharmaceutical product, interchangeable, allegations, relevant market, consumer, markets, merger, motion to dismiss, price charged, pharmaceuticals, prescription, cognizable, therapies, antitrust, defendants', plaintiffs', substitutes, submarkets, commerce

Counsel: **[*1]** For Golden Gate Pharmacy Services, Inc., doing business as Golden Gate Pharmacy, R.Ph. James Clayworth, Marin Apothecaries, doing business as Ross Valley Pharmacy, Pediatric Care Pharmacy, Inc., Tony Mavrantonis, R.Ph, R.Ph. John O'Connell, Tilley Apothecaries Inc., doing business as Zweber's Apothecary, Plaintiffs: Angelina Alioto-Grace, Joseph M. Alioto, Joseph Michelangelo Alioto, Jr, Theresa Driscoll Moore, Thomas Paul Pier, Alioto Law Firm, San Francisco, Ca; Daniel R. Shulman, Julie Lynn Boehmke, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, MN; Gary Dean McCallister, Gary D. McCallister & Associates, LLC, Chicago, IL; James M. Dombroski, Attorney at Law, Petaluma, CA; Jeffery Kenneth Perkins, Law Offices of Jeffrey K. Perkins, San Francisco, CA; John Haslet Boone, Law Offices of John H. Boone, San Francisco, CA; Russell F. Brasso, Foreman & Brasso, San Francisco, CA.

For Pfizer, Inc., Defendant: Daniel A. Schiffer, John Clayton Everett, Jr., Scott A. Stempel, PRO HAC VICE, Morgan Lewis & Bockius LLP, Washington, DC; Franklin Brockway Gowdy, Kent Michael Roger, Lisa Tenorio-Kutzkey, Morgan Lewis & Bockius LLP, San Francisco, CA.

For Wyeth, Defendant: Franklin Brockway **[*2]** Gowdy, Kent M. Roger, Kent Michael Roger, Lisa Tenorio-Kutzkey, Robert Sturtevant Eaton, Morgan Lewis & Bockius LLP, San Francisco, CA; Joseph F. Tringali, PRO HAC VICE, Simpson Thacher & Bartlett LLP, New York, NY.

Judges: MAXINE M. CHESNEY, United States District Judge.

Opinion by: MAXINE M. CHESNEY

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Before the Court is defendants Pfizer Inc. and Wyeth's motion, filed January 22, 2010, to dismiss plaintiffs' Second Amended Complaint. Plaintiffs Golden Gate Pharmacy Services, Inc., James Clayworth, R.Ph., Marin Apothecaries, Pediatric Care Pharmacy, Inc., Tony Mavrantonis, R.Ph., John O'Connell, R.Ph., and Tilley Apothecaries, Inc. have filed opposition, to which defendants have replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows. [1]

BACKGROUND

In their Second Amended Complaint ("SAC"), plaintiffs allege that each defendant is "engaged, *inter alia*, in the research, development, manufacture, distribution, and sale of pharmaceuticals products" (*see* SAC PP 11, 13), and that defendants "consummated [a] merger" on October 15, 2009 (*see* SAC P 81). Plaintiffs further allege: "The effect of the combination may be to lessen competition or to tend to create a monopoly, and has already lessened competition and tended to create a monopoly, in numerous markets and submarkets . . . involving the manufacture and sale of pharmaceuticals and involving research, development, and innovation with respect to pharmaceuticals." (*See* SAC P 82.) Based on said allegations, plaintiffs assert a claim against defendants under Section 7 of the Clayton Act, *15 U.S.C. § 18*, and Section 1 of the Sherman Act, *15 U.S.C. § 1*.

LEGAL STANDARD

Dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* can be based **[*4]** on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. *Rule 8(a)(2)*, however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Fed. R. Civ. P. 8(a)(2)*). Consequently, "a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations." *See id*. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *See id*. (internal quotation, citation, and alteration omitted).

In analyzing a motion to dismiss, a district court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. *See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*. "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to **[*5]** relief that is plausible on its face.'" *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly, 550 U.S. at 555*. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *See Iqbal, 129 S. Ct. at 1950* (internal quotation and citation omitted); *see, e.g., Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047-48 (9th Cir. 2008)* (holding plaintiff who alleged "only ultimate facts" and "legal conclusions," rather than "evidentiary facts," failed to state claim under Sherman Act).

DISCUSSION

As noted, plaintiffs allege defendants' merger violates Section 7 of the Clayton Act and *Section 1* of the Sherman Act. Section 7 of the Clayton Act prohibits mergers or acquisitions "in any line of commerce or in any activity

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[1] By order filed March 11, 2010, the Court took the matter under submission. Plaintiffs' Motion to Request Oral Argument, filed March 15, 2010, is hereby DENIED for the reasons stated in defendants' opposition thereto, specifically, that all parties have had an adequate opportunity to submit their respective arguments in writing. **[*3]** *See, e.g., Partridge v. Reich, 141 F.3d 920, 926 (9th Cir. 1988)* (holding, in context of motion for summary judgment, "a district court can decide the issue without oral argument if the parties can submit their papers to the court").

affecting commerce in any section of the country, [where] the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." *See* 15 U.S.C. § 18. Section 1 of the Sherman Act provides that any "contract, combination . . ., or conspiracy, in restraint of trade or commerce" is "illegal." **[*6]** *See* 15 U.S.C. § 1.

In the SAC, plaintiffs allege that the merger has or will have "anticompetitive effects" in "the pharmaceutical market" and in "submarkets." (*See* SAC P 127.) Defendants argue that plaintiffs have failed to sufficiently allege a product market or market.

"***Antitrust law*** requires [an] allegation of both a product market and a geographic market." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 n.4 (9th Cir. 2008)*. [2] "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put," *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3rd Cir. 1997)* (noting "while there may be some degree of preference for the one over the other, either would work effectively") (internal quotation and citation omitted), while "[c]ross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers," *see id. at 438 n.6* (internal quotation **[*7]** and citation omitted); *see also White & White, Inc. v. American Hospital Supply Corp., 723 F.2d 495, 501 (6th Cir. 1983)* (holding "a product market is [] defined by 'reasonable interchangeability' as gauged by the interchangeability of other products for the same use, and by consumer sensitivity and response to price fluctuations among available substitutes"). In short, a cognizable product market consists of "commodities reasonably interchangeable by consumers for the same purposes." *See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

"[A] complaint may be dismissed under *Rule 12(b)(6)* if the complaint's 'relevant market' definition is facially unsustainable." *Newcal Indus., 513 F.3d at 1045* (citing *Queen City Pizza, 124 F.3d at 436-37*). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed **[*8]** relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza, 124 F.3d at 436*; *see, e.g., Tanaka v. University of Southern California, 252 F.3d 1059, 1063-64 (9th Cir. 2001)* (affirming dismissal of antitrust claims where plaintiff athlete identified product market as "UCLA women's soccer program" but failed to allege any facts to support "conclusory" assertion that such market existed); *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999)* (holding, where plaintiffs alleged existence of "product markets for lodging accommodations and ski packages" in Big Bear Valley, district court properly dismissed antitrust claims because plaintiffs failed to allege "there are no other goods or services that are reasonably interchangeable with lodging accommodations or ski packages within [the] geographic market" of Big Bear Valley).

Here, plaintiffs, in the SAC, identify the product market(s) as follows: "Defendants Pfizer and Wyeth compete in what they describe to be the pharmaceutical **[*9]** industry which includes, but is not necessarily limited to, the following submarkets: manufacture, sale and innovation of all pharmaceutical products, prescription pharmaceutical products, non-prescription pharmaceutical products, brand name pharmaceutical products and particular pharmaceutical products and therapies specifically noted and identified by Pfizer and Wyeth in their annual reports." (*See* SAC P 86.)

Plaintiffs fail to allege that all commodities sold by entities who compete in the "pharmaceutical industry" are reasonably interchangeable with one another, or that "all pharmaceutical products," all "prescription pharmaceutical products," all "non-prescription pharmaceutical products," or all "brand-name pharmaceuticals products" are reasonably interchangeable with one another. As the Court noted in its order dismissing the First Amended Complaint, with reference to plaintiffs' allegation included therein that all prescription drugs constituted a product

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[2] Plaintiffs allege that the "anticompetitive effects" of the merger will be felt "in the United States." (*See* SAC P 127.) Defendants have not argued that plaintiffs' allegation of a nationwide market is insufficient to allege a geographic market.

market, the Court cannot "simply assume that all prescription drugs are reasonably interchangeable for the same purposes, such that, for example, if the price of a prescription drug used to treat osteoporosis rises, consumers **[*10]** may react by switching to a prescription drug used to treat Alzheimer's disease." (*See* Order, filed December 2, 2009, at 5:1-5.)

Plaintiffs argue that they have sufficiently alleged "interchangeability, both in the pharmaceutical product markets and in the innovation market for pharmaceutical products." (*See* Pls.' Opp., filed February 5, 2010, at 15:3-4.) In support of such argument, plaintiffs rely on the following allegations in the SAC:

> The prices charged by Pfizer for its pharmaceutical products has a direct effect and impact on the prices charged by Wyeth for its products, whether they are direct substitutes or not.

(*See* SAC P 52.)

> The prices charged by Wyeth for its pharmaceutical products has a direct effect and impact on the prices charged by Pfizer for its products, whether they are direct substitutes or not.

(*See* SAC P 53.)

> Wyeth considers the prices charged by Pfizer for pharmaceutical products when Wyeth sets its prices for its pharmaceutical products, whether they be substitute therapies or not.

(*See* SAC P 54.)

> Pfizer considers the prices charged by Wyeth for pharmaceutical products when Pfizer sets its prices for its pharmaceutical products, whether they be substitute therapies **[*11]** or not.

(*See* SAC P 55.)

The above allegations, construed in the light most favorable to plaintiffs and assumed true at the pleading stage, would support a finding that, for example, the price Wyeth charges for a product intended for use to treat depression has some type of effect on the price charged by Pfizer for products intended for use to treat renal-cell carcinoma, or, as another example, a finding that before Wyeth, in determining the price at which Wyeth will sell a product intended for use to treat depression, first considers the price at which Pfizer is selling products that are intended for use to treat renal-cell carcinoma. Plaintiffs fail to allege, however, that any such pricing considerations have any bearing on consumer behavior, e.g., that a consumer who seeks to purchase a product for use to treat depression will react to a price change by purchasing a product used to treat renal-cell carcinoma. *See* *United States v. General Dynamics Corp., 341 F. Supp. 534, 555 (N.D. Ill. 1972)* ("Any definition of a line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful."), *aff'd*, *415 U.S. 486, 94 S. Ct. 1186, 39 L. Ed. 2d 530 (1974)*. Consequently, the **[*12]** Court finds the above-quoted allegations on which plaintiffs rely are insufficient to support a finding that "all pharmaceutical products," all "prescription pharmaceutical products," all "non-prescription pharmaceutical products," and all "brand name pharmaceutical products" constitute cognizable product markets for purposes of plaintiffs' antitrust claims. *See* *Apple Inc. v. Psystar Corp., 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008)* ("Whether products are part of the same or different markets under ***antitrust law*** depends on whether consumers view those products as reasonable substitutes for one another and would switch among them in response to changes in relative prices[.]");

As noted, plaintiffs, in the SAC, also identify, as a product market or markets, "particular pharmaceutical products and therapies specifically noted and identified by Pfizer and Wyeth in their annual reports." (*See* SAC P 86.) The SAC does not state, however, what "particular" products or therapies were so identified in defendants' respective annual reports. In any event, plaintiffs fails to allege that any such products or therapies are, from the point of view of the buyers thereof, reasonably interchangeable. **[*13]** Consequently, plaintiffs' conclusory reference to the existence of "particular pharmaceutical products and therapies" is insufficient to allege a cognizable product market or markets. *See* *Queen City Pizza, 124 F.3d at 436* (holding where "plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand," complaint is subject to dismissal). [3]

To the extent plaintiffs allege there exists or existed "actual or potential competition between Pfizer and Wyeth" with respect to various "products," such allegations likewise are insufficient to plead a claim. In connection with such allegation, plaintiffs list the following: "'other primary' pharmaceutical products"; "'urological' products"; "'central nervous system' products"; "'cardiovascular' products"; "'capsugel' products"; "'oncological' products"; "'animal health' products"; "'consumer' products"; "'nutritional' products"; "'inflammation' products"; "'infectious disease' products"; and "'other specialty' products." (*See* SAC PP 39-50.) [4] No further allegations concerning any such "products" are provided by plaintiffs, and, again, plaintiffs fail to allege that the goods included within any such described category, e.g., all "'consumer' products" or all "'infectious disease' products," are reasonably interchangeable by buyers. Accordingly, such references in the SAC, if intended **[*15]** by plaintiffs to identify product markets or submarkets, are insufficient to state a claim.

Finally, plaintiffs argue that if the Court were to find the instant pleading is subject to dismissal, such a ruling would run counter to five Supreme Court decisions, each of which decisions, according to plaintiffs, "enjoined a merger where the market share pales in comparison to the market share at issue in defendants' merger." (*See* Pls.' Opp. at 23:14-15.) As defendants correctly observe, however, the issue of "market share" can only be addressed after a cognizable product market has been identified. *See* *United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593, 77 S. Ct. 872, 1 L. Ed. 2d 1057 (1957)* ("Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be **[*16]** determined only in terms of the market affected.").

Indeed, to the extent the cases cited by plaintiffs address the issue of product market, the Supreme Court, before considering whether the merger at issue therein should have been enjoined, first identified the alleged product market, and then considered whether the commodities or services at issue were reasonably interchangeable by the purchasers of such commodities or services. *See* *United States v. Aluminum Co. of America, 377 U.S. 271, 276-77, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964)* (finding relevant product market consisted of both "bare and insulated aluminum conductor products," where "[b]oth types [were] used for the purpose of conducting electricity and [were] sold to the same customers, electrical utilities"); *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 335, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)* (finding personal loans provided by "small-loan companies" and personal loans provided by "commercial banks" were not reasonably interchangeable, because "small-loan companies' rates are invariably much higher than the banks"); *Brown Shoe Co., 370 U.S. at 297-99, 326* (affirming district court's finding that, when examining propriety of merger between manufacturers of shoes, relevant "lines **[*17]** of commerce" were "product lines" of men's, women's and children's shoes, as opposed to "footwear" or "shoes as a whole"). [5]

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[3] In their First Amended Complaint ("FAC"), plaintiffs alleged that separate product markets exist for the manufacture and sale of drugs to treat Alzheimer's disease, renal-cell carcinoma, and Methicillin-resistant Staphylococcus aureus infections (*see* FAC PP 17(f), 17(h)-(i), 27-28), for the research and development of new drugs to treat osteoporosis and to treat Alzheimer's disease (*see* FAC PP 17(e), 17(g), 29-30), for brand name antidepressants, anti-bacterials, and anti-neoplastics (*see* FAC PP 17(j)-(l), 24-26), and for the manufacture and sale of drugs to treat specified animal diseases or conditions, such as "canine monovalent vaccines for the prevention and treatment of disease caused by parvovirus" and "equine tapeworm parasiticides containing praziquantel" (*see* **[*14]** FAC PP 21(m), 31, Ex. A P 7). Plaintiffs, however, did not include such allegations in the SAC, and, consequently, the Court does not consider whether such alleged product markets would be cognizable.

[4] Plaintiffs attribute the descriptions of such products, e.g., "other primary," "capsugel," and "nutritional," to Pfizer. (*See* SAC PP 39, 43, 47.) Plaintiffs do not allege the circumstances under which, or the context in which, such descriptions were used.

[5] The other two Supreme Court cases on which plaintiffs rely contain no discussion with respect to the product markets identified therein. *See* *United States v. Pabst Brewing Co., 384 U.S. 546, 548, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966)* (noting plaintiff had alleged merger at issue would have anticompetitive effect in market for "the production and sale of beer," and deciding whether plaintiff had established geographic market); *United States v. Von's Grocery Co., 384 U.S. 270, 271, 278, 86 S. Ct. 1478, 16 L.*

In sum, plaintiffs have failed to sufficiently allege the existence of a cognizable product market, because plaintiffs have failed to allege, even as a legal conclusion, let alone with the requisite "evidentiary facts," *see* *Kendall, 518 F.3d at 1047-48*, that any of the alleged markets or submarkets identified in the SAC consists of products reasonably interchangeable by consumers. Consequently, the SAC is subject to dismissal. *See* ***[*18]*** *id. at 1045* (holding antitrust complaint subject to dismissal where "complaint's 'relevant market' definition is facially unsustainable"); *Queen City Pizza, 124 F.3d at 436* (holding "relevant market is legally insufficient and a motion to dismiss may be granted," where "plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand").

CONCLUSION

For the reasons discussed above, defendants' motion to dismiss the Second Amended Complaint is hereby GRANTED, and the Second Amended Complaint is hereby DISMISSED.

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: April 16, 2010

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge

End of Document

Ed. 2d 555 (1966) (deciding, where market identified as "retail grocery market in the Los Angeles area," whether evidence demonstrated "competition would [] be destroyed" if merger not enjoined).

Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.

United States Court of Appeals for the Third Circuit

January 27, 2010, Argued; April 16, 2010, Filed

No. 08-1693, No. 08-1694

Reporter

602 F.3d 237 *; 2010 U.S. App. LEXIS 7894 **; 2010-1 Trade Cas. (CCH) P76,976

HOWARD HESS DENTAL LABORATORIES INCORPORATED and PHILIP GUTTIEREZ d/b/a DENTURES PLUS, on behalf of themselves and all others similarly situated, Appellants v. DENTSPLY INTERNATIONAL, INC. JERSEY DENTAL LABORATORIES, f/k/a Howard Hess Dental Laboratories Incorporated and PHILIP GUTTIEREZ, d/b/a Dentures Plus, on behalf of themselves and all others similarly situated, Appellants v. DENTSPLY INTERNATIONAL, INC.; ACCU BITE, INC.; ADIUM DENTAL PRODUCTS, INC.; ARNOLD DENTAL SUPPLY COMPANY; ATLANTA DENTAL SUPPLY COMPANY; BENCO DENTAL COMPANY; BURKHART DENTAL SUPPLY COMPANY; DARBY DENTAL LABORATORY SUPPLY CO., INC.; DENTAL SUPPLIES AND EQUIPMENT, INC.; EDENTALDIRECT.COM, INC., as successor to Crutcher Dental, Inc., d/b/a Larry Hyman, as Assignee for the Benefit of Creditors of EdentalDirect.Com, Inc.; HENDON DENTAL SUPPLY, INC.; HENRY SCHEIN, INC., and its affiliates including, without limitation, Zahn Dental Co., Inc.; IOWA DENTAL SUPPLY CO.; JAHN DENTAL SUPPLY COMPANY; JB DENTAL SUPPLY CO., INC.; JOHNSON & LUND CO., INC.; KENTUCKY DENTAL SUPPLY COMPANY, INC., a/k/a KDSC Liquidation Corp.; MARCUS DENTAL SUPPLY CO.; MOHAWK DENTAL CO., INC.; NOWAK DENTAL SUPPLIES, INC.; PATTERSON DENTAL COMPANY, its subsidiaries, predecessors, successors, assigns, affiliates and related companies; PEARSON DENTAL SUPPLIES, INC.; ZILA, INC., as successor to Ryker Dental of Kentucky, Inc.

Prior History: [1]** On Appeal from the United States District Court for the District of Delaware. (D.C. Nos. 1-99-cv-00255 and 1-01-cv-00267). District Judge: Honorable Sue L. Robinson.

Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., 2008 U.S. Dist. LEXIS 1487 (D. Del., Jan. 8, 2008)
Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., 516 F. Supp. 2d 324, 2007 U.S. Dist. LEXIS 71563 (D. Del., 2007)

Core Terms

Dealers, district court, conspiracy, Plaintiffs', injunction, antitrust, Dental, damages, amended complaint, injunctive relief, monopolize, Counts, summary judgment, allegations, teeth, summary judgment motion, specific intent, artificial, lost profits, anti trust law, anticompetitive, laboratories, coconspirator exception, prices, cases, reconsideration, circumstances, monopoly, parties, collateral estoppel

LexisNexis® Headnotes

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

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

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

Appellate review of a district court's denial of summary judgment is plenary. The appellate court applies the same test the district court should have used.

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

HN2[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is appropriate when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

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

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a denial of a motion for reconsideration for abuse of discretion, but reviews a district court's underlying legal determinations de novo and factual determinations for clear error.

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

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

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

Appellate review of a district court's dismissal under *Fed. R. Civ. P. 12(b)(6)* is plenary.

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

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

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

HN5[] **Regulated Practices, Private Actions**

While antitrust claims are subject to the notice-pleading standard of *Fed. R. Civ. P. 8(a)(2)*, such claims must allege facts sufficient to raise a right to relief above the speculative level. That is, the complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] Scope, Monopolization Offenses

Section 2 of the Sherman Act imposes liability on every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states. 15 U.S.C.S. § 2.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN7[] Private Actions, Sherman Act

A private party may pursue injunctive relief against threatened loss or damage stemming from a violation of § 2 of the Sherman Act, 15 U.S.C.S. § 2. 15 U.S.C.S. § 26.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN8[] Remedies, Injunctions

To meet their initial summary judgment burden on their claim for injunctive relief for an alleged Sherman Act violation, the plaintiffs must show (1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust violation. The initial question is whether the plaintiffs have raised a genuine issue of material fact sufficient to show a threat of antitrust injury if the defendant engages in future violations of the type alleged. In other words, to meet their burden the plaintiffs must demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

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

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

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

HN9[] Standards of Review, Abuse of Discretion

Because the applicability vel non of collateral estoppel is a question of law, an appellate court ordinarily exercise plenary review over a district court's collateral estoppel analysis. However, where a plaintiff seeks to collaterally estop a defendant from relitigating an issue from previous litigation in which the defendant was a party but the plaintiff was not, appellate review is limited to deciding whether the district court abused its discretion.

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

HN10[] Estoppel, Collateral Estoppel

Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. The following four elements are required for the doctrine to apply: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action.

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

HN11[] Estoppel, Collateral Estoppel

The application of collateral estoppel is inappropriate if any one element is not met.

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

HN12[] Estoppel, Collateral Estoppel

If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded by collateral estoppel. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

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

HN13[] Estoppel, Collateral Estoppel

In determining whether an issue was essential to the judgment for purposes of collateral estoppel, a court must look to whether the issue was critical to the judgment or merely dicta.

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

HN14[] Private Actions, Remedies

The law is clear that public and private antitrust injunctions may coexist without regard for one another.

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

HN15[] Private Actions, Remedies

A trial court faced with an injunction request may factor into its equitable analysis the effect of another injunction on a private plaintiff's showing of antitrust injury.

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

Evidence > Burdens of Proof > Allocation

HN16[] **Private Actions, Remedies**

A plaintiff bears the obligation of presenting evidence demonstrating antitrust injury even where another injunction is already in place.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN17[] **Entitlement as Matter of Law, Legal Entitlement**

A party moving for summary judgment must clear two hurdles to meet its initial burden. It must show that (1) there are no genuine questions of material fact; and (2) the party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN18[] **Relief From Judgments, Altering & Amending Judgments**

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Newly Discovered Evidence

HN19[] **Relief From Judgments, Altering & Amending Judgments**

"New evidence," for reconsideration purposes, does not refer to evidence that a party obtains or submits to the court after an adverse ruling. Rather, new evidence in this context means evidence that a party could not earlier submit to the court because that evidence was not previously available.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN20[] **Sherman Act, Claims**

A Sherman Act *§ 2*, *15 U.S.C.S. § 2*, conspiracy claim has four elements: (1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the conspiracy and the injury alleged.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN21[] **Sherman Act, Claims**

A plaintiff asserting a Sherman Act *§ 1*, *15 U.S.C.S. § 1*, claim must allege four elements: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN22[] **Sherman Act, Claims**

Sherman Act *§ 1*, *15 U.S.C.S. § 1*, claims are limited to combinations, contracts, and conspiracies, and thus always require the existence of an agreement.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN23[] **Sherman Act, Claims**

Sherman Act *§ 2*, *15 U.S.C.S. § 2*, claims do not require an agreement except where the specific charge is conspiracy to monopolize.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN24[] **Sherman Act, Claims**

To allege an agreement between two or more persons or entities for purposes of Sherman Act claims for conspiracy to restrain trade and conspiracy to monopolize, a plaintiff must allege facts plausibly suggesting a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN25[] **Sherman Act, Claims**

A hub-and-spoke conspiracy under the Sherman Act involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes.

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN26[] **Pleadings, Complaints**

While pleading in the alternative is authorized by the Federal Rules of Civil Procedure, *Fed. R. Civ. P. 8(a)(3)*, courts have an obligation to read allegations not in isolation but as a whole and in context.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN27[] **Conspiracy to Monopolize, Elements**

Specific intent is an essential element of a conspiracy to monopolize claim. It means an intent which goes beyond the mere intent to do the act. In other words, a defendant must have intended to achieve an illegal monopoly.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN28[] **Sherman Act, Claims**

Specific intent in the antitrust context may be inferred from a defendant's unlawful conduct.

Antitrust & Trade Law > General Overview

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

HN29[] **Antitrust & Trade Law**

It is an axiom of ***antitrust law*** that merely saying so does not make it so for pleading-sufficiency purposes.

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

HN30[] **Complaints, Requirements for Complaint**

A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

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

HN31[] **Reviewability of Lower Court Decisions, Preservation for Review**

In the U.S. Court of Appeals for the Third Circuit, issues that are not specifically presented to the district court ordinarily are waived on appeal. It is true that the court of appeals has the discretionary power to address issues that have been waived, and it sometimes exercise that power when prompted by exceptional circumstances.

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

HN32[] **Reviewability of Lower Court Decisions, Preservation for Review**

The doctrine of waiver does not serve as a surprise-avoidance mechanism alone. It ensures that a particular issue is given a full airing, permitting each party to present its views and the trial court to make an initial determination. Most important, the doctrine allows the appellate court to review both those views and that determination in arriving at its own considered judgment.

Counsel: Thomas A. Dubbs (Argued), Richard Joffe, Labaton Sucharow, New York, NY, Counsel for Appellants.

Eric J. McCarthy, Margaret M. Zwisler (Argued), Latham & Watkins, Washington, DC, Counsel for Dentsply International, Inc.

Walter H. Drane, Jr., Potter, Anderson & Corroon, Wilmington, DE, Counsel for Accu Bite, Inc., Hendon Dental Supply, Inc., and Henry Schein, Inc.

Dorothy A. Hickok, Paul H. Saint-Antoine (Argued), Drinker, Biddle & Reath, Philadelphia, PA; Darryl A. Parson, Drinker, Biddle & Reath, Wilmington, DE, Counsel for Benco Dental Co.

Patricia L. Enerio, Proctor Heyman, Wilmington, DE, Counsel for Burkhart Dental Supply Co.

Henry E. Gallagher, Jr., Connolly, Bove, Lodge & Hutz, Wilmington, DE, Counsel for Darby Dental Laboratory Supply Co., Inc.

Antoinette D. Hubbard, James J. Maron, Maron, Marvel, Bradley & Anderson, Wilmington, DE, Counsel for Pearson Dental Supplies, Inc.

William J. Wade, Richards, Layton & Finger, Wilmington, DE; Margaret M. Zwisler, Latham & **[**2]** Watkins, Washington, DC, Counsel for Patterson Dental Company.

C. Scott Reese, Cooch & Taylor, Wilmington, DE, Counsel for JB Dental Supply Co., Inc.

Judges: Before: FUENTES and FISHER, Circuit Judges, and DIAMOND, * District Judge.

Opinion by: FISHER

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* Honorable Paul S. Diamond, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Opinion

[*243] OPINION OF THE COURT

FISHER, *Circuit Judge*.

These two antitrust cases, brought by two dental laboratories against an artificial tooth manufacturer and many of its dealers, are before us for the second time. In the first of the two cases, we must decide whether the District Court properly denied the plaintiffs' motion for summary judgment on their monopolization claim against the manufacturer as well as the Court's denial of the plaintiffs' motion for reconsideration of its summary judgment ruling and subsequent dismissal of their complaint. In the second case, we must decide whether the District Court properly dismissed the plaintiffs' conspiracy to restrain trade and conspiracy to monopolize claims against both the manufacturer and its dealers for failure to state a claim. Although for slightly different reasons than those articulated by the **[**3]** District Court, we agree with the District Court's conclusions and will affirm its rulings.

I.

These appeals arise from two related antitrust cases filed in the United States District Court for the District of Delaware: *Howard Hess Dental Laboratories, Inc. v. Dentsply International, Inc*. ("*Hess*") and *Jersey Dental Laboratories v. Dentsply* ***[*244]*** *International, Inc*. ("*Jersey Dental*"). [1] Because we set forth the factual background of both cases in great detail in a prior appeal, *see Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363 (3d Cir. 2005)* ("*Hess I*"), we recite here only those facts required for the resolution of this appeal.

The plaintiffs in both cases are two dental laboratories (referred to in this opinion as the "Plaintiffs"). One of the defendants in both *Hess* and *Jersey Dental*, Dentsply International, Inc., manufactures artificial teeth, among other things, which it sells to the Plaintiffs and other laboratories through a network of authorized dealers (referred to in this opinion as the "Dealers"), several of which are named defendants only in *Jersey Dental*. The Plaintiffs **[**4]** use Dentsply's artificial teeth to make dentures. In both cases, the Plaintiffs essentially allege that Dentsply "foreclosed its competitors' access to [D]ealers by explicitly agreeing with some [D]ealers that they will not carry certain competing brands of teeth and by inducing other [D]ealers not to carry those competing brands of teeth" and that Dentsply, "by agreement [with] its [D]ealers, . . . set[] the [D]ealers' resale prices." *Hess I, 424 F.3d at 367*. In so doing, the Plaintiffs allege, Dentsply "caused [the] Plaintiffs to purchase Dentsply's teeth at artificially high prices and lose profits from unrealized sales of Dentsply's competitors' teeth." *Id*.

The Plaintiffs brought the *Hess* suit against Dentsply in 1999, alleging several antitrust conspiracies and seeking both monetary and injunctive relief. The District Court granted Dentsply's subsequent motion for summary judgment on the Plaintiffs' damages claim, concluding that the Plaintiffs lacked standing under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In 2001, the Plaintiffs brought the *Jersey Dental* suit against Dentsply as well as several of its Dealers, again alleging several antitrust conspiracies and again **[**5]** asking for damages and injunctive relief, and the District Court again dismissed the Plaintiffs' damages claims on the basis of *Illinois Brick*. The District Court also denied the Plaintiffs' motion for leave to amend their complaint, concluding that the proposed amendment would be futile. The Plaintiffs thereafter brought an interlocutory appeal in this Court.

On appeal, we affirmed in part and reversed in part. *Hess I, 424 F.3d 363*. We held that in *Hess* the Plaintiffs could not recover damages under a coconspirator exception or a control exception to *Illinois Brick* and could not recover non-overcharge damages. In *Jersey Dental*, we held that the Plaintiffs did not have statutory standing to recover lost profits damages but that they did have statutory standing to recover damages from Dentsply for its alleged price-fixing conspiracy with its Dealers. While we adopted a "limited" general coconspirator exception to *Illinois Brick*, we found that exception inapplicable to the Plaintiffs, and thus concluded that they could not pursue damages under the coconspirator exception. *Hess I, 424 F.3d at 383-84*. In summary, we held that the Plaintiffs could not

[1] These cases were brought as putative class actions but have never been certified as such.

recover any damages in *Hess* and most **[**6]** damages in *Jersey Dental*. We concluded that the Plaintiffs did have standing under the coconspirator exception for overcharge damages "caused by the alleged retail price-fixing conspiracy, although not for the alleged exclusive-dealing conspiracy." *Id. at 384* (footnote omitted).

On remand, the Plaintiffs filed a five-count amended complaint in *Jersey Dental*. **[*245]** In Count One, they re-alleged their conspiracy to restrain trade claim under *Section 1 of the Sherman Act*. Counts Two and Three asserted conspiracies to monopolize under *Section 2 of the Sherman Act* against the Dealers and Dentsply, respectively. Count Two sought damages as well as injunctive and declaratory relief while Count Three sought only injunctive and declaratory relief. Counts Four and Five asserted conspiracies to restrain trade under *Section 1 of the Sherman Act* against the Dealers and Dentsply, respectively, again seeking both damages as well as injunctive relief as to the Dealers and only injunctive and declaratory relief as to Dentsply. Motion practice ensued. In *Jersey Dental*, the Dealers moved to dismiss Counts Two and Four of the amended complaint under *Federal Rule of Civil Procedure 12(b)(6)*, as did Dentsply as **[**7]** to Counts Three and Five. In *Hess*, the Plaintiffs moved for summary judgment on their monopolization claim under *Section 2 of the Sherman Act* against Dentsply. The District Court denied the Plaintiffs' summary judgment motion in *Hess* and granted both the Dealers' and Dentsply's respective motions to dismiss in *Jersey Dental*, and dismissed Counts Two through Five of the amended complaint. [2] *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., 516 F. Supp. 2d 324 (D. Del. 2007)* ("*Howard Hess I*").

The Plaintiffs in *Hess* subsequently filed what they styled as a motion to supplement the record and to amend the District Court's summary judgment ruling, asking for permission to provide the District Court with evidence to show the existence of anticompetitive injury. Meanwhile, in *Jersey Dental* the Plaintiffs moved for certification of appealability of the District Court's dismissal of their claims in the amended complaint. In ruling on the motion to amend **[**8]** and the motion for certification, *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc., Nos. 99-255 & 01-267, 2008 U.S. Dist. LEXIS 1487 (D. Del. Jan. 8, 2008)* ("*Howard Hess II*"), the District Court construed the motion to amend as one for reconsideration and denied it, finding that the Plaintiffs' proposed evidence was not relevant. The District Court granted the motion for certification and certified for appeal the dismissal of Counts Two through Five of the amended complaint in *Jersey Dental*. The District Court in *Hess* noted that "the parties, through their litigation strategies, have made it awkward procedurally to close the case for purposes of appellate review, Dentsply having failed to file either a motion to dismiss or a motion for summary judgment." *Howard Hess II, 2008 U.S. Dist. LEXIS 1487, at *13-14*. The Court therefore "order[ed] the parties to either enter a stipulation or, if they are unable to come to agreement, to both submit proposed orders to accomplish closure of *Hess*, either through dismissal or through the entry of judgment." *Id. at *14*. In response to the District Court's order, Dentsply moved for the dismissal of the *Hess* complaint. The Plaintiffs opposed **[**9]** that motion but, to "accommodate" an appeal as they put it, echoing the District Court's directive, submitted a proposed order dismissing the complaint with prejudice. The District Court approved that order and dismissed the complaint in *Hess*.

The Plaintiffs have filed timely notices of appeal in both cases. In *Hess*, they challenge the District Court's denial of **[*246]** their summary judgment motion on Count Two's monopolization claim, denial of their motion for reconsideration, and dismissal of their complaint. In *Jersey Dental*, they challenge the District Court's various grounds for dismissal of Counts Two through Five for failure to state a claim.

II.

The District Court had jurisdiction under *28 U.S.C. § 1331* and we have jurisdiction under *28 U.S.C. § 1291*.

HN1[] Our review of the District Court's denial of summary judgment is plenary. *Chambers v. Sch. Dist. of Phila. Bd. of Educ., 587 F.3d 176, 181 (3d Cir. 2009)*. We apply the same test the District Court should have used. *Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co. of Md., 989 F.2d 635, 637 (3d Cir. 1993)*. ***HN2***[] Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that

[2] The District Court also granted the motions of several of the Dealers in *Jersey Dental* to dismiss the amended complaint for lack of personal jurisdiction and improper venue. That portion of the District Court's ruling is not at issue here.

there **[**10]** is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

HN3[] We review a denial of a motion for reconsideration for abuse of discretion, but we review the District Court's underlying legal determinations de novo and factual determinations for clear error. *Max's Seafood Cafe v. Quinteros, 176 F.3d 669, 673 (3d Cir. 1999)*.

HN4[] Our review of the District Court's dismissal under *Rule 12(b)(6)* is plenary. *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co., 579 F.3d 304, 307 (3d Cir. 2009)*. ***HN5***[] While "[a]ntitrust claims . . . are subject to the notice-pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, . . . [s]uch claims must . . . allege facts sufficient to raise a right to relief above the speculative level." *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 317 (3d Cir. 2007)* (citations omitted). That is, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual **[**11]** content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly, 550 U.S. at 556*).

III.

Our analysis is bifurcated. We begin with the District Court's rulings in *Hess* and turn next to its rulings in *Jersey Dental*.

A. *Hess*

1. Denial of the Motion for Summary Judgment

In *Hess*, Count Two of the Plaintiffs' complaint asserted a monopolization claim in violation of *Section 2 of the Sherman Act* and sought an injunction essentially to prevent Dentsply from both imposing exclusive dealing agreements on the Dealers and retaliating against those Dealers that do not submit to Dentsply's demands.

HN6[] *Section 2 of the Sherman Act* imposes liability on "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States[.]" *15 U.S.C. § 2*. ***HN7***[] A private party may pursue injunctive relief against "threatened loss or damage" stemming from a violation of *Section 2*. *15 U.S.C. § 26*. ***HN8***[] To meet their initial summary judgment **[*247]** burden on their claim for injunctive relief, the Plaintiffs had to show "(1) threatened loss or injury **[**12]** cognizable in equity; (2) proximately resulting from the alleged antitrust violation." *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856 (3d Cir. 1996)* (citations omitted). "[T]he initial question is . . . 'whether [the Plaintiffs] ha[ve] raised a genuine issue of material fact sufficient to show a threat of antitrust injury' if [Dentsply] engage[s] in future violations of the type alleged." *B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 439 F.3d 653, 668 (10th Cir. 2006)* (quoting *R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 107 (2d Cir. 1989))*. In other words, to meet their burden the Plaintiffs had to "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (citations omitted).

The Plaintiffs sought to meet their burden primarily by relying on the doctrine of collateral estoppel and this Court's decision in *United States v. Dentsply International, Inc., 399 F.3d 181 (3d Cir. 2005)* ("*Dentsply*" or the "Government Case"). There the United States sued Dentsply for monopolization in violation of *Section 2*. This **[**13]** Court reversed the district court's post-trial judgment for Dentsply and remanded with instructions to grant the injunctive relief sought by the government. *Id. at 197*. We concluded that Dentsply both possessed monopoly power in the artificial tooth market and had used that power to foreclose competition. *Id. at 196*. Our conclusion was predicated primarily on Dentsply's adoption of "Dealer Criterion 6," a policy that prohibited dealers from "add[ing] further tooth lines [other than those purchased from Dentsply] to their product offering" and that was enforced against most Dealers. *Id. at 185* (quotation marks omitted).

In their summary judgment motion in *Hess*, the Plaintiffs argued that our holding in the Government Case that Dentsply had engaged in anticompetitive practices compelled an inference of antitrust injury to the Plaintiffs. The District Court disagreed, concluding that while such an inference was certainly plausible, a determination of injury-in-fact to the Plaintiffs was not necessary to our decision in the Government Case. As a consequence, the District Court found that collateral estoppel did not apply. [3]

HN10[] Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)* (citations omitted). The following four elements are required for the doctrine to apply: "(1) the identical **[**15]** issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous **[*248]** determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Szehinskyj v. Attorney Gen. of the United States, 432 F.3d 253, 255 (3d Cir. 2005)* (citation omitted).

For interrelated reasons, we do not find that any of the first three elements required for collateral estoppel is met here. But most significantly, we do not find that the third element is satisfied. *See Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461, 475, 37 V.I. 526 (3d Cir. 1997)* (***HN11***[] "the application of collateral estoppel is inappropriate" if any one element is not met). The Restatement describes that element as follows:

> ***HN12***[] If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if **[**16]** adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.

Restatement (Second) of Judgments § 27 cmt. h (1982). ***HN13***[] "[I]n determining whether the issue was essential to the judgment, we must look to whether the issue was critical to the judgment or merely dicta." *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n, 288 F.3d 519, 527 (3d Cir. 2002)* (internal quotation marks and citation omitted).

Applying these standards to this case, we do not find that any inference of anticompetitive injury to the Plaintiffs was essential to our determination that Dentsply had committed an antitrust violation. The Plaintiffs' claim for injunctive relief hinges on whether they have established antitrust injury. To establish as much, they had to show injury "of the type the antitrust laws were designed to prevent and that flows from that which makes [Dentsply's] acts unlawful." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. In the Government Case, we had to decide, in relevant part, whether Dentsply's conduct was anticompetitive. To that end, our analysis had two **[**17]** focal points: first, whether Dentsply possessed monopoly power; and second, whether Dentsply used that power to edge out competition. *See Dentsply, 399 F.3d at 186-87*. Our finding that Dentsply's conduct led to price increases in the relevant market did not require us to find that anyone other than Dentsply's competitors was injured. Put another way, we did not need to conclude that any upstream purchasers, such as the Plaintiffs, were threatened with injury. Simply because such a conclusion may be gleaned from the Government Case does not mean that it was essential to our holding. *Cf. Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1183 (3d Cir. 1972)* ("[P]arties should be estopped only on issues they actually deem important, and not on

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[3] ***HN9***[] Because the applicability *vel non* of collateral estoppel is a **[**14]** question of law, we ordinarily exercise plenary review over a district court's collateral estoppel analysis. *See Cospito v. Attorney Gen. of the United States, 539 F.3d 166, 171 (3d Cir. 2008)* (per curiam); *Delaware River Port Auth. v. Fraternal Order of Police, 290 F.3d 567, 572 (3d Cir. 2002)*. However, where, as here, a plaintiff seeks to collaterally estop a defendant from relitigating an issue from previous litigation in which the defendant was a party but the plaintiff was not, our review is limited to deciding whether the district court abused its discretion. *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 248 (3d Cir. 2006)*; *Smith v. Holtz, 210 F.3d 186, 199 n.18 (3d Cir. 2000)*; *Raytech Corp. v. White, 54 F.3d 187, 190 (3d Cir. 1995)*.

incidental matters."). Under these circumstances, the District Court did not abuse its "broad discretion" in concluding that Dentsply should not be precluded from defending itself against the Plaintiffs' claim for injunctive relief. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

In addition to declining to collaterally estop Dentsply, the District Court concluded that the Plaintiffs did not meet their summary judgment **[**18]** burden because they **[*249]** made no showing of antitrust injury. The Court reasoned that because the Government Case injunction already prohibited Dentsply from pursuing the very conduct that gave rise to the Plaintiffs' claim, the Plaintiffs had to "demonstrate a need for further, non-duplicative measures to those already in place." *Howard Hess I, 516 F. Supp. 2d at 335* (footnote omitted). In the District Court's view, the Plaintiffs failed to present any evidence of a threat of future injury and therefore fell short of that mark.

In *United States v. Borden Co., 347 U.S. 514, 74 S. Ct. 703, 98 L. Ed. 903 (1954)*, the Supreme Court held that a private litigant's award of an antitrust injunction against a defendant does not operate as a bar to the government's right to pursue its own injunction against the same defendant, explaining that the injunctive relief afforded private litigants "supplements government enforcement of the antitrust laws" and that private and public antitrust injunctions "were designed to be cumulative, not mutually exclusive." *Id. at 518* (citations omitted); *see also id. at 519* ("Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other. In short, **[**19]** the Government's right and duty to seek an injunction to protect the public interest exist without regard to any private suit or decree." (internal citation omitted)).

The Plaintiffs argue that the District Court "attempted to maneuver around [*Borden*] on the ground that, in *Borden*, unlike here, it was the private plaintiff rather than the Government who was first to obtain the requested relief." (Appellants' Br. 32 (record citation omitted).) In their view, under the antitrust laws "relief may be granted to private plaintiffs based on the same threat that justified a prior grant of similar injunctive relief to the Government." (*Id*. at 33.) It is true that *Borden* refused to say that the existence of one type of injunction, public or private, cannot at least be taken into account by a trial judge in weighing whether a subsequent plaintiff, whether public or private, has shown the requisite antitrust injury. *See 347 U.S. at 520*. But we do not understand *Borden*, or any other antitrust authority, to require the Plaintiffs to have established a need for an injunction that was "non-duplicative," in the District Court's words, as *Borden* makes clear that private and public injunctions may exist **[**20]** concomitantly. *See also* N.J. Wood Finishing Co. v. Minn. Mining & Mfg. Co., 332 F.2d 346, 350 (3d Cir. 1964).

Although ***HN14***[] the law is clear that public and private antitrust injunctions may coexist without regard for one another, nothing in *Borden* intimates that a private litigant is relieved of its evidentiary burden of showing an entitlement to injunctive relief when the government has already obtained its own injunction. We said as much in *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979)*. There the district court granted summary judgment for the defendants on the antitrust claims of private plaintiffs, effectively holding that the plaintiffs were not entitled to an injunction. We reversed. We disagreed with the defendants' contention that "remand [was] unnecessary because . . . it [was] evident that the plaintiffs [were] not entitled to injunctive relief." *Id. at 594 n.85*. In our view, the plaintiffs were not "necessarily foreclosed from injunctive relief by the mere pendency of the government and direct purchaser suits for similar remedies[.]" *Id*. Under *Borden*, we thought the plaintiffs' injunction claim could go forward if they were "able to establish **[**21]** a 'significant threat of injury' under general **[*250]** equity principles." *Id*. (quoting *Borden, 347 U.S. at 519*). We further suggested that the district court could "consider whether any meaningful difference exists in the present case 'with respect to the parties capable of enforcing' the injunction, or whether the reality here is that 'one injunction is as effective as 100, and concomitantly, that 100 injunctions are no more effective than one[.]'" *Id*. (quoting *Hawaii v. Standard Oil Co., 405 U.S. 251, 261, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972))*.

For purposes of this appeal, two important principles emerge from *Mid-West Paper*. First, under *Borden* ***HN15***[] a trial court faced with an injunction request may factor into its equitable analysis the effect of another injunction on the plaintiff's showing of injury. Therefore, the District Court's consideration of the Government Case injunction in its assessment of the Plaintiffs' right to injunctive relief was not impermissible *per se*. While the District Court likely ascribed too much weight to the Government Case injunction in assessing the Plaintiffs' right to their own injunction, the Court clearly also found that the Plaintiffs failed to meet their burden of presenting evidence to **[**22]** show that they were entitled to such relief. And that brings us to *Mid-West Paper's* second important principle: ***HN16***[] a plaintiff bears the obligation of presenting evidence demonstrating injury even where another injunction is already in place. There can be no doubt that the Plaintiffs left that obligation unfulfilled. As they did before the District Court, the Plaintiffs refer us to several factors that, in their view, show why an injunction is necessary. Significantly, however, the Plaintiffs have packaged those factors as mere arguments, not evidence. That approach does not carry the day at summary judgment. *Cf. Thornton v. United States, 493 F.2d 164, 167 (3d Cir. 1974)*.

The Plaintiffs claim, for instance, that the term of the Government Case injunction -- seven and one-half years -- is not long enough to ensure that they will not suffer harm. They assert that Dentsply still retains monopolistic market share despite that injunction and will be able to resume its anticompetitive practices once the injunction expires because, according to them, the market for artificial teeth is relatively stagnant. But even assuming that an antitrust defendant's "ability" to engage in anticompetitive **[**23]** conduct were, standing alone, enough to justify injunctive relief, the Plaintiffs' prognosis of Dentsply's future conduct is unsupported by record evidence. In any event, if the Plaintiffs are threatened with antitrust injury at or near the end of the Government Case injunction's term, nothing prohibits them from petitioning a court for relief at that point. The Plaintiffs also rely on the alleged nationwide presence of 7,000 dental laboratories that are "better situated to monitor Dentsply's exclusive dealing practices[.]" (Appellants' Br. 38.) Tellingly, the Plaintiffs cite no authority for the proposition that a plaintiff may avoid its obligation of showing injury merely by claiming to be a more effective antitrust policeman than the government, and we are aware of no such authority. *Cf. Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1245, 362 U.S. App. D.C. 152 (D.C. Cir. 2004)*. Similarly, the Plaintiffs request that Dentsply be prohibited "from attending any meeting or phone call between any dental dealer and any dental laboratory" (Appellant's Br. 40-41), but have elected not to provide any evidence that any such meetings or phone calls are now injuring them or will soon do so. Finally, the Plaintiffs **[**24]** point to Dentsply's purported unrepentance regarding its past conduct as a basis for injunctive relief. **[*251]** They assert that "Dentsply still refuses to acknowledge the wrongful nature of its conduct." (Appellants' Br. 44 (internal quotation marks omitted).) The antitrust laws, however, afford no relief on that basis alone. *Cf. Sec. & Exch. Comm'n v. Bonastia, 614 F.2d 908, 912 (3d Cir. 1980)*. In a nutshell, the various examples of alleged injury the Plaintiffs have brought to our attention are purely speculative and thus are insufficient to justify an award of injunctive relief. *See, e.g., City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 269 (3d Cir. 1998)*.

A review of their pleadings before the District Court reflects that the Plaintiffs for the most part sought to meet their summary judgment burden simply by telling the District Court what they did not need to do. Specifically, in their moving papers the Plaintiffs asserted that they did not need to prove irreparable injury; did not have to show that they had standing to sue for damages; and were not barred from obtaining injunctive relief merely because the government had already secured one against Dentsply. Importantly, following **[**25]** remand from this Court's prior appeal, there is no hint in the record that the Plaintiffs sought to engage in any additional discovery or made any effort to introduce any factual material for the District Court to consider. The Plaintiffs' strategy betrays a misunderstanding of the summary judgment stage of litigation. ***HN17***[] A party moving for summary judgment must clear two hurdles to meet its initial burden. It must show that (1) there are no genuine questions of material fact and (2) the party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *see McCarthy, 80 F.3d at 847*. By telling the District Court what they did *not* need to establish, the Plaintiffs did not leap high enough. Accordingly, we will affirm the District Court's denial of the Plaintiffs' motion for summary judgment on their monopolization claim against Dentsply.

2. Denial of the Motion for Reconsideration

After the District Court denied their motion for summary judgment, the Plaintiffs asked the Court to amend its summary judgment ruling and for permission to supplement the record with evidence that, in their view, demonstrated the antitrust injury the District Court had found wanting. The District Court construed **[**26]** the motion as one for reconsideration and denied it, concluding that the evidence the Plaintiffs were seeking to introduce would be relevant only if they had shown that Dentsply's anticompetitive conduct would likely recur. [4] Because they had failed to make such a showing, the District Court reasoned, reconsideration was unwarranted.

HN18[] "The purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Cafe, 176 F.3d at 677* (quoting *Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)*). "Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Id.* (citation omitted).

The stated aim of the Plaintiffs' motion was **[**27]** to submit the very evidence **[*252]** the District Court had found they had failed to present in their summary judgment motion. However, **HN19**[] "new evidence," for reconsideration purposes, does not refer to evidence that a party obtains or submits to the court after an adverse ruling. Rather, new evidence in this context means evidence that a party could not earlier submit to the court because that evidence was not previously available. *See De Long Corp. v. Raymond Int'l, Inc., 622 F.2d 1135, 1139-40 (3d Cir. 1980), overruled on other grounds by Croker v. Boeing Co., 662 F.2d 975 (3d Cir. 1981)* (en banc). Nothing in the record suggests that the evidence the Plaintiffs sought to present post-summary judgment was unavailable to them when they filed their summary judgment motion. Under these circumstances, the District Court did not abuse its discretion in denying the Plaintiffs' motion for reconsideration, and we therefore will not upset that ruling. *See Harsco, 779 F.2d at 909* (district court correctly did not consider affidavit filed after summary judgment was granted because it "was available prior to the summary judgment").

3. Dismissal of the complaint

After denying the Plaintiffs' motion for an **[**28]** injunction and their motion for reconsideration, the District Court noted the procedurally "awkward" posture of the case. *Howard Hess II, 2008 U.S. Dist. LEXIS 1487, at *14*. That awkwardness, according to the District Court, stemmed from the fact that the denial of the Plaintiffs' summary judgment motion effectively barred them from pursuing their claim, thus placing their suit on a dead-end road. As a consequence, the District Court directed the parties to "submit either a stipulation or competing orders in *Hess* and *Jersey Dental* in order to accommodate a consolidated appeal." *Id. at *16*. Dentsply thereafter moved to dismiss the complaint with prejudice in light of that order. The Plaintiffs opposed Dentsply's motion but submitted their own proposed order dismissing the complaint while purporting to reserve their right to appeal any dismissal. The District Court approved that order, thereby dismissing the complaint with prejudice and denying Dentsply's motion to dismiss as moot.

We see no error in the District Court's action. Ordinarily, a district court's denial of a motion for summary judgment means only that there remain genuine questions of material fact for resolution by the fact **[**29]** finder. *See Kutner Buick, Inc. v. Am. Motors Corp., 868 F.2d 614, 619 (3d Cir. 1989)*. But here the District Court denied the Plaintiffs' summary judgment motion because it found that there were no genuine questions of material fact. To the extent the Plaintiffs thought that the District Court's denial of their summary judgment motion entitled them to pursue their claims any further, they were mistaken, as a plaintiff asserting antitrust claims does not get to a jury simply by filing a complaint and hoping for the best. *Cf. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 467-69, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 481 (3d Cir. 1992)* (en banc). The District Court concluded that the Plaintiffs could not prevail on their claim for injunctive relief against Dentsply and, as we explained earlier, we agree with that conclusion. And because the Plaintiffs could go no further on that claim, we likewise agree with the District Court's dismissal of their complaint. The Plaintiffs have given us no compelling reason to disturb that disposition. Accordingly, we will affirm the District Court's dismissal of the complaint in *Hess*.

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[4] Neither party contests the District Court's interpretation of the Plaintiffs' motion as one for reconsideration, and thus we accept that interpretation as correct.

[*253] B. *Jersey [30] Dental***

In *Jersey Dental*, the Plaintiffs alleged a conspiracy to monopolize in violation of Section 2 of the Sherman Act in Counts Two and Three of their amended complaint and a conspiracy to restrain trade in violation of Section 1 in Counts Four and Five. **HN20**[] A Section 2 conspiracy claim has four elements: (1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the conspiracy and the injury alleged. *See, e.g.,* United States v. Yellow Cab Co., 332 U.S. 218, 224-25, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947); Am. Tobacco Co. v. United States, 328 U.S. 781, 788, 809, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946). **HN21**[] A plaintiff asserting a Section 1 claim also must allege four elements: "(1) concerted action by the defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005) (citations omitted).

The District Court dismissed all four counts on several grounds. The Court dismissed Counts Three and Five, which sought injunctive relief against Dentsply, **[**31]** for the same reasons it denied the Plaintiffs' summary judgment motion in *Hess*. The Court dismissed Counts Two and Four, to the extent they sought damages from the Dealers, on the basis of *Illinois Brick*, concluding that the coconspirator exception of that case did not apply because Dentsply and the Dealers were not coequal participants in the conspiracy. The District Court also dismissed Counts Two and Three, against the Dealers and Dentsply, respectively, based on its determination that the Plaintiffs did not sufficiently allege the element of specific intent on the part of the Dealers. Finally, the Court found that the dismissal of Counts Two through Five was proper because of the Plaintiffs' failure to adequately allege the agreement element of the Section 1 and Section 2 claims asserted in those counts. The Plaintiffs dispute nearly all of the District Court's conclusions. [5] Given these overlapping alternative holdings, we find it most expeditious to begin with the District Court's finding as to the agreement element of Counts Two through Five, and then move on to the other portions of the District Court's ruling. [6]

[*254] 1. Allegation of an agreement

The District Court found the dismissal of Counts Two through Five warranted in part based on its conclusion that the Plaintiffs did not adequately allege an agreement among Dentsply and the Dealers. The Plaintiffs seek to revive their conspiracy claims essentially by reference to their allegations that "every Dealer agreed to the same plan -- Dealer Criterion 6"; that "every Dealer knew that every other Dealer agreed, or would agree, to this same plan"; and that "it . . . was obvious to each Dealer that -- only if all of the **[**34]** other Dealers complied -- would the purpose of Dealer Criterion 6 be achieved." (Appellants' Br. 68-69.)

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[5] In their briefs, the Plaintiffs do not impugn the District Court's **[**32]** dismissal of their claims for injunctive relief against Dentsply as asserted in Counts Three and Five to the extent the Court found that the Plaintiffs lacked standing to pursue those claims given their failure to allege facts demonstrating antitrust injury. As such, the Plaintiffs have waived any contest to that portion of the District Court's ruling. *See* Holk v. Snapple Beverage Corp., 575 F.3d 329, 337 n.5 (3d Cir. 2009).

[6] The defendants argue that the Plaintiffs should be judicially estopped from claiming, as they do in their amended complaint, that the Dealers were Dentsply's equals in the alleged conspiracy because of the Plaintiffs' previous allegations in these proceedings that Dentsply coerced the Dealers into participating in its anticompetitive practices. The doctrine of judicial estoppel "bar[s] a party from taking contradictory positions during the course of litigation." G-I Holdings, Inc. v. Reliance Ins. Co., 586 F.3d 247, 261 (3d Cir. 2009) (citations omitted). One of the threshold requirements for judicial estoppel is a finding of bad faith on the part of the party against whom the doctrine is invoked. Chao v. Roy's Constr., Inc., 517 F.3d 180, 186 n.5 (3d Cir. 2008). **[**33]** The applicability *vel non* of judicial estoppel is fact-specific. McNemar v. Disney Store, Inc., 91 F.3d 610, 613 (3d Cir. 1996). Here, although Dentsply invoked the doctrine before the District Court, the District Court made no mention of it, and we ordinarily do not consider issues not addressed by the district court in the first instance. *See, e.g.*, In re Montgomery Ward & Co., 428 F.3d 154, 166 (3d Cir. 2005). We see no reason to depart from that rule here, as we cannot decide, based on this record and with no findings by the District Court, whether the Plaintiffs have exhibited bad faith. *Cf.* Reliance Ins., 428 F.3d at 166 & n.25.

HN22[] Section 1 claims are limited to combinations, contracts, and conspiracies, and thus always require the existence of an agreement. *See* In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 267 (3d Cir. 2009). **HN23**[] Section 2 claims, in contrast, do not require an agreement except where, as here, the specific charge is conspiracy to monopolize. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.13, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). Therefore, the viability of the Plaintiffs' Section 1 and Section 2 claims in Counts Two through Five turns on whether the Plaintiffs have adequately alleged an agreement among Dentsply and the Dealers. *See* Englert v. City of McKeesport, 872 F.2d 1144, 1150 (3d Cir. 1989); Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 473-74 (3d Cir. 1985). [7] **HN24**[] To allege such an agreement between two or more persons or entities, a plaintiff must allege facts plausibly suggesting "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Copperweld, 467 U.S. at 771 (quotation omitted); *see also, e.g.,* Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962).

The amended complaint in this case alleges a two-tiered conspiracy. First, it alleges that the defendants conspired to "maintain Dentsply's monopoly of the manufacture of artificial teeth and/or premium artificial teeth for sale in the United States, to restrain trade for the sale of artificial teeth and/or premium artificial teeth in the United States by the implementation of an exclusive dealing arrangement, and to exclude Dentsply's competitors from the markets for such teeth in the United States[.]" (App. 435.) Second, it alleges that the defendants conspired "to sell such teeth to dental laboratories at anticompetitive prices determined by Dentsply and agreed to by the Dealer Defendants." (*Id.*) To carry out this conspiracy, Dentsply allegedly has sold teeth to the Dealers on the condition "that [the Dealers] restrict their dealings with rival manufacturers[.]" (*Id*. at 452.) The Dealers, the Plaintiffs allege, **[**36]** "knew that this exclusive dealing arrangement was and is an illegal restraint of trade designed to maintain Dentsply's monopoly." (*Id*. at 440.)

In our review of the amended complaint, we understand the Plaintiffs to allege a hybrid of both vertical and horizontal conspiracies. (*See, e.g., id*. at 435 **[*255]** ("Defendants, *each with all of the others*, have entered into two interrelated conspiracies[.]" (emphasis added).) That sort of conspiracy, sometimes dubbed a "hub-and-spoke" conspiracy, *see, e.g.,* Impro Prods., Inc. v. Herrick, 715 F.2d 1267, 1279 (8th Cir. 1983), has a long history in antitrust jurisprudence, *see, e.g.,* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S. Ct. 467, 83 L. Ed. 610 (1939). Such **HN25**[] a conspiracy

> involves a hub, generally the dominant purchaser or supplier in the relevant market, and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes.

Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 435 n.3 (6th Cir. 2008); *see also* 2 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their* ***[**37]*** *Application*, P 1426, at 188 n.11 (2d ed. 2000); ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments* 24 (6th ed. 2007).

Here, even assuming the Plaintiffs have adequately identified the hub (Dentsply) as well as the spokes (the Dealers), we conclude that the amended complaint lacks any allegation of an agreement among the Dealers themselves. The amended complaint states only in a conclusory manner that all of the defendants -- Dentsply and all the Dealers included -- conspired and knew about the alleged plan to maintain Dentsply's market position. The amended complaint alleges, for instance, that "Dentsply made clear to each . . . dealer that every other Dentsply dealer was . . . required to agree to the same exclusive dealing arrangement, and that every other Dentsply dealer had so agreed." (App. 442.) Iterations of this allegation are sprinkled throughout the amended complaint. (*E.g., id*. at 443, 451, 454, 456, 458-59.) But to survive dismissal it does not suffice to simply say that the defendants had knowledge; there must be factual allegations to plausibly suggest as much. *See* Twombly, 550 U.S. at 564. There

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[7] The **[**35]** standard for a Section 2 violation is "the more stringent monopoly standard[,]" Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), but only insofar as the practices constituting the alleged violation are concerned, not the existence of an agreement.

are none here. In other words, the "rim" connecting the various "spokes" **[**38]** is missing. *Cf. Total Benefits Planning, 552 F.3d at 436*; *Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 934-36 (7th Cir. 2000)*.

Instead of underscoring factual allegations plausibly suggesting the existence of an agreement, the Plaintiffs invite us to infer that the Dealers were aware of each other's involvement in the conspiracy because, as market participants, they all knew that Dentsply was the dominant player in the artificial tooth market and because they all had an economic incentive to create and maintain a regime in which Dentsply reigned and the Dealers did its bidding. In that regime, the Plaintiffs tell us, the Dealers would all benefit from Dentsply's policies because they would all be able to charge dental laboratories artificially inflated prices for teeth in their various regions of operation. We do not disregard the logical appeal of this argument. Certainly, the objective of many antitrust conspiracies is to control pricing with an eye to increasing profits. But simply because each Dealer, on its own, might have been economically motivated to exert efforts to keep Dentsply's business and charge the elevated prices Dentsply imposed does not give rise to a plausible inference **[**39]** of an agreement among the Dealers themselves. *Cf. Twombly, 550 U.S. at 566* (noting the "logic" of the complaint's allegation of an agreement but finding it insufficient because it did not suggest actual joint action). Notwithstanding *Twombly's* requirement that an antitrust plaintiff state "enough fact to raise a reasonable expectation **[*256]** that discovery will reveal evidence of illegal agreement[,]" *id. at 556* (footnote omitted), the Plaintiffs' allegations do not offer even a gossamer inference of any degree of coordination among the Dealers. Those allegations are not "placed in a context that raises a suggestion of a preceding agreement" among the Dealers. *Id. at 557*. Instead, they do no more than intimate "merely parallel conduct that could just as well be independent action." *Id*. As a consequence, the Plaintiffs have fallen short of their pleading obligations. [8]

Before both the District Court and us, the Plaintiffs have tried to hedge their bets. They argue that even if they have not adequately alleged an overarching conspiracy between and among Dentsply and all of its Dealers, they at least have adequately alleged several bilateral, **[**41]** vertical conspiracies between Dentsply and the Dealers. There is arguably some support for what amounts to a "rimless" conspiracy. *See Kotteakos v. United States, 328 U.S. 750, 755, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*; *Dickson v. Microsoft Corp., 309 F.3d 193, 203 (4th Cir. 2002)*. However, we need not weigh in on the alternative theory the Plaintiffs now press, for even assuming it is legally viable or even relevant here, the Plaintiffs cannot pursue it under the circumstances of this case because the amended complaint cannot be fairly understood to allege the existence of several unconnected, bilateral, vertical conspiracies between Dentsply and each Dealer. ***HN26***[] While pleading in the alternative is, of course, authorized by the Federal Rules of Civil Procedure, *see Fed. R. Civ. P. 8(a)(3)*; *see also Langer v. Monarch Life Ins. Co., 966 F.2d 786, 802 (3d Cir. 1992)*, we have an obligation to read allegations not in isolation but as a whole and in context, *see Chabal v. Reagan, 822 F.2d 349, 357 (3d Cir. 1987)*; *Pace Res., Inc. v. Shrewsbury Twp., 808 F.2d 1023, 1026 (3d Cir. 1987)*. As we read the amended complaint, we see no indication of the Plaintiffs' intention to allege that every single agreement between Dentsply **[**42]** and each Dealer had anticompetitive effects. All throughout the amended complaint are substantially similar variations on the allegation that the "Defendants have agreed, *each with all of the others*, to implement an exclusive dealing arrangement[.]" (App. 439 (emphasis added).) Indeed, the amended complaint is rife with additional references to "the conspiracy" between "[t]he Defendants, . . . *each with all of the others*[.]" (*E.g., id*. at 446, 451 (emphasis added).) These allegations are just not the stuff of several mini-agreements lacking a horizontal tether. In other words, the Plaintiffs simply did not draft their amended complaint to encompass their alternative legal theory. **[*257]** In short, the Plaintiffs are bound by the four corners of their

[8] The Plaintiffs rely on *Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 (3d Cir. 1992)*, where the district court directed a verdict for the defendant on a *Section 1 conspiracy claim*, finding insufficient evidence that the defendant distributors shared the defendant manufacturer's purpose of eliminating the plaintiff's **[**40]** business and rejecting Fineman's argument that "[S]ection 1 co-conspirators are held liable for their joint commitment to an unlawful purpose whether or not their motives for making that commitment are different." *Id. at 212*. We disagreed with the district court's "novel approach[,]" *id*., and held that "although vertically aligned co-conspirators must share a commitment to a common scheme which has an anticompetitive objective, they need not share an identical motive for engaging in concerted action in violation of *[S]ection 1 of the Sherman Act*[,]" *id. at 215*. In addition to the fact that *Fineman* reached us in an entirely different procedural posture, nothing in that case excuses the Plaintiffs from alleging an agreement between Dentsply and the Dealers. At most, *Fineman* could provide a defense for the Plaintiffs if Dentsply argued that no agreement could exist because its motives were unaligned with the Dealers'.

amended complaint, which clearly seeks to allege one conspiracy to which Dentsply and all of the Dealers, as a collective, were parties. To the extent the Plaintiffs are recasting their allegations in an effort to circumvent a motion to dismiss, we must reject that approach. *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 907-08, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F.3d 1, 5 (1st Cir. 2008).

The Plaintiffs **[**43]** have failed to allege any facts plausibly suggesting a unity of purpose, a common design and understanding, or a meeting of the minds between and among Dentsply and all of the Dealers. Accordingly, we will affirm the District Court's determination that the Plaintiffs have failed to adequately allege the agreement element of their Section 1 and Section 2 claims.

2. Allegation of Specific Intent

The District Court dismissed the conspiracy to monopolize claims asserted in Counts Two and Three on the alternative ground that the Plaintiffs failed to adequately allege specific intent on the part of the Dealers. [9] ***HN27***[] Specific intent is an essential element of a conspiracy to monopolize claim. *Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 807 (3d Cir. 1984)*. It means "an intent which goes beyond the mere intent to do the act." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (discussing specific intent in the attempt to monopolize context) (quoting *United States v. Aluminum Co. of Am., 148 F.2d 416, 432 (2d Cir. 1945))*. In other words, the defendant must have "intended to achieve an illegal monopoly." Joseph P. Bauer & William H. Page, II *Kintner's Federal* ***Antitrust*** ***[**44]*** ***Law*** § 14.40, at 423 (2002) (footnote omitted); *see also* *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 626, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *Am. Tobacco Co., 328 U.S. at 809*. ***HN28***[] Specific intent in the antitrust context may be inferred from a defendant's unlawful conduct. *See, e.g.,* *Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1199 (3d Cir. 1995)*.

Here, the Plaintiffs point us to their allegations that the defendants "have acted with the specific intent to unlawfully maintain a monopoly[,]" (App. 452); that "the intended effect of th[e] exclusive dealing arrangement . . . has been the elimination of any and all competition[,]" (*id*. at 440); and that the defendants "knew that this exclusive dealing arrangement was **[*258]** and is an illegal restraint of trade designed to maintain Dentsply's monopoly[,]" (*id*.). In essence, the Plaintiffs allege that Dentply's pricing policies were unlawful, that the Dealers knew as much, and that they signed on to those policies knowing full well they were unlawful. But that allegation, in its many iterations, is conclusory. There are no facts behind it, so it does not plausibly suggest knowledge of unlawfulness on the Dealers' part. We could feasibly infer **[**46]** the Dealers' specific intent to further Dentsply's monopolistic ambitions if the Plaintiffs had stated enough factual matter to suggest some coordination among the Dealers, something to suggest that they knew that Dentsply was spearheading an effort to squash its competitors by pressing the Dealers into its service and keeping prices artificially inflated. [10] We have already determined, however, that the Plaintiffs'

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[9] The Plaintiffs argue that the District Court erroneously applied a heightened pleading standard by requiring them to allege not only that the Dealers knew that Dentsply would achieve a monopolistic position but, additionally, that they "wanted" Dentsply to obtain a monopoly, thereby "confus[ing] motive with intent." (Appellants' Br. 81-83.) We agree that no authority of which we are aware mandates the conclusion that a defendant's intent to violate the antitrust laws is negated if the defendant was coerced into committing a violation. It is well settled that at the summary judgment stage a court may dispose of an antitrust conspiracy claim in "the absence of any plausible motive to engage in the conduct charged[.]" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. We recognize that some courts have made motive-type determinations **[**45]** in antitrust cases at the pleading stage. *See, e.g.*, *TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1026-27 (10th Cir. 1992)*. Other courts, how ever, have disavowed that approach. *See, e.g.,* *Jung v. Ass'n of Am. Med. Colleges, 300 F. Supp. 2d 119, 159 (D.D.C. 2004)*. We need not decide here which line of cases has it right.

[10] As the Plaintiffs correctly note, the agreement element of their conspiracy claims arguably is not negated by their allegation that the Dealers may have been coerced into submitting to Dentsply's pricing policies. *See* *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 142, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*; *Albrecht v. Herald Co., 390 U.S. 145, 150, 88 S. Ct. 869, 19*

allegations that the Dealers conspired with Dentsply are deficient, so we cannot infer the Dealers' specific intent from their mere participation in the conspiracy, as the Plaintiffs urge. In fact, the only actual conduct the Plaintiffs have alleged on the part of the Dealers is that each one of them, acting on its own, signed a bilateral dealing agreement with Dentsply. The only plausible inference from that conduct is that each Dealer sought to acquire, retain and/or increase its own business. Significantly, the antitrust laws do not prohibit such conduct. *See, e.g., U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 612 n.1, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)*. At bottom, the Plaintiffs' allegations of specific intent rest not on facts but on conclusory statements strung together with antitrust **[**47]** jargon. ***HN29***[] It is an axiom of ***antitrust law***, however, that merely saying so does not make it so for pleading-sufficiency purposes. *See Twombly, 550 U.S. at 555* (***HN30***[] "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" (internal quotation marks, alteration and citation omitted)).

Because we find that the Plaintiffs failed to sufficiently allege specific intent, we agree with the District Court's dismissal **[**48]** of Counts Two and Three on this ground.

3. Application of *Illinois Brick*

In addition to finding that the Plaintiffs did not adequately allege specific intent or an agreement, the District Court dismissed Counts Two and Four under *Illinois Brick*. The Court recognized that *Hess I* did not address whether the Plaintiffs could pursue damages claims against the Dealers because the Dealers were not parties to that suit. The District Court concluded, however, that *Illinois Brick's* general coconspirator exception did not apply here because the Plaintiffs did not allege facts to show that the Dealers were in fact coconspirators with Dentsply.

The Plaintiffs fault the District Court's consideration of any exception at all to *Illinois Brick*. In the Plaintiffs' view, *Illinois Brick* is inapposite because they buy directly, not indirectly, from the Dealers. But that circumstance is immaterial because **[*259]** the amended complaint does not adequately allege that the Dealers are members of a conspiracy with Dentsply. As we explained in *Hess I*, the Plaintiffs could come within *Illinois Brick's* coconspirator exception only if the Dealers were precluded from asserting claims against Dentsply because their participation **[**49]** in the conspiracy was "truly complete." *Hess I, 424 F.3d at 383*. As we have already concluded, however, the amended complaint does not give rise to a plausible inference that the Dealers' involvement in the conspiracy was truly complete. Therefore, to state a viable claim against the Dealers, the Plaintiffs must come within the coconspirator exception -- or some other exception -- to *Illinois Brick*. Because they have failed to do so, the Plaintiffs in essence are asserting their claims against the Dealers as mere middlemen. This they cannot do. *See, e.g., Kansas v. UtiliCorp United Inc., 497 U.S. 199, 204, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*; *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1044-50 (9th Cir. 2008)*; *McCarthy, 80 F.3d at 855*.

The Plaintiffs also argue that, even assuming the District Court's application of *Illinois Brick* was correct as to their request for overcharge damages, the Court made no finding as to their request for lost profits. In *Hess I*, we explained that "[w]hen antitrust violators cause prices to increase through monopolization, a price-fixing conspiracy, or exclusionary conduct, the harm they cause members of the distribution chain comes in two forms: (1) overcharges paid for goods **[**50]** actually purchased; and (2) lost profits resulting from the lost opportunity to buy and resell a greater volume of goods." *424 F.3d at 373* (footnote and citations omitted). After canvassing various sources on the subject, we held that the Plaintiffs did not have standing to recover lost profits from Dentsply.Our rationale for barring lost profits damages was based mostly on the Plaintiffs' status as indirect purchasers vis-a-vis Dentsply. *See id. at 375*. We also explained that lost profits damages are widely "disfavored" and cited approvingly from a law journal article by Judge Easterbrook in which he argued that overcharge damages, as opposed to lost profits damages, "should be the basis of all [antitrust] damages." *Id*. (quoting Frank H. Easterbrook, *Treble What?*, 55 Antitrust L.J. 95, 101 (1986)) (quotation marks omitted and alteration in original). The Plaintiffs acknowledge that portion of our holding but assert that we have "not had any occasion to rule on whether lost profits damages may be recovered from the Dealers." (Appellants' Br. 59.)

L. Ed. 2d 998 & n.6 (1968). But that argument does not relieve the Plaintiffs of their obligation to state "sufficient factual matter . . . [that] 'state[s] a claim to relief that is plausible on its face'" as to the specific intent element of their Section 2 claims. *Iqbal, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 570*).

Although *Hess I* admittedly did not categorically bar lost profits damages in this circuit, we need not explore this issue any further in **[**51]** this case. ***HN31***[] In this Court, issues that are not "specifically presented to the District Court" ordinarily are waived on appeal, *see* *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 215 F.3d 407, 418-19 & n.14 (3d Cir. 2000)* (collecting cases); *see also* *In re Ins. Brokerage Antitrust Litig., 579 F.3d at 262*; *Bagot v. Ashcroft, 398 F.3d 252, 256 (3d Cir. 2005)*, and there is no evidence in the record that the Plaintiffs specifically litigated in the District Court whether they may recover lost profits damages from the Dealers. It is true that we have the "discretionary power to address issues that have been waived[,]" *Bagot, 398 F.3d at 256* (citations omitted), and we sometimes exercise that power "when prompted by exceptional circumstances[,]" *Selected Risks Ins. Co. v. Bruno, 718 F.2d 67, 69 (3d Cir. 1983)* (citations omitted). But no such circumstances are attendant here. A substantial part of *Hess I* was dedicated to an analysis of whether the Plaintiffs could recoup lost profits damages from Dentsply. *See* *424 F.3d at 373-76*. We concluded that they **[*260]** could not do so. *Id. at 376*. Despite how central both that analysis and that conclusion were to *Hess I*, the Plaintiffs did not leverage **[**52]** our discussion to persuade the District Court on remand to allow them to seek such damages from the Dealers, electing instead to broach this issue in the District Court in only the broadest terms. [11] Accordingly, under these particular circumstances we are convinced that a waiver finding is appropriate. *See, e.g., In re Stone & Webster, Inc., 558 F.3d 234, 241 n.8 (3d Cir. 2009)*.

VI.

For the foregoing reasons, we will affirm the District Court's rulings in their entirety.

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[11] The Plaintiffs contend that the defendants cannot complain that they were caught unawares by their request for lost profits damages. That may be so, but ***HN32***[] the doctrine of waiver does not serve as a surprise-avoidance mechanism alone. It ensures that a particular issue is given a full airing, permitting each party to present its views and the trial court to make an initial determination. Most important for our purposes, the doctrine allows us to review both those views and that determination in arriving at our own considered judgment.

Lopez v. Wash. Mut. Bank, F.A.

United States District Court for the Eastern District of California

April 16, 2010, Decided; April 19, 2010, Filed

1:09-CV-1838 AWI JLT

Reporter
2010 U.S. Dist. LEXIS 38307 *; 2010 WL 1558938

ANTONIO LOPEZ, Plaintiff, v. WASHINGTON MUTUAL BANK, F.A. et. al., Defendants.

Subsequent History: Motion granted by, Dismissed by *Lopez v. Wash. Mut. Bank, F.A., 2010 U.S. Dist. LEXIS 63794 (E.D. Cal., June 24, 2010)*

Core Terms

cause of action, allegations, complaint alleges, accounting, parties, lender, unfair, unjust enrichment, unconscionability, borrower, fraudulent, negotiated, fiduciary duty, fair dealing, violations, fiduciary, motion to dismiss, extend credit, trust deed, commencing, injunction, documents, contends, recorded, qualify, fails, covenant of good faith, business practice, injunctive relief, plaintiff's claim

Counsel: **[*1]** For Antonio Lopez, Plaintiff: Gary R. Lane, NCAED, LEAD ATTORNEY, Consumer Protection Legal Services, Santa Ana, CA.

For Washington Mutual Bank, F.A., (JPMorgan Chase Bank, N.A., an acquirer of certain assets and liabilities of Washington Mutual Bank from the FDIC acting as Receiver), California Reconveyance Company, Defendants: Amy Louise Morse, Patrick Alan Cathcart, Theodore Emery Bacon, Adorno, Yoss, Alvarado and Smith, Los Angeles, CA; Frances Quevedo Jett, Adorno Yoss Alvardo & Smith, Los Angeles, CA.

Judges: Anthony W. Ishii, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: Anthony W. Ishii

Opinion

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

(Document # 10)

BACKGROUND

On September 18, 2009, Plaintiffs filed an action in the Superior Court of California for the County of Kern. The first cause of action alleges a violation of *California Civil Code § 1632*. The second cause of action alleges a violation of *California Business and Professions Code § 17200* based on Defendants' fraudulent business practices. The third cause of action alleges a violation of *California Business and Professions Code § 17200* based on violations of *15 U.S.C. § 1601*. The fourth cause of action alleges a violation of **[*2]** *California Business and Professions Code §*

17200 based on violations of *California Financial Code § 22302*. The fifth cause of action alleges fraudulent omission. The sixth cause of action requests injunctive relief. The seventh cause of action alleges breach of the covenant of good faith and failure dealing. The eighth cause of action alleges unjust enrichment. The ninth cause of action alleges failure to provide accounting. The tenth cause of action alleges negligence. The eleventh cause of action alleges breach of fiduciary duty. On October 20, 2009, Defendants removed the complaint to this court.

On October 27, 2009, Defendants filed a motion to dismiss. Defendants contends that none of the causes of action in the complaint can be asserted against Defendants, and as such, the complaint must be dismissed.

Plaintiff did not file an opposition to Defendants' motion.

On January 25, 2010, Defendants filed a reply brief.

LEGAL STANDARD

Under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* a claim may be dismissed because of the plaintiff's "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. A dismissal under *Rule 12(b)(6)* may be based on the lack of **[*3]** a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys., 534 F.3d 1116, 1121 (9th Cir. 2008)*; *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

In reviewing a complaint under *Rule 12(b)(6)*, all of the complaint's material allegations of fact are taken as true, and the facts are construed in the light most favorable to the non-moving party. *Marceau v. Balckfeet Hous. Auth., 540 F.3d 916, 919 (9th Cir. 2008)*; *Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 1999)*. The court must also assume that general allegations embrace the necessary, specific facts to support the claim. *Smith v. Pacific Prop. and Dev. Corp., 358 F.3d 1097, 1106 (9th Cir. 2004)*. However, the court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008)*; *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. Although legal conclusions may provide the framework of a complaint, they are not accepted as true and "[t]hreadbare recitals of elements of a cause of action, **[*4]** supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*; see also *Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)*. As the Supreme Court has explained:

> While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Thus, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal, 129 S.Ct. at 1949*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S.Ct. at 1949*.

> The plausibility standard is not akin to a 'probability **[*5]** requirement,' but it asks more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'
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> . . .
>
> Determining whether a complaint states a plausible claim for relief will . . . be a context specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief.

Iqbal, 129 S.Ct. at 1949-50. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

If a Rule 12(b)(6) motion to dismiss is granted, "[the] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly **[*6]** be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). In other words, leave to amend need not be granted when amendment would be futile. Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002).

JUDICIAL NOTICE

In deciding whether to dismiss a claim under Rule 12(b)(6), the court is generally limited to reviewing only the complaint, but the court may review materials which are properly submitted as part of the complaint and the court may take judicial notice of public records outside the pleadings. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001); Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996); MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986). Further, under the "incorporation by reference" doctrine, courts may review documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005); Lapidus v. Hecht, 232 F.3d 679, 682 (9th Cir. 2000). The "incorporation by reference" doctrine also applies "to situations in which the plaintiff's claim depends **[*7]** on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." Knievel, 393 F.3d at 1076 (citing Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)).

Defendants request that the court take judicial notice of the deed of trust and other recorded documents concerning the property at issue in this action and the property's title. "In deciding whether to dismiss a claim under Fed.R.Civ.P. 12(b)(6), a court may look beyond plaintiff's complaint to matters of public record." Shaw v. Hahn, 56 F.3d 1128, 1129 n. 1 (9th Cir. 1995). Thus, the court will take judicial notice of the documents provided by Defendants.

FACTS

A. Complaint's Alleged Facts

The complaint alleges that Defendants sell, procure, and facilitate a variety of home loans. The complaint alleges that the adjustable rate mortgage ("ARM") is the type of loan that is the subject of the complaint.

The complaint alleges that Defendants failed to disclose pertinent information in a clear and conspicuous manner to Plaintiff, in writing, as **[*8]** required by law when he obtained a loan. The complaint alleges that Defendants failed to inform Plaintiff that he could not actually qualify for the loan.

The complaint alleges that Defendants engaged in unlawful, fraudulent, and unfair business acts and practices and failed to provide Plaintiff pertinent information required by law.

B. Facts of Which the Court Takes Judicial Notice

Plaintiff and his spouse, Claudia Villanueva, recorded a Deed of Trust with the Kern County Recorder's Office on the real property that is the subject of this dispute on or about September 28, 2006, as instrument number 0206240380. The real property is located at 11217 Baron Avenue, Bakersfield, CA 93312 ("Subject Property").

Plaintiff and Ms. Villanueva obtained a loan in the sum of $ 279,200.00 ("Loan") in connection with the Subject Property. The Loan was secured by a Deed of Trust ("DOT") encumbering the Subject Property that was recorded on or about September 28, 2006, with the Kern County Recorder's Office as instrument number 0206240318. The DOT identifies Plaintiff and Ms. Villanueva as the trustors, Jackie Miller as the trustee, Suntrust Mortgage ("Suntrust") as the lender and Mortgage Electronic Registration **[*9]** Systems, Inc. ("MERS") as the beneficiary.

On April 3, 2009, an Assignment of the Deed of Trust ("Assignment") was recorded with the Kern County Recorder's Office as instrument number 0209047511. The Assignment assigns and transfers to Deutsche Bank National Trust CO as trustee for Long Beach Mortgage Loan Trust 2006-11 all beneficial interest under the DOT.

On April 3, 2009, a Substitution of Trustee ("Substitution") was recorded with the Kern County Recorder's Office as instrument number 0209047512. The Substitution substituted California Reconveyance Company as trustee under the Deed of Trust.

On April 3, 2009, a Notice of Default and Election to Sell Under the DOT ("NOD") was recorded with the Kern County Recorder's Office as instrument number 0209047513. The NOD states that as of April 2, 2009, the amount in arrears was $ 9,365.48.

JPMorgan acquired certain assets and liabilities of Washington Mutual Bank from the FDIC acting as receiver, including Washington Mutual's interest in the Loan pursuant to a Purchase and Assumption Agreement ("Agreement") between the FDIC and JPMorgan dated September 25, 2008.

DISCUSSION

A. Violation of *California Civil Code § 1632*

The first cause of action **[*10]** alleges that at the time the DOT and Promissory Note were signed, Plaintiff was not conversationally fluent in English and could not read or understand English. Plaintiff contends that the failure to provide him with the DOT, Promissory Note, and related documents in the Spanish language violated *California Civil Code § 1632*.

California Civil Code § 1632 provides, in relevant part:

> (b) Any person engaged in a trade or business who negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in writing, in the course of entering into any of the following, shall deliver to the other party to the contract or agreement and prior to the execution thereof, a translation of the contract or agreement in the language in which the contract or agreement was negotiated, which includes a translation of every term and condition in that contract or agreement:
> (1) A contract or agreement subject to the provisions of Title 2 (commencing with Section 1801) of, and Chapter 2b (commencing with Section 2981) and Chapter 2d (commencing with Section 2985.7) of Title 14 of, Part 4 of Division 3.
>
> (2) A loan or extension of credit secured other than by real property, or unsecured, for use **[*11]** primarily for personal, family or household purposes.
> (3) A lease, sublease, rental contract or agreement, or other term of tenancy contract or agreement, for a period of longer than one month, covering a dwelling, an apartment, or mobilehome, or other dwelling unit normally occupied as a residence.
>
> (4) Notwithstanding paragraph (2), a loan or extension of credit for use primarily for personal, family or household purposes where the loan or extension of credit is subject to the provisions of Article 7 (commencing with *Section 10240*) of Chapter 3 of Part 1 of Division 4 of the Business and Professions Code, or Division 7 (commencing with *Section 18000*), or Division 9 (commencing with Section 22000) of the Financial Code.

Cal. Civ.Code § 1632(b). The statute was enacted "to increase consumer information and protections for the state's sizeable and growing Spanish-speaking population." Cal. Civ.Code § 1632(a)(1).

Generally, Section 1632 does not require delivery of Spanish language documents where a loan is secured by real property. However, Section 1632(b)(4) contains an exception, which requires a Spanish translation if the "loan or extension of credit is for use primarily for personal, **[*12]** family, or household purposes where the loan or extension of credit is subject to the provisions of Article 7 . . ." Cal. Civ.Code § 1632(b)(4). Article 7, in turn, applies to certain loans secured by real property, which are negotiated by a real estate broker. See Cal. Bus. & Prof.Code § 10240. To take advantage of Section 1632(b)(4)'s exception, a plaintiff must allege that a defendant either acted as the real estate broker or had a principal-agent relationship with the broker who negotiated the loan. Patacsil v. Wilshire Credit Corp., 2010 U.S. Dist. LEXIS 10414, 2010 WL 500466, *8 (E.D.Cal. 2010); Castaneda v. Saxon Mortg. Services, Inc., 687 F.Supp.2d. 1191, 2009 U.S. Dist. LEXIS 119241, 2009 WL 4640673, *7 (E.D.Cal. 2009); Ortiz v. Accredited Home Lenders, Inc., 639 F.Supp.2d 1159, 1166 (S.D.Cal. 2009); Delino v. Platinum Cmty. Bank, 628 F.Supp.2d 1226, 1234 (S.D.Cal. 2009); Alvara v. Aurora Loan Serv., Inc., 2009 U.S. Dist. LEXIS 50365, 2009 WL 1689640, 3* (N.D.Cal. 2009). "More clearly, California law requiring translation of a contract or agreement for a loan or extension of credit for use primarily for personal, family or household purposes only applies to real estate brokers, rather than to lenders and subsequent services." Patacsil, 2010 U.S. Dist. LEXIS 10414, 2010 WL 500466 at *8.

Plaintiff **[*13]** does not allege that Defendants negotiated the loan or were real estate brokers. These parties therefore cannot be liable for disclosure violations at the time of loan origination. Thus, the complaint does not allege sufficient facts showing that the loan at issue falls within the exception stated in Section 1632(b)(4). Accordingly, the first cause of action based on Section 1632 must be dismissed.

B. *Section 17200* Causes of Action

The complaint alleges several violations of California Business and Professions Code § 17200. Section 17200 provides: "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof.Code § 17200. "'Because . . . section 17200 is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent.'. . . 'A practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' or vice versa.'" Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1043 (9th Cir. 2003) (quoting Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527(1999)).

A business **[*14]** act or practice is "unfair" when the conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to a violation of the law, or that otherwise significantly threatens or harms competition." Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). To sufficiently plead an action based on an "unfair" business act or practice, a plaintiff must allege facts showing the "unfair" nature of the conduct and that the harm caused by the conduct outweighs any benefits that the conduct may have. Motors, Inc. v. Times Mirror Co., 102 Cal.App.3d 735, 740, 162 Cal. Rptr. 543(1980).

A "fraudulent" business act or practice is one in which members of the public are likely to be deceived. Hall v. Time, Inc., 158 Cal.App.4th 847, 849, 70 Cal. Rptr. 3d 466 (2008). In order to state a cause of action based on a "fraudulent" business act or practice, the plaintiff must allege that consumers are likely to be deceived by the defendant's conduct. Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal.3d 197, 212, 197 Cal. Rptr. 783, 673 P.2d 660 (1983).

To constitute an "unlawful" business act, Section 17200 "borrows" violations of other laws and treats **[*15]** them as unlawful business practices independently actionable under Section 17200. Farmers Ins. Exch. v. Superior Court, 2 Cal.4th 377, 383, 6 Cal. Rptr. 2d 487, 826 P.2d 730 (1992). "Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair competition] claim." *Plascencia v. Lending 1st Mortg., 583 F.Supp.2d 1090, 1098 (N.D.Cal. 2008)* (citing *Saunders v. Superior Court, 27 Cal.App.4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994))*.

1. Unfair and Fraudulent Business Practices - Failure to Research Plaintiff's Ability to Re-Pay the Loan

The complaint contends that Defendants extended to Plaintiff the Loan on stated gross monthly income and did not conduct an adequate due diligence inquiry to determine if Plaintiff could pay the Loan back. The complaint alleges Defendants approved the Loan when they knew Plaintiff could not qualify for the Loan based upon his credit rating, income, and his asset to debt ratio. The complaint states these actions violate *Section 17200*.

Plaintiff's basic contention is that Defendants should have done more research into Plaintiff's financial condition before making the Loan. "However, no such duty exists for a lender to determine the borrower's ability to repay the loan. The lender's **[*16]** efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's." *Camillo v. Washington Mut. Bank, F.A., 2009 U.S. Dist. LEXIS 100077, 2009 WL 3614793, *6 (E.D.Cal. 2009)*; *Phillips v. MERS Mortgage Electronic Registration Systems, 2009 U.S. Dist. LEXIS 93277, 2009 WL 3233865, *4 (E.D.Cal. 2009)*; Renteria v. United States, *452 F. Supp. 2d 910, 922-923 (D. Ariz. 2006))*. "[A] lender owes no duty of care to the [borrowers] in approving their loan. Liability to a borrower for negligence arises only when the lender 'actively participates' in the financed enterprise 'beyond the domain of the usual money lender.'" *Phillips, 2009 U.S. Dist. LEXIS 93277, 2009 WL 3233865, *4*; *Wagner v. Benson, 101 Cal.App.3d 27, 34, 161 Cal. Rptr. 516 (1980)*; see also *Nymark v. Heart Fed. Sav. & Loan Assn, 231 Cal.App.3d 1089, 1096, 283 Cal. Rptr. 53 (1991)*. Without factual allegations that show Defendants stand in the place of Plaintiff's agents, there is no violation alleged and dismissal is appropriate.

2. TILA

The complaint alleges that Defendants failed to comply with the disclosure requirements mandated by the Truth in Lending Act ("TILA"), *15 U.S.C. § 1601, et seq.* The complaint contends that the failure to comply with TILA constitutes an unlawful business practice within **[*17]** the meaning of *Section 17200*.

There is a one-year statute of limitations period in which to file an action for damages under TILA. See *15 U.S.C. § 1640(e)*; *Beach v. Ocwen Federal Bank, 523 U.S. 410, 412, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (1998)*. The one-year limitations period of *15 U.S.C. § 1640(e)* runs from the date of consummation of the transaction. "Consummation" is defined as "the time that a consumer becomes contractually obligated on a credit transaction." *12 C.F.R. § 226.2(a)(13)*; *Grimes v. New Century Mortg. Corp., 340 F.3d 1007, 1009 (9th Cir. 2003)*. Plaintiff did not file any claim based on the TILA within one-year of the loan's closing. Thus, no TILA claim is available. See *15 U.S.C. § 1640(e)*; *Beach, 523 U.S. at 412*.

Because Plaintiff's TILA claim is barred, Plaintiff cannot base his *Section 17200* claim on a violation of TILA. "There are limits on the causes of action that can be maintained under *section 17200*. A court may not allow a plaintiff to 'plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition.'" *Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal.4th 163, 182, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*; **[*18]** see also *Morris v. Bank of America, 2010 U.S. Dist. LEXIS 24801, 2010 WL 761318, *7 (N.D.Cal. 2010)*; *Gonzalez v. First Franklin Loan Services, 2010 U.S. Dist. LEXIS 1657, 2010 WL 144862, *15 (E.D.Cal. 2010)*; *Garcia v. Wachovia Mortg. Corp., ___ F.Supp.2d ___, 2009 U.S. Dist. LEXIS 99308, 2009 WL 3837621, *11 (C.D.Cal. 2009)*. Because any claim based on the TILA is barred by the statute of limitations, Plaintiff's *Section 17200* claim based on the TILA is subject to dismissal.

3. California Financial Code § 22302

The complaint alleges that any consumer loan found to be unconscionable violates Financial Code *§ 22302*, and the Loan is unconscionable because of the relative bargaining positions of the parties. The complaint contends that the violation of *Section 22302* constitutes an unlawful business practice within the meaning of *Section 17200*.

California Financial Code § 22302 incorporates California Civil Code § 1670.5's prohibition on unconscionability into loan agreements. Civil Code Section 1670.5(a) allows the court to refuse to enforce all or part of a contract if the court finds as a matter of law that the contract or any clause of the contract was unconscionable at the time it was made. Cal. Civ. Code § 1670.5(a). The term "unconscionable" is not defined by statute **[*19]** but has been defined by the California courts. Trend Homes, Inc. v. Superior Court, 131 Cal.App.4th 950, 956, 32 Cal. Rptr. 3d 411 (2005). "[U]nconscionability has both a 'procedural' and a 'substantive' element." Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000). The procedural element of unconscionability focuses on oppression and surprise. Discover Bank v. Superior Court, 36 Cal.4th 148, 160, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005). "Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice." Bruni v. Didion, 160 Cal.App.4th 1272, 1289, 73 Cal. Rptr. 3d 395 (2008); Aron v. U-Haul Co. of California, 143 Cal.App.4th 796, 808, 49 Cal. Rptr. 3d 555 (2006). "Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." Bruni, 160 Cal.App.4th at 1289; Aron, 143 Cal.App.4th at 808 (2006). Id. "The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create 'overly harsh' or 'one-sided' results as to 'shock the conscience.'" Bruni, 160 Cal.App.4th at 1289; Aron, 143 Cal.App.4th at 808. "Both elements **[*20]** must be present, but the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." Trend Homes, 131 Cal.App.4th at 956 (internal quotes and cites omitted); Woodside Homes of California, Inc. v. Superior Court, 107 Cal.App.4th 723, 736, 132 Cal. Rptr. 2d 35 (2003).

The complaint alleges that the relative bargaining positions between the parties were unequal, Plaintiff could not negotiate or change any of the Loan documents' terms, and the Loan documents were so one-sided that they could only lead to one result -- a significant loss of money to Plaintiff. Plaintiff is describing a contract of adhesion. "The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Armendariz, 24 Cal.4th at 113. "[A] contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules legislative or judicial operate to render it otherwise." Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 819-20, 171 Cal. Rptr. 604, 623 P.2d 165 (1981) **[*21]** (internal cites omitted); DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc., 176 Cal. App. 4th 697, 716, 97 Cal. Rptr. 3d 856 (2009).

Plaintiff's claim of unconscionability fails. The complaint does not allege that the actual obligations imposed on Plaintiff by the contract were unclear from the Loan documents' terms. In addition, defaulting on a loan or the inability to make payments on a loan after approximately three years time does not "shock the conscience". Finally, the conclusory allegation that the contract was designed to cost Plaintiff a "significant loss of money" also does not show unconscionability. See Camillo v. Washington Mut. Bank, F.A., 2009 U.S. Dist. LEXIS 100077, 2009 WL 3614793, *7 (E.D.Cal. 2009). No factual allegations plausibly suggest an unconscionable agreement. See Iqbal, 129 S.Ct. at 1949. Thus, dismissal is appropriate.

C. Fraudulent Omission

The complaint alleges that Defendants failed to inform Plaintiff that based solely on his stated income, credit rating, and ratio of assets and liabilities, Plaintiff would not qualify for the Loan and Defendants only qualified Plaintiff based on the initial payment amount without including future increased payments. It appears that Plaintiff is alleging this failure to **[*22]** disclose information constituted fraud under California law.

To state a claim for fraudulent deceit a plaintiff must plead: (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or scienter); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage. In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1096 (9th Cir. 2007); Small v. Fritz Cos., Inc., 30 Cal.4th 167, 173, 132 Cal. Rptr. 2d 490, 65 P.3d 1255 (2003). Deceit is defined as the "suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." *Cal. Civ. Code § 1710*.

Federal Rule of Civil Procedure 9(b) requires that, when averments of fraud are made, the circumstances constituting the alleged fraud must be "specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Fed. R. Civ. Pro. 9(b)*; *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*. Although the substantive elements of fraud may be set by a state law, those elements must be pled in accordance **[*23]** with the requirements of *Rule 9(b)*. See *Vess, 317 F.3d at 1103*. Allegations of fraud should specifically include "an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007)*. "The plaintiff must set forth what is false or misleading about a statement, and why it is false." *Vess, 317 F.3d at 1106*. Stated differently, the complaint must identify "the who, what, when, where, and how" of the fraud. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009)*.

The complaint's allegations do not satisfy the heightened pleading requirement for fraud required by *Rule 9(b)*. The complaint does not identify the time, place, and manner of the alleged omissions. The complaint also fails to name any of Defendants' employees who allegedly failed to inform Plaintiff he would be unable to qualify for the Loan if future increased payments were considered. The complaint also fails to allege how Defendants are responsible for any such fraud as they were not parties to the original loan. Finally, Plaintiff has offered no information on how these Defendants owed **[*24]** Plaintiff a duty to explain the difference between qualifying for the Loan based on the initial payment as opposed to future potential payments. Thus, Plaintiff's fraud claim is subject to dismissal.

D. Injunctive Relief

The complaint's sixth cause of action alleges a claim for injunctive relief. Under Federal law, an injunction is a remedy to another claim or cause of action and not a claim or cause of action in and of itself. *Lima v. American Home Mortg. Servicing, Inc., 2010 U.S. Dist. LEXIS 6344, 2010 WL 144810 at *2 (N.D.Cal. 2010)*; see also *Washington Toxics Coalition v. Environmental Protection Agency, 413 F.3d 1024, 1034 (9th Cir. 2005)* (holding injunction is remedy for violation of the Endangered Species Act); *Catholic Social Services, Inc. v. I.N.S., 182 F.3d 1053, 1062 (9th Cir. 1999)* (stating injunction is remedy for claims against INS). Similarly, under California law, a claim or cause of action for an injunction is improper because an injunction is a remedy, not a cause of action. *Shamsian v. Atlantic Richfield Co., 107 Cal.App.4th 967, 985, 132 Cal. Rptr. 2d 635 (2003)*; *Roberts v. Los Angeles County Bar Ass'n, 105 Cal. App. 4th 604, 618, 129 Cal. Rptr. 2d 546 (2003)*. Because an injunction is merely a remedy and is not a cause of action, a cause **[*25]** of action must exist before injunctive relief may be granted. *Tapia v. Aurora Loan Services, LLC, 2009 U.S. Dist. LEXIS 82063, 2009 WL 2705853 at *3 (E.D.Cal. 2009)*. Thus, Plaintiff's of action for injunctive relief must be dismissed.

E. Covenant of Good Faith and Fair Dealing

The seventh cause of action alleges that Defendants breached the implied covenant of good faith and fair dealing. The complaint alleges that Defendants breached the implied covenant of good faith and fair dealing when they "used their superior knowledge in the real estate, lending and finance industries to intentionally hide the fact that Plaintiff would not and could not qualify for the ARM loan for which Plaintiff applied, and the LOAN would in fact cost Plaintiff significantly more than what was stated by" Defendants.

There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything that will injure the right of the other to receive the benefits of the agreement. *Kransco v. American Empire Surplus Lines Ins. Co., 23 Cal.4th 390, 400, 97 Cal. Rptr. 2d 151, 2 P.3d 1 (2000)*; *Rest.2d Contracts, § 205*. However, the duty of good faith and fair dealing is "a supplement to an existing contract, and thus it does not require parties **[*26]** to negotiate in good faith prior to any agreement." *McClain v. Octagon Plaza, LLC, 159 Cal.App.4th 784, 799, 71 Cal.*

Rptr. 3d 885 (2008). Thus, to the extent the complaint's allegations stem from the formation and negotiation of the Loan, Plaintiff's claim for a breach of the covenant must be dismissed.

Moreover, no implied covenant tort is available to Plaintiff. "Generally, no cause of action for the tortuous breach of the implied covenant of good faith and fair dealing can arise unless the parties are in a 'special relationship' with 'fiduciary characteristics.'" Pension Trust Fund v. Federal Ins. Co., 307 F.3d 944, 955 (9th Cir. 2002); Saldate v. Wilshire Credit Corp., 268 F.R.D. 87, 2010 U.S. Dist. LEXIS 21034, 2010 WL 582069, *18 (E.D. Cal. 2010). The "implied covenant tort is not available to parties in an ordinary commercial transaction where the parties deal at arms' length." Pension Trust Fund, 307 F.3d at 955. California courts do not invoke a special relationship between a lender and borrower. Oaks Management Corp. v. Superior Court, 145 Cal.App.4th 453, 466, 51 Cal. Rptr. 3d 561 (2006); Kim v. Sumitomo Bank, 17 Cal.App.4th 974, 979, 21 Cal. Rptr. 2d 834 (1993). A loan transaction is an arms' length transaction, and there is no fiduciary relationship between the borrower and lender **[*27]** absent special circumstances with "fiduciary characteristics". Oaks Management Corp., 145 Cal.App.4th at 466; Union Bank v. Superior Court, 31 Cal.App.4th 573, 579 n. 2, 37 Cal. Rptr. 2d 653 (1995); Kim, 17 Cal.App.4th at 979; Mitsui Mfrs. Bank v. Superior Court, 212 Cal.App.3d 726, 730, 260 Cal. Rptr. 793 (1989). The complaint does not allege facts establishing a "special relationship" between Plaintiff and Defendants that could justify extending tort liability. Thus, Plaintiff's claim for a breach of the covenant of good faith and fair dealing must be dismissed.

F. Unjust Enrichment

The complaint alleges that "Defendants unjustly received and retained benefits and payments at the expense of plaintiff and persons similarly situated, who is therefore entitled to restitution." The complaint contends the complaint's allegations state a cause of action for unjust enrichment.

The elements of an unjust enrichment claim are receipt of a benefit and unjust retention of the benefit at the expense of another. Peterson v. Cellco Partnership, 164 Cal.App.4th 1583, 1593, 80 Cal. Rptr. 3d 316 (2008); Lectrodryer v. SeoulBank, 77 Cal.App.4th 723, 726, 91 Cal. Rptr. 2d 881 (2000). However, "the mere fact that a person benefits another is not of itself sufficient to require the other **[*28]** to make restitution therefor." Peterson, 164 Cal.App.4th at 1593. Unjust enrichment is typically sought in connection with a "quasi-contractual" claim in order to avoid unjustly conferring a benefit upon a defendant where there is no valid contract. McBride v. Boughton, 123 Cal.App.4th 379, 388, 20 Cal. Rptr. 3d 115 (2004).

The complaint's unjust enrichment claim fails because the complaint fails to state any facts in support of the contention that Defendants received and retained benefits and payments to which they were not entitled. In addition, under California law, an action in quasi-contract does not lie "when an enforceable, binding agreement exists defining the rights of the parties." Paracor Fin. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996); Hedging Concepts, Inc. v. First Alliance Mortgage Co., 41 Cal.App.4th 1410, 1419-20, 49 Cal. Rptr. 2d 191 (1996). The complaint alleges Plaintiff and Defendants entered into the Loan, and no allegations in the complaint support a claim that no contract exists between the parties. The complaint does not allege sufficient facts to maintain a plausible claim for unjust enrichment.

In addition, most California courts agree that there is no cause of action in California **[*29]** for unjust enrichment. Walker v. Equity 1 Lenders Group, 2009 U.S. Dist. LEXIS 40991, 2009 WL 1364430, *9 (S.D. Cal. 2009); Jogani v.Supior Court, 165 Cal.App.4th 901, 911, 81 Cal. Rptr. 3d 503 (2008); Melchior v. New Line Productions, Inc., 106 Cal.App.4th 779, 794, 131 Cal. Rptr. 2d 347 (2003). "The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." Lauriedale Associates, Ltd. v. Wilson, 7 Cal.App.4th 1439, 1448, 9 Cal. Rptr. 2d 774 (1992). "Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." Melchior, 106 Cal.App.4th at 784. Thus, the unjust enrichment claim is subject to dismissal.

G. Accounting

The complaint seeks from Defendants "a detailed accounting calculation and summary of the payoff balance they are demanding, including the unpaid principal balance, accrued interest, unpaid interest, daily interest charges and all other fees, costs or expenses comprising the payoff sum."

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only **[*30]** be ascertained by an accounting." *Teselle v. McLoughlin, 173 Cal.App.4th 156, 179, 92 Cal. Rptr. 3d 696 (2009)*. An accounting will not be awarded if a sum certain is alleged in the complaint. *Lawrence v. Aurora Loan Services LLC, 2010 U.S. Dist. LEXIS 5373, 2010 WL 364276, *10 (E.D.Cal. 2010)*; *Civic Western Corp. v. Zila Industries, Inc., 66 Cal.App.3d 1, 14, 135 Cal. Rptr. 915 (1977)*; *St. James Church v. Superior Court, 135 Cal.App.2d 352, 359, 287 P.2d 387 (1955)*. A suit for an accounting will also not lie where it appears from the complaint that no accounting is necessary or that there is an adequate remedy at law. *Lawrence, 2010 U.S. Dist. LEXIS 5373, 2010 WL 364276 at *10*; *Civic Western, 66 Cal.App.3d at 14*.

The complaint does not allege a balance due to Plaintiff. Instead, Plaintiff seeks an accounting to determine how much money he owes. Plaintiff has not cited any authority to support the right to seek an accounting under these circumstances. The failure to plead "some balance is due" to Plaintiff is fatal to Plaintiff's accounting cause of action. See *Fimbres v. Chapel Mortg. Corp., 2009 U.S. Dist. LEXIS 109261, 2009 WL 4163332, *8 (S.D. Cal. 2009)*; *Reynoso v. Paul Financial, LLC, 2009 U.S. Dist. LEXIS 106555, 2009 WL 3833298, *5 (N.D.Cal. 2009)*. Accordingly, the claim for an accounting must be dismissed.

H. Negligence

The tenth cause of action **[*31]** alleges that Defendants were negligent because the finance charge on the Loan was not properly disclosed. Defendants contend that Plaintiff's negligence claim fails because they owed no duty to Plaintiff.

"Under California law, '[t]he elements of negligence are: (1) defendant's obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks (duty); (2) failure to conform to that standard (breach of duty); (3) a reasonably close connection between the defendant's conduct and resulting injuries (proximate cause); and (4) actual loss (damages).'" *Corales v. Bennett, 567 F.3d 554, 572 (9th Cir. 2009)* (quoting *McGarry v. Sax, 158 Cal.App.4th 983, 994, 70 Cal. Rptr. 3d 519, (2008)* (internal quotations omitted)). In general, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. *Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1096, 283 Cal. Rptr. 53 (1991)*; *Bojorquez v. Gutierrez, 2010 U.S. Dist. LEXIS 28302, 2010 WL 1223144, *7 (N.D. Cal. 2010)*; *Gonzalez v. First Franklin Loan Services, 2010 U.S. Dist. LEXIS 1657, 2010 WL 144862, *8 (E.D.Cal. 2010)*; *Yoo v. JPMorgan Chase Bank, 2009 U.S. Dist. LEXIS 121032, 2009 WL 4823376, *4 (C.D.Cal. 2009)*; **[*32]** *Fimbres v. Chapel Mortg. Corp., 2009 U.S. Dist. LEXIS 109261, 2009 WL 4163332, *4 (S.D.Cal. 2009)*. Parties to a contractual relationship, such as a mortgagor and mortgagee, cannot bring a tort claim for negligence unless a legal duty independent of the contract itself has been violated. *Bojorquez, 2010 U.S. Dist. LEXIS 28302, 2010 WL 1223144, at *7*; *Gaitan v. Mortgage Electronic Registration Systems, 2009 U.S. Dist. LEXIS 97117, 2009 WL 3244729, *8 (C.D.Cal. 2009)*.

The complaint fails to allege a special lending relationship or an actionable breach of duty to substantiate a negligence claim. The complaint depicts an arms' length loan transaction. Plaintiff does not allege any facts to support a finding that a fiduciary relationship existed. The complaint only alleges a borrower-lender relationship. Thus, the negligence claim must be dismissed.

I. Breach of Fiduciary Duty

The eleventh cause of action alleges that Defendants breached their fiduciary duty to Plaintiff. The complaint alleges that Defendants were engaged in a fiduciary relationship to Plaintiff and breached the fiduciary duties they owed Plaintiff.

Plaintiff's cause of action for breach of fiduciary duty fails because he cannot plausibly plead the existence of any fiduciary duty between himself and Defendants. **[*33]** A loan transaction is at arms-length and there is no fiduciary relationship between the borrower and lender. *Oaks Management Corp., 145 Cal.App.4th at 466*; *Union Bank, 31 Cal.App.4th at 579 n. 2*; *Kim, 17 Cal.App.4th at 979*. Neither does a trustee under a Deed of Trust owe fiduciary duties to the borrower. *Justo v. Indymac Bancorp, 2010 U.S. Dist. LEXIS 22831, 2010 WL 623715, *6 (C.D.Cal. 2010)*; *Abdallah v. United Savings Bank, 43 Cal.App.4th 1101, 1109, 51 Cal. Rptr. 2d 286 (1996)*; Miller and Starr CALIFORNIA REAL ESTATE § 10:4 (2010). Thus, the breach of fiduciary duty claim is subject to dismissal.

ORDER

Accordingly, for the reasons stated in the above memorandum opinion, the court ORDERS that:

1. Defendants motion to dismiss is GRANTED;
2. The complaint is DISMISSED with leave to amend;
3. Any amended complaint SHALL be filed by May 7, 2010; and
4. Failure to file an amended complaint that is consistent with this court's memorandum opinion will result in this action's dismissal.

IT IS SO ORDERED.

Dated: April 16, 2010

/s/ Anthony W. Ishii

CHIEF UNITED STATES DISTRICT JUDGE

Durell v. Sharp Healthcare

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

April 19, 2010, Filed

D054261

Reporter

183 Cal. App. 4th 1350 *; 108 Cal. Rptr. 3d 682 **; 2010 Cal. App. LEXIS 531 ***

DANIEL DURELL, Plaintiff and Appellant, v. SHARP HEALTHCARE, Defendant and Respondent.

Prior History: **[***1]** APPEAL from a judgment of the Superior Court of San Diego County, No. 37-2007-00064220-CU-BT-CTL, Luis R. Vargas, Judge.

Disposition: Affirmed.

Core Terms

unfair, alleges, consumer, demurrer, cause of action, patients, prong, business practice, misrepresentation, restitution, causation, rates, unfair competition, unjust enrichment, deceptive, covenant, bills, leave to amend, Tobacco, charges, damages, nonperformance, uninsured, breach of contract, good faith, italics, voters, actual reliance, proscribes, predicate

LexisNexis® Headnotes

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

HN1[] **Justiciability, Standing**

To have standing to bring a claim under the "unlawful" prong of the California Unfair Competition Law, *Bus. & Prof. Code, § 17200 et seq.*, in which the predicate unlawful conduct is based on misrepresentations, actual reliance is an element of the claim.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

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

HN2[] **Standards of Review, Abuse of Discretion**

A demurrer tests the sufficiency of a complaint as a matter of law. In reviewing the propriety of the sustaining of a demurrer, the appellate court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The appellate court does not, however, assume the truth of contentions, deductions, or conclusions of law. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

HN3[] **Standards of Review, De Novo Review**

An appellate court reviews the trial court's ruling sustaining a demurrer independently. The appellate court upholds the trial court's ruling on any sufficient ground, whether relied on by the court below or not.

Civil Procedure > Remedies > Injunctions > General Overview

Contracts Law > Remedies > Restitution

Torts > Business Torts > Unfair Business Practices > Remedies

Civil Procedure > Preliminary Considerations > Equity > Relief

HN4[] **Remedies, Injunctions**

The purpose of the California Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. A UCL action is equitable in nature; damages cannot be recovered. Under the UCL, prevailing plaintiffs are generally limited to injunctive relief and restitution.

Torts > Business Torts > Unfair Business Practices > Elements

HN5[] **Unfair Business Practices, Elements**

The California Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, does not proscribe specific acts, but broadly prohibits any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. *§ 17200*. The scope of the UCL is quite broad. Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition. Therefore, an act or practice is unfair competition under the UCL if it is forbidden by law or, even if not specifically prohibited by law, is deemed an unfair act or practice.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Torts > Business Torts > Unfair Business Practices > Elements

HN6[] **Standing, Injury in Fact**

A private person has standing to bring an action under the California Unfair Competition Law, *Bus. & Prof. Code, § 17200 et seq.*, only if he or she has suffered injury in fact and has lost money or property as a result of the unfair competition. A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition.

Torts > Business Torts > Unfair Business Practices > Elements

HN7[] **Unfair Business Practices, Elements**

By proscribing any unlawful business practice, the California Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, borrows violations of other laws and treats them as unlawful practices that the UCL makes independently actionable. An unlawful business practice under *§ 17200* is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law. Virtually any law - federal, state or local - can serve as a predicate for an action under *§ 17200*.

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

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > Remedies

HN8[] **Deceptive & Unfair Trade Practices, State Regulation**

The California Consumer Legal Remedies Act, *Civ. Code, § 1750 et seq.*, establishes a nonexclusive statutory remedy for unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. The self-declared purposes of the act are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection. *Civ. Code, § 1770, subd. (a)(5)*, proscribes representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not. *Section 1770, subd. (a)(9)*, proscribes advertising goods or services with intent not to sell them as advertised. *Section 1770, subd. (a)(16)*, proscribes representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Torts > Business Torts > Unfair Business Practices > Elements

HN9[] **Standing, Injury in Fact**

The phrase "as a result of" in *Bus. & Prof. Code, § 17204*, of the California Unfair Competition Law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, indicates there must be some connection between the injury and the defendant's conduct. The "as a result of" language imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong.

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

HN10[] Justiciability, Standing

A consumer's burden of pleading causation in an action under the California Unfair Competition Law (UCL), Bus. & Prof. Code, § 17200 et seq., should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes.

Torts > Business Torts > Unfair Business Practices > Elements

HN11[] Unfair Business Practices, Elements

To show a business practice is unfair in a consumer action under California's Unfair Competition Law, Bus. & Prof. Code, § 17200 et seq., the plaintiff must show the conduct threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

Evidence > Burdens of Proof > General Overview

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > Remedies

HN12[] Deceptive & Unfair Trade Practices, State Regulation

Under Civ. Code, § 1780, subd. (a), of the California Consumer Legal Remedies Act (CLRA), Civ. Code, § 1750 et seq., an action may be brought only by a consumer who suffers any damage as a result of the use or employment of a proscribed method, act, or practice. This language does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof. Accordingly, a plaintiff in a CLRA action must show not only that the defendant's conduct was deceptive but that the deception caused the plaintiff harm. A misrepresentation is material for a plaintiff only if there is reliance, that is, without the misrepresentation, the plaintiff would not have acted as he or she did.

Business & Corporate Compliance > ... > Contracts Law > Breach > Nonperformance

Civil Procedure > Remedies > Damages > General Overview

Contracts Law > Standards of Performance > General Overview

Contracts Law > Breach > Breach of Contract Actions > General Overview

HN13[] Breach, Nonperformance

A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damages to the plaintiff. One party to a contract cannot compel another to perform while he or she is in default. While the performance of an allegation can be satisfied by allegations in general terms, excuses must be pleaded specifically.

Business & Corporate Compliance > ... > Contracts Law > Breach > Nonperformance

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

Contracts Law > Defenses > Unconscionability > General Overview

HN14[] **Breach, Nonperformance**

Civ. Code, § 1670.5, subd. (a), provides that the court may refuse to enforce a contract to the extent the court finds it to be unconscionable. The statute does not concern the pleading requirements for the nonperformance of a contract and does not indicate that when a contract is unconscionable in part the plaintiff is excused from all payment obligations.

Contracts Law > Standards of Performance > General Overview

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN15[] **Contracts Law, Standards of Performance**

The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant cannot be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. The covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement. A defendant's implied duty of good faith and fair dealing may be entirely independent of the plaintiff's duty to perform under the contract.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN16[] **Equitable Relief, Quantum Meruit**

There is no cause of action in California for unjust enrichment. Unjust enrichment is synonymous with restitution.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN17[] **Equitable Relief, Quantum Meruit**

There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory. In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Contracts Law > Remedies > Restitution

HN18[] **Equitable Relief, Quantum Meruit**

Under the law of restitution, an individual is required to make restitution if he or she is unjustly enriched at the expense of another. A person is enriched if the person receives a benefit at another's expense. However, the fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it. As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract.

Contracts Law > Standards of Performance > General Overview

Contracts Law > Remedies > Restitution

HN19[] **Contracts Law, Standards of Performance**

There is no equitable reason for invoking restitution when the plaintiff gets the exchange that he or she expected. If money is paid in satisfaction of an obligation actually owed by the plaintiff, he or she is obviously not entitled to restitution even though the performance was induced by mistake or fraud.

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

Evidence > Burdens of Proof > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN20[] **Standards of Review, Abuse of Discretion**

An appellate court reviews the denial of leave to amend after the sustaining of a demurrer under an abuse of discretion standard. When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Attorneys > General Overview

Civil Procedure > Appeals > Record on Appeal

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

HN21[] **Appeals, Appellate Briefs**

Each appellate brief must support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. *Cal. Rules of Court, rule 8.204(a)(1)(C)*. The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. It is the duty of counsel to refer the reviewing court to the portion of the record which supports the appellant's contentions on appeal. If no citation is furnished on a particular point, the court may treat it as waived.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

An uninsured patient filed a putative class action against a health care provider, based on its practice of billing uninsured patients its full standardized rates for services. The patient's second amended complaint alleged violation of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), violation of the Consumers Legal Remedies Act (CLRA) (*Civ. Code, § 1750 et seq.*), breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. The trial court sustained the provider's demurrer without leave to amend and entered a judgment of dismissal. (Superior Court of San Diego County, No. 37-2007-00064220-CU-BT-CTL, Luis R. Vargas, Judge.)

The Court of Appeal affirmed the judgment. The court held that to have standing to bring a claim under the “unlawful” prong of the UCL, in which the predicate unlawful conduct is based on misrepresentations, actual reliance is an element of the claim. The patient's second amended complaint did not allege the patient relied on the provider's representations in going to the provider's hospital or in seeking or accepting services once he was transported there. Regarding the “unfair” prong of the patient's UCL claim, the complaint did not allege the provider's conduct was tethered to any underlying constitutional, statutory or regulatory provision, or that it threatened an incipient violation of an ***antitrust law***, or violated the policy or spirit of an ***antitrust law***. Regarding the CLRA claim, the complaint did not allege the patient relied on any representations by the provider in seeking or accepting treatment at its hospital. The mere allegation that the patient suffered damages as a proximate result of the provider's deception was insufficient. The patient could not state a cause of action for breach of contract or breach of the implied covenant of good faith and fair dealing without adequately pleading an excuse for his nonperformance. The trial court did not abuse its discretion in denying the patient leave to amend his complaint. The patient did not discuss any particular allegations of his proposed third amended complaint or explain how it cured the numerous defects in his second amended complaint. (Opinion by McConnell, P. J., with Nares and Irion, JJ., concurring.) **[*1351]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

Unfair Competition § 8—Actions—Standing—Misrepresentation—Actual Reliance.

To have standing to bring a claim under the "unlawful" prong of the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) in which the predicate unlawful conduct is based on misrepresentations, a party must be able to plead actual reliance as an element of the claim.

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

Unfair Competition § 10—Actions—Remedies—Injunctive Relief and Restitution.

The purpose of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. A UCL action is equitable in nature; damages cannot be recovered. Under the UCL, prevailing plaintiffs are generally limited to injunctive relief and restitution.

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

Unfair Competition § 4—Criteria.

The unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) does not proscribe specific acts, but broadly prohibits any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. The scope of the UCL is quite broad. Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition. Therefore, an act or practice is unfair competition under the UCL if it is forbidden by law or, even if not specifically prohibited by law, is deemed an unfair act or practice.

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

Unfair Competition § 8—Actions—Standing—Injury in Fact—Loss of Money or Property.

A private person has standing to bring an action under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) only if he or she has suffered injury in fact and has lost money or property as a result of the unfair competition. A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact and a loss of money or property caused by unfair competition.

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

Unfair Competition § 8—Actions—Predicate.

By proscribing any unlawful business practice, the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) borrows violations of other laws and treats them as unlawful practices that the UCL makes independently actionable. An unlawful business practice under *§ 17200* is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law. Virtually any law—federal, state or local—can serve as a predicate for an action under *§ 17200*.

CA(6)[] **(6)**

Consumer Protection Laws § 38—Deceptive Practices—Nonexclusive Statutory Remedy.

The Consumers Legal Remedies Act (*Civ. **[*1352]** Code, § 1750 et seq.*) establishes a nonexclusive statutory remedy for unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction, intended to result or which results in the sale or lease of goods or services to any consumer. The self-declared purposes of the act are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection. *Civ. Code, § 1770, subd. (a)(5)*, proscribes representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not. *Section 1770, subd. (a)(9)*, proscribes advertising goods or services with intent not to sell them as advertised. *Section 1770, subd. (a)(16)*, proscribes representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

CA(7)[] **(7)**

Unfair Competition § 8—Actions—Fraud—Actual Reliance.

The phrase "as a result of" in *Bus. & Prof. Code, § 17204*, part of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) indicates there must be some connection between the injury and the defendant's conduct. The "as a result of" language imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong.

CA(8)[] **(8)**

Unfair Competition § 8—Actions—Causation—Misrepresentation—Actual Reliance.

A consumer's burden of pleading causation in an action under the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*) should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes.

CA(9)[] **(9)**

Unfair Competition § 8—Actions—Standing—Uninsured Patient—Health Care Provider—Actual Reliance.

In a putative class action by an uninsured patient against a health care provider, the patient did not have standing to bring a claim under the "unlawful" prong of the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) because the complaint did not allege that the patient relied on the provider's representations in going to the provider's hospital or in seeking or accepting services once he was transported there.

[Cal. Forms of Pleading and Practice (2010) ch. 565, Unfair Competition, § 565.35; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, §§ 107, 124; 4 Witkin, Summary of Cal. Law (10th ed. 2005) Sales, § 296; 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 532; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1025.]

[*1353] ***CA(10)***[] **(10)**

Unfair Competition § 4—Consumer Actions.

To show a business practice is unfair in a consumer action under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*), the plaintiff must show the conduct threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

CA(11)[] **(11)**

Consumer Protection Laws § 39—Deceptive Conduct—Damages—Causation—Reliance.

Under *Civ. Code, § 1780, subd. (a)*, part of the Consumers Legal Remedies Act (CLRA) (*Civ. Code, § 1750 et seq.*), an action may be brought only by a consumer who suffers any damage as a result of the use or employment of a proscribed method, act, or practice. This language does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof. A misrepresentation is material for a plaintiff only if there is reliance, that is, without the misrepresentation, the plaintiff would not have acted as he or she did.

CA(12)[] **(12)**

Contracts § 44—Breach—Elements.

A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damages to the plaintiff. One party to a contract cannot compel another to perform while he or she is in default. While the allegation of performance can be satisfied by allegations in general terms, excuses must be pleaded specifically.

CA(13)[] **(13)**

Contracts § 13—Refusal to Enforce—Unconscionability.

Civ. Code, § 1670.5, subd. (a), provides that the court may refuse to enforce a contract to the extent the court finds it to be unconscionable. The statute does not concern the pleading requirements for the nonperformance of a contract and does not indicate that when a contract is unconscionable in part the plaintiff is excused from all payment obligations.

CA(14)[] **(14)**

Contracts § 23—Covenant of Good Faith and Fair Dealing—Duty to Perform.

The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant cannot be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those **[*1354]** incorporated in the specific terms of their agreement. A defendant's implied duty of good faith and fair dealing may be entirely independent of the plaintiff's duty to perform under the contract.

CA(15)[] **(15)**

Contracts § 45—Unjust Enrichment—Restitution.

There is no cause of action in California for unjust enrichment. A claim for unjust enrichment is synonymous with a claim for restitution.

CA(16)[] **(16)**

Contracts § 45—Unjust Enrichment—Restitution.

There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory. In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment.

CA(17)[] **(17)**

Contracts § 45—Unjust Enrichment—Restitution.

Under the law of restitution, an individual is required to make restitution if he or she is unjustly enriched at the expense of another. A person is enriched if the person receives a benefit at another's expense. However, the fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is unjust for the person to retain it. As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract.

CA(18)[] **(18)**

Contracts § 45—Restitution——Entitlement—.

There is no equitable reason for invoking restitution when the plaintiff gets the exchange that he or she expected. If money is paid in satisfaction of an obligation actually owed by the plaintiff, he or she is obviously not entitled to restitution even though the performance was induced by mistake or fraud.

CA(19)[] **(19)**

Appellate Review § 108—Briefs—Reference to Record.

Each appellate brief must support any reference to a matter in the record by a citation to the volume and page number of the record where the matter **[*1355]** appears (*Cal. Rules of Court, rule 8.204(a)(1)(C)*). The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel. It is the duty of counsel to refer the reviewing court to the portion of the record which supports the appellant's contentions on appeal. If no citation is furnished on a particular point, the court may treat it as waived.

Counsel: Law Offices of J. Michael Vallee, J. Michael Vallee; Law Offices of Darrell Palmer and Darrell Palmer for Plaintiff and Appellant.

Higgs, Fletcher & Mack, John Morris and Alexis S. Gutierrez for Defendant and Respondent.

Judges: Opinion by McConnell, P. J., with Nares and Irion, JJ., concurring.

Opinion by: McConnell

Opinion

[687] McCONNELL, P. J.**—This is a putative class action by Daniel Durell against Sharp Healthcare (Sharp) for violation of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), violation of the Consumers Legal Remedies Act (CLRA) (*Civ. Code, § 1750 et seq.*), breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. Durell's theory is that Sharp engaged in deceptive and unfair practices by billing uninsured patients its full standardized rates for services, when it substantially discounts those rates for patients covered by Medicare or private insurance. Durell appeals a judgment of dismissal entered after the court sustained without leave to amend Sharp's demurrer to his second amended complaint (SAC).

CA(1)[] **(1)** In *In re Tobacco II Cases (2009) 46 Cal.4th 298 [93 Cal.Rptr.3d 559, 207 P.3d 20]* **[***2]** (*Tobacco II*), the California Supreme Court recently held that after the voters? approval of Proposition 64 (Gen. Elec., Nov. 2, 2004), a consumer suing a business under the "fraud" prong of the UCL must show actual reliance on the alleged misrepresentation, rather than a mere factual nexus between the business's conduct and the consumer's injury. (*Tobacco II, at p. 326*.) In this case we conclude that ***HN1***[] to have standing to bring a claim under the "unlawful" prong of the UCL, in which the predicate unlawful conduct is based on misrepresentations, as here, the reasoning of *Tobacco* ***[**688]*** *II* is equally applicable and actual reliance is an element of the claim. For this and other reasons addressed below we affirm the judgment.

[*1356]

COMPLAINT ALLEGATIONS AND PROCEDURAL BACKGROUND

Durell was taken to the emergency room of Sharp Grossmont Hospital and treated five times between October 2000 and May 2005, four times with a severe asthma condition and once with severe foot pain. Durell was uninsured at those times. Sharp requires its patients to sign an "Agreement for Services at a Sharp Facility" (hereafter Agreement for Services), which obligates a patient to pay Sharp's "usual and customary charges for … **[***3]** services." The SAC alleged Sharp billed Durell a total of $ 21,188.12 for his five hospital visits. Durell did not pay his bills and Sharp referred them for collection. [1]

In March 2007 Durell filed a proposed class action against Sharp. Sharp demurred to the complaint, and in November 2007 he filed a first amended complaint (FAC). The FAC included causes of action for (1) violation of the UCL; (2) violation of the CLRA; (3) unjust enrichment; (4) breach of contract; and (5) breach of the duty of good faith and fair dealing. The court sustained Sharp's demurrer to the FAC and granted Durell leave to amend.

In April 2008 Durell filed his SAC, which is the subject of this appeal. The SAC includes the same five causes of action as the FAC. [2] The SAC alleges that hospitals, **[***4]** including Sharp Grossmont Hospital, "maintain documents called Chargemasters, which are spreadsheets that list the gross charge for each product and service provided by the hospital. These gross charges, however, rarely bear any relation to the hospital's costs for providing treatment and differ from the actual, lower charges assessed against the overwhelming majority of patients who participate in Medicare or private insurance programs." The "Chargemaster rates often form the *starting point* for negotiations with insurance companies and managed care organizations to determine reasonable (and lower) reimbursements rates, or for determining Medicare … payments to hospitals. … Significantly, uninsured patients …

[1] The SAC alleged that for a two-night stay in 2000, Sharp charged Durell $ 8,017.33, which had ballooned to $ 13,995.33 with interest and collection charges; in 2001 Sharp charged him $ 689.15, which had grown to $ 1,141.33; in 2003 Sharp charged him $ 876.35, which had grown to $ 1,261.17; in 2004 Sharp charged him $ 1,522.60, which had grown to $ 2,207.10; and in 2005 Sharp charged him $ 1,992.05, which had grown to $ 2,583.19. These amounts total $21,188.12. The SAC alleged a total amount of $21,088.12. We use the larger figure.

[2] The SAC added two new plaintiffs, Jon Bigness and Rami Saltagi, as proposed representatives for the class. They do not appeal the judgment, however, and thus it is binding on them. (*Code Civ. Proc., § 906*; *In re Marriage of Weiss (1996) 42 Cal.App.4th 106, 119 [49 Cal.Rptr.2d 339]*.) Accordingly, complaint allegations pertaining to them are irrelevant. Further, **[***5]** the SAC added a cause of action for violation of the Unruh Civil Rights Act (*Civ. Code, § 51*), but Durell does not challenge the judgment as to that claim.

are the *only* category of payors who are actually obligated to pay the excessive gross Chargemaster rates." (Original italics.)
[*1357]

Sharp allegedly charged uninsured patients "on average, 412% of the Medicare reimbursement rates for non-outlier reimbursements, compared with the national average of 305% for all hospitals." (Fn. omitted.) Sharp charged Durell its Chargemaster rates, which were "excessive, unreasonable, and unconscionable." Additionally, the SAC alleges, "Sharp regularly sends its patients to collections **[**689]** when they are unable to pay," and Durell "has been the victim of Sharp's aggressive, uncaring and mean-spirited collection efforts." The SAC claims damages consisting of "payments made on the Sharp bills, fees and interest, an adverse credit rating and lower credit score, [and] other costs and expenses, including postage, mileage, and telephone expenses and being prevented from obtaining credit."

Sharp demurred to the SAC. After a hearing on July 25, 2008, the court took the matter under submission. On August 21, 2008, the court issued an order granting the demurrer on all causes of action without leave to amend. The court determined the UCL claim fails because the **[***6]** SAC does not sufficiently allege Durell's injury in fact or causation, that he relied on Sharp's alleged misrepresentation; the CLRA claim also fails for lack of causation allegations; the unjust enrichment claim fails because the SAC does not allege he paid Sharp more than the reasonable value of services he received; and the contract claims fail because the SAC does not sufficiently allege Durell performed his contract obligations or that he had an excuse for nonperformance.

Durell moved for reconsideration of the ruling and submitted a proposed third amended complaint (TAC). The proposed TAC, which is dated September 8, 2008, alleges Durell "has expended money in the sum of $ 1,522.60 due to [Sharp's] acts of unfair competition." Durell's attorney filed a supporting declaration, which states that since the date of the court's demurrer ruling "Durell paid to Sharp on his account, the amount of $ 1,522.60." In its opposition, Sharp submitted evidence that Durell had not paid Sharp anything. Durell's counsel admitted his error, and submitted a declaration by Durell that stated on September 29, 2008, "I paid … my Sharp bill that was originally $ 1522 but with 'collection' fees ballooned **[***7]** to $ 2,098.85."

The court granted reconsideration, but reaffirmed its ruling on the demurrer. The court determined the " 'new fact' of … Durell's payment to Sharp does not cure the deficiencies in [his] [SAC]." Judgment was entered in Sharp's favor on January 5, 2009.
[*1358]

DISCUSSION [3]

I

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[3] In support of his contentions on appeal, Durell cites lower court cases from California and other states that have no precedential value. We do not consider them. Further, we do not consider Sharp's lengthy argument its conduct was legal under applicable statutes and regulations, and that courts should not become embroiled in the highly regulated field of hospital billing practices. Sharp does not argue these laws preclude Durell's action as a matter of law, and rather it admits they are not relevant to the demurrer analysis.

We note that nationwide, purported class actions are being brought against hospitals under a variety of federal and state law theories pertaining to disparate billing practices. It appears that such suits have largely been unsuccessful. (See *Burton v. William Beaumont Hospital (E.D.Mich. 2005) 373 F.Supp.2d 707, 712* [discussing dozens of similar federal lawsuits and concluding plaintiffs **[***8]** misguidedly came to the judicial branch for relief that only the legislative branch can grant]; *Bobo v. Christus Health (E.D.Tex. 2005) 227 F.R.D. 479, 480* [discussing what court refers to as "latest epidemic" in class action suits].) In *Sutter Health Uninsured Pricing Cases (2009) 171 Cal.App.4th 495, 499 [89 Cal.Rptr.3d 615]*, the health care provider agreed in a proposed settlement to "end[] price discrimination against the uninsured." In affirming the settlement, the court explained the issue of whether the provider "had a duty not to give discounts to insured patients, or, if given, a duty to give the same discounts to uninsured patients," was "hotly contested." (*Id. at p. 511*.)

Standard of Review

HN2[] "A demurrer tests the sufficiency of a complaint as a matter of law." (*City [**690] of Chula Vista v. County of San Diego (1994) 23 Cal.App.4th 1713, 1718 [29 Cal.Rptr.2d 89]*.) In reviewing the propriety of the sustaining of a demurrer, the "court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the **[***9]** several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317]*.)

HN3[] We review the trial court's ruling independently. (*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal.4th 412, 415 [106 Cal.Rptr.2d 271, 21 P.3d 1189]*.) We uphold the court's ruling "on any sufficient ground, whether relied on by the court below or not." (*Wheeler v. County of San Bernardino (1978) 76 Cal.App.3d 841, 846, fn. 3 [143 Cal.Rptr. 295]*.)
[*1359]

II

UCL Cause of Action

A

Overview of Law

HN4[] **CA(2)**[] **(2)** "The purpose of the UCL [citation] 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. [Citation.]' " (*McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1470 [49 Cal.Rptr.3d 227]*.) "A UCL action is equitable in nature; damages cannot be recovered. [Citation.] … [U]nder the UCL, '[p]revailing plaintiffs are generally limited **[***10]** to injunctive relief and restitution.' " (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144 [131 Cal.Rptr.2d 29, 63 P.3d 937]*.)

HN5[] **CA(3)**[] **(3)** The UCL does not proscribe specific acts, but broadly prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising … ." (*Bus. & Prof. Code, § 17200*.) "The scope of the UCL is quite broad. [Citations.] Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition." (*McKell v. Washington Mutual, Inc., supra, 142 Cal.App.4th at p. 1471*.) " 'Therefore, an act or practice is "unfair competition" under the UCL if it is forbidden by law or, even if not specifically prohibited by law, is deemed an unfair act or practice.' " (*Troyk v. Farmers Group, Inc. (2009) 171 Cal.App.4th 1305, 1335 [90 Cal.Rptr.3d 589]*.)

CA(4)[] **(4)** Historically, the UCL authorized any person acting for the interests of the general public to sue for relief notwithstanding any lack of injury or damages. (*Troyk v. Farmers Group, Inc., supra, 171 Cal.App.4th at p. 1335*.) At the November 2, 2004, General Election, the voters approved Proposition 64, which amended the UCL to provide that **HN6**[] a private **[***11]** person has standing to bring a UCL action only if he or she "has suffered **[**691]** injury in fact and has lost money or property as a result of the unfair competition." (*Bus. & Prof. Code, § 17204*; see *Troyk v. Farmers Group, Inc., supra, at p. 1335*.) "A private plaintiff must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition." (*Peterson v. Cellco Partnership (2008) 164 Cal.App.4th 1583, 1590 [80 Cal.Rptr.3d 316]*.)

"The voters' intent in passing Proposition 64 and enacting the changes to the standing rules in *Business and Professions Code section 17204* was **[*1360]** unequivocally to narrow the category of persons who could sue businesses under the UCL." (*Hall v. Time Inc. (2008) 158 Cal.App.4th 847, 853 [70 Cal.Rptr.3d 466]*.) "In Proposition 64, as stated in the measure's preamble, the voters found and declared that the UCL's broad grant of standing had encouraged '[f]rivolous unfair competition lawsuits [that] clog our courts[,] cost taxpayers' and 'threaten[] the survival of small businesses … .' [Citation.] The former law, the voters determined, had been 'misused by some private attorneys who' '[f]ile frivolous lawsuits as a means of generating attorney's fees without **[***12]** creating a corresponding public benefit,' '[f]ile lawsuits where no client has been injured in fact,' '[f]ile lawsuits for clients who have not used the defendant's product or services, viewed the defendant's advertising, or had any other business dealing with the defendant,' and '[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision.' [Citation.] '[T]he intent of California voters in enacting' Proposition 64 was to limit such abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact' [citation] and by providing 'that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public' [citation]." (*Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal.4th 223, 228 [46 Cal.Rptr.3d 57, 138 P.3d 207]*.) [4]

The SAC alleges that Sharp violated all three prongs of the UCL. On appeal, however, Durell does not raise the "fraud" prong and contends only that the SAC states a cause of action under both the "unlawful" and "unfair" prongs of the UCL.

B

Unlawful Business Practice

HN7[] ***CA(5)***[] **(5)** "By proscribing 'any unlawful' business practice, '[*Business and Professions Code] section 17200* "borrows" violations of other laws and treats them as unlawful practices' that the [UCL] makes independently actionable." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180 [83 Cal.Rptr.2d 548, 973 P.2d 527]* (*Cel-Tech*).) "An unlawful business practice under [*Business and Professions **[*1361]** Code] section 17200* is ' "an act or practice, committed pursuant to business activity, that is at the same time *forbidden by law*. **[**692]** [Citation.]" ' " (*Progressive West Ins. Co. v. Superior Court (2005) 135 Cal.App.4th 263, 287 [37 Cal.Rptr.3d 434]*.) **[***14]** " 'Virtually any law—federal, state or local—can serve as a predicate for an action under *Business and Professions Code section 17200*. [Citation.]' " (*Ticconi v. Blue Shield of California Life & Health Ins. Co. (2008) 160 Cal.App.4th 528, 539 [72 Cal.Rptr.3d 888]*.)

CA(6)[] **(6)** The SAC alleges that the predicate for the UCL claim of unlawfulness is Sharp's violation of provisions of the CLRA. [5] "***HN8***[] ' "The [CLRA], enacted in 1970, 'established a nonexclusive statutory remedy for "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. …" [Citation.]' " [Citation.] "The self-declared purposes of the act are 'to protect consumers against unfair and deceptive

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[4] "Proposition 64 also amended *Business and Professions Code section 17203*, which authorizes courts to enjoin unfair competition, by adding this sentence: 'Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements **[***13]** of *Section 17204* and complies with *Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.' " (*Hall v. Time Inc., supra, 158 Cal.App.4th at p. 852*.)

[5] The SAC also alleges as predicates for the UCL claim of unlawfulness, *Business and Professions Code section 17500*, which pertains to false or misleading advertising, and California's Rosenthal Fair Debt Collection Practices Act (*Civ. Code, § 1788 et seq.*). On appeal, however, Durell has abandoned any issues related to those statutes by not developing any specific argument pertaining to how the SAC supposedly alleges a UCL claim for unlawfulness based on them. (See *Buller v. Sutter Health (2008) 160 Cal.App.4th 981, 984 [74 Cal.Rptr.3d 47]*.)

business practices and to provide efficient and economical procedures to secure such protection.' " ' " (Bardin v. DaimlerChrysler Corp. (2006) 136 Cal.App.4th 1255, 1275 [39 Cal.Rptr.3d 634].) The SAC cites *subdivision (a)(5) of Civil Code section 1770*, which proscribes "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have"; *subdivision (a)(9)* **[***15]** of the statute, which proscribes "[a]dvertising goods or services with intent not to sell them as advertised"; and *subdivision (a)(16)* of the statute, which proscribes "[r]epresenting that the subject of a transaction has been supplied in accordance with a previous representation when it has not."

The SAC alleges Sharp's Web site includes a number of misrepresentations, including that its " 'goal is to offer quality care and programs that set community standards, exceed patients' expectations and are provided in a caring, convenient, *cost-effective* and accessible manner.' " (Italics added.) The SAC alleges that "[a]lthough Sharp promises to provide affordable care to **[***16]** members of the community and to put its patients first, these promises are false and intended to induce patients to seek treatment at Sharp facilities. Sharp has engaged, and continues to engage, in a pattern and practice of charging unfair, unreasonable and inflated prices for medical care to its uninsured patients." Additionally, the SAC alleges Sharp violated the CLRA by misrepresenting in its Agreement for Services that it would charge Durell **[*1362]** the "usual and customary charges for … services," when it actually charged him substantially higher rates it applies only to uninsured patients.

The court sustained the demurrer to the UCL cause of action without leave to amend on the ground Durell lacks standing to pursue the claim. The court found the SAC insufficiently alleges "injury in fact" and causation. (*Bus. & Prof. Code, § 17204*.) As to causation, the court explained the SAC fails to allege Durell was harmed "as a result of" Sharp's conduct. (*Ibid*.) For instance, the SAC does not allege he "relied on Sharp charging its 'usual and customary rates' in receiving treatment." We turn first to the causation issue, which we find dispositive.

[693]** The UCL does not define the phrase "as a result **[***17]** of" in *Business and Professions Code section 17204*. (*Tobacco II, supra, 46 Cal.4th at p. 325*.) In *Tobacco II*, the Supreme Court addressed the issue in the context of a claim under the "fraud" prong of the UCL (*46 Cal.4th at p. 311*) based on "claims of deceptive advertisements and misrepresentations by the tobacco industry about its products" (*id. at p. 312*; see also *id. at pp. 307–308, fn. 2*).

CA(7)[] **(7)** The court held that after the voters' approval of Proposition 64, representative plaintiffs, but not absent class members, must meet Proposition 64 standing requirements. (*Tobacco II, supra, 46 Cal.4th at p. 320*.) The parties in *Tobacco II* agreed ***HN9***[] the phrase "as a result of" in *Business and Professions Code section 17204* "indicates there must be some connection between the injury and the defendant's conduct," but they disagreed as to the particular type of causation the plaintiff must plead and prove. (*Tobacco II, at p. 325*.) The court held the "as a result of" language "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." (*Id. at p. 326*.) The court explained, "there is no doubt that reliance is the causal mechanism of fraud. [Citation.] **[***18]** Additionally, because it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, we must construe the phrase 'as a result of' in light of this intention to limit such actions." (*Ibid*.) The court rejected the argument that the phrase "as a result of" "merely requires 'a factual nexus' between a defendant's conduct and a plaintiff's injury: 'the representative plaintiff need only be one of the people from whom the defendant obtained money or property while engaging in its unfair business practice.' " (*Id. at p. 325*.) [6]

[*1363]

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[6] The court expounded: " '[R]eliance is proved by showing that the defendant's misrepresentation or nondisclosure was "an immediate cause" of the plaintiff's injury-producing conduct. [Citation.] A plaintiff may establish that the defendant's misrepresentation is an "immediate cause" of the plaintiff's conduct by showing that in its absence the plaintiff "in all reasonable probability" would not have engaged in the injury-producing conduct.' " (*Tobacco II, supra, 46 Cal.4th at p. 326*.)

In their briefing, the parties do not address *Tobacco II*, or whether the court's reasoning there pertaining to reliance applies **[***19]** to Durell's claim under the UCL's "unlawful" prong of the UCL. [7] In *Tobacco II*, the court announced: ?We emphasize that our discussion of causation in this case is limited to such cases where, as here, a UCL action is based on a fraud theory involving false advertising and misrepresentations to consumers. The UCL defines 'unfair competition' as 'includ[ing] any unlawful, unfair or fraudulent business act or practice … .' ([Bus. & Prof. Code,] § 17200.) There are doubtless many types of unfair business practices in which the concept of reliance, as discussed here, has no application.? (Tobacco II, supra, 46 Cal.4th at p. 325, fn. 17.)

CA(8)[] **(8)** Construing the phrase "as a result of" in Business and Professions Code section 17204 **[**694]** in light of Proposition 64's intention to limit private enforcement actions under the UCL, we conclude the reasoning of *Tobacco II* applies equally to the "unlawful" prong of the UCL when, as here, the predicate unlawfulness is misrepresentation and deception. **[***20]** HN10[] A consumer's burden of pleading causation in a UCL action should hinge on the nature of the alleged wrongdoing rather than the specific prong of the UCL the consumer invokes. This is a case in which the "concept of reliance" unequivocally applies (Tobacco II, supra, 46 Cal.4th at p. 325, fn. 17), and omitting an actual reliance requirement when the defendant's alleged misrepresentation has not deceived the plaintiff "would blunt Proposition 64's intended reforms" (Cattie v. Wal-Mart Stores, Inc. (S.D.Cal. 2007) 504 F.Supp.2d 939, 948).

CA(9)[] **(9)** The SAC does not allege Durell relied on either Sharp's Web site representations or on the language in the Agreement for Services in going to Sharp Grossmont Hospital or in seeking or accepting services once he was transported there. Indeed, the SAC does not allege Durell ever visited Sharp's Web site or even that he ever read the Agreement for Services. The SAC merely alleges that as a "proximate result of Sharp's unlawful business practices," Durell and the proposed class "have suffered economic damages in that they are obligated to pay an unreasonable, unfair and unconscionable debt." This is the type of "factual nexus" causation the court rejected **[***21]** in *Tobacco II* in the context of claimed misrepresentation and deception. (Tobacco II, supra, 46 Cal.4th at p. 325.)

Durell asserts the SAC is sufficient because actual reliance is not a requirement of his UCL claim. His sole authority is the following language from Hall v. Time Inc., supra, 158 Cal.App.4th at page 855: "The phrase 'as a **[*1364]** result of' [in Business and Professions Code section 17204] in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection *or* reliance on the alleged misrepresentation." (Italics added.) Durell claims that since the court used the disjunctive term "or," reliance is an optional requirement, and the SAC satisfies the causation requirement merely by pleading Sharp's conduct caused him to incur unreasonable medical bills. We disagree with him based on Tobacco II and its applicability here. We conclude the court properly granted the demurrer as to the "unlawful" prong of the UCL cause of action.

C

Unfair Business Practice

Durell also contends the demurrer was improper as to the "unfair" prong of his UCL claim. He cites Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 718 [113 Cal.Rptr.2d 399], for the general proposition **[***22]** that the "unfair" standard of the UCL " 'is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud.' " Durell summarily asserts the SAC "properly pleads the existence of harm resulting from a business practice that a finder of fact could reasonably determine to be unfair." Although he does not say so, we presume Durell attempts to avoid the demurrer on the ground his claim under the "unfair" prong of the UCL is not fraud based, and thus he is not required to plead reliance.

[7] *Tobacco II* was filed on May 18, 2009. Durell filed his opening brief in this matter on July 30, 2009. We asked the parties to be ready to address *Tobacco II* at oral argument, and the opinion was then discussed.

The UCL does not define the term “unfair” as used in *Business and Professions Code section 17200*. As this court has explained: “The proper definition for the term ‘unfair’ in a consumer action is uncertain. In *Cel-Tech,* the California **[**695]** Supreme Court held that in the context of an unfair competition claim by a *competitor*, the term ‘unfair’ in *[Business and Professions Code] section 17200* ‘means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.’ (*Cel-Tech, supra, 20 Cal.4th at p. 187*.) **[***23]** The court also held that ‘to guide courts and the business community adequately and to promote consumer protection, we must require that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.’ ” (*Puentes v. Wells Fargo Home Mortgage, Inc. (2008) 160 Cal.App.4th 638, 646 [72 Cal.Rptr.3d 903]* (*Puentes*).)

“The *Cel-Tech* court criticized as ‘too amorphous’ the appellate courts’ previous attempts to define ‘unfair’ within the meaning of the UCL. [Citation.] The court cited *People v. Casa Blanca Convalescent Homes, Inc. (1984)* ***[*1365]*** *159 Cal.App.3d 509, 530 [206 Cal.Rptr. 164]*, a case by the state against a convalescent home, in which the court held ‘ “[a]n ‘unfair’ business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers” ’ [citation], and *State Farm & Casualty Co. v. Superior Court (1996) 45 Cal.App.4th 1093, 1104 [53 Cal.Rptr.2d 229]*, a consumer case, in which the court held it ‘ “ ‘must weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.’ ” ’ ” (*Puentes, supra, 160 Cal.App.4th at p. 646*.)

“In **[***24]** *Cel-Tech*, the court left open the question of whether its definition of ‘unfair’ should also apply to consumer actions. [Citation.] Following *Cel-Tech*, ‘appellate court opinions have been divided over whether the definition of “unfair” under the UCL as stated in *Cel-Tech* should apply to UCL actions brought by consumers.’ ” (*Puentes, supra, 160 Cal.App.4th at p. 646*.) “In summary, one line of cases relies heavily on the Supreme Court’s language in footnote 12 of *Cel-Tech, supra, 20 Cal.4th at page 187*, that ‘[n]othing we say relates to actions by consumers’ (italics added), while the other line strongly relies on the Supreme Court?s unqualified criticism in *Cel-Tech* of the definitions of ‘unfair’ as set forth in *State Farm Fire & Casualty Co. v. Superior Court, supra, 45 Cal.App.4th at page 1104* and *People v. Casa Blanca Convalescent Homes, Inc., supra, 159 Cal.App.3d at page 530*, both of which were UCL cases brought by consumers.” (*Bardin v. DaimlerChrysler Corp., supra, 136 Cal.App.4th 1255, 1273*; see also *Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal.App.4th 1235, 1254–1255 [99 Cal.Rptr.3d 768]* [noting split of authority]; *Davis v. Ford Motor Credit Co. LLC (2009) 179 Cal.App.4th 581, 594–596 [101 Cal.Rptr.3d 697]*.) **[***25]** [8]

[696]** In *Scripps Clinic v. Superior Court (2003) 108 Cal.App.4th 917 [134 Cal.Rptr.2d 101]* (*Scripps Clinic*), this court agreed with the following analysis in *Gregory v. Albertson’s, Inc. (2002) 104 Cal.App.4th 845, 854 [128 Cal.Rptr.2d 389]* (*Gregory*), a consumer UCL case: “ ‘*Cel-Tech* … may signal a narrower interpretation of the prohibition of unfair acts or practices in all unfair competition actions and provides reason for caution in relying on the broad language in earlier decisions that the court found to be “too amorphous.” Moreover, where a claim of **[***26]** an unfair act or practice is **[*1366]** predicated on public policy, we read *Cel-Tech* to require that the public policy which is a predicate to the action must be “tethered” to specific constitutional, statutory or regulatory provisions.’ ” (*Scripps Clinic, at p. 940*.) In *Gregory*, the court rejected the pre-*Cel-Tech* definition of “unfair” as conduct that “ ‘ “ ‘ “offends an established public policy or … is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” ’ ” ’ ” (*Gregory, at p. 854*.)

CA(10)[] **(10)** Shortly after we issued *Scripps Clinic*, we issued *Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal.App.4th 1134, 1147 [135 Cal.Rptr.2d 796]* (*Byars*), in which we applied the *Cel-Tech* test in a consumer

[8] In a third approach, some courts have adopted the following test of the term “unfair” in consumer UCL actions based on section 5 (*15 U.S.C. § 45(a)*) of the Federal Trade Commission Act (*15 U.S.C. § 41 et seq.*): “(1) [t]he consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.” (*Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403 [48 Cal.Rptr.3d 770]*; accord, *Davis v. Ford Motor Credit Co. LLC, supra, 179 Cal.App.4th 581, 595, 596*, disagreeing with its earlier post-*Cel-Tech* opinion that applied a test the Supreme Court criticized in *Cel-Tech*.)

UCL action. We concluded that ***HN11***[] "[t]o show a business practice is unfair, the plaintiff must show the conduct 'threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.' " (*Byars, at p. 1147*, quoting *Cel-Tech, supra, 20 Cal.4th at p. 187*.)

Here, the court's order does not specifically address the "unfair" prong of the **[***27]** UCL. The SAC alleges Sharp's conduct violates public policy, and is "immoral, unethical, oppressive, and unscrupulous," a vague test of unfairness this court rejects. The SAC does not allege the conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***. In his briefing, Durell does not address *Cel-Tech, supra, 20 Cal.4th 163*, and its effect on the definition of "unfair" in consumer UCL cases, or this court's opinions in *Scripps Clinic, supra, 108 Cal.App.4th 917*, and *Byars, supra, 109 Cal.App.4th 1134*. We conclude the court properly granted the demurrer as to the claim under the "unfair" prong of the UCL. [9]

III

CLRA

HN12[] ***CA(11)***[] **(11)** Under *Civil Code section 1780, subdivision (a)*, CLRA actions may be brought "only by a consumer 'who suffers **[**697]** any damage *as a result of the use or employment*' of a proscribed method, act, or practice. (Italics added.) ' **[*1367]** This language does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof.' [Citation.] Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm.' " (*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal.App.4th 798, 809 [66 Cal.Rptr.3d 543]*.) A "misrepresentation is material for a plaintiff only if there is reliance—that is, ' " 'without the misrepresentation, the plaintiff would not have acted as he did' " ' … ." (*Id. at p. 810*.)

Again, the SAC does not allege Durell relied on any representation by Sharp in seeking or accepting treatment at its facility. The mere allegation that Durell suffered **[***29]** damages "[a]s a proximate result" of Sharp's deception is insufficient. Thus, the court's ruling is also correct on the CLRA claim.

IV

Contract-based Claims

A

Breach of Contract

Additionally, Durell contends the court erred by finding the SAC insufficiently pleads a breach of contract cause of action. Specifically, he asserts the SAC adequately alleges Sharp's unreasonable billing practices excuse him from paying its bills.

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[9] Given our holdings on the UCL issues, we are not required to address Durell's argument the SAC sufficiently pleads "injury in fact" within the meaning of *Business and Professions Code section 17204*. (See, however, our discussion of "injury in fact" as including the incurrence of unreasonable hospital bills in our related opinion in *Hale v. Sharp Healthcare (2010) 183 Cal.App.4th 1373 [108 Cal.Rptr.3d 669]*, also filed this date.) In *Hale*, **[***28]** we conclude the plaintiff's second amended complaint adequately pleaded actual reliance for purposes of the UCL and CLRA. (*183 Cal.App.4th at p. 1386–1387*.)

HN13[] ***CA(12)***[] **(12)** "A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) *plaintiff's performance or excuse for nonperformance*, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1388 [272 Cal.Rptr. 387]*, italics added.) "[I]t is elementary that one party to a contract cannot compel another to perform while he himself is in default." (*Lewis Publishing Co. v. Henderson (1930) 103 Cal.App. 425, 429 [284 P. 713]*; see *Karales v. Los Angeles Creamery Co. (1918) 36 Cal.App. 171, 172–173 [171 P. 821]*.) While the allegation of performance "can be satisfied by allegations in general terms" (*Careau & Co. v. Security Pacific Business Credit, Inc., supra, 222 Cal.App.3d at p. 1389*), "excuses **[***30]** must be pleaded specifically." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 532, p. 661; see *Kirk v. Culley (1927) 202 Cal. 501, 506 [261 P. 994]* ["The rule is well understood that a recovery on proof of excuse for nonperformance cannot be had on an allegation of full performance … ."].)

[*1368]

Durell's assertion that an excuse for the nonperformance of a contract may be generally pleaded is incorrect. He cites *Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal.App.2d 488, 492 [8 Cal.Rptr. 379]*, which states that a general allegation of *full performance* was sufficient. He also cites *Careau & Co. v. Security Pacific Business Credit, Inc., supra, 222 Cal.App.3d at page 1389*, which also notes that *performance* may be alleged in general terms, subject to noted exceptions.

We reject Durell's claim that the SAC sufficiently pleads an excuse for nonperformance. The SAC alleges Durell and the proposed class "have fulfilled their obligations and complied with all conditions of the contract(s) they are required to perform or have been excused from fully performing because Sharp have [*sic*] prevented them from doing so." Durell also **[**698]** cites the SAC's allegation that "Sharp unfairly and unlawfully charges its uninsured patients unfair, unreasonable **[***31]** and/or discriminatory rates that are significantly higher than those charged to insured patients."

Certainly, Sharp's services to Durell on five different occasions had value to him, and before pursuing a breach of contract action he was required in good faith to compensate Sharp a minimum of the amount he deemed reasonable. The SAC alleges, "Sharp charges uninsured patients more than four times the price of what Medicare pays hospitals for the same treatment," thus he admits he has no quarrel with approximately one-fourth of the total amount Sharp billed him. The SAC does not allege Durell paid Sharp anything toward his bills, and he admitted during his motion for reconsideration of the demurrer ruling that he had belatedly paid Sharp only $ 2,098.85 (a debt of $ 1,522.60 for one visit plus collection fees), which is less than 10 percent of Sharp's total billings. [10] Durell does not assert the $ 2,098.85 payment remotely covers the reasonable value of Sharp's services, even by his own estimation. [11] We agree that the breach of contract cause of action fails for insufficient allegations of excuse for nonperformance.

CA(13)[] **(13)** Durell's reliance on ***HN14***[] *Civil Code section 1670.5* is misplaced, as it provides that the court may refuse to enforce a contract to the extent the court finds it to be unconscionable. (*Civ. Code, § 1670.5, subd. (a)*.) The statute does not concern the pleading requirements for the nonperformance of a contract, and contrary to Durell's position, it does not indicate that when a **[*1369]** contract is unconscionable in part the plaintiff is excused from all payment obligations. Durell also cites *Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal.App.2d 594, 602 [78 Cal.Rptr. 302]*, which states, "A breach does not terminate a contract as a matter of course **[***33]** but is a ground for termination at the option of the injured party." Durell claims this language means that because "Sharp

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[10] Although on demurrer the court ordinarily looks only at the complaint **[***32]** and matters judicially noticed, "[w]hen a party opposing a demurrer admits that it does not dispute facts extrinsic to the complaint, the trial court may properly treat these facts as judicial admissions for the purpose of testing the sufficiency of the complaint." (*Buckland v. Threshold Enterprises, Ltd., supra, 155 Cal.App.4th 798, 806*.)

[11] Durell essentially concedes that since he has paid Sharp so little he has no breach of contract damages. He claims he is entitled to nominal damages for breach of contract. (See *Sweet v. Johnson (1959) 169 Cal.App.2d 630, 632 [337 P.2d 499]*.)

has breached its contractual obligation to charge reasonable rates," he "is no longer obligated to pay." The general language of *Whitney* does not mean Durell is excused from paying Sharp any amount whatsoever.

B

Breach of Implied Covenant

HN15[] ***CA(14)***[] **(14)** "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. [Citation.] The covenant thus cannot ' "be endowed with an existence independent of its contractual underpinnings." ' [Citation.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National Inc. (2000) 24 Cal.4th 317, 349–350 [100 Cal.Rptr.2d 352, 8 P.3d 1089]*.) The "covenant **[**699]** is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement." (*Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 36 [44 Cal.Rptr.2d 370, 900 P.2d 619]*.) "Breach **[***34]** of the covenant of good faith and fair dealing gives rise to a contract action … or, in limited contexts, a tort action with the tort measure of compensatory damages and the right to recover punitive damages … ." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 800, p. 894, citations & italics omitted.)

Although a defendant's implied duty of good faith and fair dealing may be entirely independent of the plaintiff's duty to perform under the contract (see *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 577 [108 Cal.Rptr. 480, 510 P.2d 1032]*), such is not the case here when the SAC's implied covenant cause of action is essentially based on the same allegations as the breach of contract cause of action. Under the circumstances, Durell cannot state a cause of action for breach of the implied covenant without adequately pleading an excuse for his nonperformance. The court properly sustained the demurrer to both the breach of contract and breach of implied covenant causes of action on the same ground.
[*1370]

V

Unjust Enrichment

HN16[] ***CA(15)***[] **(15)** "[T]here is no cause of action in California for unjust enrichment." (*Melchior v. New Line Productions, Inc. (2003) 106 Cal.App.4th 779, 793 [131 Cal.Rptr.2d 347]*; see *McKell v. Washington Mutual, Inc., supra, 142 Cal.App.4th 1457, 1490*.) **[***35]** Unjust enrichment is synonymous with restitution. (*Dinosaur Development, Inc. v. White (1989) 216 Cal.App.3d 1310, 1314 [265 Cal.Rptr. 525]*.)

HN17[] ***CA(16)***[] **(16)** "There are several potential bases for a cause of action seeking restitution. For example, restitution may be awarded in lieu of breach of contract damages when the parties had an express contract, but it was procured by fraud or is unenforceable or ineffective for some reason. [Citations.] Alternatively, restitution may be awarded where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct. In such cases, the plaintiff may choose not to sue in tort, but instead to seek restitution on a quasi-contract theory … . [Citations.] In such cases, where appropriate, the law will imply a contract (or rather, a quasi-contract), without regard to the parties' intent, in order to avoid unjust enrichment." (*McBride v. Boughton (2004) 123 Cal.App.4th 379, 388 [20 Cal.Rptr.3d 115]*, fn. omitted.)

HN18[] ***CA(17)***[] **(17)** "Under the law of restitution, '[a]n individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another's expense. [Citation.]' [Citation.] However, **[***36]** '[t]he fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it. [Citation.]' "

(McBride v. Boughton, supra, 123 Cal.App.4th at p. 389.) As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract. (California Medical Assn v. Aetna U.S. Healthcare of California, Inc. (2001) 94 Cal.App.4th 151, 172 [114 Cal.Rptr.2d 109].)

An unjust enrichment theory is inapplicable because Durell alleges the parties entered into express contracts. Further, **[**700]** as the court noted, Durell failed "to allege [he] paid in excess of reasonable value for the services [he] received or that the services were not worth what [he] paid for them." The SAC alleges Sharp charged Durell a total of $ 21,188.12 for services rendered during his five emergency room visits, but it does not allege what amount of those charges Durell has paid. During the hearing on Durell's motion for **[*1371]** reconsideration of the demurrer ruling, and for leave to filed his proposed TAC, he presented evidence **[***37]** he belatedly paid a bill from Sharp "that was originally $ 1522 but with 'collection' fees ballooned to $ 2,098.85." Durell does not assert Sharp's retention of the $ 2,098.85, less than 10 percent of its total billings, would be unjust.

HN19[] ***CA(18)***[] **(18)** " 'There is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected.' " (Peterson v. Cellco Partnership, supra, 164 Cal.App.4th 1583, 1593.) "If the money is paid in satisfaction of an obligation actually owed by the plaintiff, he or she is obviously not entitled to restitution even though the performance was induced by mistake or fraud." (1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 1025, p. 1117.)

VI

Leave to Amend

HN20[] "An appellate court reviews the denial of leave to amend after the sustaining of a demurrer under an abuse of discretion standard. [Citation.] When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. [Citation.] The plaintiff bears the burden of establishing **[***38]** that it could have amended the complaint to cure the defect." (Align Technology, Inc. v. Tran (2009) 179 Cal.App.4th 949, 958–959 [102 Cal.Rptr.3d 343].)

Durell cursorily argues that if this court "deems any claim inadequately plead [*sic*], it should grant [him] leave to amend the complaint." He claims the proposed "TAC contained numerous additional and detailed allegations when compared to the allegations of the SAC." In support, he gives a block citation to the portion of the appellant's appendix containing the proposed TAC (citing to pp. 733–754 of the appellant's appendix). He does not discuss any particular allegations of the proposed TAC or explain how it cures the numerous defects in the SAC's five causes of action. Further, he does not explain how yet another amended complaint would cure the defects. For instance, he does not claim he can in good faith amend the complaint to allege actual reliance for purposes of the UCL and CLRA claims, to allege he has paid Sharp a reasonable amount for purposes of his contract-based claims, or that he has paid Sharp even more than it is entitled to for purposes of his unjust enrichment claim.

CA(19)[] **(19)** Under the circumstances, Durell has not met his burden of showing abuse of discretion. ***HN21***[] Each appellate **[***39]** brief must "[s]upport any reference to a **[*1372]** matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure, *supra*, Appeal, § 701, p. 769.) "It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's **[**701]** contentions on appeal. [Citation.] If no citation 'is furnished on a particular point, the court may treat it as waived.' " (Guthrey v. State of California (1998) 63 Cal.App.4th 1108, 1115 [75 Cal.Rptr.2d 27].) Further, Durell has already filed three complaints without being able to state a single cause of action.

DISPOSITION

The judgment is affirmed. Sharp is entitled to costs on appeal.

Nares, J., and Irion, J., concurred.

EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.

United States District Court for the Central District of California

April 22, 2010, Decided; April 22, 2010, Filed

Case No. 2:09-cv-07875-MRP-AJW

Reporter

711 F. Supp. 2d 1074 *; 2010 U.S. Dist. LEXIS 55660 **

ECODISC TECHNOLOGY AG, Plaintiff, v. DVD FORMAT/LOGO LICENSING CORPORATION ET AL., Defendant.

Subsequent History: Dismissed by *Ecodisc Tech. AG v. DVD Format/Logo Licensing Corp., 2010 U.S. Dist. LEXIS 153221 (C.D. Cal., July 19, 2010)*

Core Terms

Format, discs, contacts, manufacture, alleges, licensees, personal jurisdiction, license agreement, replicators, specifications, meetings, forum state, Logo, motion to dismiss, licenses, aiming, website, products, prong, Technology, targeting, false advertising, intentional act, announcement, contends, resident, optical, non-compliant, discovery, posted

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

On a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim, a court must accept all factual allegations pleaded in the complaint as true, and construe those facts and draw all reasonable inferences therefrom in the light most favorable to the nonmoving party.

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

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

A court may dismiss a complaint under *Fed. R. Civ. P. 12(b)(6)* only if it appears beyond doubt that the alleged facts, even if true, will not entitle the plaintiff to relief on the theories asserted. While a complaint need not contain detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Moreover, a court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. Only a complaint that states a plausible claim for relief survives a motion to dismiss. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief.

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

HN3[] Motions to Dismiss, Failure to State Claim

Although a court generally cannot look beyond the pleadings in deciding a *Fed. R. Civ. P. 12(b)(6)* motion, it may consider: (1) any documents attached to the pleadings; (2) materials that are properly subject to judicial notice under *Fed. R. Evid. 201*; and (3) evidence upon which the complaint necessarily relies so long as (a) the complaint refers to the document, (b) the document is central to the plaintiff's claim, and (c) no party questions the authenticity of the document.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN4[] Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr-Pennington doctrine has been applied to actions petitioning each of the three branches of government, including the courts, and has been expanded beyond its original antitrust context. The essence of the Noerr-Pennington doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct. The United States Court of Appeals for the Ninth Circuit held the Noerr-Pennington doctrine applied to the plaintiff's state law intentional interference with prospective economic advantage claims. The court explained, because Noerr-Pennington protects federal constitutional rights, it applies in all contexts, even where a state law doctrine advances a similar goal.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN5[] Exemptions & Immunities, Noerr-Pennington Doctrine

Only litigation activities which constitute communications to the court may be described fairly as petitions. A pre-litigation demand letter directed to a private party, therefore, is not a petition. Nevertheless, in connection with the *First Amendment's* Petition Clause and protection of the right to access the courts, the United States Court of Appeals for the Ninth Circuit recognizes a breathing space principle which extends immunity under the Noerr-Pennington doctrine to conduct which is incidental to petitioning activities, even if it is not itself petitioning activity. Under that case law, all communications between private parties related to litigation, including pre-suit demand letters and settlement offers, are entitled to immunity.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN6[] Noerr-Pennington Doctrine, Sham Exception

Noerr-Pennington immunity is not a shield for petitioning conduct that, although ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. Accordingly, conduct otherwise protected by the Noerr-Pennington doctrine may nevertheless be restricted by law if it falls within the sham litigation exception. Judicial precedent establishes a two-part test for determining whether the sham litigation exception applies. To establish that a defendant's conduct was a sham, the plaintiff must prove (1) the defendant's alleged threats were objectively baseless in the sense that it could not have reasonably expected to prevail in litigation, and (2) the defendant's subjective motivation was to interfere with the plaintiff's business relationships.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

HN7[] **Pleadings, Heightened Pleading Requirements**

Where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the *First Amendment*, the danger that the mere pendency of the action will chill the exercise of *First Amendment* rights requires more specific allegations than would otherwise be required.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN8[] **False Advertising, Lanham Act**

To support a claim for false advertising under the Lanham Act, a plaintiff must show: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN9[] **Heightened Pleading Requirements, Fraud Claims**

See *Fed. R. Civ. P. 9(b)*.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN10[] **False Advertising, Lanham Act**

Although the United States Court of Appeals for the Ninth Circuit has not concluded that *Fed. R. Civ. P. 9(b)* applies to Lanham Act claims, many district courts have applied this heightened pleading standard to claims that are grounded in fraud, such as misrepresentation claims.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN11[] **Heightened Pleading Requirements, Fraud Claims**

To satisfy *Fed. R. Civ. P. 9(b)*, a plaintiff must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation. Further, a plaintiff must set forth what is false or misleading about a statement, and why it is false.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN12[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

In the absence of a viable federal claim, the United States District Court for the Central District of California will decline to exercise supplemental jurisdiction. *28 U.S.C.S. § 1367(c)(3)*.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN13[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Where a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. Where the motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts. Although the plaintiff cannot simply rest on the bare allegations of its complaint, uncontroverted allegations in the complaint must be taken as true. In addition, the court considers the declarations submitted by the parties. Any factual conflicts in the parties' declarations must be resolved in the plaintiff's favor.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN14[] **Federal & State Interrelationships, Erie Doctrine**

Where there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits. *Fed. R. Civ. P. 4(k)(1)(A)*.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

HN15[] **In Rem & Personal Jurisdiction, Constitutional Limits**

Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

HN16[] **In Rem & Personal Jurisdiction, Constitutional Limits**

The *Due Process Clause of the Fourteenth Amendment* requires that the defendant have minimum contacts with the forum state and that the exercise of jurisdiction be consistent with traditional notions of fair play and substantial justice.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

HN17[] **Jurisdiction, In Rem & Personal Jurisdiction**

There are two types of personal jurisdiction: general and specific. Where a defendant's contacts with a forum are substantial, continuous and systematic, a defendant can be deemed to be present in the forum for all purposes. In that case, general jurisdiction is present. Otherwise, a forum may exercise only specific jurisdiction, which is based on the relationship between the defendant's forum contacts and the plaintiff's claim. In both cases, all of a defendant's contacts with the forum state are considered, regardless of whether those contacts involve wrongful activity by the defendant. Finally, the prima facie jurisdictional analysis requires the court to accept the plaintiff's allegations as true.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN18[] **Jurisdiction, In Rem & Personal Jurisdiction**

In the event that no state within the United States can exercise personal jurisdiction over a defendant, the court may exercise jurisdiction under *Fed. R. Civ. P. 4(k)(2)*.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN19[] **Jurisdiction, In Rem & Personal Jurisdiction**

Fed. R. Civ. P. 4(k)(2) governs the territorial limits of effective service. As a practical matter, the rule is used to aggregate a foreign defendant's contacts with the country in order to find jurisdiction proper when contacts with any individual state are insufficient.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN20[] **Jurisdiction, In Rem & Personal Jurisdiction**

See *Fed. R. Civ. P. 4(k)(2)*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN21[] **In Rem & Personal Jurisdiction, In Personam Actions**

A court may exercise jurisdiction under *Fed. R. Civ. P. 4(k)(2)* when three requirements are met. First, the claim against the defendant must arise under federal law. Second, the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction. Third, the federal court's exercise of personal jurisdiction must comport with due process.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN22[] **In Rem & Personal Jurisdiction, In Personam Actions**

So long as a defendant does not concede to jurisdiction in another state, a court may use *Fed. R. Civ. P. 4(k)(2)* to confer jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > Service of Process > Methods of Service > General Overview

HN23[] **In Personam Actions, Due Process**

The due process analysis under *Fed. R. Civ. P. 4(k)(2)* is identical to the traditional personal jurisdiction analysis, however, the contacts are measured with respect to the United States rather than an individual forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Minimum Contacts

HN24[] **In Personam Actions, Due Process**

California law does not recognize conspiracy as a basis for acquiring jurisdiction over a foreign defendant. Thus, actions taken by coconspirators in furtherance of the conspiracy cannot be attributed to a conspirator for purposes of establishing personal jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN25[] **In Personam Actions, Substantial Contacts**

To be haled into court in the United States in an action unrelated to its contacts with the country, a foreign defendant's contacts must be substantial or continuous and systematic. The standard for establishing general jurisdiction is fairly high and requires that the defendant's contacts be of the sort that approximate physical presence.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN26[] **In Personam Actions, Purposeful Availment**

Specific jurisdiction is tethered to a relationship between the forum and the claim. Under *Fed. R. Civ. P. 4(k)(2)*, the United States is the relevant forum. In the United States Court of Appeals for the Ninth Circuit, specific jurisdiction exists when the following three elements are met: (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN27[] **In Personam Actions, Purposeful Availment**

The plaintiff bears the burden of satisfying the first two prongs of the United States Court of Appeals for the Ninth Circuit's specific jurisdiction test. If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state. Only after the plaintiff succeeds in satisfying both of the first two prongs does the burden shift to the defendant to present a compelling case that the exercise of jurisdiction would not be reasonable.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN28[] **In Personam Actions, Purposeful Availment**

The United States Court of Appeals for the Ninth Circuit treats the purposeful availment prong as a purposeful direction prong in a tort case. Where the defendant is accused of a tort, the inquiry is whether the defendant purposefully directed its activities at the forum state, applying an effect test that focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum. The effect test has three requirements: the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN29[] **In Personam Actions, Purposeful Availment**

The United States Court of Appeals for the Ninth Circuit clarifies that, for purposes of the purposeful availment prong of the specific jurisdiction test, the brunt of the harm need not be suffered in the forum state. If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN30[] **In Personam Actions, Purposeful Availment**

The United States Court of Appeals for the Ninth Circuit has emphasized that a foreign act with foreseeable effects on the forum state does not always give rise to specific jurisdiction; there must be express aiming at the forum state. The court explained that the express aiming requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN31[] In Personam Actions, Purposeful Availment

For purposes of the purposeful availment prong of the specific jurisdiction test, express aiming encompasses conduct expressly aimed at the forum state. While such conduct can include specifically targeting the plaintiff whom the defendant knows to be a resident of the forum state, it can also include specifically targeting the state itself.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN32[] In Personam Actions, Purposeful Availment

In the context of the intentional act test of specific jurisdiction, the United States Court of Appeals for the Ninth Circuit construes the term intent as referring to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN33[] In Personam Actions, Purposeful Availment

The result or consequence of the act is relevant for purposes of the purposeful availment prong of the specific jurisdiction test, but with respect to the third part of the Calder test, i.e., harm suffered in the forum.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN34[] In Personam Actions, Purposeful Availment

It is beyond dispute in the Ninth Circuit that maintenance of a passive website alone cannot satisfy the express aiming prong of the purposeful direction test. However, if there is something more, i.e., other conduct targeting the forum, the contacts can be sufficient to confer personal jurisdiction.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN35[] In Personam Actions, Purposeful Availment

For a court properly to exercise specific jurisdiction, the contacts constituting purposeful availment must be the ones that give rise to the current suit. This prong is met if but for the contacts between the defendant and the forum state, the cause of action would not have arisen.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Due Process

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Purposeful Availment

HN36[] In Personam Actions, Due Process

The final requirement for specific jurisdiction is that it comport with fair play and substantial justice.

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN37[] **Discovery & Disclosure, Disclosure**

A court may permit discovery to aid in determining whether it has personal jurisdiction. Discovery is appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary. On the other hand, where a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the court need not permit even limited discovery.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN38[] **In Rem & Personal Jurisdiction, In Personam Actions**

As the United States Court of Appeals for the Ninth Circuit has explained, where the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction.

Counsel: **[**1]** For Ecodisc Technology AG, a corporation, Plaintiff: Jeffery Jay Daar, LEAD ATTORNEY, Daar and Newman, Los Angeles, CA; Michael R Newman, LEAD ATTORNEY, Daar & Newman APLC, Los Angeles, CA.

For DVD Format/Logo Licensing Corporation, a corporation, Defendant: John H Longwell, Robert P Parker, LEAD ATTORNEYS, PRO HAC VICE, Paul Weiss Rifkind Wharton & Garrison LLP, Washington, DC; Kelli L Sager, LEAD ATTORNEY, Andrew J Thomas, Davis Wright Tremaine LLP, Los Angeles, CA.

For DVD Forum, an association, Defendant: Carey R Ramos, Robert B Davis, Tara J DiBenedetto, LEAD ATTORNEYS, PRO HAC VICE, Paul Weiss Rifkind Wharton & Garrison LLP, New York, NY; Kelli L Sager, LEAD ATTORNEY, Andrew J Thomas, Davis Wright Tremaine LLP, Los Angeles, CA.

Judges: Hon. Mariana R. Pfaelzer, United States District Judge.

Opinion by: Mariana R. Pfaelzer

Opinion

[*1076] ORDER RE: MOTIONS TO DISMISS

I. INTRODUCTION

In this unfair competition case, the licensor of a new technology for manufacturing thin optical discs (EcoDisc Technology AG or "Plaintiff") sues the optical disc standard-setting organization ("DVD Forum") and the corporation that licenses that DVD Format standard and DVD Logo (DVD Format/Logo Licensing Corporation or "DVDFLLC")(collectively, **[**2]** "Defendants") to disc replicators worldwide. The First Supplemental Complaint ("FSC") alleges Defendants have threatened **[*1077]** all disc replicators that if they manufacture the new thinner disc--the EcoDisc--they will be in breach of their license agreement with DVDFLLC and will no longer be permitted to manufacture standard DVDs or use the DVD Logo. The FSC further alleges that Defendants have placed in the marketplace false information regarding the EcoDisc. Plaintiff contends Defendants are conspiring to keep EcoDiscs out of the market to preserve the predominance of their own DVD formats and specifications.

Plaintiff filed this lawsuit in late October 2009, alleging Defendants have engaged in: a conspiracy to restrain trade in violation of state and federal ***antitrust law***; false advertising in violation of *Section 43(a) of the Lanham Act*; tortious interference with contractual relations; tortious interference with prospective economic advantage; trade libel; and unfair business practices in violation of *California Business & Professions Code § 17200 et seq.*

Defendants each filed a motion to dismiss the claims against them on separate grounds. DVD Forum, a Japanese trade association, filed **[**3]** a *Federal Rule of Civil Procedure ("FRCP") 12(b)(2)* motion, contending the Court should dismiss the FSC for lack of personal jurisdiction. DVDFLLC, the licensing corporation, moved to dismiss under *FRCP 12(b)(6)* for failure to state a claim upon which relief can be granted. DVDFLLC argues Plaintiff's claims are barred under the *Noerr-Pennington* doctrine, which protects the right to petition the government, and Plaintiff otherwise fails to allege cognizable antitrust and false advertising claims. DVDFLLC further argues the Court should decline to exercise supplemental jurisdiction over Plaintiff's state law claims upon dismissal of the federal causes of action. Plaintiff opposes these motions.

After the Court heard oral argument on Defendants' motions, DVDFLLC filed an *ex parte* application for leave to file a supplemental declaration. Docket No. 42. Plaintiff opposed. The Court **DENIES** the application and proceeds to adjudicate the motions to dismiss.

For the reasons outlined in greater detail below, the Court **GRANTS** DVDFLLC's motion to dismiss the federal antitrust claim on the basis of the *Noerr-Pennington* doctrine and the false advertising claim on the basis of Plaintiff's failure to **[**4]** plead with the particularity required by *FRCP 9(b)*. The dismissal is with leave to amend. The Court declines to address the merits of the state law claims until Plaintiff has pleaded a viable federal cause of action. With respect to DVD Forum's motion to dismiss for lack of personal jurisdiction, the motion is **GRANTED** without leave to amend.

The Court addresses DVDFLLC's motion first.

II. THE RULE 12(b)(6) MOTION

HN1[] On a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must accept all factual allegations pleaded in the complaint as true, and construe those facts and draw all reasonable inferences therefrom "in the light most favorable to the nonmoving party." *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*; *see also* *Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007)*. The Court recites the factual background of the case as alleged by Plaintiff.

A. BACKGROUND

Defendant DVD Forum is a standard-setting organization that developed a technical standard for optical discs, which it calls the "DVD Format," and which it promotes internationally. FSC P16. Defendant DVDFLLC is a Japanese corporation which is the exclusive licensor **[**5]** of the DVD **[*1078]** Format standard and the DVD Logo worldwide. [1] FSC PP5, 26. DVDFLLC implements policies and procedures that DVD Forum sets through DVD Forum's Steering Committee. FSC P27. For example, DVDFLLC produces, maintains and issues DVD Format books; registers trademarks and maintains DVD Logos; and polices pirate manufacturers, non-compliant products, and the incorrect usage of DVD Logos. FSC P25.

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[1] DVDFLLC has ten shareholders: Hitachi, Philips, Mitsubishi, Panasonic, Pioneer, Sony, Thomson, Time Warner, Toshiba and JVC. FSC P25.

DVDFLLC enters into license agreements with disc replicators to allow replicators to manufacture optical discs in compliance with the accepted DVD Format. The license agreements mandate that the proprietary technology may not be used to manufacture, sell or distribute any products that do not comply fully with the specifications set forth in the DVD Format Book. FSC P56; Saito Decl., Ex. 1 [DVDFLLC License Agreement Art. 2.8]. [2] The heart of this dispute is whether disc replicators, licensed by DVDFLLC, are using the specifications in the DVD Format Book to create EcoDiscs that do not fully comply with the technical standard adopted by DVD Forum and required **[**6]** to use the DVD Logo. Plaintiff alleges its 0.6mm discs are compatible with standard DVD players and can be played in 132 different playback systems. *See* FSC P52.

Plaintiff is a research and development company that licenses "EcoDisc Technology" in Europe and in the United States. FSC P39. EcoDisc Technology consists of a thin 0.6mm disc that is essentially one-half the thickness of the standard DVD (1.2mm disc) and more flexible. FSC P40. In addition, an EcoDisc is recyclable and environmentally-friendly. *Id.* Plaintiff alleges Defendants, along with certain of their respective members and shareholders, acted intentionally to suppress the use of innovative EcoDisc Technology and prevent EcoDiscs from competing with the standard DVD promoted by the DVD Forum and DVDFLLC. FSC P45.

For example, Plaintiff alleges that in 2008 a DVD Forum Working Group, WG-2, conducted a technical study of 0.6mm discs. FSC P47. At a September 17, 2008 DVD Forum Steering **[**8]** Committee meeting, the DVDFLLC representative reported DVDFLLC was awaiting the WG-2's final report on its technical study to determine "what should be done as to 0.6mm discs." *Id.* Two months later, the Steering Committee met and heard the WG-2's report **[*1079]** on 0.6mm discs, which judged the EcoDisc non-compliant with DVD Forum's specifications. FSC PP47, 51. At this meeting, "[t]here was a further discussion of the issue of 0.6mm discs in the marketplace in Europe." FSC P47.

Plaintiff further alleges in March 2009, DVDFLLC sent a written communication to all of its licensed replicators throughout the world. FSC P48. Plaintiff characterizes this communication as a threat to each replicator with a DVDFLLC License Agreement ("License Agreement") that if the replicator manufactures any 0.6mm discs, including an EcoDisc, the manufacture would be a serious breach of the DVDFLLC License Agreement and may lead to early termination. FSC P48. The letter stated "0.6mm Optical Discs are Not DVD Format Complaint" and "in some instances, such 0.6mm discs have caused damages to the playback apparatus." *Id.* The letter quoted from Article 2.8 of the License Agreement which states, "[t]he License Agreement **[**9]** requires that all DVD products manufactured by Licensees comply with the specifications set forth in the applicable DVD Format Books." *Id.* Moreover, "[t]he manufacturer of non-compliant products, including but not limited to the manufacture of 0.6mm discs, is a serious breach of the DVD Format/Logo License Agreement and may lead to early termination of the DVD Format/Logo License Agreement." *Id.*

DVDFLLC also posted a warning about 0.6mm discs on its website. FSC P49. The posting stated that the 0.6mm disc does not use DVD Format in a proper manner and "is only imperfectly and inappropriately using the Format. The DVD Forum judged that such a Disc is not compliant with the DVD Specifications. To use DVD Formats for products that do not conform to the Specifications is NOT admissible." *Id.* The posting also states that 0.6mm discs "often cannot be properly played on existing players and drives, and there have been reports of damages to the

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[2] Article 2.1 of the License Agreement provides the license "shall not under any circumstance authorize Licensee or its Affiliates to use the DVD Format Book(s) or the information contained therein in connection with the manufacture, sale or distribution of any Product other than the DVD Products(s) and DVD Product Category(ies) that have been designated by Licensee in Annex A-1 and for which the appropriate license fee has been paid." Saito Decl., Ex. 1. Article 1.17 defines "Product" as "any disc, device or other product that uses information disclosed in a DVD Format Book." Article 1.10 defines "DVD Product" as "a Product identified in Annex A-2 that conforms to the applicable DVD Format Book(s) specified in Annex A-1." The definition of DVD Product thus appears to be limited to products that use information disclosed in a DVD Format Book. *See* Saito Decl., Ex. 1 [DVDFLLC License Agreement Arts. 1.10, 1.17, 2.1]. As EcoDisc points out in the FSC, Blue-ray discs and DVD+RW discs are not considered DVD Products because they **[**7]** require unique playback systems, different from those of standard DVDs, and the DVDFLLC License Agreement does not prohibit licensees from manufacturing discs in those alternative formats. It is a disputed question of fact, one which is at the heart of this controversy, whether an EcoDisc is a DVD Product, *i.e.,* whether it is replicated using information disclosed in DVDFLLC's proprietary DVD Format Book.

discs and/or the hardware. . . . Licensees are warned that manufacturing non-compliant DVD Products could lead to termination of the License." *Id.*

In response to at least one e-mail from a licensee regarding the March 2009 letter, DVDFLLC reiterated that **[**10]** the 0.6mm disc does not use DVD Format in a proper manner and is non-compliant with DVD Specifications. FSC P55. DVDFLLC explained that because it "strive[s] to contain non-compliant products from appearing in the market" and in order to "minimize the problems between disc products and hardware," DVDFLLC must instruct its licensees to manufacture *compliant* DVD Products as stipulated in Articles 2.8 and 2.9 of the License Agreement. *Id.*

On June 12, 2009, DVDFLLC filed a complaint in federal court in the Southern District of New York against two licensees for producing EcoDiscs, which were marketed as identical to standard DVD discs in all respects other than thickness. FSC P60. DVDFLLC later distributed copies of the complaint to other licensees. FSC P62.

Plaintiff filed this lawsuit in October 2009, contending Defendants are attempting to suppress and prevent competition from EcoDisc "by making knowingly unfounded and unwarranted statements about the reliability of the EcoDiscs and, more importantly, by threatening all of DVD FLLC's licensed replicators that if they make an EcoDisc, they may lose the ability to make standard DVD discs and use the DVD logo." FSC P54. Subsequent to the **[**11]** filing of this lawsuit, on December 15, 2009, DVDFLLC sent a written communication to licensees offering an amendment to the License Agreement that would allow replication of 0.6mm discs if the licensee places the following warning **[*1080]** on 0.6mm disc packaging: "This disc is not a standard DVD, and may not operate in some drives or players." FSC P76. Further, the licensee must agree to indemnify DVDFLLC with respect to any costs or liabilities incurred in relation to the manufacture or sale of such discs. *Id.*

DVDFLLC explains that it does not seek to prevent its licensees from manufacturing EcoDiscs at all; it only seeks to prevent them from using the DVD Format and proprietary technology to manufacture an optical disc that is not fully compliant with its specifications. DVDFLLC contends the playability problems that accompany the non-compliant discs damage the brand and diminish the value of the DVD Logo. Plaintiff, on the other hand, alleges the EcoDisc was awarded a 99.2% playability rating and can be safely played in the same manner as a standard DVD. FSC P52. Plaintiff recognizes there were some ejection problems with certain Apple Mac notebook computers but explains that the slot-in **[**12]** drives on those computers did not meet DVD specifications. FSC P52. In addition, Plaintiff states EcoDisc had a printed visual warning on each EcoDisc stating it should not be used on an Apple Mac slot-in drive. *Id.* However, Plaintiff has taken steps to change the design of the EcoDisc to avoid this issue. "As of approximately November 2009 [after this lawsuit was filed], EcoDiscs no longer have any known ejection issue on any disc drives." FSC P70. Plaintiff no longer places warnings on its product. *Id.*

Plaintiff brings two claims for conspiracy to restrain trade. The first is a federal claim for violation of the *Section 1 of the Sherman Act*, FSC PP78-82, and the second is a state claim for violation of the Cartwright Act, FSC PP83-86. Plaintiff's third claim is for false advertising in violation of *Section 43(a) of the Lanham Act*, FSC PP87-94, and alleges defendants have made false statement of fact about EcoDisc products. The remaining four claims for tortious interference with contractual relations, tortious interference with prospective economic advantage, trade libel, and violation of *California Business & Professions Code § 17200 et seq.* are state law claims over which the Court **[**13]** will exercise supplemental jurisdiction only if the federal claims survive dismissal.

B. THE LEGAL STANDARD

HN2[] A court may dismiss a complaint under *Rule 12(b)(6)* only if it appears beyond doubt that the alleged facts, even if true, will not entitle the plaintiff to relief on the theories asserted. *See* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007)*; *see also* *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996)*. While a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citation, alteration, and internal quotation marks omitted). Moreover, a court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. The Supreme Court has stated, "only a complaint that states a plausible claim for relief survives a motion to **[**14]** dismiss . . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'shown'--that the pleader is entitled to relief." *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*.

Finally, ***HN3***[] although a court generally cannot look beyond the pleadings, it may consider: **[*1081]** (1) any documents attached to the pleadings, *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*; (2) materials that are properly subject to judicial notice under *Rule 201 of the Federal Rules of Evidence*, *id. at 688-89*; and (3) evidence upon which the complaint "necessarily relies" so long as (a) the complaint refers to the document, (b) the document is central to the plaintiff's claim, and (c) no party questions the authenticity of the document, *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*. Here, the Court considers the following documents referenced in and relied upon by the FSC: (1) the DVDFLLC standard Licensing Agreement, Saito Decl., Ex. 1, (2) the complaint filed by DVDFLLC against its licensee, U-Tech, in the Southern District of New York, Saito Decl., Ex. 2, (3) the December 15, 2009 communication re: supplemental **[**15]** licensing agreement, Saito Decl., Ex. 3, and (4) the DVDFLLC supplemental licensing agreement, Saito Decl., Ex. 4.

C. DISCUSSION

The Court begins by considering the threshold question of whether DVDFLLC is entitled to immunity from liability under the *Noerr-Pennington* doctrine.

1. *Noerr-Pennington* Immunity

The *Noerr-Pennington* doctrine derives from two Supreme Court cases holding that the *First Amendment* Petition Clause immunizes acts of petitioning the legislature from antitrust liability. *See United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. ***HN4***[] The doctrine has since been applied to actions petitioning each of the three branches of government, including the courts, and has been expanded beyond its original antitrust context. *Theme Promotions, Inc. v. News Am. Mktg. FSI, 546 F.3d 991, 1007 (9th Cir. 2008)*. "The essence of the *Noerr-Pennington* doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct." *Id. at 1006 (9th Cir. 2008)*; *Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006)*. In *Theme Promotions, Inc.,* **[**16]** the Ninth Circuit held the *Noerr-Pennington* doctrine applied to the plaintiff's state law intentional interference with prospective economic advantage claims. *Theme Promotions, 546 F.3d at 1007*. The court explained, "because *Noerr-Pennington* protects federal constitutional rights, it applies *in all contexts,* even where a state law doctrine advances a similar goal." *Id.* (second emphasis added); *see also White v. Lee, 227 F.3d 1214, 1231 (9th Cir. 2000)*(stating the *Noerr-Pennington* doctrine is not limited to the antitrust context, but "applies equally in all contexts.") Relying on *Theme Promotions, Inc.* and *White v. Lee,* DVDFLLC thus contends the *Noerr-Pennington* doctrine applies here to bar all of Plaintiff's state and federal law claims. At this time, the Court does not consider whether the doctrine extends to all of Plaintiff's claims because the answer is not necessary to the resolution of the pending motion. [3] The **[*1082]** Court considers the *Noerr-Pennington* doctrine only in connection with Plaintiff's federal antitrust claim.

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[3] *See Citizens United v. Federal Election Commission, 130 S. Ct. 876, 918, 175 L. Ed. 2d 753 (2010)*(Roberts, J., concurring)("Because the stakes are so high, our standard practice is **[**17]** to refrain from addressing constitutional questions except when necessary to rule on particular claims before us."); *Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944)*("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."); *Ashwander v. TVA, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936)*(Brandeis, J., concurring)("The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of.").

a. Protected Petitioning Activity

HN5[] Only litigation activities which constitute communications to the court may be described fairly as petitions. *Sosa, 437 F.3d at 933*. A pre-litigation demand letter directed to a private party, therefore, is not a petition. *Id.* Nevertheless, in connection with the *First Amendment's* Petition Clause and protection of the right to access the courts, the Ninth Circuit recognizes a breathing space principle which extends immunity under the *Noerr-Pennington* doctrine to conduct which is incidental to petitioning activities, **[**18]** even if it is not itself petitioning activity. *Id. at 934-35*; *see also* *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc., 944 F.2d 1525, 1528-29 (9th Cir. 1991)*, *aff'd* *508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. [4] Under *Sosa,* all communications between private parties related to litigation--including presuit demand letters and settlement offers--are entitled to immunity. *Sosa, 437 F.3d at 936-37*. [5]

DVDFLLC argues its communications with licensees and its website announcements, which were intended to enforce and protect its intellectual property, are sufficiently related to petitioning activity to trigger the *Noerr-Pennington* doctrine. *See* *id. at 935*. Plaintiff disagrees, insisting "[t]he threat to cancel a license to make standard DVDs has nothing to do with the *First Amendment's* Petition Clause and is not conduct incidental to any lawsuit." Opp. Br. at 10. Plaintiff's argument is insincere because the FSC itself recognizes that DVDFLLC did file a lawsuit against licensees that failed to satisfactorily respond to DVDFLLC's warnings. FSC P60. The communications at issue in this case asserted DVDFLLC's rights under the License Agreement and warned licensees that manufacturing 0.6mm discs using specifications licensed under the License Agreement could result in litigation. This conduct can be accurately characterized as sufficiently related to litigation to fall within the scope of the *Noerr-Pennington* doctrine.

b. Sham Litigation

HN6[] "Noerr-Pennington immunity is not a shield for petitioning conduct that, although **[**20]** 'ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.'" *Sosa, 437 F.3d at 938* (quoting *Noerr, 365 U.S. at 144*). Accordingly, conduct otherwise protected by the *Noerr-Pennington* doctrine may nevertheless be restricted by law if it falls within the "sham litigation" exception. **[*1083]** *Theme Promotions, Inc., 546 F.3d at 1007*. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.,* the Supreme Court established a two-part test for determining whether the sham litigation exception applies. *508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. To establish DVDFLLC's conduct here was a "sham," Plaintiff must prove (1) DVDFLLC's alleged threats were objectively baseless in the sense that it could not have reasonably expected to prevail in litigation *and* (2) DVDFLLC's subjective motivation was to interfere with Plaintiff's business relationships. *See id.*

Plaintiff argues DVDFLLC's alleged threats to revoke licenses were baseless because no licensee was using DVDFLLC's format to manufacture EcoDiscs. Thus, EcoDisc claims that because the alleged threats were **[**21]** a "sham," DVDFLLC is not entitled to the antitrust immunity that generally accompanies petitioning conduct. At this stage in the litigation, the Court need not conclude whether DVDFLLC's conduct was a sham. It must decide only whether Plaintiff has properly pleaded that the conduct was a sham, *i.e.,* objectively unreasonable and subjectively motivated to interfere with Plaintiff's business relationships. Plaintiff must meet a heightened pleading standard because it seeks damages based on conduct that implicates the *First Amendment*. *Kottle v. N.W. Kidney Centers, 146 F.3d 1056, 1063 (9th Cir. 1998)*; *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of*

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[4] The FSC recites details of DVDFLLC's lawsuit against U-Tech under the heading "Defendants' Efforts To Suppress EcoDisc Technology and EcoDiscs." FSC PP60-63. However, Plaintiff's opposition to DVDFLLC's motion to dismiss indicates that the pursuit of the U-Tech lawsuit is not alleged to be anticompetitive conduct, but merely evidence showing malice toward Plaintiff in particular. Opp. Br. at 10 n.1.

[5] The Ninth Circuit explained, "preceding the formal filing of litigation with an invitation to engage in negotiations to settle legal claims is a common, if not universal, feature of modern litigation. . . . Restricting such prelitigation conduct when the same demands asserted in a petition to the court is protected would render the entire litigation process more onerous, imposing a substantial burden **[**19]** on a party's ability to seek redress from the courts." *Sosa, 437 F.3d at 936*.

Culinary Workers, 542 F.2d 1076, 1082-83 (9th Cir. 1976)(***HN7***[]) "[W]here a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the *First Amendment*, the danger that the mere pendency of the action will chill the exercise of *First Amendment* rights requires more specific allegations than would otherwise be required.")

DVDFLLC relies on the "objectively reasonable" prong. It contends there are no allegations in the FSC that, if true, would demonstrate DVDFLLC's assertion of its **[**22]** rights against its licensees was completely unfounded. In fact, Plaintiff concedes that the use of the DVD Format book to produce non-compliant discs violates the License Agreement, FSC P56, and further admits that the EcoDisc does not comply, FSC P42. Plaintiff insists that licensees do not need to use DVDFLLC's format to create an EcoDisc. However, Plaintiff has not adequately explained in its FSC *how* it is that EcoDiscs can be played on a standard DVD player if manufacturers are not employing DVDFLLC's format standards. DVDFLLC quotes Plaintiff's own allegations that its discs have "the same data structure and same data layer as a conventional DVD-5," FSC P41, which DVDFLLC contends means EcoDiscs use the same specifications that were developed by DVD Forum and licensed by DVDFLLC.

Plaintiff alleges industry standards exist in the public domain from which a basic DVD can be created in a read-only format. FSC PP31-32. The FSC refers to the ECMA standards and *implies* that replicator licensees could use an ECMA standard instead of Defendants' standard to replicate an EcoDisc, but does not allege that they do. *Id.* Plaintiff alleges:

> The EcoDisc does not use the DVD Logo, but rather uses **[**23]** the EcoDisc Logo. An EcoDisc does not use any of the Format standards of the DVD Forum and is not compliant with any DVD Format. The EcoDisc is not a standard DVD. A number of patents of different patent pools are used in the manufacture of an EcoDisc and EcoDisc manufacturers are to pay royalties to these patent pools for the manufacture of an EcoDisc.

[*1084] FSC P42. Plaintiff further alleges that an EcoDisc "uses different molds, different specifications, is subject to different patents and patents pending, does not use the DVD Logo, and does not claim to be compliant with any of the specifications of the DVD Forum." *Id.* P50. Thus, Plaintiff implies Defendants' standards are never used in the manufacture of EcoDiscs and DVDFLLC's license agreements are therefore irrelevant to the production of EcoDiscs.

An important factual question, of course, is whether EcoDiscs are replicated by licensees using DVDFLLC's proprietary information from their DVD Format Book. For our immediate purpose, the crucial truth is that Plaintiff has not adequately alleged directly that replicators are not using Defendants' proprietary information in the manufacture of EcoDiscs. Plaintiff clearly alleges that *it* does **[**24]** not use Defendants' standards or format, but as to the replicators, the representations are lacking. The FSC contains no allegations that suggest Defendants' belief that their proprietary standards were being improperly utilized by replicators to manufacture EcoDiscs was unreasonable. Thus, EcoDisc has not passed the heightened pleading hurdle that the *First Amendment* requires.

Accordingly, the motion to dismiss is **GRANTED** with leave to amend under the doctrine of *Noerr-Pennington* immunity. To qualify for the sham litigation exception and survive the motion to dismiss, Plaintiff must allege DVDFLLC did not have a reasonable basis to believe its licensees were using its proprietary technology and specifications to make EcoDiscs, but nevertheless threatened its licensees with termination for the improper purpose of interfering with Plaintiff's business.

2. Section 43(a) of the Lanham Act

Neither the United States Supreme Court nor the Ninth Circuit Court of Appeals has addressed the applicability of the *Noerr-Pennington* doctrine specifically to claims that arise under *Section 43(a)* of the Lanham Act. Although the Court may ultimately determine that the *Noerr-Pennington* doctrine applies **[**25]** to the claim, at this time the Court will not address the issue because it concludes the Lanham Act was not pleaded with the particularity required by *Federal Rule of Civil Procedure 9(b)*. *See supra* n.3; *Santana Prods. v. Bobrick Washroom Equipment, Inc., 401*

F.3d 123, 135 (3d Cir. 2005)("We will not address at this time the *Noerr/Pennington* doctrine's applicability to Lanham Act claims because we conclude that Santana's Lanham Act claim is barred by laches.")

Plaintiff claims that DVDFLLC disseminated false statements of fact about plaintiff's EcoDisc product in violation of the false advertising provisions of the Lanham Act. *See* 15 U.S.C. § 1125(a)(1)(B). **HN8**[] To support a claim for false advertising under the Lanham Act, a plaintiff must show:

(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product;
(2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience;
(3) the deception is material, in that it is likely to influence the purchasing decision;

(4) the defendant caused its false statement to enter interstate commerce; and

(5) the plaintiff has been or is likely to be injured as a result **[**26]** of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997).

[*1085] DVDFLLC argues Plaintiff must meet the heightened pleading standard of Rule 9(b) because the claim for false advertising is grounded in fraud. Rule 9(b) sets forth: **HN9**[] "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). **HN10**[] Although the Ninth Circuit has not concluded that Rule 9(b) applies to Lanham Act claims, many district courts have applied this heightened pleading standard to claims that are grounded in fraud, such as misrepresentation claims. *See* Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC, 404 F. Supp. 2d 1214, 1219-20 (E.D. Cal. 2005). The Court agrees that Plaintiff's false advertising claims are grounded in fraud and that Rule 9(b) applies to the pleading of this claim. **HN11**[] To satisfy Rule 9(b), Plaintiff must state the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986). **[**27]** Further, Plaintiff must set forth what is false or misleading about a statement, and why it is false. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (citations omitted).

The Court finds Plaintiff has not met the burden of pleading the claim for false advertising according to the standards of Rule 9(b). Plaintiff identifies three separate communications by DVDFLLC that include alleged false statements without specifying which statements are allegedly false or setting forth what is false or misleading about such statements. First, Plaintiff describes a letter from DVDFLLC to its licensees regarding manufacture of 0.6mm discs such as the EcoDisc under the DVDFLLC License Agreement. FSC P48. Second, Plaintiff describes information posted on its website regarding 0.6mm discs. FSC P49. Third, Plaintiff describes a second letter from DVDFLLC to its licensees with a proposed Supplemental Agreement for licensees interested in replicating 0.6mm discs such as the EcoDisc. FSC PP75-76. With respect to each of these three communications, Plaintiff has adequately described the time, place and parties to the alleged misrepresentations. However, Plaintiff has failed to identify the **[**28]** specific content of the alleged false representations, set forth what is false about each statement and explain why it is false. DVDFLLC's motion to dismiss Plaintiff's false advertising claim is **GRANTED.** Plaintiff is permitted leave to amend the claims in conformity with Rule 9(b) and this order.

3. The State Law Claims

The Court will not address the sufficiency of the state law claims until Plaintiff has adequately pleaded a federal claim. **HN12**[] In the absence of a viable federal claim, the Court will decline to exercise supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3).

D. CONCLUSION REGARDING THE RULE 12(B)(6) MOTION

The motion is **GRANTED** in its entirety with leave to amend. Plaintiff may file an amended complaint no later than thirty days from the date of this Order. No further supplemental complaints will be allowed.

III. THE RULE 12(b)(2) MOTION

Plaintiff alleged in its FSC that the Court has personal jurisdiction over Defendants because they "do substantial business in the State of California and within this District and are transacting and doing business and conducting or otherwise transacting their affairs in this District, and the defendants have performed acts in furtherance of **[**29]** their illegal and wrongful conduct as alleged herein, which have had a substantial effect in this District." FSC **[*1086]** P3. DVD Forum refutes this statement with respect to itself and has moved to dismiss the complaint for lack of personal jurisdiction.

A. THE LEGAL FRAMEWORK

As the Ninth Circuit explained in *Schwarzenegger v. Fred Martin Motor Co.,* ***HN13***[] "[w]here a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. Where, as here, the motion is based on written materials rather than an evidentiary hearing, the plaintiff need only make a prima facie showing of jurisdictional facts." *374 F.3d 797, 800 (9th Cir. 2004)*(internal quotation and citations omitted). Although the plaintiff cannot "simply rest on the bare allegations of its complaint," *Amba Mktg. Sys., Inc. v. Jobar Int'l, Inc., 551 F.2d 784, 787 (9th Cir. 1977)*, uncontroverted allegations in the complaint must be taken as true, *AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996)*. In addition, the Court considers the declarations submitted by the parties. Any factual conflicts in the parties' declarations must be resolved **[**30]** in Plaintiff's favor. *Harris Rutsky & Co. Ins. Servs. Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir. 2003)*. However, here there are no conflicts.

HN14[] Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits. *See* *Fed. R. Civ. P. 4(k)(1)(A)*; *Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998)*. ***HN15***[] Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state law and federal due process are the same. *Id. at 1320* (citing *Cal. Civ. Proc. Code § 410.10*). ***HN16***[] The *Due Process Clause of the Fourteenth Amendment* requires that the defendant have minimum contacts with the forum state and that the exercise of jurisdiction be consistent with traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*.

HN17[] There are two types of personal jurisdiction: general and specific. Where a defendant's contacts with a forum are substantial, continuous and systematic, a defendant can be deemed to be "present" in the forum for all purposes. In that **[**31]** case, general jurisdiction is present. Otherwise, a forum may exercise only "specific" jurisdiction, which is based on the relationship between the defendant's forum contacts and the plaintiff's claim. In both cases, all of a defendant's contacts with the forum state are considered, regardless of whether those contacts involve wrongful activity by the defendant. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006)*. Finally, the prima facie jurisdictional analysis requires the Court to accept the plaintiff's allegations as true. *See* *Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002)*; *Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000)*.

HN18[] In the event that no state within the United States can exercise personal jurisdiction over a defendant, the Court may exercise jurisdiction under *Federal Rule of Civil Procedure 4(k)(2)*. [6] Plaintiff **[*1087]** now concedes that

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[6] *Rule 4(k)(2)* applies in rare situations. In fact, three years ago, the Ninth Circuit remarked that none of its cases thus far had countenanced jurisdiction under the rule. ***Holland Am. Line v. Wartsila N. Am., Inc., 485 F.3d 450, 462 (9th Cir. 2007)***. The Circuits that **[**33]** have concluded *Rule 4(k)(2)* conferred jurisdiction did so in cases where the defendants had extensive

neither California nor any other state may exercise personal jurisdiction over DVD Forum and it urges the Court to apply ***HN19***[] *Rule 4(k)(2)*, which governs the territorial limits of effective service. As a practical matter, the rule is used to **[**32]** aggregate a foreign defendant's contacts with the country in order to find jurisdiction proper when contacts with any individual state are insufficient. *Rule 4(k)(2)* provides:

> ***HN20***[] For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.

Accordingly, ***HN21***[] a court may exercise jurisdiction when three requirements are met. First, the claim against the defendant must arise under federal law. *Pebble Beach Co. v. Caddy, 453 F.3d 1151, 1159 (9th Cir. 2006)*. Second, the defendant must not be subject to the personal jurisdiction of any state court of general jurisdiction. *Id.* Third, the federal court's exercise of personal jurisdiction must comport with due process. *Id.*

With respect to the first requirement, two of Plaintiff's claims arise under federal law, the Sherman Act and the Lanham Act. With respect to the second requirement, Plaintiff now contends jurisdiction is not proper in any state court. [7] DVD Forum itself has not conceded to jurisdiction in any state. ***HN22***[] So long as a defendant does not concede to jurisdiction in another state, a court may use *Rule 4(k)(2)* to confer jurisdiction. *See Holland Am. Line v. Wartsila N. Am., Inc., 485 F.3d 450, 461-62 (9th Cir. 2007)*. Accordingly, the second requirement of *Rule 4(k)(2)* is met.

It is the third requirement, **[**34]** the due process requirement, that is not satisfied. ***HN23***[] The due process analysis under *Rule 4(k)(2)* is identical to the traditional personal jurisdiction analysis, however, the contacts are measured with respect to the United States rather than an individual forum state. *Pebble Beach Co., 453 F.3d at 1159*. Importantly, Plaintiff offers no examples of contacts between DVD Forum and another state that are different from DVD Forum's contacts with California. In other words, DVD Forum's aggregated contacts with the United States are no greater than, and not meaningfully different from, its contacts with California.

B. THE PARTIES

1. EcoDisc

Plaintiff EcoDisc Technology AG is a Swiss corporation with its principal place of business in Switzerland. FSC P4. Plaintiff describes itself as a research and development company that licenses certain technology relating to optical discs with a thickness of 0.6mm rather than the standard 1.2mm of the DVD Format. FSC PP38-39. Plaintiff licenses its technology to replicators which manufacture EcoDiscs with EcoDisc Technology. *Id.*

2. DVD Forum

Defendant DVD Forum is an unincorporated DVD industry association, comprised of over one hundred members worldwide, with **[**35]** its principal place of business in Japan. 01/08/10 Irie Decl. PP1, 3; FSC P7. **[*1088]** DVD Forum is governed by a Steering Committee which meets at least twice a year. 01/08/10 Irie Decl. P3, Ex. A at 7 [DVD Forum Charter, Art. 8(3)]. The Steering Committee approves all decisions relating to the licensing of DVD Formats and the DVD Logo to third parties, including terms and conditions. 01/08/10 Irie Decl., Ex. A at 8 [DVD

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contacts to the country. *See id.; e.g., Mwani v. bin Laden, 417 F.3d 1, 13, 368 U.S. App. D.C. 1 (D.C. Cir. 2005)*(defendants engaged in numerous conspiracies to bomb U.S. landmarks); *Adams v. Unione Mediterranea Di Sicurta, 364 F.3d 646, 651 (5th Cir. 2004)*(defendant directly insured hundreds of claims in the U.S.).

[7] Plaintiff's opposition brief declares that jurisdiction is proper under *Rule 4(k)(2)* and presents its argument within that framework. At oral argument, counsel again urged the Court to apply *Rule 4(k)(2)*.

Forum Charter, Art. 8(5)(b)]. DVD Forum also has Working Groups, which develop physical specifications for the DVD Format. *Id.* at 9-10 [DVD Forum Charter, Art. 10].

DVD Forum periodically holds meetings throughout the world, a few each year; the meetings typically last one or two days. *See* 01/08/10 Irie Decl. P6. Over the course of the last twelve years, nine meetings have been held in the state of California, seven of which were held in the Central District of California. *Id.* The record does not indicate any meetings were held anywhere else in the United States. *See* Opp. Br., Exs. 11-15. DVD Forum has charged a registration fee at its conferences, which Plaintiff implies is equivalent to transacting business in California, but DVD Forum is a non-profit organization. 03/08/10 **[**36]** Irie Decl. PP2-3. In an effort to link specific acts of DVD Forum to the claims in this case, the FSC alleges the subject of "0.6 mm discs in the marketplace in Europe" was discussed at the meetings of the DVD Forum Steering Committee held in September and November 2008. FSC P47. However, neither of those meetings were held in the United States. 01/08/10 Irie Decl. P7.

DVD Forum has limited contacts with the United States. It does not make or sell any products or engage in commercial business activities. *Id.* P3. It does not have a bank account, employees, an office, or any assets or property in California. *Id.* P5. It does not have an agent designated for service of process in California. *Id.* Upon advancing its *Rule 4(k)(2)* theory of jurisdiction, Plaintiff did not additionally allege any of the aforementioned indicators of presence in any other state.

Finally, DVD Forum maintains an informational website on which it posts informational announcements. 01/08/10 Irie Decl. P4. The announcements are passive, are not addressed to any particular recipient, and do not invite comment or response. *Id.* One announcement DVD Forum posted states, "0.6mm Thick Optical Disc does not use the DVD Format **[**37]** in a proper manner. It is only imperfectly and inappropriately using the Format. The DVD Forum judged that such a disc is not compliant with the DVD Specifications." FSC P53. DVD Forum does list two verification laboratories on its website, which it approves as Class-A labs and which are located in the Central District of California. 03/08/10 Irie Decl. P4. However, DVD Forum does not own or administer those laboratories. *Id.*

The FSC alleges no actions taken by DVD Forum in the United States, or directed at the United States, related to 0.6 mm discs. There is no evidence that any of the content on DVD Forum's website is designed specifically for the California or the United States market, and, as explained further below, mere web presence is insufficient to establish personal jurisdiction. *Panavision Int'l, 141 F.3d at 1322 (9th Cir. 1998)*.

3. DVDFLLC

DVD Forum publishes and licenses its DVD Format throughout the United States through DVDFLLC, a Japanese corporation. DVDFLLC issues DVD Format Books, registers trademarks and maintains DVD logos, and polices pirate manufacturers. FSC P25. DVDFLLC, not DVD Forum, is alleged to have sent threatening, written communications to disc replicators. **[**38]** FSC PP48, 75. **[*1089]** DVDFLLC, not DVD Forum, is alleged to have posted on its website information regarding 0.6mm thick optical discs that such discs are not DVD Format compliant and the manufacture of non-compliant products "is a serious breach of the DVD Format/Logo License Agreement and may lead to early termination" of the License Agreement. FSC PP48-49. DVDFLLC, not DVD Forum, is alleged to have filed a complaint in the Southern District of New York against licensees. FSC PP60-61.

C. RELEVANT CONTACTS

Plaintiff seeks to impute the activities of DVDFLLC to DVD Forum for the purposes of personal jurisdiction. For example, Plaintiff alleges that DVD Forum "made the determinations that form the basis for this lawsuit"--concluding EcoDiscs and other 0.6mm discs do not use the DVD Forum's DVD Format in a proper manner--and DVDFLLC used this judgment to threaten disc replicators worldwide. Opp. Br. at 1-2. Plaintiff also argues the DVD Forum Steering Committee directs the activities of DVDFLLC and attributes to DVD Forum the lawsuit DVDFLLC filed against its licensee, U-Tech. *Id.* at 9. Importantly, Plaintiff never alleges DVDFLLC is an agent or the alter ego of

DVD Forum. If the two entities **[**39]** are separate and distinct, DVDFLLC's presence in a forum state may not be attributed to DVD Forum. *Doe v. Unocal Corp., 248 F.3d 915, 925-26 (9th Cir. 2001)*; *AT&T Co., 94 F.3d at 591* ("A parent corporation's relationship with its subsidiary may confer personal jurisdiction over the parent if the subsidiary is acting as the parent company's alter ego, so as to justify disregard of the corporate entity, but AT&T failed to make out a prima facie case that Keystone was GBL's alter ego." (internal citations and quotation marks omitted)); *Holland Am. Line, 485 F.3d at 459* ("It is well established that, as a general rule, where a parent and a subsidiary are separate and distinct corporate entities, the presence of one [] in a forum state may not be attributed to the other [].")

Plaintiff also seeks to piggy-back off DVDFLLC's contacts by employing a conspiracy theory of jurisdiction. Plaintiff argues, "[u]nder the circumstance of an alleged conspiracy, the minimum contacts test has been met." Opp. Br. at 17. However, ***HN24***[] California law does not recognize conspiracy as a basis for acquiring jurisdiction over a foreign defendant. *U.S. Vestor, LLC v. Biodata Info. Tech., AG, 290 F. Supp. 2d 1057, 1065 (N.D. Cal. 2003)*; **[**40]** *Mansour v. Superior Court, 38 Cal. App.4th 1750, 1760, 46 Cal. Rptr. 2d 191 (1995)*. Thus, actions taken by co-conspirators in furtherance of the conspiracy cannot be attributed to a conspirator for purposes of establishing personal jurisdiction. *CenterPoint Energy, Inc. v. Superior Court, 157 Cal. App.4th 1101, 1118, 69 Cal. Rptr. 3d 202 (2007)*; *see* 12 California Jurisprudence 3d Civil Conspiracy § 3; *Morris v. Atchity, No. CV 08-5321-RSWL, 2009 U.S. Dist. LEXIS 14581, 2009 WL 463971, *3 (C.D. Cal. Jan. 13, 2009)*.

The only relevant contacts here are DVD Forum's contacts. DVD Forum's contacts with the United States are the same as its contacts with California, which is to say that Plaintiff has not proffered any additional contacts between DVD Forum itself and states other than California. Thus, the jurisdictional analysis under *Rule 4(k)(2)* is essentially identical to the analysis of personal jurisdiction in California. It therefore follows that by Plaintiff's concession that DVD Forum is not subject to personal jurisdiction in California, and its failure to offer any additional contacts with any other state, Plaintiff has admitted DVD Forum does not have the requisite contacts with the United States either. The Court cannot conclude otherwise.

[*1090] Nevertheless, **[**41]** the Court will conduct a *Rule 4(k)(2)* analysis of personal jurisdiction, considering the contacts of DVD Forum only; DVDFLLC's contacts are not relevant. DVD Forum's purpose, website, and meetings are evidence of its contacts with the United States. First, the purpose of DVD Forum is to propagate its standards and encourage their adoption worldwide. Second, DVD Forum maintains an informational, non-interactive website, which also contains announcements related to the DVD Format and its use. Third, DVD Forum occasionally holds meetings in the United States, but there is no allegation that 0.6mm discs were discussed at any meeting in the United States.

D. JURISDICTIONAL ANALYSIS

1. General Jurisdiction

HN25[] To be haled into court in the United States in an action unrelated to its contacts with the country, DVD Forum's contacts must be substantial or "continuous and systematic." *See* *Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*. "The standard for establishing general jurisdiction is 'fairly high' and requires that the defendant's contacts be of the sort that approximate physical presence." *Bancroft & Masters, Inc., 223 F.3d at 1086* (quoting *Brand v. Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986))*.

DVD **[**42]** Forum's contacts with the United States are insufficient to qualify as either substantial or continuous and systematic. As outlined above, DVD Forum does not make or sell any products or engage in commercial business activities anywhere. 01/08/10 Irie Decl. P3. It does not have a bank account, employees, an office, an agent designated for service of process, or any assets or property in California. *Id.* P5. Plaintiff has not alleged, and there is no indication in the record, that any of these factors are present in any other state either. The absence of these factors indicates DVD Forum has not established a physical presence in the United States. *See* Bancroft & Masters, Inc., 223 F.3d at 1086 (reciting factors to be taken into consideration); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1124-25 (9th Cir. 2002).

2. Specific Jurisdiction

Plaintiff has failed to establish a prima facie case of general jurisdiction. However, the Court may still exercise personal jurisdiction if the case arises out of certain forum-related acts. **HN26**[] "[S]pecific jurisdiction is tethered to a relationship between the forum and the claim." *Holland Am. Line Inc., 485 F.3d at 460*. Under **[**43]** Rule 4(k)(2), the United States is the relevant forum. In the Ninth Circuit, specific jurisdiction exists when the following three elements are met:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802 (quoting Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987)); Brayton Purcell LLP v. Recordon & Recordon, 575 F.3d 981, 985 (9th Cir. 2009). **HN27**[] "The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum state." Schwarzenegger, 374 F.3d at 802. Only after the **[*1091]** plaintiff succeeds in satisfying both of the first two prongs does the burden shift to the defendant to **[**44]** present a compelling case that the exercise of jurisdiction would not be reasonable. *Id.* Because the Court finds Plaintiff has failed to satisfy the first two prongs, the Court will not reach the third.

a. Purposeful Direction

HN28[] The Ninth Circuit treats the purposeful availment prong as a purposeful *direction* prong in a tort case. Where the defendant is accused of a tort, the inquiry is whether the defendant purposefully directed its activities at the forum state, applying an "effect" test that focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum. *See* Schwarzenegger, 374 F.3d at 802; Calder v. Jones, 465 U.S. 783, 789-90, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). The effect test has three requirements: the defendant allegedly must have "'(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'" Schwarzenegger, 374 F.3d at 803 (quoting Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002)). [8]

HN30[] The Ninth Circuit has emphasized that a foreign act with foreseeable effects on the forum state does not always give rise to specific jurisdiction; there must be "express aiming" at the forum state. Bancroft & Masters, Inc., 223 F.3d at 1087. The court explained that the express aiming requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state. Id. at 1087-88 (citing five prior Ninth Circuit cases which "bear out the conclusion that 'express aiming' encompasses wrongful conduct individually targeting a known forum resident."); *accord* Rio Props., Inc., 284 F.3d at 1020-21 (defendant targeted its marketing campaign toward Nevada, which was plaintiff's principal place of business).

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[8] Later, **HN29**[] the Ninth Circuit clarified that the "brunt" of the harm need not be suffered in the forum state. Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006)(en **[**45]** banc). "If a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state." *Id.*

DVD Forum takes the position that the express aiming requirement is satisfied only when a defendant targets a plaintiff who is a resident of the forum state and, therefore, there can be no express aiming at the United States **[**46]** in this case because Plaintiff is a Swiss corporation and not a U.S. resident. DVD Forum is incorrect. ***HN31***[] Express aiming encompasses conduct "expressly aimed at the forum state." *Schwarzenegger, 374 F.3d at 803*. While such conduct can include specifically targeting the plaintiff whom the defendant knows to be a resident of the forum state, it can also include specifically targeting the state itself. For example, in *Schwarzenegger,* the Ninth Circuit found the defendant expressly aimed its conduct at Ohio, the state in which he circulated offending advertisements, rather than at California, the state in which the plaintiff was known to reside. *Id. at 807*. Accordingly, the Court rejects DVD Forum's argument that express aiming at the United States is foreclosed due to Plaintiff's Swiss residency. [9]

[*1092] i. Intentional Act

Here, the effect test falters at the first prong because Plaintiff has not offered an intentional act upon which purposeful direction can be based. Plaintiff contends DVD Forum aims its conduct to the United States by seeking to have its standards and formats used for **[**48]** all DVD discs replicated in the United States. However, ***HN32***[] in the context of the "intentional act" test, the Ninth Circuit construes the term intent "as referring to an intent to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act." [10] *Id. at 806*. Therefore, DVD Forum's purpose of having its standard DVD formats and specifications accepted and used on a worldwide basis cannot be considered an intentional act for the purpose of express aiming. For the same reason, the alleged conspiracy to foreclose EcoDisc from the optical disc market cannot qualify as an intentional act because it constitutes an intent to accomplish a result. Plaintiff is left only with the website, website announcements, and the Steering Committee meetings as possible intentional acts.

ii. Express Aiming

DVD Forum's website is informational and passive, making it insufficient for the assertion of specific jurisdiction in the absence of other targeting activities. *Pebble Beach, 453 F.3d at 1158*; **[**49]** *Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997)*. ***HN34***[] "It is beyond dispute in this circuit that maintenance of a passive website alone cannot satisfy the express aiming prong." *Brayton Purcell LLP, 575 F.3d at 986*. However, if there were "something more," *i.e.,* other conduct targeting the forum, the contacts could be sufficient to confer personal jurisdiction. *Cf. Panavision Int'l, L.P., 141 F.3d at 1321-22* (use of plaintiff's domain name was part of a plan to target and extort competitor plaintiff, creating personal jurisdiction over defendant in the state where plaintiff resided); *Pebble Beach, 453 F.3d at 1156-57* (plaintiff and defendant were not competitors and defendant's use of plaintiff's name in his domain name was part of a legitimate operation not a plan targeting plaintiff). Here, Plaintiff argues the posting of the announcement regarding 0.6mm discs on the DVD Forum website constitutes an intentional act. However, the announcement regarding 0.6mm discs did not target California or American residents

[9] The distinction between *Schwarzenegger* and cases in which courts have found express aiming at a forum by virtue of plaintiff's known residency may lie in the nature of the intentional act. In *Calder v. Jones,* where the plaintiff claimed she was libeled, and *Panavision Int'l, L.P. v. Toeppen,* where the plaintiff was a competitor, the plaintiffs were the target of the intentional act and thus the **[**47]** acts were expressly aimed at the plaintiffs and the states in which the defendant knew the plaintiffs resided. *Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)*; *Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998)*. In *Schwarzenegger,* the effect on the plaintiff was incidental; he was not the target of the conduct. *374 F.3d at 807*. Likewise, in *Pebble Beach,* the Ninth Circuit found the defendant did not expressly aim its conduct at California or the United States, despite his knowledge that plaintiff resided there, because the only acts identified as being directed at California or the United States were the maintenance of a website that could be accessed worldwide and the use of the name "Pebble Beach" in the domain name. *453 F.3d at 1156*. The passive website did not target a particular audience, and it did not target the plaintiff because the two were not competitors; the "something more" was missing.

[10] ***HN33***[] "The result or consequence of the act is relevant, but with respect to the third part of the Calder test--'harm suffered in the forum.'" *Schwarzenegger, 374 F.3d at 806*.

in particular. It applied, and was viewed, internationally. To the extent the announcement targeted Plaintiff as a competitor, Plaintiff is a Swiss corporation **[**50]** that would be injured--if at all--in Switzerland.

Plaintiff contends the DVD Forum Steering Committee meetings held in Fall 2008 constitute intentional acts and give rise to the current suit because 0.6mm discs were discussed. But both of those meetings were held in Europe, not in the **[*1093]** United States, and the discussion was regarding "the issue of 0.6 mm discs in the marketplace in Europe." *See* FSC P47. Neither the topic nor the location of the meetings have anything to do with the United States. This allegation also fails to show express aiming at the United States.

iii. Foreseeable Harm

With respect to the meetings that DVD Forum Steering Committee held in California as intentional acts expressly aimed at the United States, Plaintiff has not linked any of those meetings to the claims in this case. Plaintiff therefore fails to properly allege how the meetings have caused foreseeable harm in the forum state, as the third prong of the effects test. Moreover, because the California meetings do not give rise to the current suit, they fail the "but for" causation prong -- the second prong -- of the specific jurisdiction test.

b. "Arising Out Of" Activities In California

HN35[] For a court properly to **[**51]** exercise specific jurisdiction, "the contacts constituting purposeful availment must be the ones that give rise to the current suit." *Bancroft & Masters, Inc., 223 F.3d at 1088*. This prong is met if "but for" the contacts between the defendant and the forum state, the cause of action would not have arisen. *Id.; Terracom v. Valley Nat'l Bank, 49 F.3d 555, 561 (9th Cir. 1995)*. Plaintiff has not alleged any of the meetings DVD Forum held in California gave rise to its claims. And, as already explained, the announcement posted on the passive globally accessible website cannot confer jurisdiction simply because California residents can access it. Such a result would cast the jurisdictional net of California in an unconstitutionally broad manner. Thus, the second element of the specific jurisdiction test is not satisfied.

c. Due Process Considerations

HN36[] The final requirement for specific jurisdiction is that it comport with fair play and substantial justice. *See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)*. Because the Court finds Plaintiff has failed to satisfy the first two prongs, the Court need not engage in such a reasonableness determination.

D. [52] REQUEST FOR ADDITIONAL DISCOVERY**

HN37[] A court may permit discovery to aid in determining whether it has personal jurisdiction. *Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977)*. Discovery is appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary. *See id.* On the other hand, "'where a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the Court need not permit even limited discovery. . . .'" *Pebble Beach Co., 453 F.3d at 1160* (quoting *Terracom, 49 F.3d at 562*).

The declarations of Hideyuki Irie, submitted by DVD Forum, address the few relevant facts put at issue, and were not controverted by the Plaintiff. Plaintiff requests extensive and burdensome jurisdictional discovery but has failed to demonstrate how further discovery would allow it to contradict the Irie declaration. The Court concludes that additional discovery would be futile and will not yield any facts relevant to jurisdictional issues. Accordingly, the request for additional discovery **[**53]** is **DENIED.**

E. CONCLUSION REGARDING THE RULE 12(B)(2) MOTION

The Court concludes the contacts between DVD Forum and the United States are random and attenuated. DVD Forum does not have an office or employees in the **[*1094]** United States. It does not sell products to the United States. Nothing in the record links DVD Forum to the United States except for a few conferences in California. A defendant should not be haled into court as a result of such random, fortuitous or attenuated contacts. *See Burger King Corp., 471 U.S. at 475*. Moreover, ***HN38***[] as the Ninth Circuit has explained, "[w]here, as here, the defendant is from a foreign nation rather than another state, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction." *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc., 1 F.3d 848, 852 (9th Cir. 1983)*, quoted by *Glencore Grain Rotterdam B.V., 284 F.3d at 1126*. Accordingly, the Court **GRANTS** DVD Forum's motion to dismiss the complaint for lack of personal jurisdiction. The complaint is **DISMISSED** against DVD Forum **WITH PREJUDICE.**

IV. CONCLUSION

For the reasons set forth above, the Court **GRANTS** DVDFLLC's motion to dismiss in its entirety **WITH LEAVE TO AMEND.** Plaintiff may file **[**54]** an amended complaint no later than thirty (30) days from the date of this Order. No further supplemental complaints will be allowed.

The Court **DENIES** Plaintiff's request for jurisdictional discovery and **GRANTS** DVD Forum's motion to dismiss the complaint for lack of personal jurisdiction. The complaint is **DISMISSED** against DVD Forum **WITH PREJUDICE.**

IT IS SO ORDERED.

DATED: April 22, 2010

/s/ Mariana R. Pfaelzer

Hon. Mariana R. Pfaelzer

United States District Judge

Datel Holdings Ltd. v. Microsoft Corp.

United States District Court for the Northern District of California

April 23, 2010, Decided; April 23, 2010, Filed

No. C-09-05535 EDL

Reporter

712 F. Supp. 2d 974 *; 2010 U.S. Dist. LEXIS 40021 **; 2010-1 Trade Cas. (CCH) P77,062

DATEL HOLDINGS LTD, Plaintiff, v. MICROSOFT CORPORATION, Defendant.

Subsequent History: Motion denied by *Datel Holdings, Ltd. v. Microsoft Corp., 2010 U.S. Dist. LEXIS 110304 (N.D. Cal., Oct. 4, 2010)*

Core Terms

Xbox, alleges, Aftermarket, accessories, Online, memory, customers, cards, consumers, judicial notice, gaming, argues, market power, documents, console, relevant market, products, antitrust, add-ons, warranty, third party, barriers, software, Multiplayer, competitor, knowingly, packaging, license, Terms, monopolization

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A complaint will survive a motion to dismiss if it contains sufficient factual matter to state a claim to relief that is plausible on its face. The reviewing court's inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff. A court need not, however, accept as true the complaint's legal conclusions. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. Thus, a reviewing court may begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. Courts must then determine whether the factual allegations in the complaint plausibly give rise to an entitlement of relief. Though the plausibility inquiry is not akin to a probability requirement, a complaint will not survive a motion to dismiss if its factual allegations do not permit the court to infer more than the mere possibility of misconduct. That is to say, plaintiffs must nudge their claims across the line from conceivable to plausible.

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

Evidence > Judicial Notice > Adjudicative Facts > Public Records

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

On a motion to dismiss, a court normally may not look to matters beyond the complaint without converting the motion into one for summary judgment. There are two exceptions to this rule: (1) a court may take judicial notice of material which is either submitted as part of the complaint or necessarily relied upon by the complaint; and (2) a court may take judicial notice of matters of public record. Under *Fed. R. Evid. 201(b)*, a judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Furthermore, a court shall take judicial notice if requested by a party and supplied with the necessary information. *Fed. R. Evid. 201(d)*.

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

Evidence > Judicial Notice > General Overview

HN3[] **Motions to Dismiss, Failure to State Claim**

Judicial notice appropriate where the plaintiff's claim depends on the contents of a document. The Ninth Circuit has extended the incorporation by reference doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint.

Evidence > Judicial Notice > General Overview

HN4[] **Evidence, Judicial Notice**

Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.

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

HN5[] **Market Definition, Relevant Market**

In general, single brand markets do not constitute a relevant market for purposes of a claim under the Sherman Act, *15 U.S.C.S. § 1 et seq.* However, there is an exception where aftermarket restrictions are not disclosed or agreed to by the customers at the time of purchase of a product or service from the primary market.

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

HN6[] **Market Definition, Relevant Market**

To establish a single-brand aftermarket under the U.S. Supreme Court's decision in Kodak and the Ninth Circuit's decision in Newcal, the restriction in the aftermarket must not have been sufficiently disclosed to consumers in advance to enable them to bind themselves to the restriction knowingly and voluntarily.

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

HN7[] **Market Definition, Relevant Market**

For purposes of a relevant market, competition in the initial market does not necessarily suffice to discipline anticompetitive practices in the aftermarket.

Copyright Law > ... > Assignments & Transfers > Licenses > Shrink-Wrap Licenses

HN8[] **Licenses, Shrink-Wrap Licenses**

The weight of authority, including in the U.S. District Court for the Northern District of California, is that shrinkwrap licenses are enforceable.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

HN9[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Contract ambiguities are interpreted against the drafter. *Cal. Civ. Code § 1654*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] **Standing, Requirements**

To establish standing under the federal antitrust laws, a plaintiff must have suffered an antitrust injury, that is, an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful. In Associated General Contractors of America v. California State Council of Carpenters, the U.S. Supreme Court set forth a multi-factor test for analyzing antitrust standing, but the Supreme Court subsequently determined that the essential element is antitrust injury: a showing of antitrust injury is necessary, but not always sufficient, to establish standing.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN11[] **Standing, Requirements**

Antitrust injury requires the plaintiff to have suffered an injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer an antitrust injury. There is no rigid "consumer or competitor" test for standing. Rather, while consumers and competitors are most likely to suffer antitrust injury, there are situations in which other market participants can suffer antitrust injury. Further, it is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff. Therefore, the fact that a plaintiff is not a consumer or competitor does not resolve the issue.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN12[] **Tying Arrangements, Sherman Act Violations**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Not all tying arrangements are illegal. Rather, ties are prohibited where a seller exploits, controls, forces, or coerces a buyer of a tying product into purchasing a tied product. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is violated. An essential element of a tying claim is market power in the tying product--the tying market. Failure to allege power in the relevant market is a sufficient ground to dismiss an antitrust complaint. Further, a tying claim generally requires that the defendant's economic power be derived from the market, not from a voluntary contractual relationship.

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

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

In order to state a claim under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, a plaintiff must allege that the defendant has market power in a "relevant market." A relevant market must be a product market, and must encompass the product at issue as well as all reasonable substitutes for the product. A relevant market can be based on a submarket, which must be economically distinct from the general product market.

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

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

In Newcal, the Ninth Circuit noted that three principles emerged from the leading cases: (1) the law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue; (2) the law prohibits a claimant from resting on market power that arises solely from contractual rights that consumers knowingly and voluntarily give to the defendant; and (3) in determining whether the defendant's market power falls within the category of contractually-based market power or in the category of economic market power, the law permits an inquiry into whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket.

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

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

For purposes of the relevant market in the antitrust context, reasonable interchangeability means all products which could be used for the same general purpose, despite functional or price differences among them.

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN16[] **Market Definition, Relevant Market**

The question of whether the market should include other products is better resolved at the summary judgment stage, rather than on a motion to dismiss. Ultimately what constitutes a relevant market is a factual determination for the jury. The definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved. For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business. This definitional process is a factual inquiry for the jury.

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

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

HN17[] **Market Definition, Relevant Market**

There is no requirement to plead with specificity the existence of market power in a relevant market. Market definition involves a deeply fact-intensive inquiry and, for this reason, a court must be hesitant to grant a motion to dismiss for failure to plead a relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN18[] **Tying Arrangements, Per Se Rule**

In Jefferson Parish, the U.S. Supreme Court determined that per se condemnation--condemnation without inquiry into actual market conditions--is only appropriate if the existence of forcing is probable. Specifically, the application of the per se rule focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify per se condemnation. It is for this reason that the Supreme Court has refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. Once this threshold is surmounted, per se prohibition is appropriate if anticompetitive forcing is likely.

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

HN19[] **State Regulation, Claims**

Where a plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed.

Counsel: [1]** For Datel Holdings Ltd., Datel Design & Development, Inc., Plaintiffs: Martin R. Glick, LEAD ATTORNEY, Bernard A. Burk, Daniel B. Asimow, Michelle Sabrina Ybarra, Robert Hallman, Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, San Francisco, CA.

For Microsoft Corporation, Defendant: Hojoon Hwang, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; Gregory P. Stone, Munger Tolles & Olson LLP, Los Angeles, CA; Robert Hallman, Howard Rice Nemerovski Canady Falk & Rabkin, San Francisco, CA; Rohit K. Singla, Munger Tolles & Olson, San Francisco, CA.

Judges: ELIZABETH D. LAPORTE, United States Magistrate Judge.

Opinion by: ELIZABETH D. LAPORTE

Opinion

[*978] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

Plaintiff Datel Holdings filed this action against Defendant Microsoft for violations of Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and Section 3 of the Clayton Act, *15 U.S.C. § 14*, alleging that Defendant unlawfully monopolized the relevant markets for the Xbox 360 online video **[*979]** game system and Xbox 360 accessories. The complaint contains six claims: (1) violation of the Sherman Act: Monopolization and Attempted Monopolization of the Aftermarket for Xbox **[**2]** 360 Accessories and Add-ons; (2) violation of the Sherman Act: Monopolization and Attempted Monopolization of the Multiplayer Online Dedicated Gaming Systems Market; (3) violation of the Sherman Act and Clayton Act: tying arrangement; (4) violation of *California Business & Professions Code section 17200*; (5) common law unfair competition ; and (6) Intentional Interference with Prospective Economic Advantage. On January 22, 2010, Defendant filed this motion to dismiss, which Plaintiff opposed. On March 9, 2010, the Court held a hearing on Defendant's motion. For the reasons stated at the hearing and in this Order, Defendant's motion is granted in part and denied in part.

Facts

Plaintiff, a leading developer of video game enhancement products, develops and manufactures aftermarket products for the Xbox 360 video game system. Compl. P 1. One of Plaintiff's leading products is a memory card for the Xbox known as the MAX Memory card. Id. Plaintiff's two gigabyte MAX Memory card retails for approximately $ 39.99. Id. Defendant is the only other supplier of memory cards for the Xbox 360. Id. Defendant's memory card, which has only 512 megabytes of memory, also retails for approximately $ 39.99. **[**3]** Id.

Defendant released the Xbox in 2001, and launched the second generation console, Xbox 360, in 2005. Compl. P 11. Various models of the Xbox 360 sell for $ 199.99 to $ 299.99. Id. In addition to the functionality of the Xbox 360, Defendant attracts customers with its Xbox Live program, which is a subscription-based online multiplayer gaming service. Id. P 12. As of May 2009, Defendant reported more than 20 million active members of Xbox Live. Id.

The Xbox 360 reached the market one year before Sony, Defendant's competitor, released its Playstation 3 in November 2006. Compl. P 13. The Xbox 360 continues to control a larger share of the market that Sony's Playstation 3. Id. In January 2009, Defendant reported that total sales of Xbox 360 had reached 28 million, as compared to 20 million for Playstation 3. Id. In May 2009, Defendant's unit sales passed the 30 million mark for the Xbox 360, and analysts reported sales of 23 million for the Playstation 3. Id.

There is a considerable aftermarket for Xbox 360 accessories and add-ons, apart from Xbox 360 games. Compl. P 14. Plaintiff, which has been developing and manufacturing electronics and video game console peripherals since the late **[**4]** 1980s, offers several aftermarket products for the Xbox 360: (1) the XSATA and Xport (for transferring data between an Xbox 360 and a personal computer, allowing users to store Xbox demos, game saves and other materials on personal computer); (2) MAX Memory card (memory cards compatible with the Xbox 360 available in 2GB and 4GB versions); (3) MAX Drive 160 (an external 160GB hard drive for use with the Xbox 360 console); and (4) other accessories designed for use with the Xbox 360 or Xbox Live such as game headsets and rechargers for wireless controllers. Compl. P 15. Plaintiff has announced, but not yet released, a Joypad controller to compete with Defendant's wireless controllers. Id. P 16.

Plaintiff is the only source for Xbox 360-compatible memory cards other than Defendant itself. Compl. P 17. Plaintiff's cards were first released in May 2009. Id. As of November 1, 2009, Plaintiff's 2 gigabyte MAX Memory card ("DMMC") for the Xbox 360 console was available for **[*980]** purchase at a retail price of $ 39.99, and Plaintiff's 4 gigabyte DMMC was available for $ 49.99. Id. P 18. The DMMCs may be purchased online or in stores, sometimes at a discount. Id. Plaintiff's memory card is described **[**5]** at a retailer's website as follows: "Ensure that you have enough memory to save vital game information from your Xbox 360 games. The Max Memory 2GB

Memory Card provides 2 gigabytes of reliable storage. Easily save levels, characters, and high scores with speed and security." Id. P 18.

As of November 1, 2009, Defendant's 512 MB memory card, the only size Defendant offers, retailed for approximately $ 39.99, and was described at xbox.com as follows: "Take your games everywhere you go with eight times the space of the original Xbox 360 Memory Unit. With 512 MB of memory and a keychain carrying case, it's a snap to bring your game saves, Xbox Live gamer profiles, Arcade game downloads and even exclusive kiosk content." Compl. P 19.

On October 16, 2009, Defendant issued a notice to Xbox users through a blog entitled "Major Nelson." Compl. P 20. The notice stated that when users receive a software update in the following week, unauthorized memory cards (such as Plaintiff's) would no longer work with the Xbox 360. Id. The blog suggested moving information from an unauthorized memory card to an authorized one. Id.

Defendant informed Plaintiff that the disabling of third party memory cards was **[**6]** an unintentional effect of a software update. Compl. P 21. Later, however, Defendant stated in an October 23, 2009 article that it goes to great lengths to protect the Xbox service from cheating that comes from use of unauthorized memory cards, and that use of those cards could cause compatibility and safety issues. Id. The move from unauthorized cards has created discussion online, and Plaintiff alleges that Defendant has not explained how a larger memory card promotes cheating, nor has it identified a compatibility or safety issue between a DMMC and an Xbox console. Id. Plaintiff alleges that Defendant's justification for disabling unauthorized memory cards based on cheating is a pretext, and that the true purpose behind disablement of the DMMCs is to exclude competition from the Xbox 360 aftermarket for memory cards and to force consumers to buy Defendant's memory cards. Id. P 24. Plaintiff alleges that there is no benefit to consumers from Defendant's decision to target Plaintiff's product that will leave approximately 50,000 consumers with useless memory cards, and will forestall innovation and deprive consumers of the benefits of competition. Id. at P 3.

Plaintiff alleges that **[**7]** Defendant has modified the Xbox 360's authorization protocols to prevent the interoperability of Plaintiff's other products, including the as-yet-unreleased Joypad. Compl. P 25. Plaintiff alleges that Defendant's intention is to block the use of Plaintiff's competitive devices. Id. Plaintiff alleges that Defendant's update does not constitute an improvement of the product, but is instead an arbitrary contrivance intended to perpetuate Defendant's market power. Id. at P 4.

Relevant markets

Plaintiff alleges that Defendant's anticompetitive conduct has affected two relevant product markets: (1) the aftermarket for accessories and add-ons specific to the Xbox brand; and (2) the primary market for video game systems that feature multiplayer online gaming in addition to personal gaming. Compl. P 26.

Aftermarket for Xbox 360 Accessories and Add-ons ("Aftermarket")

Plaintiff alleges that the Aftermarket is a relevant market that is wholly derivative of and dependent upon the primary market for the Xbox 360 gaming system. **[*981]** Compl. P 27. Plaintiff alleges that Defendant dominates this Aftermarket. Id. Defendant's add-ons are designed specifically for the Xbox 360 and are not interchangeable with **[**8]** products outside the Aftermarket. Id. P 28. Plaintiff alleges that Defendant controls the Aftermarket, and has effected policies and practices designed to retain its control, including: (1) tying the sale of aftermarket accessories and add-ons to the sale of the Xbox 360 console; (2) erecting technological barriers to restrict the interoperability of third party accessories and add-ons; (3) using software updates to disable otherwise functional third party add-ons and accessories; and (4) using its special access to purchasers of an Xbox gaming system to promote its own add-ons and accessories and to advise customers against purchasing third party products. Id. P 29.

Plaintiff alleges that the efficacy of Defendant's techniques is indicated by the fact that Plaintiff is the only firm that has been able to overcome Defendant's technical barriers and bring to market a competing memory card for the Xbox 360. Compl. P 30. Plaintiff alleges that Defendant's market power in the Aftermarket derives from Defendant's control over the Xbox 360 hardware and software, and from its special access to purchasers of the gaming system, and does not derive from contractual rights that consumers knowingly **[**9]** and voluntarily gave Defendant at the time of purchase. Id. P 31. Plaintiff alleges that market imperfections have prevented consumers from realizing the impact that their choice in the primary market would have on their freedom in the Aftermarket. Id. P 32 (for example, the presence of a USB port in the Xbox 360 console suggests to consumers that third party accessories and add-ons would be compatible and permissible).

Plaintiff alleges that Defendant misled customers into a reasonable belief at the time of purchasing an Xbox 360 console that third party accessories and add-ons are available. Compl. P 33 (for example, Defendant's spokesperson stated that the Xbox 360 "also drives a ton of third-party spend," and noted the availability of "a lot of third party alternatives."). Plaintiff alleges that Defendant has touted its "accessories attach rate" as higher than any other manufacturer, including Sony. Id. P 34. Defendant attributed this high rate to customer loyalty and trust. Id. However, Plaintiff alleges that the real reason is Defendant's anticompetitive conduct, including tying and predatory design, that drives the accessories attach rate. Id.

Plaintiff alleges that Defendant **[**10]** has used its power in the Aftermarket to charge supra-competitive prices. Compl. P 35 (for example, although prices for memory cards in general have decreased steadily since 2005, Defendant's proprietary Xbox 360 memory card held steady at $ 59.99 across a two-year period, until Plaintiff introduced its memory card, at which time Defendant reduced its price). Plaintiff alleges that even if there were meaningful competition in the primary market for multiplayer online dedicated gaming systems, that would not check Defendant's monopoly power in the Aftermarket due to: (1) the high switching costs associated with switching gaming systems; (2) the high information costs; (3) the large ratio of installed customer base relative to potential new customers; and (4) the substantial ability to exploit customers. Id. P 36.

Multiplayer Online Dedicated Gaming Systems Market ("Online Market")

The Multiplayer Online Dedicated Gaming Systems Market is a specific market for dedicated gaming systems with a meaningful capacity for online multiplayer gaming. Compl. P 37. Plaintiff alleges that only two systems, the Xbox 360 and **[*982]** the Playstation 3, compete in the Online Market. Id. P 37, 42.

Plaintiff alleges **[**11]** that Nintendo's Wii system has limited multiplayer gaming functionality, and that the reduced functionality and lower price point reflect a target market that is distinct from that of Xbox 360 and the Playstation 3. Id. at P 38. Therefore, the Wii system should not be considered reasonably interchangeable with the Xbox 360 and the Playstation 3. Id.

Plaintiff alleges that personal computers may offer multiplayer online functionality, but at a higher price for a system that tends to lack other features usually included in dedicated gaming systems. Compl. P 39. Therefore, personal computers should not be considered reasonably interchangeable with the Xbox 360 and the Playstation 3. Id.

Plaintiff alleges that Defendant has measured the success of the Xbox 360 against the Playstation 3, to the exclusion of other products or platforms. Compl. P 40 (for example, on December 1, 2008, Defendant issued a press release comparing Xbox 360 sales against Playstation 3 sales, and did not address Wii sales or personal computer sales). Plaintiff also alleges that Defendant's pricing of the Xbox 360 line has influenced Sony's pricing of the Playstation 3 line, and vice versa, but such pricing has not **[**12]** tracked or influenced the pricing of the Wii or personal computers. Id. P 41.

Plaintiff alleges that Defendant enjoys market power within the Online Market. Compl. P 43. Specifically, sales statistics reported by Defendant establish that the Xbox 360 console has significantly more total unit sales than the Playstation 3 console. Id. Plaintiff alleges that Defendant's share of the Online Market was approximately 66% as of

July 2009, and that in June 2009, the Xbox 360 outsold the Playstation 3 by approximately 1.5 to 1. Id. Plaintiff alleges that this disparity shows that Defendant's market dominance is continuing and stable. Id.

Plaintiff alleges that Defendant's market power in the Online Market is unchecked by the potential for competition from new market entrants due to substantial barriers to market entry other than anticompetitive conduct, such as: (1) the extremely high costs of development and production of a competing video game system; (2) the established libraries of games and online gaming communities of Defendant and Sony, which tend to entrench consumers in a particular system; and (3) the massive monetary, technological and human resources at the disposal of Defendant and **[**13]** Sony and their ability to sell at below cost. Compl. P 45.

Legal standard

HN1[] A complaint will survive a motion to dismiss if it contains "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))*. The reviewing court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*.

A court need not, however, accept as true the complaint's "legal conclusions." *Iqbal, 129 S. Ct. at 1949*. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id. at 1950*. Thus, a reviewing court may begin "by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id.

[*983] Courts must then determine whether the factual allegations in the complaint "plausibly give rise to an entitlement of relief." Id. Though the plausibility inquiry "is not akin to a probability requirement," a complaint will not survive **[**14]** a motion to dismiss if its factual allegations "do not permit the court to infer more than the mere possibility of misconduct . . . ." *Id. at 1949* (internal quotation marks omitted) & 1950. That is to say, plaintiffs must "nudge[] their claims across the line from conceivable to plausible." *Twombly, 550 U.S. at 570*.

Request for Judicial Notice

HN2[] On a motion to dismiss, a court normally may not look to matters beyond the complaint without converting the motion into one for summary judgment. See *Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986)*, overruled on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)*. There are two exceptions to this rule: (1) a court may take judicial notice of material which is either submitted as part of the complaint or necessarily relied upon by the complaint; and (2) a court may take judicial notice of matters of public record. See *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*. Under *Fed. R. Evid. 201(b)*, a "judicially noticed fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; **[**15]** or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Furthermore, a court "shall take judicial notice if requested by a party and supplied with the necessary information." See *Fed. R. Evid. 201(d)*; *Mullis v. United States Bank, 828 F.2d 1385, 1388 fn. 9 (9th Cir. 1987)*.

Defendant seeks judicial notice of three documents: (1) the Xbox 360 "Limited Warranty and Return Information," which includes the Xbox 360 software license; (2) the Xbox Live Terms of Use; and (3) a portion of the Xbox 360 console packaging. The first two documents are publicly available online and the third is available in any Xbox 360 console packaging. Plaintiff has objected to judicial notice of these documents, and has filed a conditional request for judicial notice of other documents if the Court grants judicial notice of Defendant's documents. Defendant has filed a response to Plaintiff's objections, but did not file objections to Plaintiff's conditional request for judicial notice.

Not reasonably in dispute

Defendant argues that its three documents are judicially noticeable because they are publicly available and not subject to reasonable dispute. **[**16]** The first two documents are available online and the third can be obtained from the purchase of any Xbox 360 system. See, e.g., *Mayfield. Sara Lee Corp., 2005 U.S. Dist. LEXIS 42458, 2005 WL 88965, at 3, n. 2 (N.D. Cal. Jan. 13, 2005)* (taking judicial notice of photocopies of various bread product packages displaying the Sara Lee brand"); *Wright v, Gen. Mill, Inc., 2009 U.S. Dist. LEXIS 90576, 2009 WL 3247148 at *5 (S.D. Cal. Sept. 30, 2009)* (taking judicial notice of various labels and packaging associated with the Nature Valley products). Defendant further argues that the documents are easily verifiable, and that documents found on the Internet have been held to constitute public records subject to judicial notice. See, e.g., *Wible v. Aetna Life Ins. Co., 375 F. Supp. 2d 956, 965-66 (C.D. Cal. 2005)* (taking judicial notice of admissions on a website associated with a witness as well as the contents of Amazon.com web pages describing books related to the case); but cf., e.g., *Experian Info. Solutions, Inc. v. Lifelock, 633 F. Supp. 2d 1104, 1107 (C.D. Cal. 2009)* (finding that Governor of Connecticut's webpage was not judicially noticeable because **[*984]** material on website not capable of accurate and ready determination by resort to sources whose **[**17]** accuracy cannot be questioned); *Ruiz v. Gap, Inc., 540 F. Supp. 2d 1121, 1124 (N.D. Cal. 2008)* (declining to take judicial notice of webpage containing list of reported identity theft breaches in California because materials "not remotely akin to the type of facts which may be appropriately judicially noticed."). Here, the documents sought to be judicially noticed are capable of accurate and ready determination because they are standard documents. These documents are judicially noticeable for the fact that they exist, not whether, for example, the documents are valid or binding contracts.

Plaintiff argues that several issues relating to these documents are in dispute. Although Plaintiff argues that there has been no showing that the documents cover the entire relevant market, Defendant has submitted a follow-up declaration from Patrick King attaching additional packaging information since 2005, which resolves this issue. See King Decl. Ex. 1-4.

Plaintiff also argues that the Terms of Use document is dated September 2008, so Defendant cannot argue that it was provided to all Xbox customers during the relevant period since 2005. Plaintiff's argument, however, goes to the weight of the **[**18]** evidence, not to whether the documents are judicially noticeable. See *In re NVIDIA GPU Litig., 2009 U.S. Dist. LEXIS 108500, 2009 WL 4020104 at *8 (N.D. Cal. Nov. 19, 2009)* (taking judicial notice of certain documents (including web pages), even though the defendant failed to demonstrate that the documents were the warranties that applied to all of the class computers purchased during the class period or even whether the warranties comprised the full extent of the applicable warranties).

Necessarily relied on in complaint

Defendant also argues that judicial notice is appropriate because Plaintiff's claim depends on these documents. See *Knievel v. ESPN, Inc., 393 F.3d 1068, 1076 (9th Cir. 2005)* (***HN3***[] judicial notice appropriate where the plaintiff's claim depends on the contents of a document, stating: "We have extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint."); see also *Berenblat v. Apple, Inc., 2009 U.S. Dist. LEXIS 80734, 2009 WL 2591366 at *1, n.3 (N.D. Cal. Aug, 21, 2009)* **[**19]** ("Apple's Request for Judicial Notice of the terms of the express warranty is granted, as the FAC references the warranty and at least two of the Berenblat Plaintiffs exercised their rights under the express warranty.").

Here, the complaint alleges that Defendant's market power does not derive from a contractual right with its customers that was knowingly given at the time of purchase. Compl. P 31. Therefore, judicial notice is appropriate because Plaintiff's complaint depends, at least in part, on the contents of the documents. See *In re Samsung Elecs. Am., Inc. Blu-Ray Class Action Litig., 2008 U.S. Dist. LEXIS 105199, 2008 WL 5451024, at *4 n. 2 (D. N.J. Dec. 31, 2008)* ("In the Amended Complaint, Plaintiffs specifically acknowledge the existence of warranty information in each Player's packaging. Those documents are integral to Plaintiffs' Amended Complaint, as the warranty language serves, as a matter or law, to either support or erode Plaintiffs' claims. As a result, this Court will consider the warranty information, without converting Defendant's motion to dismiss into one for summary judgment.").

[20]** The Court takes judicial notice of the existence and content of these documents, though not of their legal effect.

[*985] Plaintiff's conditional request for judicial notice

Plaintiff filed a conditional request for judicial notice, seeking judicial notice of ten documents. The documents are: (1) a screen shot from the game "Mass Effect 2" showing an Xbox update prompt (Exhibit A); (2) packaging for Horipad EX2 Turbo controller and a Wal-Mart printout for sale of the controller (Exhibit B); (3) webpages for the game Battlefield: Bad Company (Exhibit C); (4) printout of the website of IGN Entertainment (Exhibit D); (5) printout from Defendant's website link to the IGN Entertainment webpage (Exhibit E); (6) game disc and screen shots from game disc in the March 2004 Official Xbox magazine (Exhibit F); (7) printout from website showing a third party cable for transferring data between Xbox 360 memory unit and a personal computer (Exhibit G); (8) printouts of tutorials on connecting third party accessories to the Xbox (Exhibit H); (9) copy of Xbox 360 console packaging purchased in November 2009 (Exhibit I); and (10) printout from website showing a news article entitled "Wii is for Babies" (Exhibit **[**21]** J).

Exhibits E and H are printouts from Defendant's own website, which are judicially noticeable. See *Blue Lake Rancheria v. United States, 2010 U.S. Dist. LEXIS 1428, 2010 WL 144989 at *2 n.4 (N.D. Cal. Jan. 8, 2010)* (taking judicial notice of printout from tribe's website in part because it was reliable since it was maintained by the tribe). To the extent that the other printouts (exhibits B, C, D, G) are from third parties, they are judicially noticeable as described above.

Exhibit A is a screen shot from a game showing the requirement that a user update the game. This document is judicially noticeable because it is capable of accurate and ready determination using sources whose accuracy cannot reasonably be questioned. See *Fed. R. Evid. 201(b)*. Plaintiff notes that the fact of the update cannot be reasonably disputed because inserting the Mass Effect 2 disc in any Xbox game player will show the update.

Exhibit F contains copies of and screens shots from a game disc distributed in Defendant's magazine as evidence of what was in the public domain at the time of the magazine in 2004. The Court takes judicial notice of the existence of these documents that were in the public realm at that time. See Von Saher v. Norton Simon Museum of Art at Pasadena, 2010 WL 114959, at *4 (9th Cir. Jan. 14, 2010) **[**22]** (***HN4***[] "Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'") (internal citation omitted).

Exhibit I is the console packaging from an Xbox 360 console. This is the same document submitted for judicial notice by Defendant, except Exhibit I contains the full text of the packaging. The Court takes judicial notice of this document for the same reasons that it took notice of Defendant's version of this packaging.

Discussion

1. First claim for violation of Sherman Act based on Aftermarket for Xbox 360 Accessories and Add-ons

Plaintiff alleges that Defendant possesses substantial market power in the secondary Aftermarket, or that a dangerous probability exists that Defendant will gain such power, and that Defendant has deployed that power to charge customers supra-competitive prices in the Aftermarket. Compl. P 48. Specifically, Plaintiff alleges that Defendant "controls access to the Aftermarket for Xbox 360 Accessories and Add-ons by way of technological barriers and by way of its special access to customers arising from their purchase of the Xbox 360. Microsoft can then leverage **[**23]** its control over the Xbox 360 console, **[*986]** and its power in the primary market, into monopoly power in the Aftermarket. . . ." Compl. P 49. Plaintiff alleges that Defendant has committed exclusionary, predatory and anticompetitive acts with the specific intent to maintain monopoly power in the Aftermarket. Compl. P 51. According to Plaintiff, maintaining a monopoly in the Aftermarket allows Defendant not only to charge supra-competitive prices for Xbox 360 accessories, but also to supply inferior Xbox 360 accessories and force customers to purchase and use those inferior accessories. Compl. P 55. Further, Plaintiff alleges that Defendant's disabling of Plaintiff's DMMCs and the anticipated imposition of new technological barriers to block Plaintiff's accessories "reduces choices available to customers, bars access to high quality accessories for lower prices than those offered by Microsoft, and has no legitimate technological or business justification." Compl. P 52.

Defendant argues that Plaintiff's first claim should be dismissed on the ground that Plaintiff has failed to plead a legally cognizable Aftermarket because Plaintiff cannot pursue antitrust claims based on a single-brand market. **[**24]** ***HN5***[] In general, single brand markets do not constitute a relevant market. See, e.g., *Green Country Food Mkt., Inc. v. Bottling Group, 371 F.3d 1275, 1282 (10th Cir. 2004)*. However, there is an exception where aftermarket restrictions are not disclosed or agreed to by the customers at the time of purchase of a product or service from the primary market. See *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*.

In Kodak, Eastman Kodak manufactured and sold photocopiers and micrographic equipment. Kodak also sold service and replacement parts for the equipment. The plaintiffs, a group of independent service organizations that serviced Kodak's equipment, challenged Kodak's policies that made it more difficult for them to compete with Kodak in servicing equipment, including Kodak's practice of limiting the availability of Kodak parts. The plaintiffs alleged that Kodak unlawfully tied the sale of service for Kodak machines to the sale of Kodak-compatible parts, a market in which Kodak had a monopoly. Kodak parts were not compatible with competitors' machines and vice versa. The Court held that in certain circumstances, a single brand can constitute a separate market: "because service **[**25]** and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines." *Eastman Kodak, 504 U.S. at 482*. The Court found that the single-brand aftermarket for parts and service for Kodak equipment arose once customers had already purchased and were "locked in" to Kodak photocopiers or equipment.

Defendant argues that the Kodak exception does not apply because purchasers of the Xbox 360 knew and agreed at the time they purchased their systems that they could only use Defendant's authorized accessories with their systems. Thus, Defendant argues that its power in the market derives from contract, not from exclusionary conduct, so Eastman Kodak does not apply. See *Newcal Indus. v. IKON Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*; *id. at 1043* ("Second, the law prohibits an antitrust claimant from resting on market power that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant."). The Newcal court stated:

> The critical distinction between Eastman Kodak and the two circuit court opinions **[**26]** [Queen City Pizza and Forsyth] was that the Kodak customers did **[*987]** not knowingly enter a contract that gave Kodak the exclusive right to provide parts and service for the life of the equipment. In other words, the simple purchase of Kodak-brand equipment (unlike the signing of a Domino's franchise agreement or the purchase of a Humana insurance policy) did not constitute a binding contractual agreement to consume Kodak parts and services in the aftermarket. Equally critically, the Supreme Court found that market imperfections, including information and switching costs, prevented consumers from discovering, as they were shopping for equipment, that the Kodak brand would include a de facto commitment to consume only supracompetitively priced Kodak-brand service contracts.

Newcal, 513 F.3d at 1045.

In Newcal, the court permitted a single-brand aftermarket because the defendant, which leased office equipment, allegedly defrauded its customers by amending the lease agreements after the customers had already signed up for service without disclosing that the amendments would lengthen the service contract. See *id. at 1043*; see also *In re Apple and AT&TM Antitrust Litig., 596 F. Supp. 2d 1288 (N.D. Cal. 2008)* **[**27]** (finding that there was an aftermarket for iPhone voice and data services because the aftermarket restriction of iPhone users to AT&T services for five years was not disclosed to customers; instead only a two year contract with AT&T was disclosed). In In re Apple, the court stated: "Ultimately, the dispositive issue is whether Plaintiffs knowingly placed Defendants in a monopoly position in the alleged voice and data services aftermarket." Id. Therefore, ***HN6***[] to establish a single-brand aftermarket under *Kodak* and *Newcal*, the restriction in the aftermarket must not have been sufficiently disclosed to consumers in advance to enable them to bind themselves to the restriction knowingly and voluntarily.

In *Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997)*, the Third Circuit rejected a single brand aftermarket relating to pizza making ingredients for Domino's franchisees, where the restriction was disclosed and agreed to in advance. There, franchisees signed an agreement to operate a Domino's Pizza location, and under the agreement were required to purchase pizza ingredients from Domino's or authorized vendors. Distinguishing Kodak, the court noted that the plaintiffs in Queen **[**28]** City Pizza did not need to become franchisees if they did not like the terms of the franchise agreement, while the challenged restraint in Kodak was not authorized by the original contract terms and the change in policy was not foreseen at the time of sale, so buyers had no ability to calculate the risk. Similarly, in *Forsyth v. Humana, 114 F.3d 1467, 1476 (9th Cir. 1997)*, the court rejected a claim for monopolization of the market for hospital services for a single company's insureds because the purported restraint arose from contract provisions disclosed in advance in the plaintiffs' insurance policies under which the insurance company realized discounts from medical providers allegedly in the nature of kickbacks. Further, in *Apple v. Psystar, 586 F. Supp. 2d 1190, 1194-95 (N.D. Cal. 2008)*, the court held that the defendant had failed to plead a plausible aftermarket for hardware that could be used with the Mac OS because through "its End User License Agreement and other means, Apple specifically restricts the use of Mac OS to Apple-labeled computer hardware systems," and "customers, therefore, knowingly agree to the challenged restraint." See *Psystar, 586 F. Supp. 2d at 1201*. The **[**29]** Psystar court stressed that the restriction there was unlike Kodak "where customers did not knowingly bind themselves to a single brand of the aftermarket and market imperfections (information costs and switching **[*988]** cost) prohibited customers from imposing market discipline in the aftermarket by switching among competitors in the primary market," because "Apple asks its customers to purchase Mac OS knowing that it is to be used only with Apple computers." Id.

Defendant argues that this case is more like Queen City Pizza, Forsyth, and Psystar, than Kodak, Newcal, and In re Apple, because Xbox purchasers knowingly gave Defendant the right to prohibit the use of unauthorized accessories through the warranty and software license that is included in the Xbox 360 packaging, as well as through the Xbox Live Terms of Use. The shrinkwrap license in the packaging states: "The software included in the Xbox product [Xbox 360 Video Game System or Xbox 360-compatible hardware accessories manufactured by or for Defendant whether included or purchased separately] is licensed to you, not sold. You are licensed to use such software only in your Xbox product and you may not reverse engineer it, except as **[**30]** expressly permitted by applicable law notwithstanding this limitation." Def's RJN Ex. A at 7. This language, however, is arguably ambiguous. Further, it may not be applicable to using external accessories to boost memory, which may not involve a prohibited use of the software and does not constitute reverse engineering. Defendant also points to the Xbox Live Terms of Use presented to consumers when they sign up for the service, which requires customers to "agree that you are using only authorized software and hardware to access the Service." Def.'s RJN Ex. B at 10. But this language is also arguably ambiguous in that use of accessories such as a memory card is not necessarily "using . . . software and hardware" to *access* the service. The Terms of Use also permit Defendant to, among other things, issue automatic software updates to prevent a customer from using unauthorized hardware peripheral devices. See id. at 10-11. However, this statement is somewhat ambiguous with respect to the meaning of peripheral device because the phrase is used earlier in the same paragraph to refer to devices used to log on to the Service, which may not include accessories such as memory cards. Further, **[**31]** the Terms of Use could not have informed a customer's purchasing decision because the Xbox Live is a separate optional service that a user may join after purchasing the Xbox 360. See Def.'s RJN Ex. C.

Plaintiff argues that customers did not knowingly agree at the time of purchase that their use of aftermarket accessories would be restricted. Plaintiff alleges in the complaint that the monopolization of the Aftermarket "does not derive from contractual rights that consumers knowingly and voluntarily gave Microsoft at the time of purchase," and that "market imperfections have prevented customers from realizing the impact that their choice in the primary market would have on their freedom in the aftermarket." Compl. PP 31-32. In Newcal, the plaintiff made allegations to rebut a presumption that the equipment customers made a knowing choice to restrict their aftermarket options when they decided to purchase a product in the primary market. The Newcal court stated: ***HN7***[] "Competition in the initial market, therefore, does not necessarily suffice to discipline anticompetitive practices in the aftermarket." *Newcal, 513 F.3d at 1050*. Here, Plaintiff has made even stronger allegations insofar as it **[**32]** alleges that the primary market is also not very competitive. While Defendant would dismiss these allegations as conclusory, Plaintiff also includes specific allegations that there are built-in USB ports that suggest that third party accessories may be used (Compl. P 32) and that Defendant's spokesperson noted the existence of many third **[*989]** party alternatives for accessories (Compl. PP 33-34).

Plaintiff argues that the Warranty could not have been discovered by consumers until the box was opened, and that therefore, a consumer could not have knowingly and voluntarily accepted it prior to purchase. See Opp. at 7. ***HN8***[] The weight of authority, however, including in this district, is that shrinkwrap licenses are enforceable. See, e.g., *ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451-52 (7th Cir. 1996)* (enforcing shrinkwrap license because "any buyer . . . can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price."); *Novell, Inc. v. Unicom Sales, Inc., 2004 U.S. Dist. LEXIS 16861, 2004 WL 1839117, at *11 (N.D. Cal. Aug. 17, 2004)*, but see, e.g., *Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1341 (D. Kan. 2000)* **[**33]** ("The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms.").

Plaintiff argues that Defendant's interpretation of the definition of "Xbox Product" in the Warranty is not reasonable. Xbox Product is defined as:

> either (1) the Microsoft Xbox 360 Video Game System console including the Microsoft software stored on the separate Xbox 360 hard disk and/or embedded in the microprocessors within the Xbox 360 console; or (2) Microsoft branded Xbox 360-compatible hardware accessories manufactured by or for Microsoft whether included with the console or purchased separately.

Def.'s RJN Ex. A at 5. According to Plaintiff, only by reading the definition in the conjunctive can Defendant support the argument that the Warranty language prohibits unauthorized third party accessories. See Pl.'s Opp. to Def.'s Mot. to Dismiss at 8-9. Defendant responds that the terms in the definition are not mutually exclusive (see *Federation of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1164 (N.D. Cal. 2000)* ("These factors are listed in the disjunctive; any one or a combination can be sufficient.")), and that Plaintiff's **[**34]** reading of the definition is unreasonable. For example, Defendant notes that reading the Warranty language where "Xbox Product" means only "Xbox 360 console" would implausibly disallow use of all accessories made by anyone. Plaintiff counters that other inconsistencies would arise if the definition covered third party accessories. For example, elsewhere in the Warranty, Defendant is obligated to repair or replace a defective "Xbox Product," so under Defendant's interpretation, Defendant would be obligated to repair an unauthorized third party accessory. See Def.'s RJN Ex. A at 6. Further, Plaintiff argues that adopting Defendant's interpretation of the language would implausibly make authorized accessories that are approved, but not manufactured, by Defendant improper for the Xbox 360 console. Accordingly, Plaintiff argues that it is highly unlikely that a customer purchasing an Xbox 360 console would understand the contract as prohibiting unauthorized accessories. At the very least, Plaintiff has shown an ambiguity in the relevant contract language which counsels against granting a motion to dismiss premised on Defendant's contested interpretation of the provision, which customers **[**35]** may not have understood.

Defendant further argues that this case is like Psystar because there, the defendant argued that the plaintiff erected technical barriers to prevent Mac OS from operating on non-Apple computers (*Psystar, 586 F. Supp. 2d at 1194*), similar to Plaintiff's allegations here that Xbox accessories are unique and that Defendant used an authentication technique to block the use of Plaintiff's products. Further, **[*990]** Defendant argues that in Psystar, the defendant alleged that the Mac hardware aftermarket was a distinct aftermarket that was derivative from and dependent on the primary market for the Mac OS (*Id. at 1202*), and here, Plaintiff alleges that the accessories Aftermarket is derivative from and dependent on the primary market for the gaming system (Compl. P 27).

In Psystar, however, unlike *Kodak* and its progeny, the plaintiff alleged "not a single-brand aftermarket dependent on and derivative of a specific company's primary product but instead that a single brand of primary product (Apple's operating system) constitutes an independent market." *Psystar, 586 F. Supp. 2d at 1197*. Further, the plaintiff's pleadings "do not suggest market imperfections such as switching **[**36]** costs and customer 'lock in.'" *Id.*

at 1197, n.3. Finally, Psystar specifically alleged that Apple's End User License Agreement restricted use of the Mac operating system to Apple-labeled computer hardware systems. Id. at 1201. By contrast, in this case, Plaintiff alleges, as in Kodak, that there is a single-brand Aftermarket that is dependent on the primary market. Further, Plaintiff here alleges market imperfections such as switching costs. Finally, as described above, the license agreement in this case is not as clear as the license in Psystar. Thus, the reasoning in Psystar is not applicable to this case as pled.

In the absence of a clearly binding contractual restriction on the market, Plaintiff points to the factors applied by the Newcal court to determine whether a consumer's selection of a brand in the market is the functional equivalent of a contractual commitment, or instead allows the plaintiff to pursue a claim based on a single-product aftermarket as in Kodak. First, here, as in Newcal and Kodak, and unlike in Queen City Pizza, the Aftermarket is "wholly derivative and dependant on the primary market," (Newcal, 513 F.3d at 1049), so Defendant allegedly may exploit its unique **[**37]** position in the primary market to gain market power in the derivative market. Second, however, in Newcal the flex agreements were only obtained after the initial contract, whereas here, the effect of the original contract is ambiguous. Third, the complaint here, as in Newcal, alleges that the contractual relationship, rather than any contractual provision, gives Defendant special access to its customers. Fourth, the complaint here, as in Newcal, alleges that Defendant's representations and market imperfections lead its customers to mistakenly believe that they will be free to shop in the Aftermarket despite their choice in the primary market. On balance, the Newcal factors weigh in favor of denying the motion to dismiss this claim. Viewing the allegations in the light most favorable to Plaintiff, and because ***HN9***[] contract ambiguities are interpreted against the drafter (see Cal.Civ. Code § 1654), shopping for competing products in the Aftermarket is not clearly precluded by any contractual provision into which customers knowingly and voluntarily entered. Therefore, Defendant's motion to dismiss the first claim is denied.

2. Second claim for violation of Sherman Act based on Multiplayer Online [38] Dedicated Gaming Systems Market**

Plaintiff argues that Defendant either has significant market power in the primary Online Market, or there is a dangerous probability that Defendant will obtain that market power. Compl. P 63, 65. Plaintiff alleges that Defendant "has deployed this market power to control related and subsidiary markets," and "to impede the development of a vibrant competitive Aftermarket. . . ." Compl. P 62. Plaintiff alleges that by using its power in the Online Market to curb competition **[*991]** and innovation in the Aftermarket, Defendant is able to facilitate price discrimination, increase switching costs and erect substantial barriers to potential entrants of the primary market. Compl. P 63. Plaintiff alleges that Defendant committed these exclusionary, predatory or anticompetitive acts with the specific intent to acquire or maintain monopoly power in the Online Market. Compl. P 66. Further, Plaintiff alleges that Defendant has "intentionally impeded the development of a vibrant competitive Aftermarket for Xbox 360 Accessories and Add-ons, removed functionality, reduced the choices available to consumers, raised its competitors' costs and has raised barriers to entry in **[**39]** the Multiplayer Online Dedicated Gaming Systems, Market." Compl. P 67.

Defendant argues that this claim must be dismissed because: (1) Plaintiff lacks antitrust injury and thus lacks standing to bring the claim because it is not a participant in the primary market; (2) Plaintiff has not pled a legally tenable market because it has excluded certain products; and (3) Plaintiff does not plead any exclusionary acts by Defendant in the online gaming systems market. Because the Court concludes that Plaintiff has not adequately alleged standing, the Court need not reach the remaining bases for Defendant's motion.

HN10[] To establish standing under the federal antitrust laws, Plaintiff must have suffered an antitrust injury, that is, "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes Defendant's acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977); see also William C. Holmes, ***Antitrust Law*** Handbook, at p. 885 (West 2009) ("Implicit in this definition are two separate conceptual issues. First, the claimed injury must be of a type that the antitrust laws were meant to discourage (e.g., a business' lost profits from a **[**40]** reduced ability to compete, as opposed to lost profits from increased competition in the market). And second, the plaintiff's injury must have been proximately caused by the defendant's antitrust violation, and not by some other act or event."). In *Associated General Contractors of America v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the Supreme Court set forth a multi-factor test for analyzing antitrust standing, but the Court subsequently determined that the essential element is antitrust injury: "a showing of antitrust injury is necessary, but not always sufficient, to establish standing." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; see also *Bhan v. NME Hosp., Inc., 772 F.2d 1467, 1470 n.3 (9th Cir. 1985)* ("Although the Supreme Court did not explicitly state that a plaintiff must satisfy all of the Associated General Contractors factors or, indeed, any particular factor, the inquiry whether the plaintiff has suffered an injury of the type which the antitrust statute was intended to forestall is a factor of tremendous significance.").

HN11[] "Antitrust injury requires the plaintiff to have suffered an injury in the market where competition is **[**41]** being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer an antitrust injury." *American Ad Mgmt., Inc. v. General Telephone Co. of Cal., 190 F.3d 1051, 1057 (9th Cir. 1999)*. The parties do not dispute that there is no rigid "consumer or competitor" test for standing. Rather, "[w]hile consumers and competitors are most likely to suffer antitrust injury, there are situations in which other market participants can suffer antitrust injury. . . . **[*992]** Further, it is not the status as a consumer or competitor that confers antitrust standing, but the relationship between the defendant's alleged unlawful conduct and the resulting harm to the plaintiff." *American Ad, 190 F.3d at 1057-58* (rejecting *Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574 (9th Cir. 1986)* (which rejected the claim of a market participant simply because the plaintiff was not a consumer or competitor of the defendant)). Therefore, the fact that Plaintiff is not a consumer or competitor does not resolve the issue.

Defendant argues that Plaintiff is not a market participant and so lacks standing. Plaintiff **[**42]** responds that even though it does not directly compete with Defendant, it participates in the Online Market by "offering aftermarket products that have the capacity to lower barriers of entry and switching costs in the relevant market." Pl.'s Opp. to Def.'s Mot. to Dismiss at 22; see *Novell, Inc. v. Microsoft, Inc., 505 F.3d 302 (4th Cir. 2007)* (finding that the plaintiff, a maker of software applications to be used on a PC, had standing to assert monopolization claim against the defendant: "Taking Novell's allegations as true, as we must, the injury that Novell alleges here is plainly an injury to *competition* that the anti-trust laws were intended to forestall. Microsoft's activities, Novell claims, were intended to and did restrain competition in the PC operating-system market by keeping the barriers to entry into that market high.") (emphasis in original). Novell, however, is from another circuit, and is factually distinguishable. Unlike here, in Novell, the court found that there was no better situated party to bring the antitrust claims because Novell was "one of the few private plaintiffs whose claims . . . are neither time-barred nor too tenuous to support antitrust standing." **[**43]** *Novell, 505 F.3d at 319*.

Defendant points out that Plaintiff has not suffered any injury in the Online Market because Plaintiff's allegations of harm regarding disablement of its memory cards and the technical barriers to Plaintiff's other products occurred in the secondary Aftermarket, not in the primary market. See *Ticketmaster LLC v. Designer Tickets & Tours, 2008 U.S. Dist. LEXIS 22236, 2008 WL 649804 at *3-4 (C.D. Cal. Mar. 10, 2008)* (finding that the defendant, who bought tickets from the plaintiff in the primary market to be sold by the defendant in the secondary market, lacked standing because it did not have an antitrust injury, as the defendant did not allege that it participated in the primary ticket distribution market); *R.C. Dick v. Geothermal Corp. v. Thermogenics, 890 F.2d 139 (9th Cir. 1989)* (holding that the plaintiff lacked antitrust standing where it was not a participant in the primary market for geothermal steam, even though it participated in a closely related market of land leasing for geothermal steam production, which could affect the market for geothermal steam).

Plaintiff attempts to distinguish Ticketmaster on the grounds that there, the defendant advanced inconsistent claims, and conceded **[**44]** that the injury was in the secondary market. Here, by contrast, Plaintiff argues that it participates in the relevant market and was injured as a necessary step in Defendant's monopolization of that market. See Pl.'s Opp. to Def.'s Mot. to Dismiss at n. 19. Specifically, Plaintiff argues that even if it is not a participant in the primary market, its injury was the "necessary step" and "means" by which the anticompetitive conduct was carried out, relying on *Blue Shield of Virginia v. McCready, 457 U.S. 465, 479, 483-84, 102 S. Ct.*

2540, 73 L. Ed. 2d 149 (1982). In Blue Shield, the plaintiff, a member of a group health plan, sued the insurer for antitrust damages arising from the insurer's refusal to reimburse medical expenses for psychotherapy received from psychologists **[*993]** rather than psychiatrists. The plaintiff alleged that the insurer entered into a conspiracy with psychiatrists to restrain competition in the psychotherapy market. The Court rejected the argument that because the conspiracy was directed against psychologists instead of subscribers to the health plan like the plaintiff, the injury to the plaintiff was too remote. The Court reasoned that denial of reimbursement to patients of psychologists was "the very **[**45]** means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready . . . was a necessary step in effecting the ends of the alleged illegal conspiracy" and an "integral . . . aspect of the conspiracy alleged." Blue Shield, 457 U.S. at 479, 483-84 (holding that the plaintiff was entitled to sue because the defendant was charged with a "purposefully anti-competitive scheme," and the injury the plaintiff suffered "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market."). [1]

The Ninth Circuit explained the limited scope of the Blue Shield exception in Exhibitors' Service. See Exhibitors' Serv., 788 F.2d at 580; **[**47]** see also American Ad., 190 F.3d at 1057, n.5 (recognizing that the Blue Shield exception was narrow). In Exhibitors' Service, the plaintiff, a motion picture licensing agent, sued two motion picture exhibitors that had entered into a splitting agreement under which they allocated films between themselves, resulting in lower cost of films for both exhibitors (to the detriment of film distributors), and terminated the plaintiff's services. The court determined that the plaintiff, a film licensing agent, did not come within the Blue Shield exception because the plaintiff's injury was not inextricably intertwined with the injury inflicted upon film distributors. Although the conspirators terminated the plaintiff's services, its injury was not necessary for the creation or implementation of the trade-restraining scheme, whose intended victim was the film distributors. The court determined that the plaintiff's interest was not in enhanced competition between exhibitors, but instead was in continuing to assist the conspiring exhibitors: "At best, [the plaintiff] was neutral on the question whether trade was restrained or not." Exhibitors' Service, 788 F.2d at 580; see also Chelson **[*994]** v. Oregonian Publishing Co., 715 F.2d 1368, 1371 (9th Cir. 1983) **[**48]** (reversing summary judgment where there was a triable issue of fact as to whether a group of newsdealers had antitrust standing against the defendant, which was alleged to have interfered with the dealers' attempts to reach agreement with the defendant's competitor to distribute advertising circulars in the restrained market of advertising distribution, because there was a triable issue of fact as to whether their injury was inextricably intertwined: "although the dealers were neither consumers nor competitors in the relevant market, it is clear that their interests would directly be served by enhanced competition in the market."). Further, like the plaintiff in Exhibitors' Service, Plaintiff here would not appear to have a stake in whether Defendant monopolizes the primary market for online gaming, because Plaintiff sells accessories that only function with the Xbox 360 system;

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[1] Plaintiff's reliance on the Ninth Circuit's interpretation of Blue Shield in Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 745 (9th Cir. 1984) is misplaced. In Ostrofe, the court found that the plaintiff, a former employee in the paper lithograph label industry who alleged that he had been discharged and boycotted because of his refusal to participate in bid rigging scheme, had standing because his discharge furthered the anticompetitive scheme in the labels market even though he was not a consumer or a competitor in the market. Ostrofe stated:

> As sales manager of one of the label manufacturers, Ostrofe was an essential **[**46]** participant in the scheme to eliminate competition in the marketing of labels by fixing prices and allocating customers. It could not succeed without his active cooperation. When Ostrofe sold labels to customers not allocated to his employer and at prices below those agreed upon, his discharge was a necessary means to achieve the conspirators' illegal end as well as an integral and inextricable part of the anticompetitive scheme.

Ostrofe, 740 F.2d at 746. Ostrofe, however, is limited to cases in which a dismissed employee is an essential participant in the antitrust scheme and the dismissal is the necessary means to accomplish the anticompetitive scheme. See Vinci v. Waste Management, Inc., 80 F.3d 1372, 1376 (9th Cir. 1996) ("The exception recognized in Ostrofe II is limited to those cases in which a dismissed employee is an 'essential participant' in an antitrust scheme, the dismissal is a 'necessary means' to accomplish the scheme, and the employee has the greatest incentive to challenge the antitrust violation."). Those circumstances are not present here.

increased market share for the Xbox 360 system would result in more sales of Plaintiff's accessories, other things being equal, as long as Defendant did not block Plaintiff's products in the Aftermarket.

The allegations in the complaint do not support Plaintiff's argument that its injury was inextricably intertwined **[**49]** with Defendant's anticompetitive conduct in the primary market such that it comes within the *Blue Shield* exception. Plaintiff's allegations center on its injury in the secondary market, even though Plaintiff attempts to convert spillover effects in the secondary market into an injury in the primary market. Plaintiff alleges that Defendant profited from blocking Plaintiff's accessories, and that the extension of Defendant's proprietary interests in the secondary market served to "reinforce" Defendant's power in the Online Market. Compl. P 62. Plaintiff alleges that by using this power, Defendant curbed competition in the Aftermarket and thereby erected substantial barriers to potential entrants to the primary Online Market. Compl. P 63. These allegations are not sufficient to come within the narrow *Blue Shield* exception. Further, it is questionable whether Plaintiff could allege in good faith that it was necessary for Defendant to exclude Plaintiff's unauthorized accessories from the Aftermarket in order to gain a monopoly in the Online Market, in light of other allegations in the complaint. Specifically, Plaintiff alleges that there are other barriers to the Online Market, such as **[**50]** cost, other established libraries of games, and the massive resources available to Defendant. Compl. P 45. Further, Plaintiff introduced its memory cards in May 2009, but alleges that Defendant dominated the market since 2006 (Compl. P 13). Thus, it does not appear that blocking Plaintiff's products in October 2009 (Compl. P 20) was a necessary step in Defendant's alleged market dominance, which is alleged to have started much earlier. Rather, Plaintiff alleges that Defendant possessed substantial power in the Online Market and then "deployed" that power to control subsidiary markets. Compl. P 62. Therefore, Plaintiff has not adequately pled the narrow *Blue Shield* exception.

Accordingly, Defendant's motion to dismiss Plaintiff's second claim is granted for lack of standing. Plaintiff has stated that if the Court determined that Plaintiff lacked standing, Plaintiff would seek to amend the complaint to allege a combined market consisting of the Online Market and the Aftermarket in the alternative. It is possible that if Plaintiff does so, it will undermine its other claims, but that is a choice for Plaintiff to make. The Court grants Plaintiff leave to amend the complaint no later than **[**51]** May 14, 2010.

3. Third claim for violation of Sherman Act based on tying

Plaintiff alleges that Defendant illegally "ties the sale of the Xbox 360 console to a **[*995]** separate product or products, namely accessories and add-ons to sales of a separate product, including memory cards." Compl. P 74. Plaintiff alleges that by using a technological tie, such as the dashboard update, Defendant sells the Xbox 360 console only on the condition that consumers purchase memory cards solely from Defendant. Id.

HN12[] "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Kodak, 504 U.S. at 461* (internal citation omitted). "Not all tying arrangements are illegal. Rather, ties are prohibited where a seller 'exploits,' 'controls,' 'forces,' or 'coerces' a buyer of a tying product into purchasing a tied product." *Rick-Mik Enters., Inc. v. Equilon Enters., LLC, 532 F.3d 963, 972 (9th Cir. 2008)*. "The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force **[**52]** the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. An essential element of a tying claim is market power in the tying product -- the tying market. See *Rick-Mik, 532 F.3d at 972*; see also *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 36, 43, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (tying arrangements no longer viewed an inherently anticompetitive, but holding that tying "must be supported by proof of power in the relevant market rather than by a presumption thereof."). Failure to allege power in the relevant market is a sufficient ground to dismiss an antitrust complaint. See *Rick-Mik, 532 F.3d at 972*. Further, a tying claim generally requires that the defendant's economic power be derived from the market, not from a voluntary contractual relationship. See *Rick-Mik, 532 F.3d* *at 973* ("While the allegation of a contractual relationship does not necessarily doom a tying claim at the pleading stage, **[**53]** it also does not remedy a complaint's failure to properly plead market power.").

Defendant argues that Plaintiff's tying claim fails because Plaintiff has failed to plead a viable primary market and aftermarket. ***HN13***[] In order to state a claim under the Sherman Act, Plaintiff must allege that Defendant has market power in a "relevant market." *Newcal, 513 F.3d at 1044-45* ("An antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect. And since the validity of the 'relevant market' is typically a factual element rather than a legal element, alleged markets may survive scrutiny under *Rule 12(b)(6)* subject to factual testing by summary judgment or trial."). A relevant market must be a product market, and must encompass the product at issue as well as all reasonable substitutes for the product. *Newcal, 513 F.3d at 1045* (citing *Brown Shoe v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). A relevant market can **[**54]** be based on a submarket, which must be economically distinct from the general product market. Id. (citing Brown Shoe).

In Newcal, the Ninth Circuit reversed the district court's decision that **[*996]** the plaintiff failed to plead legally cognizable relevant markets for: "replacement copier equipment for IKON and GE customers with Flexed IKON contracts," and "copier service for IKON and GE customers with Flexed IKON contracts." ***HN14***[] The court noted that three principles emerged from the leading cases: (1) "the law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue;" (2) "the law prohibits a claimant from resting on market power that arises solely from contractual rights that consumers knowingly and voluntarily give to the defendant;" and (3) "in determining whether the defendant's market power falls within the . . . category of contractually-based market power or in the . . . category of economic market power, the law permits an inquiry into whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in **[**55]** an aftermarket." *Id. at 1048-49*; cf., e.g., *Apani Southwest v. Coa-Cola Enterprises, 300 F.3d 620 (5th Cir. 2002)* (failure to allege a relevant geographical market, stating that an antitrust claim should be dismissed when market definition does not encompass all interchangeable substitutes even when all factual inferences are made in the plaintiff's favor); *Tanaka v. Univ. of S. Cal., 252 F.3d 1059 (9th Cir. 2001)* (failure to state a claim based on market of one university's athletic program for one sport); *Hack v. President and Fellows of Yale College, 237 F.3d 81 (2d Cir. 2000)* (failure to state a claim of relevant market because the market was actually a contractually-created class of consumers); *Star Tobacco v. Darilek, 298 F. Supp 2d 436 (E.D. Tex. 2003)* (failure to state a claim based on discount cigarettes market because of the high elasticity between discount and name-brand cigarettes).

Defendant first argues that Plaintiff has not adequately pled power in the tying market, here, the Online Market, because Plaintiff's allegation of a primary market limited to Multiplayer Online Dedicated Gaming Systems is impermissibly narrow. See, e.g., *Rick-Mik Enters., Inc. v. Equilon Enters., LLC, 532 F.3d 963, 972 (9th Cir. 2008)* **[**56]** (stating that: "If Equilon lacks market power in the gasoline-franchise market, there can be no cognizable tying claim," because Equilon would have no power to force, exploit or coerce a franchisee to purchase the tied product, credit-card processing services). Specifically, Defendant argues that the exclusion of other gaming systems such as the Wii, Playstation 2, handheld devices and personal computers, makes the Online Market legally untenable.

Defendant argues that the market must contain the product at issue and all economic substitutes, which can be determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product and substitutes for it. *Newcal, 513 F.3d at 1045*. ***HN15***[] Reasonable interchangeability means all products which could be used for the same general purpose, despite functional or price differences among them. *United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 396, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Defendant argues that the only reasons for excluding the Wii, Playstation 2 and personal computers from the relevant market are price and quality, which are not proper bases for their exclusion, and therefore, the market definition fails. See *In re Super Premium Ice Cream Distribution Antitrust Litig., 691 F.Supp. 1262, 1268 (N.D. Cal. 1988)* **[**57]** ("Courts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are economically meaningless where the differences are actually a *spectrum* of price and quality differences.") **[*997]** (emphasis in original); *Psystar, 586 F. Supp. 2d at 1199* ("The mere existence of a price differential, however, does not necessarily mean that a product is unconstrained by competition . . . .").

Plaintiff responds that the market is not defined solely by price and quality. Instead, Plaintiff points to the allegations that other products, such as the Wii and personal computers, have a distinct core functionality (Compl. P 38), distinct perceptions by consumers (Compl. PP 38, 39), distinct customer targeting by manufacturers (Compl. P 38), distinct analyses by industry analysts (Compl. P 39), and distinct pricing and pricing patterns (Compl. P 39). At least some of these allegations do not relate to price and quality, and therefore, are appropriate differentiations at the pleading stage to demonstrate that there is no reasonable interchangeability between the Xbox 360 and the Playstation 3 on the one hand, and the Wii, Playstation 2 and personal computers **[**58]** on the other hand. Further, Plaintiff alleges that Defendant itself "has measured the success of the Xbox 360 against the Playstation 3, to the exclusion of other products or platforms." Compl. P 40. Finally, ***HN16***[] the question of whether the market should include other products is better resolved at the summary judgment stage, rather than on a motion to dismiss. See Pl.'s Opp. at 18, n.15; *Image Tech. Servs. v. Eastman Kodak, 125 F.3d 1195, 1203 (9th Cir. 1997)* ("Ultimately what constitutes a relevant market is a factual determination for the jury."): *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1299 (9th Cir. 1982)* ("The definition of the relevant market is basically a fact question dependent upon the special characteristics of the industry involved . . . ."); *Thurman Indus., Inc. v. Pay 'n Pak Stores, Inc., 875 F.2d 1369 (9th Cir. 1989)* (stating that "For antitrust purposes, defining the product market involves identification of the field of competition: the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business. . . . This definitional process is a factual inquiry for the jury . . . .").

Viewing **[**59]** the allegations in the light most favorable to Plaintiff, the Court concludes that Plaintiff has not improperly ignored products that may be reasonably interchangeable ones, but instead has included two products in the alleged market and alleged differences regarding others that plausibly exclude them from the relevant market. See *Newcal, 513 F.3d at 1045* (stating that ***HN17***[] there is no requirement to plead with specificity the existence of market power in a relevant market); see also *Jamsports & Entm't, LLC v. Paradama Prods., Inc., 2003 U.S. Dist. LEXIS 6100, 2003 WL 1873563, at *6 (N.D. Ill. Apr. 15, 2003)* ("Market definition, however, involves a deeply fact-intensive inquiry, . . . and for this reason a court must be hesitant to grant a motion to dismiss for failure to plead a relevant market.") (internal citations omitted). Moreover, as Plaintiff notes, the market power requirement for a tying claim appears to be more lenient than for a monopolization claim:

> . . . the law of both tying and exclusive dealing was intended to apply to firms falling short of the § 2 market share requirements for monopolization. Indeed, only recently have the courts put real teeth into the market power requirements for exclusive dealing **[**60]** and tying, and even today the minimum market share hovers in the range of 30-40%, which is roughly half of the amount needed for a § 2 violation.

Hoverkamp, Federal ***Antitrust Law***, § 7.6c.

Here, Plaintiff alleges that Defendant's share of the Online Market was approximately 66% as of July 2009. Compl. P 44. Further, Plaintiff alleges that "in June 2009, the Xbox 360 outsold the Playstation **[*998]** 3 by approximately 1.5 to 1, indicating that Defendant's market dominance is continuing and stable." Compl. P 44. Plaintiff also alleges that Defendant controls over 50% of both markets, and has virtually complete control in the Aftermarket. Compl. P 73. Defendant allegedly ties the sale of Xbox 360 consoles to accessory products, including memory cards, by implementing the dashboard update that conditioned use of the Xbox 360 system on purchasing memory cards solely from Defendant. Compl. P 74. Plaintiff alleges that the tying arrangement harms competition in the Aftermarket in many ways, including by "decreasing competitors' ability to compete in the aftermarket;" "increasing the barriers to entry in the aftermarket;" "increasing the barriers to entry on the market for Multiplayer Online Dedicated **[**61]** Gaming Systems;" "facilitating price discrimination in the markets for Multiplayer Online Dedicated Gaming Systems and the Aftermarket for Xbox 360 Accessories and Add-ons by permitting Microsoft to extract a higher, supra-competitive price from certain users;" "exploiting locked-in customers who are deprived of the benefits of competition in the aftermarket;" and "forcing consumers, who would otherwise prefer third-party accessories and add-ons for the Xbox 360, including the DMMCs and other Datel accessories, to nonetheless use Microsoft's accessories and add-ons." Compl. P 76. Plaintiff alleges that there are no procompetitive benefits derived from Defendant's conduct. Compl. P 77. Further, Plaintiff alleges that the tying arrangement reinforces Defendant's market power and improperly prevents competition. Compl. P 78. In addition, Plaintiff alleges that the tying arrangement affects a substantial volume of interstate commerce. Compl. P 75. Accordingly, to the extent that there is a lower threshold to support the market power requirement for purposes of a tying claim, Plaintiff has met that threshold.

Plaintiff also argues that it has alleged a per se tying claim (Compl. P 76), that **[**62]** affects a substantial volume of commerce (Compl. PP 73, 75), and therefore, it is not necessary to rigorously define a market for the product. See *Fortner Enters. v. United States Steel Corp., 394 U.S. 495, 501, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)* (stating that "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie, for as we said in International Salt, it is 'unreasonable, per se, to foreclose competitors from any substantial market' by a tying arrangement."); *Kodak, 504 U.S. at 464* (finding that there was a triable issue of fact as to the claim of market power where there was evidence that, among other things, certain parts were available exclusively from Kodak, Kodak had control over the availability of parts it did not manufacture, Kodak had prohibited independent manufacturers from selling Kodak parts, and Kodak taken steps to restrict the availability of used machines); Phillip Areeda & Herbert Hovencamp, ***Antitrust Law***, § 1721 (2d ed. 2004) (stating that tying is unlawful under a special per se rule that requires both power over the tying product and coverage of a "not **[**63]** insubstantial" volume of commerce in the tied product, and the volume of commerce is the dollar value of tied sales rather than the share of any defined market.). Further, ***HN18***[] in Jefferson Parish, the Court determined that "per se condemnation -- condemnation without inquiry into actual market conditions -- is only appropriate if the existence of forcing is probable." *Id.* at 15. Specifically, the application of the per se rule "focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must **[*999]** be a substantial potential for impact on competition in order to justify per se condemnation. . . . It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce if foreclosed thereby. . . . Once this threshold is surmounted, per se prohibition is appropriate if anticompetitive forcing is likely." *Id.* at 16.

Viewing the allegations in the light most favorable to Plaintiff, Plaintiff has adequately pled a per se tying claim. For all of the reasons stated above, Defendant's motion to dismiss Plaintiff's tying claim based on the viability of the primary market is denied.

Defendant also seeks dismissal of the tying **[**64]** claim on the ground that there is no legally plausible definition of the tied product because the Aftermarket claim is legally improper. See *Jefferson Parish Hosp., 466 U.S. at 20-21* (tying arrangement requires two separate product markets that have been linked). However, as set forth above, Plaintiff's Aftermarket claim is adequately pled.

4. Fourth and Fifth claims for unfair competition

Defendant argues that these claims fail because the antitrust claims fail. See *Formula One Licensing v. Purple Interactive, 2001 U.S. Dist. LEXIS 2968, 2001 WL 34792530, at *4 (N.D. Cal. Feb. 6, 2001)* (***HN19***[] " Where a plaintiff fails to state an antitrust claim, and where an unfair competition claim is based upon the same allegations, such state claims are properly dismissed."). Because at least one of Plaintiff's Sherman Act claims survive dismissal, Plaintiff's unfair competition claims also survive.

Conclusion

Defendant's motion to dismiss is granted in part with leave to amend and denied in part. A further case management conference is set for June 2, 2010 at 10:00 a.m. As discussed at the motion hearing, the parties shall meet and confer and file a joint case management conference statement on later than May 25, 2010 with proposed **[**65]** agreed pretrial and trial dates.

IT IS SO ORDERED.

Dated: April 23, 2010

/s/ Elizabeth D. Laporte

ELIZABETH D. LAPORTE

United States Magistrate Judge

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Leggett v. Duke Energy Corp.

Supreme Court of Tennessee, At Jackson

November 5, 2009, Session; April 23, 2010, Filed

No. W2007-00788-SC-R11-CV

Reporter
308 S.W.3d 843 *; 2010 Tenn. LEXIS 408 **; 2010-1 Trade Cas. (CCH) P77,000; 2010 WL 11679203

SAMUEL D. LEGGETT ET AL. v. DUKE ENERGY CORPORATION ET AL.

Prior History: [1]** Tenn. R. App. P. 11; Judgment of the Court of Appeals Reversed. Appeal by Permission from the Court of Appeals, Western Section Chancery Court for Fayette County. No. 13847. Martha B. Brasfield, Chancellor.

Leggett v. Duke Energy Corp., 2008 Tenn. App. LEXIS 684 (Tenn. Ct. App., Oct. 29, 2008)

Disposition: Judgment of the Court of Appeals Reversed.

Core Terms

natural gas, pre-emption, regulation, pre-empted, wholesale, deregulation, interstate, prices, Energy, interstate commerce, first sale, sales, purchasers, pipeline, consumer, transportation, Trading, rates, state regulation, state law, indirect, federal law, transactions, high-cost, ratable, courts, cases, electricity, retail, practices

LexisNexis® Headnotes

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

HN1[] **Natural Gas Industry, Distribution & Sale**

A wash trade is a transaction where two parties simultaneously buy and sell the same quantity of natural gas at the same price and on the same day, creating a false appearance of demand for and short supply of natural gas.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Securities Law > ... > Exchanges & Other Markets > Broker-Dealer Practices > Churning

HN2[] **Natural Gas Industry, Distribution & Sale**

In churning, volumes of natural gas are sequentially bought and sold by a trader and counterparty so that each time a buy/sell cycle is complete, the basis price has been incrementally increased without the net exchange of any actual natural gas.

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

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

HN3[] **Standards of Review, De Novo Review**

A *Tenn. R. Civ. P. 12.02(6)* motion to dismiss seeks to determine whether the pleadings state a claim upon which relief can be granted. Such a motion tests only the legal sufficiency of the complaint, not the strength of the proof. The resolution of the motion is determined by an examination of the pleadings alone. In considering a motion to dismiss, courts must construe the assertions in the complaint liberally; the motion cannot be sustained unless it appears that there are no facts warranting relief. On appeal, all allegations of fact by the plaintiffs must be taken as true. The scope of review is de novo with no presumption of correctness.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

Governments > Legislation > Interpretation

HN4[] **Federal Common Law, Preemption**

Whether a state statute or common law cause of action is preempted by federal law is a question of law that the appellate courts review de novo. In determining whether a statute expressly or implicitly preempts state law, courts must look to the principles of statutory construction. When interpreting a statute, courts must first ascertain and then give full effect to the legislature's intent and purpose in drafting those sections. The chief concern is to carry out the legislature's intent without unduly broadening or restricting the statute. Courts presume that every word in a statute has meaning and purpose and should be given full effect if so doing does not violate the legislature's obvious intent. When the statutory language is clear and unambiguous, courts simply apply its plain meaning. When a statute is ambiguous, however, courts may refer to the broader statutory scheme, the history of the legislation, or other sources to discern its meaning. Courts presume that a legislative body was aware of its prior enactments and knew the state of the law at the time it passed the legislation.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN5[] **Trade Practices & Unfair Competition, State Regulation**

The Tennessee Trade Practices Act (TTPA), *Tenn. Code Ann. § 47-25-101 et seq.* (2001), is a general antitrust statute establishing that various anticompetitive practices are against public policy, unlawful, and void in the State of Tennessee. *Tenn. Code Ann. §§ 47-25-101*, *-102*. *Tenn. Code Ann. § 47-25-106* creates a private cause of action for persons harmed by violations of the TTPA.

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

HN6[] **State Regulation, Claims**

See *Tenn. Code Ann. § 47-25-106* (2001).

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

HN7[] Trade Practices & Unfair Competition, State Regulation

Indirect purchasers may recover under *Tenn. Code Ann. § 47-25-106* (2001). In other words, when a wholesaler violates the Tennessee Trade Practices Act, *Tenn. Code Ann. § 47-25-101 et seq.* (2001), and the cost of that violation is passed through a retailer to a consumer, that consumer can seek to recover from the wholesaler, despite the fact that the two parties never directly conducted business with each other. In contrast, federal ***antitrust law*** does not permit indirect purchasers to recover for antitrust violations.

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

HN8[] Trade Practices & Unfair Competition, State Regulation

See *Tenn. Code Ann. § 47-25-101* (2001).

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

HN9[] Trade Practices & Unfair Competition, State Regulation

See *Tenn. Code Ann. § 47-25-102* (2001).

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN10[] Supremacy Clause, Supreme Law of the Land

See *U.S. Const. art. VI, cl. 2*.

Constitutional Law > Supremacy Clause > Federal Preemption

HN11[] Supremacy Clause, Federal Preemption

Pursuant to the *Supremacy Clause, U.S. Const. art. VI, cl. 2*, federal law sometimes preempts otherwise permissible state laws, rendering the state laws without force. When Congress legislates in an area within the federal domain, it may, if it chooses, take for itself all regulatory authority over the subject, share the task with the states, or adopt as federal policy the state scheme of regulations. Courts recognize both express preemption and implied preemption. Express preemption occurs when Congress defines explicitly the extent to which its enactments preempt state law. When Congress has made its intent known through explicit statutory language, the courts' task is an easy one. In practice, however, an express preemption clause is no guarantee that the scope of the preemption is clearly defined. Even when there is no explicit textual reference to preempting state law, preemption may be implicit.

Constitutional Law > Supremacy Clause > Federal Preemption

HN12[] Supremacy Clause, Federal Preemption

Implied preemption typically falls into one of three categories: direct conflict preemption; purposes and objectives conflict preemption; and field preemption. Conflict preemption is based on the rule that state law is preempted to the extent that it actually conflicts with federal law. Direct conflict preemption occurs when there is an inescapable contradiction between state and federal law - for example, where it is impossible for a private party to comply with both state and federal law. Even when there is no direct contradiction, however, state law may be preempted by federal law when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Field preemption occurs when federal regulation of a field is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. If the context and substance of the congressional enactments indicate an intent to occupy a given field to the exclusion of state law, field preemption precludes intrusion by the state.

Constitutional Law > Supremacy Clause > Federal Preemption

HN13[] Supremacy Clause, Federal Preemption

Despite the variety of opportunities for federal preeminence, courts should never assume lightly that Congress has derogated state regulation. When addressing questions of express or implied preemption, a court begins its analysis with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. That presumption is especially strong when Congress has legislated in a field which the States have traditionally occupied. Finally, because preemption is always a federal question, the court's conclusion in a preemption case must fall within the boundaries prescribed by United States Supreme Court precedent. The court is not empowered to second-guess that the U.S. Supreme Court's wisdom or to disregard its earlier edicts solely because it suspects that the result might be different today.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN14[] Commerce Clause, Dormant Commerce Clause

The Commerce Clause provides that Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes. *U.S. Const. art. I, § 8, cl. 3*. Although the clause is primarily a grant of authority to Congress, courts have long recognized that it also imposes restrictions on the authority of states through what is called the dormant Commerce Clause doctrine.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Policy Act > General Overview

HN15[] Supremacy Clause, Federal Preemption

The Natural Gas Act (NGA), *15 U.S.C.S. § 717 et seq. (2009)*, establishes field preemption for interstate wholesales of natural gas. The Natural Gas Policy Act of 1978, *15 U.S.C.S. § 3301 et seq. (2009)*, deregulates first sales of much of the gas that is subject to price controls under the NGA, but that deregulation does not disturb the field preemption. The Natural Gas Wellhead Decontrol Act of 1989 (WDA), Pub. L. No. 101-60, 103 Stat. 157, deregulates the remaining regulated first sales, and subsequent Federal Energy Regulatory Commission (FERC) action eliminates rate-filing requirements for sales within its jurisdiction through blanket pre-approvals. Nevertheless, neither the WDA or the FERC deregulation affects the field preemption.

Constitutional Law > Supremacy Clause > Federal Preemption

HN16[] **Supremacy Clause, Federal Preemption**

There are no precise guidelines for determining whether or how broadly field preemption has occurred, because each case turns on the peculiarities and special features of the federal regulatory scheme in question. The ultimate question, however, is one of congressional intent: did Congress intend to leave no room for the States to supplement the federal system of regulation in a particular field.

Constitutional Law > Supremacy Clause > Federal Preemption

HN17[] **Supremacy Clause, Federal Preemption**

A federal determination that deregulation was appropriate is entitled to as much weight in determining preemption as a federal decision to regulate actively.

Constitutional Law > Supremacy Clause > Federal Preemption

HN18[] **Supremacy Clause, Federal Preemption**

Field preemption cases that involve statutes with a history of deregulation present unique challenges that more traditional field preemption cases do not. For example, courts typically look to whether Congress has enacted an intricate web of statutory provisions that affords no room for the imposition of state-law requirements. A chief purpose of deregulation, however, is to ensure that an industry is not overburdened by an intricate web of restrictive requirements. In a field preemption case involving deregulation, therefore, the scope and complexity of the relevant federal statutes are less helpful indicators of congressional intent than they would ordinarily be. Instead, we must ascertain congressional intent from other indicators as to whether the deregulatory legislation altogether precludes states from regulation. An assumption of non-preemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.

Governments > Legislation > Expiration, Repeal & Suspension

HN19[] **Legislation, Expiration, Repeal & Suspension**

Repeals by implication are not favored.

Constitutional Law > Supremacy Clause > Federal Preemption

HN20[] **Supremacy Clause, Federal Preemption**

When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > Courts > Judicial Precedent

HN21[] **Supremacy Clause, Federal Preemption**

The Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.

Counsel: Brian S. Faughnan and Cannon Fairfax Allen, Memphis, Tennessee, for the appellants, Williams Companies, Inc., Williams Energy Marketing & Trading Company, Inc., and Williams Merchant Services.

Leo Bearman, Jr., Michael Cotter Patton, and W. Michael Richards, Memphis, Tennessee; and Terry J. Houlihan, San Francisco, California, for the appellants, Reliant Energy Services, Inc. and Reliant Energy, Inc.

Jef Feibelman, Memphis, Tennessee, for the appellants, ONEOK, Inc. and ONEOK Energy Marketing and Trading Company, LP.

Douglas Ray Tribble, San Diego, California; John S.Golwen, Memphis, Tennessee; Michael J. Kass, San Francisco, California; and Joshua Ray Denton and Robert Dale Grimes, Nashville, Tennessee, for the appellant, Dynegy Marketing and Trade.

Glen G. Reid, Jr. and Robert Edgar Craddock, Jr., Memphis, Tennessee, for the appellants, CMS Energy Corporation, CMS Field Services, and CMS Marketing Services & Trading Company.

Brent Benoit, J. **[**2]** Michael Dorman, James R. Leahy, and Stacy Williams, Houston, Texas; Paul Howard Morris and Shea Sisk Wellford, Memphis, Tennessee, for the appellants, El Paso Corporation and El Paso Merchant Energy, LP.

Joel B. Kleinman, Washington, DC; Lela M. Hollabaugh and Paul G. Summers, Nashville, Tennessee, for the appellants, Duke Energy Corporation and Duke Energy Trading and Marketing Company, LLC.

Joel B. Kleinman, Washington, DC, for the appellants, American Electric Power Co. and AEP Energy Services, Inc.

Alan G. Crone, Memphis, Tennessee; John S. Wilder, Somerville, Tennessee; and Thomas H. Brill, Mission Hills, Kansas, for the appellees, Samuel D. Leggett, Bing's Stop & Shop, Wolfe River Cafe, and Frank H. Colvett, Jr.

Judges: GARY R. WADE, J., delivered the opinion of the Court, in which JANICE M. HOLDER, C.J., CORNELIA A. CLARK, WILLIAM C. KOCH, JR., and SHARON G. LEE, JJ., joined.

Opinion by: GARY R. WADE

Opinion

[*847] The plaintiffs, commercial and residential consumers of natural gas, purchased natural gas from utilities, which had acquired **[*848]** the product wholesale from the defendants. In this class action antitrust suit, the plaintiffs allege that the defendants engaged in various anti-competitive practices, including **[**3]** making false statements about natural gas transactions and engaging in "wash trades" and "churning." After the defendants filed a motion to dismiss, contending that the claims were barred by both field pre-emption and the filed rate doctrine, the chancellor dismissed the claims. The plaintiff appealed and the Court of Appeals reversed, holding that the claims were not subject to dismissal. Because the Natural Gas Act and subsequent federal legislation pre-empt state actions in this particular field of regulation, the judgment of the Court of Appeals is reversed and all claims are dismissed.

OPINION

Facts and Procedural History

[1]

This litigation represents a single component of a complex, nationwide effort by consumers and other purchasers challenging the pricing practices of wholesalers of natural gas. Williams Companies, Inc., Williams Energy Marketing & Trading Company, Inc., Williams Merchant Services, Reliant Energy Services, Inc., Reliant Energy, Inc., ONEOK, Inc., ONEOK Energy Marketing and Trading Company, L.P., Dynegy Marketing & Trade, CMS Energy Corporation, CMS Field Services, **[**4]** CMS Marketing Services & Trading Company, El Paso Corporation, El Paso Merchant Energy, LP, Duke Energy Corporation, Duke Energy Trading and Marketing Company, LLC, American Electric Power Co., and AEP Energy Services, Inc. (the "Defendants") sold natural gas at wholesale to Tennessee utilities (the "Utilities"), which then sold the product at retail to a variety of individuals and businesses in Tennessee, including Samuel D. Leggett, Frank H. Colvett, Jr., Bing's Stop & Shop, Wolfe River Cafe, and others, who make up the class filing this suit (the "Plaintiffs"). The Plaintiffs claim that, from at least January 1, 2000, through October 31, 2002, the Defendants engaged in a pervasive and widespread scheme to artificially inflate the price of wholesale natural gas, and that the Utilities passed along those costs to the Plaintiffs.

Reporting firms such as Platts, a division of the McGraw-Hill Companies, gather information about volume and pricing from those in the natural gas market and publish indices reflecting their data, such as Gas Daily and the monthly Inside FERC Gas Market Report ("IFERC"). In turn, natural gas sellers, purchasers, and futures traders rely on the indices to evaluate **[**5]** market conditions and set prices. The Plaintiffs allege that the various Defendants reported thousands of natural gas trades to these firms containing false or misleading information designed to influence the price of gas in their favor. The Plaintiffs contend that, as a part of their efforts to manipulate pricing, the Defendants reported sales that did not exist, failed to report sales that did occur, and reported actual sales accompanied by false information regarding the volume and the price.

The Plaintiffs further assert that certain of the Defendants engaged in "wash trades" and "churning" in an effort to inflate the price of natural gas. ***HN1***[] "A wash trade is a transaction where two parties simultaneously buy and sell the same quantity of natural gas at the same price and on the same day[,] creat[ing] a false appearance of demand for and short supply **[*849]** of natural gas." *E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1032 n.3 (9th Cir. 2007)*. ***HN2***[] "In churning, volumes of natural gas are sequentially bought and sold by a trader and counterparty so that each time a buy/sell cycle is complete, the basis price has been incrementally increased without the net exchange of any actual natural **[**6]** gas." *E. & J. Gallo Winery v. EnCana Energy Servs., Inc., No. CV F 03-5412 AWI LJO, 2008 U.S. Dist. LEXIS 80734, 2008 WL 4224492, at *7 (E.D. Cal. Sept. 12, 2008)*. The Plaintiffs allege that as a result of these practices, the Defendants caused further artificial inflation of the wholesale prices at which the Utilities purchased natural gas. Because the Utilities, in turn, passed those prices on to retail customers such as the Plaintiffs, the Plaintiffs experienced substantial, unwarranted expense.

All in all, the Plaintiffs contend that more than three-quarters of the trades reported to three of IFERC's "trading desks," [2] as well as thousands of trades reported to Gas Daily, were false, misleading, or knowingly inaccurate.

[1] Because this case was decided on a motion to dismiss, the following facts were taken from the pleadings.

[2] Reporting firms have divided the natural gas market - often by region - into various "trading desks," to reflect variation among different segments of the national market.

Since 2002, several of the Defendants have been subjected to civil penalties associated with false reporting and market manipulation. For example, ONEOK, Inc. and ONEOK Energy Marketing and Trading Company, L.P. each paid $ 3 million in penalties to the Commodity Futures Trading Commission (the "CFTC") in October of 2002; Dynegy Marketing and Trade and non-partyWest Coast Power LLC paid $ 5 million to the CFTC in December of 2002; El Paso Corporation and El Paso Merchant Energy, LP paid $ 20 **[**7]** million in penalties to the CFTC in March of 2003; Williams Companies, Inc., and Williams Energy Marketing & Trading Company, Inc., paid $ 20 million in civil penalties to the CFTC in July of 2003; Duke Energy Corporation and Duke Energy Trading and Marketing Company, LLC, paid $ 28 million to the CFTC in September of 2003; CMS Energy Corporation, CMS Marketing Services & Trading Company, and CMS Field Services paid $ 16 million to the CFTC in November of 2003; during the same month, Reliant Energy Services, Inc. [3] paid $ 18 million to the CFTC; and American Electric Power Company and AEP Energy Services, Inc., paid $ 30 million to the CFTC in January of 2005. Further, AEP Energy Services, Inc., paid an additional $ 30 million to the United States Department of Justice.

In January of 2005, the Plaintiffs filed a complaint for damages under **[**8]** the Tennessee Trade Practices Act ("TTPA") alleging an unlawful conspiracy to increase the wholesale price of natural gas. Later, the case was removed to federal court and referred to a Multi-District Litigation Panel, which assigned the suit to the U.S. District Court for the District of Nevada. The Defendants sought a dismissal for failure to state a claim, but before ruling on the motion, the district court remanded the case to the Chancery Court of Fayette County. On September 18, 2006, the Plaintiffs filed a motion for class certification in the chancery court, seeking certification for two subclasses - first, the "Indirect Residential Class," as represented by Leggett and Colvett, and secondly, the "Indirect Business Class," as represented by Bing's Stop & Shop and Wolfe River Cafe. <u>See generally</u> Tenn. R. Civ. P. 23 **[*850]** (governing class actions). They defined the proposed subclasses as follows:

> <u>Indirect Residential Class</u>
>
> All persons in Tennessee who made indirect purchases of natural gas from any municipality (city, town, or county) or any utility district for a residence, household, apartment, or place of dwelling at any time during the period January 1, 2000 through October 31, 2002. **[**9]** Excluded from the class are indirect business purchasers of any municipality or utility district, direct purchasers, federal government agencies, defendants, defendants' affiliates, or sellers or resellers of natural gas.
>
> <u>Indirect Business Class</u>
> All persons, partnerships, associations, private firms, public entities, corporations, and other business entities in Tennessee who made indirect purchases of natural gas from any municipality (city, town, or county) or any utility district for use by their business at any time during the period January 1, 2000 through October 31, 2002. Excluded from the class are indirect residential purchasers of any municipality or utility district, direct purchasers, federal government agencies, defendants, defendants' affiliates, or sellers or resellers of natural gas.

Afterward, the Defendants renewed the motion to dismiss that had initially been filed in the federal district court, arguing first that under the "filed rate doctrine," the cause of action, if allowed to proceed, would invade the exclusive rate-making authority of the Federal Energy Regulatory Commission ("FERC"); and, in the alternative, that any state cause of action would be pre-empted insofar **[**10]** as it applied to "the field of transportation and sales of natural gas in interstate commerce," regardless of whether it specifically violated the filed rate doctrine. In response, the Plaintiffs asserted that the prices at issue were never filed with FERC and thus were not subject to the filed rate doctrine and, further, that pre-emption applies only to wholesale natural gas sales, and the Plaintiffs were retail-level customers. [4] The Defendants, in reply, claimed that the filed rate doctrine continues to apply even when deregulation has ended the practice of formally filing rates, if the rates remain subject to federal policy. In addition, they contended that although the Plaintiffs were retail customers, the conduct at issue occurred in the

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[3] Reliant Energy Services, Inc. and Reliant Energy, Inc. have apparently changed their corporate names since this litigation began. For the sake of convenience, we use the old names.

[4] The Plaintiffs have since revised their field pre-emption argument to mirror the rationale adopted by the Court of Appeals.

wholesale market, and thus within the field pre-empted by federal governance. The chancellor conducted a hearing on the motion, and afterwards, both the Plaintiffs and the Defendants filed supplemental pleadings.

On February 2, 2007, at the closing of a subsequent hearing on issues relating to jurisdiction, the chancellor **[**11]** concluded that the claims were barred by federal pre-emption and dismissed the complaint:

> [O]nce the [Natural Gas Act] began the regulation [of pricing of natural gas wholesales in the interstate market], . . . the United States [g]overnment kept it. They had the ability to regulate it. Nobody else had the ability to regulate it. And therefore that regulation is still under the United States [g]overnment, and . . . if it's . . . under the auspices of the [f]ederal [g]overnment, this [s]tate [c]ourt has absolutely no authority to do anything concerning . . . the change in the rates of the wholesale gas. That's **[*851]** up to the [f]ederal [g]overnment. They regulate it; you go to them.

On appeal by the Plaintiffs, the Court of Appeals reversed, relying heavily on *E. & J. Gallo Winery, 503 F.3d at 1034*, in which the Ninth Circuit Court of Appeals affirmed the denial of summary judgment to various natural gas wholesalers facing similar claims under state and federal ***antitrust law***. Our Court of Appeals ruled as follows:

> [W]e find that the trial court erred in concluding that all of the Tennessee Purchasers' claims were preempted by federal law. . . . [S]ome of the transactions may be subject to FERC's **[**12]** exclusive jurisdiction, some may not be. From the record before us, it is impossible to make a definitive determination. Because FERC's jurisdiction is predicated upon the nature of each transaction, it was premature to dismiss the case at this early stage of the lawsuit.

*Leggett v. Duke Energy Corp., No. W2007-00788-COA-R3-CV, 2008 Tenn. App. LEXIS 684, 2008 WL 4756653, at *7 (Tenn. Ct. App. Oct. 29, 2008)*. Because of the nature and complexity of the issues presented, this Court granted the Defendants' application for permission to appeal.

Standard of Review and Statutory Interpretation

HN3[] A Rule 12.02(6) motion to dismiss under the Tennessee Rules of Civil Procedure seeks "to determine whether the pleadings state a claim upon which relief can be granted." *Edwards v. Allen, 216 S.W.3d 278, 284 (Tenn. 2007)*. Such a motion tests only the legal sufficiency of the complaint, not the strength of the proof. The resolution of the motion is determined by an examination of the pleadings alone. Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc*., 878 S.W.2d 934, 938 (Tenn. 1994)* (citing *Wolcotts Fin. Servs., Inc. v. McReynolds, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990))*. In considering a motion to dismiss, courts must **[**13]** construe the assertions in the complaint liberally; the motion cannot be sustained unless it appears that there are no facts warranting relief. Id. (citing *Fuerst v. Methodist Hosp. S., 566 S.W.2d 847, 848-49 (Tenn. 1978))*. On appeal, all allegations of fact by the Plaintiffs must be taken as true. *Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997)*. Our scope of review is de novo with no presumption of correctness. *Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 836 (Tenn. 2008)*; *Owens v. Truckstops of Am., 915 S.W.2d 420, 424 (Tenn. 1996)*.

HN4[] "Whether a state statute or common law cause of action is preempted by federal law is a question of law [that the appellate courts] review *de novo*." *Friberg v. Kansas City S. Ry. Co., 267 F.3d 439, 442 (5th Cir. 2001)*. "In determining whether a statute expressly or implicitly preempts state law, [courts must] look to the principles of statutory construction." *Russell v. United States, 551 F.3d 1174, 1178 (10th Cir. 2008)*. When interpreting a statute, we "must first ascertain and then give full effect to the [legislature]'s intent and purpose" in drafting those sections. *Waldschmidt v. Reassure Am. Life Ins. Co., 271 S.W.3d 173, 176 (Tenn. 2008)*. **[**14]** Our chief concern is to carry out the legislature's intent without unduly broadening or restricting the statute. *Houghton v. Aramark Educ. Res., Inc., 90 S.W.3d 676, 678 (Tenn. 2002)* (quoting *Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995))*. We presume that every word in a statute has meaning and purpose and should be given full effect if so doing does not violate the legislature's obvious intent. *Colonial Pipeline, 263 S.W.3d at 836* (citing *In re C.K.G., 173 S.W.3d 714, 722 (Tenn. 2005))*. When the statutory language is clear and unambiguous, we simply apply its plain meaning. *Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004)*. When a statute is ambiguous, however, **[*852]** we may refer to the broader statutory scheme, the history of the legislation, or other sources to discern its meaning. *Colonial Pipeline, 263 S.W.3d at 836*. We presume that a legislative body was aware of its prior enactments and knew the state of the law at the time it passed the legislation. *Owens, 908 S.W.2d at 926*.

Analysis

I. The Tennessee Trade Practices Act

HN5[] The Tennessee Trade Practices Act ("TTPA"), *Tenn. Code Ann. §§ 47-25-101 to -112 (2001)*, is a general antitrust statute establishing that various anti-competitive **[**15]** practices are "against public policy, unlawful, and void" in the State of Tennessee. *Tenn. Code Ann. §§ 47-25-101*, *-102*. [5] *Tennessee Code Annotated section 47-25-106* creates a private cause of action for persons harmed by violations of the TTPA:

> ***HN6***[] Any person who is injured or damaged by any such arrangement, contract, agreement, trust, or combination described in this part may sue for and recover, in any court of competent jurisdiction, from any person operating such trust or combination, the full consideration or sum paid by the person for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust.

In Freeman Industries, LLC v. Eastman Chemical Co., we held that ***HN7***[] "indirect purchasers" may recover under *Tennessee Code Annotated section 47-25-106*. *172 S.W.3d 512, 519-20 (Tenn. 2005)*. In other words, when a wholesaler violates the TTPA and the cost of that violation is passed through a retailer to a consumer, that consumer can seek to recover from the wholesaler, despite the fact that the two parties never directly conducted business with each other. In contrast, federal ***antitrust law*** does not permit indirect purchasers to recover for antitrust **[**16]** violations. *Ill. Brick Co. v. Illinois, 431 U.S. 720, 729, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In consequence, the Plaintiffs in this case would not likely have a cognizable claim under federal ***antitrust law***, but might be able to sustain a claim under the TTPA.

II. Pre-emption

5

> ***HN8***[] All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

Tenn. Code Ann. § 47-25-101.

> ***HN9***[] Any arrangements, contracts, and agreements that may be made by any corporation or person, or by and between its agents and subagents, to sell and market its products and articles, manufactured in this state, or imported into this state, to any producer or consumer at prices reduced below the cost of production **[**17]** or importation into this state, including the cost of marketing, and a reasonable and just marginal profit, to cover wages or management, and necessary incidentals, as is observed in the usual course of general business, and the continuance of such practice under such contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or any other arrangements, contracts, or agreements, by and between its agents and subagents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported into the state, and which amount to a subterfuge for the purpose of obtaining the same advantage and purposes are declared to be against public policy, unlawful, and void.

Tenn. Code Ann. § 47-25-102.

Article VI, paragraph 2 of the United States Constitution (the "Supremacy Clause") provides as follows:

> **[*853]** ***HN10***[] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or **[**18]** Laws of any State to the Contrary notwithstanding.

(Emphasis added.) ***HN11***[] Pursuant to the Supremacy Clause, federal law sometimes pre-empts otherwise permissible state laws, rendering the state laws without force. E.g., *Riegel v. Medtronic, Inc., 552 U.S. 312, 323-25, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008)* (holding that state law claims of negligence, strict liability, and implied warranty against manufacturer were pre-empted by federal law governing approval of medical devices). "When Congress legislates in an area within the federal domain, it may, if it chooses, take for itself all regulatory authority over the subject, share the task with the states, or adopt as federal policy the state scheme of regulations." *Narragansett Elec. Co. v. Burke, 119 R.I. 559, 381 A.2d 1358, 1361 (R.I. 1977)* (citing *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947))*.

Courts have historically recognized both "express pre-emption" and "implied preemption." Express pre-emption occurs when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." *English v. Gen. Elec. Co., 496 U.S. 72, 78, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)*; see, e.g., *29 U.S.C. § 1144(a) (2009)* (expressly pre-empting "any and all State laws insofar as they may now or hereafter relate **[**19]** to any employee benefit plan described" by *29 U.S.C. § 1003(a)* and not exempt under *29 U.S.C. § 1003(b)*). The United States Supreme Court has suggested that "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English, 496 U.S. at 79*. In practice, however, an express pre-emption clause is no guarantee that the scope of the pre-emption is clearly defined. Compare *Altria Group, Inc. v. Good, 555 U.S. 70, 129 S.Ct. 538, 546, 172 L. Ed. 2d 398 (2008)* (holding, via a 5-4 majority, that the express pre-emption clause of the Federal Cigarette Labeling and Advertising Act does not pre-empt state fraud claims based on labels describing cigarettesas "light" cigarettes) with *Brown v.Brown & Williamson Tobacco Corp.,479 F.3d 383, 393 (5th Cir. 2007)* ("[B]y the express terms of the pre-emption clause . . . fraudulent misrepresentation claims based on the use of [the 'light'] descriptors are pre-empted.").

Even when there is no explicit textual reference to pre-empting state law, pre-emption may be implicit. See *Geier v. Am. Honda Motor Co.., 529 U.S. 861, 884, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000)* (quoting *English, 496 U.S. at 78*) (noting that "[p]re-emption fundamentally is a question **[**20]** of congressional intent" and discussing implied pre-emption). ***HN12***[] Implied pre-emption typically falls into one of three categories: direct conflict pre-emption; "purposes and objectives" conflict pre-emption; and field pre-emption. Conflict pre-emption is based on the rule that "state law is pre-empted to the extent that it actually conflicts with federal law." *English, 496 U.S. at 79*. Direct conflict pre-emption occurs when there is an inescapable contradiction between state and federal law - for example, "where it is impossible for a private party to comply with both state and federal law." *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)*. Even when there is no direct contradiction, however, state law **[*854]** may be pre-empted by federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*. Field pre-emption occurs when federal regulation of a field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice, 331 U.S. at 230*. If the context and substance of the congressional enactments "indicate an intent **[**21]** to occupy a given field to the exclusion of state law," field pre-emption precludes intrusion by the state. *Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988)*.

HN13[] "[D]espite the variety of . . . opportunities for federal preeminence, [courts should] never assume[] lightly that Congress has derogated state regulation . . . ." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995)*. "When addressing questions of express or implied pre-emption, we begin our analysis with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc., 129 S.Ct. at 543* (internal quotation omitted). "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)* (citing *Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 447-48, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960))*. That presumption is **[**22]** especially strong when Congress has "legislated . . . in [a] field which the States have traditionally occupied." *Rice, 331 U.S. at 230* (citing *Davies Warehouse Co. v. Bowles, 321 U.S. 144, 148-49, 64 S. Ct. 474, 88 L. Ed. 635 (1944)*; *Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77 (1876))*.

Finally, because "[p]re-emption . . . is always a federal question," *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 388, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986)*, our conclusion in a pre-emption case must fall within the boundaries prescribed by United States Supreme Court precedent. See *South Carolina v. Bailey, 289 U.S. 412, 420, 53 S. Ct. 667, 77 L. Ed. 1292 (1933)* ("[I]t was the duty of [the state] court to administer the law prescribed by the Constitution and statute of the United States, as construed by this Court."). We are not empowered to second-guess that Court's wisdom or to disregard its earlier edicts solely because we suspect that the result might be different today.

III. History of the State/Federal Relationship in Natural Gas

Federal regulation of the natural gas market has had a unique and storied history. On several occasions, the United States Supreme Court has considered the extent of state regulatory authority on the subject. A synopsis of the history may provide context for our **[**23]** consideration of the issues presented in this litigation.

A. The "*Attleboro* Doctrine" and the Natural Gas Act of 1938

A 1925 breakthrough in pipeline technology triggered a boom in the interstate natural gas market. Dozier A. DeVane, Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938, 14 Geo. Wash. L. Rev. **[*855]** 30, 31 (1945-46). Even before that, however, the Supreme Court had already laid the groundwork for its treatment of an interstate natural gas market. In West v. Kansas Natural Gas Co., the Court considered various challenges to a 1907 Oklahoma statute (1) forbidding out-of-state corporations from engaging in their natural gas market and (2) denying "a charter or right of eminent domain, or right to use the highways of this state" to any corporation transmitting natural gas unless the charter "expressly stipulated" that it would neither transport nor transmit the gas out of the state, nor provide the gas to any "individuals, associations, copartnership companies, or corporations engaged in transporting or furnishing natural gas . . . outside of th[e] State." *221 U.S. 229, 239-40, 31 S. Ct. 564, 55 L. Ed. 716 (1911)* (quoting Act of Dec. 21, 1907, ch. 67, § 2, 1907 Okla. Sess. Laws) **[**24]** . The Supreme Court ruled that the statute so severely limited any party's ability to move natural gas out of the state, that it "absolutely prevented - prohibited in effect" - interstate commerce in natural gas in violation of *Article I, section 8, clause 3 of the U.S. Constitution* (the "Commerce Clause"). [6] *Id. at 249-50*. The Court rejected the argument that the Oklahoma legislation was permissible because there was no federal legislation on the subject:

> [T]his overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate

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[6] ***HN14***[] The Commerce Clause provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." *U.S. Const. art. I, § 8, cl. 3*. **[**25]** Although the clause is primarily a grant of authority to Congress, courts have long recognized that it also imposes restrictions on the authority of states through what has been called the "dormant Commerce Clause doctrine." See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007)* ("Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute."); Brannon P. Denning, Reconstructing the Dormant Commerce Clause Doctrine, *50 Wm. & Mary L. Rev. 417, 421 (2008)* ("In some form, the dormant Commerce Clause doctrine . . . has been a feature of American constitutional law for nearly two centuries.").

> interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar.

Id. at 261 (citations omitted). Soon thereafter, the Court confirmed its intention to strike down the Oklahoma statute in its entirety. *Haskell v. Kan. Natural Gas Co., 224 U.S. 217, 223-24, 32 S. Ct. 442, 56 L. Ed. 738 (1912)*.

Although the West decision signaled the Court's willingness to provide a constitutional framework for distinguishing between state and federal interests in the field of natural gas, it did not draw a bright line for those states having legislation less transparently protectionist than the Oklahoma statute. In *Public Utilities Commission for Kansas v. Landon, 249 U.S. 236, 39 S. Ct. 268, 63 L. Ed. 577, 17 Ohio L. Rep. 8 (1919)*, however, the **[**26]** Court began to provide clarity on the subject. The Kansas Public Utilities Commission and the Missouri Public Service Commission had set rates for natural gas sales at the consumer level - that is to say, "prices for gas at burner-tips." *Id. at 246*. When the Kansas Natural Gas Company challenged the Commissions' orders as unconstitutional under West and Haskell, the Court rejected the claim, distinguishing **[*856]** non-retail sales from those at the consumer level:

> That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. . . . But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. . . . Interstate movement ended when the gas passed into local mains.

Id. at 245.

In 1924, the Court, relying on its Landon decision, struck down Kansas and Missouri laws asserting power to regulate rates for upstream sales of natural **[**27]** gas:

> [The] sale and delivery . . . to . . . customers at retail is intrastate business and subject to state regulation. In such case the effect on interstate commerce, if there be any, is indirect and incidental. But the sale and delivery here is an inseparable part of a transaction in interstate commerce-not local, but essentially national, in character-and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve.

Missouri ex rel. Barrett v. Kan. Natural Gas Co., 265 U.S. 298, 308, 44 S. Ct. 544, 68 L. Ed. 1027 (1924). The Court rejected the argument by the states that its holding would leave portions of the natural gas market under-regulated:

> The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. . . .
> ....
>
> The paramount interest is not local but national, admitting of and requiring uniformity of regulation. **[**28]** Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned.

Barrett, 265 U.S. at 308-10 (citing *Robbins v. Taxing Dist. of Shelby County, Tenn., 120 U.S. 489, 493, 7 S. Ct. 592, 30 L. Ed. 694 (1887)*; *Hall v. De Cuir, 95 U.S. 485, 490, 24 L. Ed. 547 (1878)*; *Welton v. Missouri, 91 U.S. 275, 282, 23 L. Ed. 347 (1876))*. The rule enunciated by Landon and Barrett came to be embodied in "the Attleboro doctrine," as set forth in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83, 47 S. Ct. 294, 71 L. Ed. 549 (1927)*. See *Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 687, 74 S. Ct. 794, 98 L. Ed. 1035 (1954)* (discussing "the Attleboro doctrine"). In Attleboro, the Court considered the power of the states to regulate the market for electrical current, establishing the bright-line rule that the states could regulate retail sales but not the wholesale market. *273 U.S. at 90*; see also Frank R. Lindh, Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle, 10 Energy L.J. 277, 279-85 (1989).

The natural gas boom sparked in 1925, [7] however, rendered the "uniformity of governmental **[**29] [*857]** nonaction" imposed by the Attleboro doctrine problematic in the eyes of both Congress and the public. By 1928, Congress had adopted a resolution authorizing the Federal Trade Commission to investigate the electricity and natural gas industries, despite opposition from the industries themselves. S. Res. 83, 70th Cong., 1st Sess. (1928); see DeVane, 14 Geo. Wash. L. Rev. at 32-33. The report to Congress "documented numerous abuses by natural gas companies . . . and recommended federal regulation of interstate natural gas prices." Rodney L. Brown, Jr., Note, Legislative History of the Natural Gas Policy Act: Title I, 59 Tex. L. Rev. 101, 106 (1980); see also Note, Legislative History of the Natural Gas Act, 44 Geo. L. J. 695, 696-97 (1955-56) (discussing Federal Trade Commission reports and their role in the passage of the Natural Gas Act). State commissions, which had been denied the ability to regulate the interstate wholesale natural gas market by the Supreme Court, applied their own pressure, urging Congress to introduce a federal statute for the regulation of natural gas. DeVane, 14 Geo. Wash. L. Rev. at 38. In response, Congress enacted the Natural Gas Act of 1938, ch. 556, 52 Stat. **[**30]** 821 (1938) (codified as amended at *15 U.S.C. § 717 et seq. (2009)*) (the "NGA").

The NGA defined its scope as follows:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for . . . any . . . use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

NGA § 1(b) (emphasis added). The act required that the prices for the regulated gas sales be filed with and approved by the Federal Power Commission ("FPC") (later FERC). *NGA §§ 2(9)*, *4*.

The original purpose of the NGA, which was restricted to the regulation of interstate **[**31]** sales for resale, was to fill the gap in natural gas regulation created by the Attleboro doctrine:

> An avowed purpose of the Natural Gas Act of June 21, 1938, was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.

Ill. Natural Gas Co. v. Cent. Ill. Pub. Serv. Comm'n, 314 U.S. 498, 506, 62 S. Ct. 384, 86 L. Ed. 371 (1942); see also *Fed. Power Comm'n v. Panhandle E. Pipe Line Co., 337 U.S. 498, 502-03, 69 S. Ct. 1251, 93 L. Ed. 1499 (1949)* ("[The NGA] contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the *Commerce Clause of the Federal Constitution*."); *Interstate Natural Gas Co. v. Fed. Power Comm'n, 331 U.S. 682, 690, 67 S. Ct. 1482, 91 L. Ed. 1742 (1947)* (discussing congressional intent to occupy a field where the Court had held that states could not act); *Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 609-10, 64 S. Ct. 281, 88 L. Ed. 333 (1944)* ("[T]he 'basic purpose' of this legislation was 'to occupy' **[*858]** the field in which such cases as [Barrett **[**32]** and Attleboro] had held the States might not act."); Lindh, 10 Energy L.J. at 285-86 (discussing intent to fill "the Attleboro gap"); Brown, 59 Tex. L. Rev. at 106 ("Congress began efforts to establish a national regulatory scheme because the lack of state power to control the activities of interstate pipelines left an uncontrolled regulatory gap."). As a result, early cases interpreting the scope of the NGA looked to the line set forth in the Attleboro doctrine for guidance. See, e.g., *Panhandle E. Pipe Line Co., 337 U.S. at 502-03*; *Interstate Natural Gas Co., 331 U.S. at 689-90*; *Hope Natural Gas Co., 320 U.S. at 609-10*; *Ill. Natural Gas Co., 314 U.S. at 506-07*.

The Attleboro doctrine itself, however, soon fell out of favor as a rule of constitutional law. In Illinois Natural Gas Co., the Supreme Court observed that its prior rulings endorsing the Attleboro doctrine were in conflict with the

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[7] "By 1938 more than 50,000 miles of natural gas pipelines had been constructed and more than 400 billion cubic feet of natural gas moved annually across state lines or our international boundary lines." DeVane, 14 Geo. Wash. L. Rev. at 32. Investment in the pipeline facilities numbered in the billions of dollars. Id.

rationale expressed in other decisions pertaining to the dormant Commerce Clause doctrine and implied that, if the NGA had not rendered the wholesale/resale distinction in natural gas a question of statutory law, it might reconsider the Attleboro doctrine altogether:

> In the absence of any controlling **[**33]** act of Congress, we should now be faced with the question whether the [test set forth in non-Attleboro cases] is a more reliable touchstone for ascertaining state power than the mechanical distinctions on which appellee relies. But we are under no necessity of making that choice here, for Congress, by the Natural Gas Act, has brought under national control the very matters which the state has undertaken to regulate [in this case].

314 U.S. at 506; see also *Fed. Power Comm'n v. E. Ohio Gas Co., 338 U.S. 464, 472, 70 S. Ct. 266, 94 L. Ed. 268 (1950)* ("[P]rior constitutional decisions, not what we have since decided or would decide today, form the measure of the gap which Congress intended to close by this Act." (emphasis added)). In 1983, the Supreme Court formally recognized that the Attleboro doctrine had been abrogated as contrary to "roughly the past 45 years" of Commerce Clause jurisprudence. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 390-91, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983)*. The result of this course of events is that, although the influence of Attleboro had rapidly waned in the field of constitutional law, it retained significance in the interpretation of the scope of the NGA, because the doctrine had provided the **[**34]** legal background against which Congress originally legislated the boundaries of federal statutory authority.

B. Pre-Emption Under the NGA

In the years following its enactment, the Supreme Court began to consider the degree to which the NGA pre-empted state law. See, e.g., *Natural Gas Pipeline Co. of Am. v. Panoma Corp., 349 U.S. 44, 44-45, 75 S. Ct. 576, 99 L. Ed. 866 (1955)* (holding that Oklahoma law was pre-empted); *Phillips, 347 U.S. at 684* (considering whether "states may regulate" certain natural gas sales under the NGA); *Ill. Natural Gas Co., 314 U.S. at 509-10* (holding that Illinois law was preempted). Although these early cases provided some guidance for courts considering preemption claims under the NGA, the Court did not articulate the full extent of that preemption until *Northern Natural Gas Co. v. State Corporation Commission, 372 U.S. 84, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963)*. The Northern Natural Gas Company ("Northern Natural") operated a "pipeline system . . . connected to some 1,100 natural gas wells in the Kansas Hugoton Field [natural gas **[*859]** source] under about 125 purchase contracts." *Id. at 86* (footnote omitted). One contract with Republic Natural Gas Company ("Republic") required Northern Natural to purchase "up to the maximum **[**35]** production allowables for Republic's Kansas wells connected to [Northern Natural]'s system." *Id. at 86-87*. For several years, Northern Natural's demand was so great that it not only met the purchasing obligations to Republic, but it also purchased similar amounts of gas from other Hugoton Field well owners. After 1958, however, Northern Natural's demand fell below the maximum allowables for the field as a whole. In order to comply with its Republic contract, Northern Natural had to purchase far more natural gas from Republic than from the other well owners. *Id. at 87-88*. In response to the plight of the non-Republic well operators, the Kansas State Corporation Commission entered an order requiring Northern Natural to purchase a ratable (or, in other words, proportional) amount from each of the wells connected to that source. *Id. at 86 n.1*. Shortly thereafter, that order was superseded by a second order extending the ratable taking requirement to all purchasers. *Id. at 89*. Unable to comply simultaneously with both its Republic contract and the directives of the Commission, Northern Natural challenged the orders in Kansas state court. The Kansas Supreme Court upheld the orders, concluding **[**36]** that there was no conflict with the NGA because "the matters dealt with in [the orders did not] affect interstate transportation or sale [of natural gas] in any respect." *N. Natural Gas Co. v. State Corp. Comm'n, 188 Kan. 355, 362 P.2d 599, 604 (Kan. 1961)*.

The Supreme Court reversed, employing a classic field pre-emption rationale:

> The Congress enacted a comprehensive scheme of federal regulation of "all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company."

> The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result.

Northern Natural, 372 U.S. at 91 (quoting *Phillips, 347 U.S. at 682*) (citations and footnotes omitted). This broad pre-emption, the Court observed, was a result of Congress's desire "to achieve . . . uniformity of regulation," id., and did not, the Court stressed, "arise from an asserted actual and immediate conflict between the federal and state regulations," *id. at 97*. Instead, the determinative question was "whether **[**37]** the state orders may stand in the face of the pervasive scope of federal occupation of the field." *Id. at 98* (citing *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241-44, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959))*. The Court concluded they could not.

C. Deregulation and the *Transcon* Era

In the 1970s, the United States experienced a natural gas shortage that has been widely attributed to the supply-suppressing effects of the NGA's stringent price controls. *Pub. Serv. Comm'n v. Mid-La. Gas Co., 463 U.S. 319, 330-31, 103 S. Ct. 3024, 77 L. Ed. 2d 668 (1983)*; see also Stephen Breyer & Paul W. MacAvoy, The Natural Gas Shortage and the Regulation of Natural Gas Producers, 86 Harv. L. Rev. 941, 965-79 (1973); Brown, 59 Tex. L. Rev. at 110-16; Richard J. Pierce, Jr., Natural Gas Regulation, Deregulation, and Contracts, 68 Va. L. Rev. 63, 69-72 **[*860]** (1982). In response to the shortage, Congress enacted the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978) (codified as amended at *15 U.S.C. §§ 3301-3432 (2009)*) (the "NGPA"), which introduced elements of deregulation into the framework established by the NGA. The core reform of the NGPA was to "replace[] the federal price controls that had been established under the [NGA] with price ceilings **[**38]** that rise monthly based on 'an inflation adjustment factor' and other considerations." *Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 405, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983)*. The NGPA determined which ceiling would apply to a given transaction by subdividing natural gas into various classifications that would be treated differently under the act. *Mid-La. Gas Co., 463 U.S. at 332-33*; *Energy Reserves Group, 459 U.S. at 406*. Generally, these classifications could be broken down into three major types of gas: high-cost, new, and old. *NGPA §§ 102-109*; see Steven M. Spaeth, Our Experience Under the Natural Gas Policy Act of 1978, and Its Relevance to the Natural Gas Wellhead Decontrol Act of 1989, 12 U. Ark. Little Rock L. Rev. 265, 27-721 (1989) (discussing the distinctions between high-cost, new, and old gas); Kevin L. Ward, Note, Preemption Survives Deregulation of Natural Gas: *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 22 Tulsa L.J. 639, 646-47 (1987) (same). Although the specific definitions of new, old, and high-cost gas are complex, what is relevant to our inquiry is that "first sales," see infra, of most high-cost gas and new gas were gradually deregulated **[**39]** under the NGPA. Specifically, the act removed the price of first sales of high-cost gas from the jurisdiction of FERC shortly after it was enacted, while deregulating first sales of most new gas over a span of years. *NGPA § 121*; see also Spaeth, 12 U. Ark. Little Rock L. Rev. at 271-72. The NGPA also modified the boundaries of the state/federal balance in natural gas regulation. *Section 105(a) of the NGPA* extended the federal price ceilings to some aspects of the intrastate natural gas market; *section 602(a)*, however, explicitly preserved state authority to impose maximum prices on intrastate sales that were below the federal maximums. In other words, the NGPA expressly provided for overlapping state and federal jurisdiction in the intrastate market. See *Exxon Corp. v. Eagerton, 462 U.S. 176, 186, 103 S. Ct. 2296, 76 L. Ed. 2d 497 (1983)*.

The Supreme Court quickly confirmed that field pre-emption survived the enactment of the NGPA, at least in some form. In Exxon Corp. v. Eagerton, for example, several natural gas producers challenged an Alabama law prohibiting them from passing the state severance tax along to consumers. While conceding that there was no direct conflict between the pass-through prohibition and the NGPA, **[**40]** *id. at 183*, the Court nevertheless found that the Alabama law was "pre-empted by federal law insofar as it applied to sales of gas in interstate commerce" because "the pass-through prohibition represented an attempt to legislate in a field that Congress has chosen to occupy." *Id. at 184*. The Court explained:

> The Alabama pass-through prohibition trespassed upon FERC's authority over wholesale sales of gas in interstate commerce, for it barred gas producers from increasing their prices to pass on a particular expense--the increase in the severance tax--to their purchasers. Whether or not producers should be permitted to

> recover this expense from **[*861]** their purchasers is a matter within the sphere of FERC's regulatory authority.

Id. at 185.

In Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, ("Transcon") the Court went a step further, holding that field pre-emption under the NGPA extended even to high-cost gas sales that had been deregulated. *474 U.S. 409, 424-25, 106 S. Ct. 709, 88 L. Ed. 2d 732 (1986)*. Transcon, like Northern Natural, involved a ratable taking requirement. A Mississippi law "requir[ed] an interstate pipeline to purchase gas from all the parties owning interests in a common gas pool . . . in proportion **[**41]** to the owners' respective interests in the pool." *Id. at 411*. Interstate pipeline operator Transcon contracted to purchase gas from Marion County, Mississippi's Harper Sand gas pool, which yielded gas classified as high-cost under the NGPA. When the Mississippi Oil and Gas Board found that Transcon's Harper Sand purchases violated the ratable taking law, Transcon, arguing pre-emption, challenged the ruling in the state court. The Board conceded that the ratable taking law, prior to the enactment of the NGPA, would have been pre-empted, but argued that Congress, in deregulating high-cost gas, had subjected that product to state regulation. *Transcont'l Gas Pipeline Corp. v. State Oil & Gas Bd., 457 So. 2d 1298, 1314 (Miss. 1984)*. The Mississippi Supreme Court agreed with the Board, holding that "[w]ith respect to [high-cost] gas, the regulatory situation existing at the time Northern Natural was decided ha[d] . . . been altered radically." *Id. at 1316*. In upholding the ratable taking requirement of the Harper Sand wells, the court concluded that "[i]f the NGA and FERC's jurisdiction under the NGA no longer extend to deregulated gas, and FERC has no authority to regulate the first sales **[**42]** and purchases of deregulated gas either directly or indirectly, then [the holding in] Northern Natural does not dictate a preemption of otherwise existing state authority." *Id. at 1316-17*.

In a 5-4 decision, the Supreme Court reversed, observing, as an initial matter, that based on content and legislative history, the NGPA did not signal a retreat from a comprehensive federal gas policy and, "in some respects expanded federal control, since it granted FERC jurisdiction over the intrastate market for the first time." *Transcon, 474 U.S. at 421* (citing *NGPA §§ 311-12*). After examining the congressional intent behind the decision to deregulate first sale prices of high-cost gas, the Court concluded that "[t]o the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market." *Id. at 422*. The Court then reasoned that "[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." **[**43]** Id. (quoting *Ark. Elec. Coop. Corp., 461 U.S. at 384*). Based on that principle, the Court ruled that the Board's ratable taking rule was pre-empted:

> The proper question in this case is not whether FERC has affirmative regulatory power over wellhead sales of [deregulated] gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC. The answer to the latter question must be in the negative. First, when Congress meant to vest additional regulatory authority **[*862]** in the States it did so explicitly. Second, although FERC may now possess less regulatory jurisdiction over the "intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States," than it did under the old regime, that relationship is still a subject of deep federal concern. FERC still must review Transco's pricing practices, even though its review of Transco's purchasing behavior has been circumscribed. In light of Congress' intent to move toward a less regulated national **[**44]** natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations.

Id. at 422-23 (quoting *Northern Natural, 372 U.S. at 92*) (emphasis added) (citations omitted). The Court further concluded that the ratable taking rule "runs afoul of other concerns identified in Northern Natural. First, it disturbs the uniformity of the federal scheme . . . . Second, Mississippi's order would have the effect of increasing the ultimate price to consumers." *Id. at 423*. The Court, therefore, held that the ratable taking requirement was preempted under the NGA as amended by the NGPA, just as it would have been pre-empted under the NGA before the amendments. *Id. at 425*.

Two years later, the Court had the opportunity to clarify the full scope of pre-emption under Northern Natural and Transcon. A Michigan statute ("Act 144") required certain natural gas companies to obtain approval from the Michigan Public Service Commission ("MPSC") before issuing long-term securities. As part of the approval process, the MPSC was empowered to "conduct an investigation, including an appraisal of the company's property at the company's expense." **[**45]** *Schneidewind, 485 U.S. at 298*. The MPSC would not approve an issuance of long-term securities until "satisfied that the funds derived . . . are to be applied to lawful purposes and that the issue and amount is essential to the successful carrying out of the purposes or that the issue of the stock fairly represents accumulated and undistributed earnings invested in capital assets and not previously capitalized." Id. (quoting *Mich. Comp. L. Ann. § 460.301(3)* (1967 & Supp. 1987)). In Schneidewind v. ANR Pipeline Co., the Supreme Court considered pipeline operators' challenges to Act 144, concluding that it was pre-empted by the NGA and NGPA. *Id. at 310*. First, however, the Court rejected the pipeline operators' argument that the state law was necessarily pre-empted because it would have violated the dormant Commerce Clause doctrine at the time of the enactment of the NGA:

> Even if Commerce Clause jurisprudence would have barred Act 144's regulation at the time of the enactment of the NGA, an issue never directly settled by the Court, that would not decide this case. The authorities on which respondents rely state only [that] Congress occupied the field of matters relating to wholesale sales **[**46]** and transportation of natural gas in interstate commerce. The question remains, however, whether Act 144 regulates within this exclusively federal domain. . . . An intent to pre-empt state regulation thus cannot be inferred from the mere fact that States were precluded from such regulation at the time of the NGA's enactment.

Id. at 305-06 (citation omitted). The Court did not disavow its earlier reliance on the Attleboro doctrine as an interpretive guide in construing the scope of federal authority intended by Congress **[*863]** at the time of the enactment of the NGA; instead, its reasoning made clear that, regardless of the role Attleboro-era jurisprudence played in Congress's initial drafting, when a court considers whether a state law is pre-empted by the NGA and NGPA, it cannot simply place itself in the shoes of a 1938 court and decide the statutory case as if it were a constitutional one. It is the specific content of the federal natural gas statutes that determines the scope of the field of pre-emption.

The Court concluded that the "crux of the issue" was "whether Act 144 is a regulation of the rates and facilities of natural gas companies used in transportation and sale for resale of **[**47]** natural gas in interstate commerce. Since . . . it [was], . . . it [was] pre-empted." *Id . at 306*. The Court also noted that the Michigan Supreme Court had previously held that Act 144 was intended to protect both investors, who would purchase the securities, and consumers, who demanded "efficient and uninterrupted service at reasonable rates." *Id. at 307* (citing *Attorney Gen. v. MPSC, 412 Mich. 385, 459, 316 N.W.2d 187 (Mich. 1982)*, and quoting *Ind. & Mich. Power Co. v. Pub. Serv. Comm'n, 405 Mich. 400, 275 N.W.2d 450, 453 (Mich. 1979))*. In light of the consumer protection purpose, the Court concluded that "when applied to natural gas companies, Act 144 amounts to a regulation of rates and facilities, a field occupied by federal regulation." Id. Moreover, the Court held that the aim of "ensur[ing] that a company is financed in a way that will allow proper maintenance of its facilities and continuance of its services . . . also falls within FERC's exclusive purview since those facilities are a critical part of the transportation of natural gas and sale for resale in interstate commerce." *Id. at 308*. When considered in these terms, Schneidewind appears to stake out a broader interpretation of the pre-emptive force **[**48]** of the NGA and NGPA than had been apparent in earlier cases. See Peter Wirth, Note, Schneidewind v. ANR Pipeline Co., 30 Nat. Resources J. 227, 233 (1990) ("By invalidating the Michigan securities statute, the Court extended its reasoning in Transco and Northern Natural to a statute that does not address any of the . . . areas Congress sought to regulate in passing the Natural Gas Act."). Indeed, compared to a ratable taking requirement, which would directly regulate the transactions targeted by the NGA, see *Northern Natural, 372 U.S. at 92*, the Michigan statute's relevance to wholesale rate-making seems attenuated and incidental; nevertheless, the broad scope of pre-emption laid out in Schneidewind remains good law. But see *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 496, 512-13, 109 S. Ct. 1262, 103 L.*

Ed. 2d 509 (1989) (holding that a regulation "govern[ing] the timing of production of natural gas from" a certain field was not pre-empted because the NGA explicitly does not regulate "production and gathering" of gas).

D. The Wellhead Decontrol Act

The NGPA did not end federal deregulation of natural gas. Many observers felt that the more modest price controls under the NGPA, like the stronger controls **[**49]** that preceded them, were having a damaging effect on the natural gas market. Judith M. Matlock, The Natural Gas Wellhead Decontrol Act of 1989, 19 Colo. Law. 655, 655-56 (1990) (discussing criticisms of the post-NGPA price controls). In response to calls for further deregulation, Congress enacted the Natural Gas Wellhead Decontrol *Act of 1989, Pub. L. No. 101-60, 103 Stat. 157* (the "WDA"). The WDA "completely eliminated FERC's authority to set prices at the wellhead by removing 'first sales' from FERC's rate-setting jurisdiction." **[*864]** *E. & J. Gallo Winery, 503 F.3d at 1037*. The Plaintiffs and Defendants in this case disagree on how to interpret the statutory definition of "first sales." According to the Ninth Circuit Court of Appeals, "first sales are, in essence, merely sales of natural gas that are not preceded by a sale to an interstate pipeline, intrastate pipeline, local distribution company, or retail customer." Id. (citing *15 U.S.C. § 3301(21)(B)*) (emphasis added). "Additionally, to give effect to the North American Free Trade Agreement . . . all sales of Canadian and Mexican natural gas are also first sales." Id. (citing Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2866 (codified at *15 U.S.C. § 717b(b)*) **[**50]** . The precise definition of what is and is not a first sale has been and will continue to be a source of disagreement in the natural gas industry. Suffice it to say that at this juncture, however, Congress has by deregulating first sale pricing substantially increased the number of natural gas transactions that are wholly free of federal price controls.

Finally, FERC itself took additional steps to further deregulate the natural gas transactions within its remaining jurisdiction in hopes of developing a more competitive market. In December of 1992, FERC effectively suspended the rate-filing requirements for all sales for resale within its jurisdiction by offering "blanket marketer certificates" for sales for resale other than sales to interstate pipelines (which themselves were already subject to blanket approval). *Regulations Governing Blanket Marketer Sales Certificates, 57 Fed. Reg. 57,952, 57,957-58 (Dec. 8, 1992)* (codified at 18 C.F.R. pt. 284); see *E. & J. Gallo Winery, 503 F.3d at 1038*. After revelations of price manipulation, FERC amended the blanket certificates to include a prohibition on anti-competitive acts. *Amendments to Blanket Sales Certificates, 68 Fed. Reg. 66,323 (Nov. 26, 2003)* **[**51]** (codified at 18 C.F.R. pr. 284); see *E. & J. Gallo Winery, 503 F.3d at 1038*.

Historical Summary

In the early days of the natural gas industry, the Supreme Court recognized and enforced a rigid distinction between federal and state authority over the natural gas market, based primarily around the wholesale/retail distinction embodied in the Attleboro doctrine. In response, Congress enacted the NGA, which was designed to fill the "Attleboro gap" (the regulation of the interstate wholesale market) without interfering in states' constitutionally permitted authority to regulate the retail and intrastate natural gas market. Because, however, the Attleboro doctrine itself fell quickly out of favor, the wholesale/retail distinction in the NGA became an issue of statutory rather than constitutional law. In Northern Natural, the Supreme Court held that ***HN15***[] the NGA established field pre-emption for interstate wholesales of natural gas. The NGPA deregulated first sales of much of the gas that had been subject to price controls under the NGA, but the Court held in Transcon that deregulation did not disturb the field pre-emption recognized in Northern Natural. Finally, the WDA deregulated the remaining **[**52]** regulated first sales, and subsequent FERC action eliminated rate-filing requirements for sales within its jurisdiction through blanket pre-approvals. Nevertheless, the Supreme Court has not suggested that either the WDA or the FERC deregulation has affected the import of the holding in Transcon.

IV. Analysis

The Plaintiffs do not contest that broad field pre-emption has been a cardinal feature of natural gas regulation for much of the previous century. Instead, they argue that under the current federal regime -- **[*865]** and especially in light of the deregulatory steps taken in the WDA -- their claims are not pre-empted because they arise, at least in part, out of transactions that are not within FERC jurisdiction. For the reasons set out below, we disagree.

As the United States Supreme Court has observed,

> [m]aintaining the proper balance between federal and state authority in the regulation of . . . energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. On the other hand, the production and transmission **[**53]** of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests.

Ark. Elec. Coop. Corp., 461 U.S. at 377 (citation omitted).

When considering a claim that a Tennessee statute is subject to field pre-emption, we must first determine whether Congress intended to enact a system of field pre-emption, or if, in the alternative, Congress intended to limit state authority more narrowly -- by pre-empting, for example, only those state regulations in actual conflict with the relevant federal law. If we conclude that field pre-emption exists, whatever the area of law, the second step in our analysis is to determine whether the Tennessee law intrudes upon that field. The Tennessee law survives only if it does not fall within the pre-empted field. *Schneidewind, 485 U.S. at 305* ("The question remains . . . whether Act 144 regulates within th[e] exclusively federal domain.").

A. Field Pre-emption and its Scope under the WDA

HN16[] There are no "precise guidelines" for determining whether or how broadly field pre-emption has occurred, **[**54]** because "each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 638, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973)* (citing *Hines, 312 U.S. at 52*; *Huron Portland Cement Co., 362 U.S. at 440*)). The ultimate question, however, is one of congressional intent: did Congress intend to "le[ave] no room for the States to supplement" the federal system of regulation in a particular field? *Rice, 331 U.S. at 230*.

The Plaintiffs assert that, due to the enactment of the WDA, many of the wholesale natural gas transactions that were subject to FERC jurisdiction at the time of Transcon and Northern Natural no longer are. This, they argue, demonstrates that Congress did not intend to exclude those transactions from state regulation. As the Supreme Court has noted, however, ***HN17***[] "a federal determination that deregulation was appropriate [is] entitled to as much weight in determining pre-emption as a federal decision to regulate actively." *Transcon, 474 U.S. at 415* (citing *Ark. Elec. Coop. Corp., 461 U.S. at 384*).

Nevertheless, the Plaintiffs are right to suggest that deregulation complicates our inquiry. ***HN18***[] Field pre-emption cases that involve **[**55]** statutes with a history of deregulation present unique challenges that more traditional field pre-emption cases do not. For example, courts typically look to whether Congress has enacted an "intricate web of statutory provisions **[*866]** [that] affords no room for the imposition of state-law" requirements. *French v. Pan Am Exp., Inc., 869 F.2d 1, 4 (1st Cir. 1989)*. A chief purpose of deregulation, however, is to ensure that an industry is not overburdened by an "intricate web" of restrictive requirements. In a field pre-emption case involving deregulation, therefore, the scope and complexity of the relevant federal statutes are less helpful indicators of congressional intent than they would ordinarily be. Instead, we must ascertain congressional intent from other indicators as to whether the deregulatory legislation -- in this case, the WDA, when read in the context of the NGA and NGPA -- altogether precludes states from regulation. Because it is well-established under Transcon that Congress had enacted broad field pre-emption prior to the WDA, our inquiry is whether Congress repealed or reduced the scope of the pre-emptive regime, not whether it intended to implement an entirely new system **[**56]** of pre-emption. Cf. *United States v. Locke, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)* ("[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

That question is almost identical to the question that faced the Supreme Court in Transcon. In that case, the Court considered whether the pre-emption ruling in Northern Natural could be applied to gas that had been removed from FERC jurisdiction by the NGPA. In the case before us, we consider whether pre-emption continues to apply to gas that was removed from FERC jurisdiction by the WDA. If there is anything about the WDA that would dictate a different conclusion than that reached in Transcon regarding the NGPA, the Plaintiffs would prevail.

In our view, the Plaintiffs have not provided any persuasive reason to treat the preemptive effect of the two acts differently. Instead, they argue that this case is distinguishable from Transcon due to differences between the TTPA and the Transcon ratable taking requirement. We take that argument as relevant to the second step in our field pre-emption analysis -- whether the Plaintiffs' TTPA claims intrude on the field of **[**57]** pre-emption -- but irrelevant to the question of whether the WDA, unlike the NGPA, reduced the pre-emptive force of the NGA.

When rejecting the argument that the NGPA reduced the pre-emptive effect of the NGA, the Court in Transcon made the following observation:

> The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, but the NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand. The new federal role is to "overse[e] a national market price regulatory scheme." The NGPA therefore does not constitute a federal retreat from a comprehensive gas policy.

474 U.S. at 421 (quoting Barry L. Haase, The Federal Role in Implementing the Natural Gas Policy Act of 1978, 16 Hou. L. Rev. 1067, 1079 (1979)) (citations omitted) (emphasis added). In other words, the purpose of the NGPA was not to withdraw from the regulation of the wholesale natural gas market, but instead to replace the older, more direct method of exercising that responsibility with a newer, more hands-off approach. Because the NGPA was merely a change in approach, the scope of pre-emption did not contract. The same logic applies in **[**58]** this instance. Congress appears to have been driven by the same desire to deregulate in the enactment of the NGPA and the WDA. Like the NGPA, however, the WDA did not put an end to federal oversight. As evidenced by **[*867]** FERC's own efforts to refine its pricing policy in the decades since the WDA, the federal government is still an active regulator of the wholesale market in natural gas. A tool has merely been eliminated by the Congress -- the ability to regulate directly the price of first sales -- just as Congress eliminated the direct regulation of the first sale price of new and high-cost gas in the NGPA.

Furthermore, if indeed Congress intended by the WDA to reduce the amount of regulation of the natural gas market, it would make little sense to conclude that Congress simultaneously intended to expand states' authority to regulate that same market. The last three decades of federal natural gas policy -- from the NGPA to the more recent FERC orders -- demonstrate a desire to lessen regulations in the natural gas market; nothing, however, suggests a congressional aim to benefit the market by yielding to more intrusive legislation by the states. Moreover, ***HN19***[] "[r]epeals by implication are **[**59]** not favored." *Sullivan ex rel. Wrongful Death Beneficiaries of Sullivan v. Chattanooga Med. Investors, LP, 221 S.W.3d 506, 512 (Tenn. 2007)* (quoting *Cronin v. Howe, 906 S.W.2d 910, 912 (Tenn. 1995))*. Although the WDA did repeal some of the affirmative powers laid out in the NGA, nothing in the enactment implies that Congress intended to repeal the well-established policy of pre-emption laid out in Transcon.

In our view, therefore, the field of pre-emption today is identical to the field recognized by the Supreme Court in pre-WDA cases: "the field of wholesale sales of natural gas in interstate commerce." *Exxon Corp., 462 U.S. at 184*; see also *Schneidewind, 485 U.S. at 301* ("the transportation and sale of natural gas in interstate commerce for resale"); *Northern Natural, 372 U.S. at 91* ("all wholesales of natural gas in interstate commerce" (quoting *Phillips, 347 U.S. at 682*)). Because there is field pre-emption, we turn to whether our state legislation intrudes upon the field.

B. Application to the TTPA Claims

Our next step is to consider whether enforcing the Plaintiffs' claims under the TTPA would improperly intrude upon the federal field of pre-emption. [8] Two electrical power cases **[**60]** from the Ninth Circuit Court of Appeals, *Public Utility District No. 1 of Grays Harbor County Washington v. IDACORP Inc., 379 F.3d 641 (9th Cir. 2004)* and *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing Inc., 384 F.3d 756 (9th Cir. 2004)*, provide helpful guidance. In Grays Harbor, that court considered a complaint by a local utility district seeking damages for unjust enrichment and the rescission of its contract with an electricity wholesaler. The utility alleged, among other things, that the defendants had engaged in market manipulation that inflated the price at which they sold electricity. *379 F.3d at 645*. The court held that the claims were barred on three grounds: (1) field pre-emption, (2) conflict pre-emption, and (3) the filed rate doctrine. *Id. at 647*. As to field pre-emption, the court held that **[*868]** because the "fundamental thrust" of the claim alleging market manipulation was "to determine the fair price of the electricity," *id. at 648*, that claim was barred by field pre-emption under the Federal Power Act ("FPA"), which "grants FERC 'exclusive **[**61]** authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce,'" *id. at 646* (quoting *Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 928 (9th Cir. 2002))*; see also *id. at 649-52* (discussing conflict pre-emption and the filed rate doctrine). In Snohomish County, the Ninth Circuit extended the rationale in Grays Harbor to pre-empt state antitrust claims. *384 F.3d at 761*.

Grays Harbor and *Snohomish County* are, admittedly, distinguishable. First, of course, they consider electrical power, rather than natural gas, and thus **[**62]** are based on the FPA, not the NGA. The underlying principle, however -- that price manipulation claims are preempted insofar as the field of price regulation is itself pre-empted -- is equally applicable to natural gas under the NGA. Cf. DeVane, 14 Geo. Wash. L. Rev. passim (discussing shared history of the NGA and the FPA). Second, the market-based rates at issue in those cases were the result of deregulation by FERC, whereas some of the market-based rates in this case were the result of deregulation by statute. Compare *Grays Harbor, 379 F.3d at 649* ("Idaho Power Company's authority to charge market-based rates comes from FERC.") with discussion of high-cost gas and first sales under the NGPA and WDA, supra. We express no opinion on whether that difference would be relevant to the conflict pre-emption and filed rate doctrine rationales in Grays Harbor. As we have already determined, however, the NGPA and WDA did not alter the broad scope of statutory field pre-emption under the pre-deregulation NGA. For that reason, whether deregulation was statutory or administrative is immaterial. We, therefore, believe that *Grays Harbor* and *Snohomish County* **[**63]** provide useful guidance by way of analogy.

Nevertheless, the Plaintiffs argue that the TTPA claims are not pre-empted because the TTPA is "complementary" to the NGA and its amending acts. The TTPA, they submit, is intended only to assure that goods are priced competitively, a goal consistent with the NGA, NGPA, and WDA. For that reason, they argue, there is no pre-emption. We disagree. Even if we were to assume that the TTPA claims would not be pre-empted if they were purely "complementary" to the federal regulatory regime, [9] our inquiry would not **[*869]** end there, because an

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[8] As an initial matter, the Plaintiffs go to great lengths to distinguish their TTPA claims from the ratable taking requirements at issue in Northern Natural and Transcon. As we have discussed, however, Northern Natural and Transcon do not define the outer bounds of natural gas field pre-emption. The securities regulation struck down in Schneidewind was significantly more attenuated from the core concerns of the NGA than the ratable taking requirements, and the Supreme Court still found pre-emption. Whether the TTPA claims can be distinguished from a ratable taking requirement is, therefore, not determinative.

[9] To the contrary, however, it is highly questionable that complementarity can ever be a defense against field pre-emption. See *Locke, 529 U.S. at 115* (***HN20***[]) "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther **[**64]** than Congress has seen fit to go." (quoting *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597, 604, 35 S. Ct. 715, 59 L. Ed. 1137 (1915))*; *Rice, 331 U.S. at 236* ("[I]f a licensed warehouseman complied with each requirement [of the federal statute that pre-empted the relevant field], he did all that he need do. He could not be required by a State to do more or additional things or conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act."). It is true that, in Transcon and Northern Natural, the Supreme Court considered the degree to which ratable taking requirements would conflict with the goals of the federal price regulations found in the NGA and NGPA. See *Transcon, 474 U.S. at 420* ("[I]n the absence of ratable-take requirements, purchasers would choose a different, and presumably less costly, purchasing pattern."); *Northern Natural, 372 U.S. at 92* ("Moreover, any readjustment of purchasing patterns which such orders might

abstract preference for "competitive" pricing was not the only goal of the federal enactments. Rather, the Plaintiffs' argument would fail because it ignores two of the additional purposes of the federal statutory scheme: national uniformity and freedom from burdensome government intervention.

For decades, the Supreme Court has consistently identified uniformity as a central purpose of the NGA. See *Schneidewind, 485 U.S. at 310* (referring to "the uniformity of regulation which was an objective of the Natural Gas Act" (quoting *Northern Natural, 372 U.S. at 91-92*)); **[**66]** *Transcon, 474 U.S. at 423* ("Mississippi's order . . . disturbs the uniformity of the federal scheme, since interstate pipelines will be forced to comply with varied state regulations of their purchasing practices."). If we were to hold that this state could impose restrictions on the interstate wholesale natural gas market by way of its antitrust laws, we would imply that every other state could do so as well. There is much disagreement as to the meaning of a "competitive" market, and, therefore, when ***antitrust law*** should intervene. See Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 58-61 (1978) (discussing different models of "competitive" markets). If we were to conclude that there is no pre-emption, interstate natural gas wholesalers could be forced to comply with the rules of fifty different states regarding what reporting practices or transactions might qualify as anti-competitive. To avoid such an outcome, Congress is free to legislate when one "need serve but one master." *Rice, 331 U.S. at 234*. In our assessment, Congress has chosen to adopt a single, uniform system of regulation. A separate system of state regulation is not "complementary," regardless of **[**67]** whether it shares other goals of the federal legislation, because it conflicts with the federal policy of uniformity.

Moreover, to hold that applying the TTPA would be complementary to the purposes of the NGA, NGPA, and WDA would ignore a key aim of the Congress in the passage of the latter two of those acts: the removal of restrictive regulations on the interstate market for natural gas wholesales. The common thread within the NGPA and the WDA -- as well as subsequent FERC actions -- is an overriding skepticism of government's ability to intervene beneficially in the wholesale natural gas market. Whether Congress and FERC have gone too far is not for us to decide.

It is true that a goal of the TTPA is to assure that market forces function in a competitive manner -- a purpose also attributable to NGPA and WDA deregulation, **[*870]** insofar (and only insofar) as Tennessee and federal law share the same view of what it means for a market to be competitive. Congress's decision to deregulate, however, was not simply a decision to endorse some abstract ideal of "competitive" markets; rather, Congress made specific decisions about what it viewed as threats to competition, what tools were necessary **[**68]** to counter those threats, and which portions of the market did not require government intervention. Since the enactment of the NGA, the policy of Congress appears to be the result of careful deliberation and revision -- a balance between regulation and deregulation that we are not free to disturb simply because we feel that our laws also promote competition within the market.

The stated purpose of the original Natural Gas Act price controls was to assure that the regulated prices were "just and reasonable." *NGA § 4(a)*. As Stephen Breyer and Paul W. McAvoy have written, at the core of the concern that unregulated rates were not just and reasonable was the belief that natural gas producers had exercised monopolistic or oligopolistic "market power" permitting them "to raise the price of gas to the interstate pipelines above the level that competition would otherwise dictate." Breyer & MacAvoy, 86 Harv. L. Rev. at 945 (emphasis added). As the Supreme Court observed in Hope Natural Gas Co., "the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas,

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require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs **[**65]** to wholesale customers who sell to consumers in other States."). However, the core concern in both cases was the comprehensive nature of the federal policy. See *Transcon, 474 U.S. at 422* ("The proper question in this case is . . . whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC."); *Northern Natural, 372 U.S. at 91* ("The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result." (citation omitted)). Because, however, the Supreme Court discussed possible conflicts between the state and federal laws in those cases, we will proceed as if such conflicts are at least relevant to the pre-emption analysis.

together with an increasing percentage of the **[**69]** natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies," and "[s]tate commissions, independent producers, and communities . . . were growing quite helpless against these combinations." *320 U.S. at 610* (emphasis added). In other words, a driving force in the enactment of the NGA was the perception of an anti-competitive, oligopolistic market, combined with the belief that direct price regulation was an appropriate remedy. The NGA, therefore, embodied a federal determination regarding the competitiveness of the wholesale natural gas market, the threats to that competitiveness, and the appropriate remedy to those threats.

The push to deregulate first sales was also the product of changing attitudes as to whether the natural gas market -- specifically the natural gas market at the wellhead -- was competitive and what regulatory framework would best enable competition. "[W]hile the question of market power played an important role in the early history of the debate over producer regulation, it ha[d] become less significant [by the early 1970s] as accumulated evidence . . . created a strong presumption that gas producers d[id] not possess monopolistic **[**70]** or oligopolistic market power." Breyer & MacAvoy, 86 Harv. L. Rev. at 945-46. This evidence guided Congress, in the enactment of the NGPA and the WDA, to deregulate first sales while retaining regulatory authority over other aspects of the market. Although the natural gas market has a multitude of participants -- from producers to pipelines to utilities to consumers -- the ultimate goal of the NGA was the "protection of consumers against exploitation at the hands of natural-gas companies." *Phillips Petroleum Co., 347 U.S. at 685* (citing *Hope Natural Gas Co., 320 U.S. at 610*) (emphasis added). Under the original terms of the NGA, the federal government pursued this consumer protection rationale indirectly by intervening at all stages of the interstate wholesale market. The NGPA and WDA reflect a later decision that the consumer would be better served, and with fewer unwanted negative **[*871]** consequences, by the regulation of only a portion of the wholesale market, while leaving unregulated the aspects of the wholesale market -- first sales -- that appeared to be adequately competitive. Those later enactments, therefore, also reflected a detailed federal determination of the appropriate posture **[**71]** toward competition in the wholesale market.

In short, the NGA, the NGPA, and the WDA were the result of Congress's resolution of three core issues: first, what it means for a market to be competitive; second, whether the wholesale natural gas market, if free from regulation, would comply with that definition of "competitive"; and third, what the best mechanism was for correcting any flaws in that market. It is not, therefore, enough to say that both state and federal government are interested in "competition" and conclude that our laws are complementary. The relevant federal legislation reflects not just a broad commitment to competition, but specific policy answers to a number of difficult questions, such as when government intervention will be more damaging than nonintervention and which methods of intervention will be most effective without causing too much disruption. Because, as we have found, Congress enacted a broad regime of field pre-emption, we cannot substitute our judgment for that of Congress on those issues any more than we could substitute our judgment on the question of whether competition is desirable at all.

Our Court of Appeals based its holding on another Ninth Circuit **[**72]** case, E. & J. Gallo Winery v. EnCana Corp. In that case, the Ninth Circuit considered claims much like the claims here, explicitly rejecting a similar field pre-emption argument, *503 F.3d at 1046*, and remanding the case to "consider Gallo's claims to the extent they are based on rates that are not FERC-authorized rates," *id. at 1049*. If, therefore, we were bound to follow E. & J. Gallo Winery, we would be inclined to agree with the Court of Appeals; however,

> ***HN21***[] [t]he Supreme Court of the United States has appellate jurisdiction over federal questions arising either in state or federal proceedings, and by reason of the supremacy clause the decisions of that court on national law have binding effect on all lower courts whether state or federal. On the other hand, because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.

United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970). E. & J. Gallo Winery, therefore, is only persuasive authority.

In that case, the Ninth Circuit dealt primarily with the filed rate doctrine, addressing only briefly the topic of field pre-emption and **[**73]** the holding in Transcon. Compare *503 F.3d 1033-46* with *id. at 1046*. The court relied on an argument we have rejected here, that ***antitrust law*** is complementary to the purposes of the NGA, NGPA, and

WDA. *Id. at 1046*. Our view is different. The application of our state's ***antitrust law*** to the circumstances here would undermine two essential purposes of the federal legislation: uniformity and freedom from government interference. Moreover, we believe that the Ninth Circuit mistakenly framed the relevant issue as whether "Congress's removal of FERC's jurisdiction over first sales . . . preempt[s] the type of claims brought by Gallo." Id. As previously stated, the determinative issue is not whether Congress enacted a new regime of field pre-emption through the NGPA or WDA. Instead, the question is whether Congress eliminated or reduced the scope of the field pre-emption established decades earlier by the NGA, and -- if the revisions did not eliminate **[*872]** or reduce the field of pre-emption -- whether the claims would be pre-empted as infringing upon that long-standing, broad field of exclusive federal legislation. For these reasons, we decline to adopt the rationale of the Ninth Circuit Court **[**74]** of Appeals as to their determination that field pre-emption did not preclude a state action.

Finally, although the Plaintiffs have focused chiefly on the arguments that prevailed in E. & J. Gallo Winery, we will address an argument that they advanced both in the trial court and in our Court of Appeals; that is, that their claims are not pre-empted because they are based on consumer transactions, rather than sales for resale. We simply disagree. As indirect purchasers, they are ultimately challenging wholesale prices. See *Freeman Indus., 172 S.W.3d at 517-20*. Their claims, therefore, necessarily intrude upon the federal domain, even if the transactions to which they were direct parties fell outside the scope of the NGA. Such claims are pre-empted.

Conclusion

We conclude, therefore, that the Plaintiffs' claims under the TTPA have been pre-empted by federal law. [10] As a result, they have not stated a claim upon which relief can be granted. The chancery court properly dismissed their complaint. In reaching this conclusion, we are acutely aware that field pre-emption is a powerful tool by which the federal government may constrain the exercise of state authority, and that, therefore, courts **[**75]** must exercise the utmost caution before application of the doctrine. Nevertheless, our overriding duty is fealty to the decisions of the Supreme Court in an area of law that is undeniably federal in character. In *Northern Natural*, the Supreme Court set forth a broad field of pre-emption in natural gas cases. In *Transcon*, using logic that is no less applicable to the WDA, the Supreme Court ruled that field pre-emption continued to reach transactions that had been deregulated by the NGPA. Finally, in *Schneidewind*, the Supreme Court held that the field of pre-emption not only precluded direct price controls and ratable taking requirements, but extended to many regulations with an indirect bearing on prices. Although plausible arguments were made in each of these cases for a broader reading of state authority, we are bound to follow the path set out by the Supreme Court.

For that reason, the judgment of the Court of Appeals is reversed and costs are assessed **[**76]** to the Plaintiffs, for which execution may issue if necessary.

GARY R. WADE, JUSTICE

End of Document

[10] Because we decide this case on the question of field pre-emption, we have not considered the parties' filed rate doctrine arguments. We also decline to reconsider Tennessee's pleading standards, as some of the Defendants have urged.

Tyr Sport, Inc. v. Warnaco Swimwear, Inc.

United States District Court for the Central District of California

April 26, 2010, Decided; April 26, 2010, Filed

SACV 08-00529-JVS (MLGx)

Reporter
2010 U.S. Dist. LEXIS 153408 *

TYR Sport Inc. v. Warnaco Swimwear Inc., et al.

Prior History: *TYR Sport, Inc. v. Warnaco Swimwear, Inc., 2010 U.S. Dist. LEXIS 153407 (C.D. Cal., Mar. 22, 2010)*

Core Terms

Swimming, swimmers, suits, sales, competitors, swimsuit, coaches, Team, false advertising, disparagement, summary judgment, championship, manufacturers, advertising, argues, reconsideration, wearing, Lanham Act, products, testing, email, antitrust claim, market share, blueseventy, antitrust, entrants, puffery, inferior product, false statement, promotion

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)(2)*. The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. If the nonmoving party meets this burden, then the motion will be denied.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Entitlement as Matter of Law, Materiality of Facts**

With respect to a motion for summary judgment, material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3[] Entitlement as Matter of Law, Genuine Disputes

With respect to a motion for summary judgment, a fact issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. To demonstrate a genuine issue, the opposing party must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. In deciding a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

HN4[] Sherman Act, Claims

For a disparagement-based antitrust claim, the Ninth Circuit sets a high burden of proof—the Ninth Circuit insists on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer) before these practices can rise to the level of exclusionary conduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope

HN5[] Sherman Act, Claims

Misrepresentations encouraging the purchase of a product can fit the general test for an exclusionary practice when the impact on rivals is significant; deception of buyers can impede the opportunities of rivals.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

Antitrust & Trade Law > Sherman Act > Scope

HN6[] Sherman Act, Claims

An antitrust plaintiff must demonstrate that the false statement was made in commercial advertising or promotion, as under the Lanham Act. The Ninth Circuit's rationale for allowing false advertising-based antitrust claims—to prevent the deception of buyers to the detriment of rivals—is the same as the policy behind the Lanham Act. Indeed, Harcourt Brace's de minimis presumption test closely tracks the elements of a Lanham Act claim. Compare (antitrust plaintiff must show statements are (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization), with (Lanham Act plaintiff must show that statement is (1) false, (2) in commercial advertising or promotion, (3) deceptive, (4) material, (5) in interstate commerce, and (6) that plaintiff had been injured).

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Puffery

HN7[] **False Advertising, Puffery**

Classic puffery is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely. For a statement to be actionable, it must make a specific and measurable advertisement claim of product superiority.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Elements of False Advertising

HN8[] **False Advertising, Elements of False Advertising**

An alleged false advertisement must, at a minimum, be actionable non-puffery under the Lanham Act.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > False Advertising > Puffery

HN9[] **False Advertising, Puffery**

Whether a statement is puffery does not depend on the truth or falsity of a statement; it depends on the degree of generality or specificity. The puffing rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > False Advertising

HN10[] **Sherman Act, Claims**

In order to state a valid Sherman Act claim under a false advertising theory, the plaintiff must make a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer). Because of the difficulties in distinguishing actionable false statements from puffing, the speculative effect that advertising has on consuming behavior, and buyer distrust of seller's disparaging comments, the Ninth Circuit has set forth a presumption that commercial speech or advertising has a de minimis effect on competition. A plaintiff may overcome this presumption by showing that the charged speech meets a six-factor test: the statements must be (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > False Advertising

HN11[] **Sherman Act, Claims**

With respect to an antitrust false advertising claim, the plaintiff has the burden of proving a significant and enduring impact in order to proceed on the claim.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > False Advertising

HN12[] **Sherman Act, Claims**

Antitrust claims based on false advertising should presumptively be ignored—that is, the defendant is entitled to a presumption that false advertising has a de minimis effect on competition before the introduction of any evidence of actual market impact. The six-factor test—which focuses on the characteristics of the charged speech and not on any evidence of actual market effect—is the plaintiff's means of overcoming this first hurdle. It does not, however, satisfy the plaintiff's burden of proving an actual significant and enduring adverse impact on competition. In other words, a plaintiff that has discharged the de minimis presumption is not automatically entitled to its own presumption of significant market effect. In addition to showing that the speech is of the type that could have a significant effect on competition, the plaintiff has the burden of showing that it actually did affect competition.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > False Advertising

HN13[] **Sherman Act, Claims**

The Harcourt Brace presumption rested partially on the rationale that buyers generally do not trust comments made by competitors. However, the Ninth Circuit also relied on the difficulty in distinguishing actionable false statements from puffery and the speculative nature of the effects of false advertising, especially when it is not systematic. That circumstance may be considered within the Harcourt Brace factors, such as the likelihood of inducing reliance or susceptibility of neutralization, but the Court does not find that it negates the application of the presumption entirely.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > False Advertising

HN14[] **Sherman Act, Claims**

With respect to an antitrust claim for false advertising, it is not enough to show that there was a long period between the statements; the advertising must be continued, i.e., sustained, for a prolonged period.

Antitrust & Trade Law > Sherman Act > Claims

HN15[] **Sherman Act, Claims**

Where Cartwright Act claims are premised on the same facts as Sherman Act claims, and summary judgment is granted on the Sherman Act claims, summary judgment is also appropriate for Cartwright Act claims.

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

HN16[] **Trade Practices & Unfair Competition, State Regulation**

The California Unfair Competition Law (UCL) prohibits three separate categories of conduct—acts or practices which are unlawful, or unfair, or fraudulent. *Cal. Bus. & Prof. Code § 17200*. Conduct is unfair if it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Thus, in most cases, where plaintiff's UCL claim is predicated on antitrust violations that fail to withstand summary judgment, the UCL claim must also fail.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN17[] **Relief From Judgments, Altering & Amending Judgments**

Under *Fed. R. Civ. P. 59(e)*, a party may move to alter or amend a judgment within 28 days. A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion. The Court may disregard evidence or arguments on a motion for reconsideration that could reasonably have been presented prior to the Court's ruling.

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

Attorneys for Defendants: NOT Present.

Judges: James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) Defendant Speedo etc.'s Renewed Motion for Summary Judgment, or in the Alternative for Summary Adjudication of Claims (Fld 3-22-10)

Defendnt US Swimmng's Motion for Summary Judgment as to Remaining claims (Fld 3-22-10)

Plaintiff's Motion for reconsideration re Order on Motion for summary Judgment (fld 3-22-10)

The Court, having been informed that the parties submit on the Court's tentative ruling previously filed, hereby GRANTS the referenced Motions for Summary Judgment and DENIES the Motion for Reconsideration in accordance with the tentative ruling as follows:

Defendant Warnaco Swimwear, Inc. dba Speedo USA ("Speedo") moves for for summary judgment under *Federal Rule of Civil Procedure 56* on the remaining claims for relief asserted against it by Plaintiff TYR Sport, Inc. ("TYR"). Defendants United States Swimming, Inc. ("USA Swimming") and Mark Schubert ("Schubert") also move for summary judgment under *Rule 56* on TYR's remaining claims. Speedo and USA Swimming and Schubert (collectively, "Defendants") join each others' respective motions. TYR opposes both motions.

TYR also **[*2]** moves under *Rule 59* and *Local Rule 7-18* for reconsideration of the Court's order granting summary judgment on TYR's Fourth claim for relief under the Lanham Act. Speedo opposes.

I. PROCEDURAL BACKGROUND

On March 3, 2010, the Court granted in part and denied in part the Defendants' initial motions for summary judgment. (Docket Nos. 149, 154.) The Court granted summary judgment on TYR's claims for false advertising under the Lanham Act and intentional interference with contractual relations. (Docket No. 154 at 28, 32.) The Court also granted summary adjudication on the remaining antitrust claims to the extent they were based on a coercion theory of antitrust liability—that the Defendants conspired to force or coerce swimmers to purchase Speedo swimsuits. (Id. at 24.) However, because the Defendants had failed to address TYR's disparagement theory of liability, the Court denied summary judgment on the antitrust claims. (Id. at 20.) Recognizing the high threshold that a plaintiff must overcome to show that speech rises to the level of an antitrust violation, the Court invited a second round of briefing on the disparagement issue before the matter went to trial. (Id. at 33.) The Defendants now seek summary judgment on the remaining disparagement **[*3]** theory.

As set forth in the Court's prior order on summary judgment, this case revolves around the "swimsuit wars" of 2008 and 2009. (Id. at 2.) Speedo and TYR are competing manufacturers of high-end swimwear and accessories. (Id.) USA Swimming is the national governing body of the sport of swimming in the United States and has an exclusive sponsorship agreement with Speedo. (Id.) Schubert was, at all relevant times, employed by USA Swimming as the National and Olympic Team head coach and general manager. (Id.)

TYR's antitrust claims, under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* & *2*, the Cartwright Act, *Cal. Bus. & Prof. Code § 16720 et seQ.*, and the California Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seQ.*, rest on TYR's theory that Speedo, USA Swimming, and Schubert all conspired to unfairly promote Speedo's products and disparage competitors' from Schubert's position of clout within the swimming community.

II. SUMMARY JUDGMENT

A. Legal Standard

HN1[] Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The burden initially is on the moving party to demonstrate an **[*4]** absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323*. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. See *id. at 322-23*. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000)*.

HN2[] Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex, 477 U.S. at 322*.

HN3[] A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248*. To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (internal quotation marks and citations omitted). In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id. at 255*. Nevertheless, inferences are not drawn **[*5]** out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Am. Int'l Group, Inc. v. Am. Int'l Bank, 926 F.2d 829, 837 (9th Cir. 1991)*.

B. Discussion

As discussed above, TYR's remaining claims against Speedo, USA Swimming, and Schubert all depend on its disparagement theory of antitrust liability. TYR bases this claim on a series of statements made by Schubert to elite swimmers and coaches touting the benefits of Speedo's LZR Racer swimsuit and disparaging the suits of Speedo's competitors.

TYR points to five sets of statements that it contends amount to violations of the antitrust laws: (1) a statement by Schubert at the December 2007 National Team Coaches Meeting that "athletes [should] wear the Speedo equipment if they wanted to compete at the highest level," and references made by Schubert and a fellow USA Swimming employee to NASA testing and "4% less drag"; (2) a March 2008 email from Schubert to twenty swimming coaches stating that "only one company [Speedo] is putting millions into research and development" and "the trailing companies . . . [offer] an inferior product"; (3) a statement by Schubert to swimmers at a National Team meeting before an April 2008 swim meet in Manchester, England, **[*6]** that the Speedo LZR Racer "would give you a 2% advantage"; (4) a statement by Schubert to reporter Craig Lord at the same April 2008 meet that "if you take the best times of world record holders and their new times [in the Speedo LZR], the difference is 2 percent," and that "some [swimmers] are contracted to an inferior product"; and (5) a statement by Schubert in January 2009 to two Junior National Team swimmers in Guam that they should wear the Speedo LZR because it was "faster" than the non-Speedo suits they were wearing.

1. False Advertising Under *Section 1*

As a preliminary matter, USA Swimming and Schubert contend that TYR cannot maintain an antitrust claim for false advertising under *Section 1* of the Sherman Act. They note the Court's previous order on a motion to dismiss that, in order to distinguish *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989)*, TYR would have to prove that Schubert used his influence to coerce swimmers into wearing Speedo products. (Docket No. 72 at 8-9.) However, as pointed out by TYR, Schachar's analysis rests partially on the fact that the Seventh Circuit does not recognize a theory of antitrust liability based on false advertising. *870 F.2d at 399*; see also *Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005)*. In contrast, the Ninth Circuit does. See *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1151-52 (9th Cir. 1997)*. Thus *Schachar*, which is only **[*7]** persuasive authority in this Court, need not be entirely distinguished, especially where it may conflict with Harcourt Brace. This leaves open the question of whether a *Section 1* claim can be based on false advertising in the Ninth Circuit.

USA Swimming and Schubert note that Harcourt Brace is a *Section 2* decision and that no Ninth Circuit decision has extended it to a *Section 1* conspiracy claim. However, the Ninth Circuit has never expressly precluded false advertising as a *Section 1* claim either. And to the extent that Harcourt Brace recognizes that false advertising may constitute exclusionary conduct under *Section 2*, the Court is hesitant to find that it can never constitute a restraint of trade under *Section 1*.

In fact, the Eighth Circuit has recognized a *Section 1* claim based on a conspiracy between a market participant and an ostensibly neutral non-market participant to disparage a competitor. See *Impro Prods., Inc. v. Herrick, 715 F.2d 1267, 1271, 1273 (8th Cir. 1983)*. In Impro, the plaintiff alleged that:

> in return for compensation from the corporate defendants, [defendant] Dr. Herrick used his various positions [as a U.S. Department of Agriculture veterinarian and an Iowa State University professor] to promote the products of the corporate defendants, to disparage [plaintiff's] products, and to influence various **[*8]** federal and state governmental officials to deny [plaintiff] necessary licensing for its products.

Id. at 1271. The court recognized this as a cognizable theory under *Section 1*, though it granted summary judgment because there was no evidence of a conspiracy. *Id. at 1273, 1279-80*.

HN4[] However, for a disparagement-based antitrust claim, Harcourt Brace sets a high burden of proof—the Ninth Circuit "insist[s] on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer) before these practices can rise to the level of exclusionary conduct." *108 F.3d at 1151* (citing 3 Phillip Areeda & Donald F. Turner, ***Antitrust Law*** ¶ 737b (1978)) (emphasis in original) (internal quotation marks omitted). Because TYR has not made this requisite preliminary showing, the Court need not decide whether a *Section 1* claim can ever be based on false advertising.[1]

2. Disparagement Versus Promotion

The Defendants argue that many of the statements TYR complains of involve only promotion of Speedo and do not directly disparage TYR or other competitors. ***HN5***[] Although *Harcourt Brace* itself involved the direct disparagement of a rival, the Court sees no reason why false statements of **[*9]** promotion could not be actionable under similar reasoning. "[M]isrepresentations encouraging the purchase of [a] product can fit [the] general test for an exclusionary practice when the impact on rivals is significant; deception of buyers can impede the opportunities of rivals." 3A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 782b (2007). The claims should not be dismissed on this basis.

3. Protected Statements

The Defendants also argue that several of the statements upon which TYR rests its claims are protected by the *First Amendment* or constitute puffery and thus cannot be the basis for an antitrust claim. See *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 860 (10th Cir. 1999)* ("[T]he *First Amendment* does not allow antitrust claims to be predicated solely on protected speech."). For example, in the order on the initial motions for summary judgment, the Court found that Schubert's statements to reporter Craig Lord ("Lord") were not commercial speech and thus not actionable under the Lanham Act. (Docket No. 154 at 26-28.) The Court also previously found several statements by Schubert to be puffery. (Docket No. 72 at 16-18.)

Statements to Lord

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[1] USA Swimming and Schubert also argue that TYR did not plead a *Section 1* false advertising or disparagement claim against them. This is incorrect. (See Compl. ¶ 13 ("USA SWIMMING, SPEEDO and SCHUBERT have also combined to engage in a campaign of falsely disparaging the products of SPEEDO'S competitors, including TYR . . . .").)

USA Swimming and Schubert also appear to contend that TYR should be estopped from asserting a disparagement-based claim against them under *Section 1* because in TYR's opposition to a motion to dismiss, it stated that Harcourt Brace "is irrelevant to the standards for pleading a *Section 1* claim." (Docket No. 49 at 13.) However, TYR appears to have been arguing that the limitations set forth in Harcourt Brace do not apply to a *Section 1* claim, not that the *Section 1* claim was not based on disparagement. Because this argument is not inconsistent with its current argument, TYR is not estopped from asserting a disparagement-based theory against USA Swimming and Schubert. See *Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001)*.

TYR contends that Schubert's statements to Lord are commercial speech actionable under the antitrust laws.[2] That ship has sailed; the **[*10]** Court already made the determination the statements to Lord did not constitute commercial speech in the context of TYR's Lanham Act claim—TYR failed to even oppose Speedo's argument. (Docket No. 154 at 26-28.) TYR cannot resurrect these statements as a basis for its antitrust claim absent some grounds for reconsideration, see *Local Rule 7-18*, which TYR has not provided.

In any case, the Court is not persuaded by TYR's attempt to distinguish *Boule v. Hutton, 328 F.3d 84 (2d Cir. 2003)*, which the Court relied upon in granting summary judgment on TYR's Lanham Act claim. As discussed in the Court's prior order, Boule involved allegedly false statements made by art collectors about the authenticity of another collection. *Id. at 86, 88*. The statements were made to a reporter for an industry publication writing about the prevalence of fraud in the art market. Id. The Second Circuit found that the statements were not commercial speech and therefore not actionable under the Lanham Act. *Id. at 91-92*.

TYR argues that Schubert's statements to Lord promoting the virtues of Speedo and stated that competitors had "inferior products" are distinguishable because they are not "inextricably intertwined" with the issue of public concern that Lord was writing **[*11]** about—"the evolution of swimsuit technology and its impact on the sport of competitive swimming." (TYR's Compendium of Exs. ("COE"), Ex. 12 ¶ 13.) The Court disagrees. Schubert's discussion of the Speedo LZR Racer, its effect on swimming times, and his concern that swimmers who wore what he considered "inferior products" would be at a competitive disadvantage all closely relate to the to topic of swimsuit technology and the impact on the sport. Indeed, when read in the full context and not just as carefully plucked snippets, Schubert's statements reflect a desire for more competition in swimsuit technology, which he hoped would prolong the careers of swimmers.[3]

The Court is not persuaded by the two cases cited by TYR. In *Semco, Inc. v. Amcast, Inc., 52 F.3d 108 (6th Cir. 1995)*, the Sixth Circuit found that an article in a trade journal written by a manufacturer could constitute commercial speech because it contained gratuitous promotions of the manufacturer's product, "which [did] not contribute to [the article's] intellectual or technical value." *Id. at 113*. Here, in contrast, the SwimNews.com article was written by Lord, not Schubert; Lord chose what to include in the article, and Schubert's comments came only in response to Lord's apparently unsolicited **[*12]** questions. See *Boule, 328 F.3d at 91*. Moreover, unlike the comments at issue in Semco, Schubert's comments about competing swimsuit manufacturers are inextricably related to the subject of Lord's article—the evolution of swimsuit technology. It is difficult to fathom how Schubert could have discussed the subject without addressing the products currently on the market.

In *Fuente Cigar Ltd. v. Opus One, 985 F. Supp. 1448 (M.D. Fla. 1997)*, the court, on a motion for leave to amend a pleading, held that a competitor's statements made to a reporter in a trade publication about pending litigation was

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[2] ***HN6***[] Though the parties do not explicitly address the issue and assume that Lanham Act cases are applicable to a false advertising-based antitrust claim, the Court finds that an antitrust plaintiff must demonstrate that the false statement was made in commercial advertising or promotion, as under the Lanham Act. See *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1052 (9th Cir. 2008)*. The Ninth Circuit's rationale for allowing false advertising-based antitrust claims—to prevent the deception of buyers to the detriment of rivals—is the same as the policy behind the Lanham Act. Indeed, Harcourt Brace's de minimis presumption test closely tracks the elements of a Lanham Act claim. Compare *Harcourt Brace, 108 F.3d at 1152* (antitrust plaintiff must show statements are "(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization"), with *Newcal Indus., 513 F.3d at 1052* (Lanham Act plaintiff must show that statement is (1) false, (2) in commercial advertising or promotion, (3) deceptive, (4) material, (5) in interstate commerce, and (6) that plaintiff had been injured).

[3] "The fact is that there is nothing more important than having the manufacturers be competitive because they do provide the living for the athletes and that's what's really helped the sport of swimming to allow the athletes to swim to older ages, more like track and field. I have always felt that swimming should be like track and field (in terms of the ages and longevity of athletes) but the problem we have now is that everyone is contracted to one suit and some are contracted to an inferior product and those manufacturers need to let go and everyone can compete on a level playing field with a product that is the same and then they need to put the effort in and catch up." (COE, Ex. 13.)

commercial speech actionable under the Lanham Act. *Id. at 1450, 1456*. The court primarily relied on the fact that the comments were made in a trade publication and not general news publications or magazines. *Id. at 1456*. The Court finds this case distinguishable because SwimNews.com is not a trade publication. Fuente Cigar involved statements in a cigar industry publication about competing cigar manufacturers. *Id. at 1450*. SwimNews.com, by contrast, is a general news publication about the sport of swimming, providing news about swim meets, specific swimmers and coaches, controversies in the swimming community, and other relevant news.[4] Its intended audience is not swimsuit manufacturers or vendors. No reasonable juror **[*13]** would mistake the website for a trade journal or industry publication. Moreover, to the extent Fuente Cigar's reasoning conflicts with Boule—which also involved an industry publication—the Court finds *Boule*, a more recent Court of Appeals decision, to be more persuasive.

Accordingly, the Court affirms its prior decision that the statements to Lord are not commercial speech and therefore not actionable as an antitrust violation.

2007 Coaches Meeting and 2008 Email

The Defendants contend that the comments made by Schubert at the December 2007 coaches meeting and Schubert's March 2008 email to coaches constitute puffery. One of the coaches at the 2007 meeting recalls "Coach Schubert stat[ing] that coaches should advise their athletes to wear Speedo equipment if they wanted to compete at the highest level."[5] (COE, Ex. 7 ¶ 3.) The Court finds this to be ***HN7***[] classic puffery—"exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997)* (citing 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27.04[4][d] at 27-52 (3d ed. 1994). For a statement to be actionable,[6] it must make a "specific and measurable advertisement claim of product superiority." **[*14]** *Id. at 1145*. The statement attributed to Schubert is a general statement of superiority and contains nothing about the specific attributes of Speedo equipment. No reasonable buyer would rely on this statement in making a purchasing decision.

TYR argues that the statement is not puffery because it is capable being proven false, as demonstrated by the fact that swimmers wearing TYR suits successfully competed at the Olympics, "the highest level." TYR misses the point. ***HN9***[] Whether a statement is puffery does not depend on the truth or falsity of a statement; it depends on the degree of generality or specificity. "The "puffing" rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific." *Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 945 (3d Cir. 1993)* (quoting W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 109, at 756-57 (5th ed. 1984)); *Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir. 2000)*. The statement here is unquestionably a statement of hyperbole, but it is a general one. No reasonable person would think that they would be incapable of competing without the Speedo suit.

TYR also attempts to analogize to two Second Circuit decisions, *Castrol and Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144 (2d Cir. 2007)*. In Castrol, the defendant claimed that its motor oil "outperforms any leading motor oil against viscosity breakdown." *987 F.3d at 941*. The **[*15]** court found this to be literally false, as demonstrated by a battery of comparative tests of viscosity breakdown. *Id. at 943-44*. The analogy to this case is very weak: the *Castrol* statement singled out a specific attribute of motor oil—viscosity breakdown—that could be

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[4] The Court takes judicial notice of SwimNews.com. *Fed. R. Evid. 201(b)*.

[5] Although TYR has a video recording of the coaches meeting, (see Hilton Decl. ¶ 2), it is unable to point out where Schubert actually made such an assertion. The only evidence of this statement is the coach's declaration, executed over two years after the meeting took place. However, because this is a motion for summary judgment, the Court may not weigh this evidence against the actual recording of the coaches meeting. *Balint v. Carson City, Nev., 180 F.3d 1047, 1054 (9th Cir. 1999)*.

[6] ***HN8***[] As noted above, the Court finds that an alleged false advertisement must, at a minimum, be actionable non-puffery under the Lanham Act. See *Harcourt Brace, 108 F.3d at 1152* (noting the difficulty of distinguishing actionable false statements from puffing in setting for the de minimis presumption).

proven false by specific testing, whereas the statement here amounts to a general statement that Speedo's swimsuits are superior without any comparisons of any specific attributes of the suits.

Likewise, the analogy to *Time Warner Cable* is weak. There, the court found that the statements in television advertisements that "[y]ou're just not gonna get the best picture out of some fancy big screen TV without DIRECTV. It's broadcast in 1080i," and that "settling for cable would be illogical," were likely to be shown literally false on a motion for a preliminary injunction. *497 F.3d at 154, 158*. The court found that, in the context of the advertisements, the statements made the claim that the picture quality of satellite was better than cable. Id. Again, this case is distinguishable because the statements made assertions about a specific attribute of the product—picture quality—whereas the general statement attributed to Schubert does not.

The Defendants also **[*16]** argue that the statements in Schubert's March 2008 email are puffery. Schubert giving his "personal opinion" on the swimsuit controversy, stated that:

> [Speedo] is putting millions into research and development. . . . To combat this, the trailing companies [TYR and Nike] pay more money to sign our new pros to big contracts wearing an inferior product. We need our coaches and athletes to pressure the other manufacturers to "get in the game." Three competitive companies (or more) is to all our advantage.

(COE, Ex. 10 (emphasis in original).) The statement that TYR provided "an inferior product" is clearly puffery. See, e.g., *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 926 (3d Cir. 1990)* (finding "better than" statement to be "the most innocuous kind of 'puffing'").

However, TYR argues that the "inferior product" statement is actionable because it came within the context of previous statements about testing and therefore gave the impression that the claim was based on independent testing. See *Southland Sod, 108 F.3d at 1145*; *Pizza Hut, 227 F.3d at 495 n.5* ("Where the context of an advertising statement may lend greater specificity to an otherwise vague representation, the court should not succumb to the temptation to hastily rule a phrase to be unactionable under the Lanham Act." (quotation omitted)). TYR points **[*17]** to comments made by Jonty Skinner ("Skinner"), a USA Swimming employee, at the December 2007 coaches meeting that the Speedo suit was tested by NASA and achieved a 4% reduction in drag, (Hilton Decl. ¶ 2), a reference in Schubert's email to research and development, (COE, Ex. 10), and a note in Craig Lord's SwimNews.com article that the technology was developed by NASA, (COE, Ex. 13).

The Court finds that none of these references even remotely implies that the "inferior product" statement was based on any testing. First of all, Skinner's statements were clearly based on comparative testing of previous generations of swimsuits and could not be reasonably interpreted as comparative testing of Speedo's current products against competitors' current products.[7] They are irrelevant to Schubert's statement months later about "inferior products."[8] Second, Schubert's reference to Speedo spending millions on research in no way implies any sort of comparative testing. And finally, Lord's article can give no context to the March 13 email as it was published nearly a month after the email. (COE, Ex. 13.) Moreover, it was written by Lord, a swim reporter who is not alleged to be an agent of Speedo, **[*18]** USA Swimming, or Schubert.

Accordingly, the Court finds that Schubert's statements at the December 2007 coaches meeting and the March 2008 email are non-actionable puffery.[9]

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[7] "In the testing that they [Speedo] do, and they go all the way to NASA and they test with a device at NASA, test the friction of the suit . . . . And you quantify the suit that evolved in Melbourne as being 4% less friction as the one that they had in Sydney . . . . And they quantify the suit that's going to come out in Beijing as being 3% faster than the suit that came out in Melbourne, or 3% less friction than the suit that came out in Melbourne." (COE, Ex. 8, [Recording of National Team Coaches Meeting, Dec. 16-17, 2007, Disk 4] at 39:05.)

[8] The Court reads TYR's argument as using Skinner's comments to provide the context for statements by Schubert, and not as providing a separate instance of false advertising. (See Opp'n Br. 9.) In any case, Defendants would be entitled to summary judgment, as TYR admits that it cannot prove

4. Effect on Competition

HN10[] In order to state a valid Sherman Act claim under a false advertising theory, the plaintiff must make a "preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer)." *Harcourt Brace, 108 F.3d at 1151* (emphasis in original). Because of the difficulties in distinguishing actionable false statements from puffing, the speculative effect that advertising has on consuming behavior, and buyer distrust of seller's disparaging comments, the Ninth Circuit has set forth a presumption that commercial speech or advertising has a de minimis effect on competition. *Id. at 1152*. A plaintiff may overcome this presumption by showing that the charged speech meets a six-factor test: the statements must be "(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals." Id. (citation **[*19]** omitted).

TYR argues that it must only demonstrate that the speech here meets the Harcourt Brace six-factor test. In other words, TYR's position is that the de minimis presumption is the only hurdle that an antitrust plaintiff must overcome to get to a jury on a false advertising claim. The Court disagrees with TYR's reading of Harcourt Brace.

Harcourt Brace *HN11*[] first sets out the requirement that disparagement "must have a significant and enduring adverse impact on competition itself in the relevant markets to that Skinner's statements are false. (Id. at 5:13-15; COE, Exs. 22, 23.) rise to the level of an antitrust violation." *Id. at 1152*. The plaintiff has the burden of proving this "significant and enduring impact" in order to proceed on the claim. *Id. at 1151*.

HN12[] The court then specified that antitrust claims based on false advertising "should presumptively be ignored"—that is, the defendant is entitled to a presumption that false advertising has a de minimis effect on competition before the introduction of any evidence of actual market impact. See *id. at 1152*. The six-factor test—which focuses on the characteristics of the charged speech and not on any evidence of actual market effect—is the plaintiff's means of overcoming **[*20]** this first hurdle. It does not, however, satisfy the plaintiff's burden of proving an actual "significant and enduring adverse impact on competition." In other words, a plaintiff that has discharged the de minimis presumption is not automatically entitled to its own presumption of significant market effect. In addition to showing that the speech is of the type that could have a significant effect on competition, the plaintiff has the burden of showing that it actually did affect competition.[10]

Therefore, the Defendants having asserted TYR's lack of evidence of a "significant and enduring adverse impact," TYR has the burden of coming forward with evidence to create a triable issue of fact. *Celotex, 477 U.S. at 323*. TYR points to four alleged market circumstances it puts forth as evidence of an adverse effect on competition: (1) from February 2008 to June 2009, Speedo increased market share while charging a higher price than TYR; (2) Speedo controlled 95% of the market by June 2009; (3) during that time period, TYR lost market share; and (4) Nike completely exited the market in September 2009.

The first three circumstances are based on a report prepared by Robin Cantor ("Cantor"). (COE, Ex. 1.) Cantor's report **[*21]** compared the sales of "championship suits," such as the Speedo LZR Racer and the TYR Tracer Rise, in periods prior to the alleged unlawful conduct against the "injury period" of February 2008 to July 2009. (Id. PP 15, 18.) Cantor limited her analysis to sales to "Team Dealers," retailers who sell suits to competitive swimmers and teams, where TYR and Speedo generated a majority of their championship suit revenue. (Id. PP 15, 19.) Cantor studied the sales data from three Team Dealers. (Id. ¶ 20.) Cantor also limited her analysis to sales of TYR and Speedo products only, because those two manufacturers "dominated" the Team Dealer market. (Id. ¶ 20.) Cantor found that Speedo increased its relative share of the Team Dealer market after the introduction of the LZR Racer

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[9] The Defendants do not argue that the statement at the 2008 Manchester team meeting and the statement to the junior swimmers in 2009 are puffery.

[10] This holding is supported by the fact that the Ninth Circuit has applied the "significant and enduring impact" test for claims outside the context of false advertising. *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998)*

while charging higher prices than TYR's Tracer Rise. (Id. PP 48-50.) Cantor concludes that this is "consistent with the conclusion that the challenged conduct injured TYR sales and competition in championship suits." (Id. ¶ 50.)

The one major flaw in Cantor's analysis—and the reason it does not provide evidence of significant injury to competition—is that it completely omits the sales of any other swimsuit manufacturers. Cantor defined a market where TYR is Speedo's **[*22]** only competitor, thereby allowing her to assert that injury to TYR is injury to competition. The supposed "market share" is actually a measure of the relative sales volume of Speedo as compared to TYR, and says nothing about Speedo's of TYR's actual market share because there is no evidence of the sales of other competitors like Nike, blueseventy, Arena, Jaked, or Adidas.

Cantor justifies the exclusion of other competitors from the analysis on the assertion that TYR and Speedo "dominate" the Team Dealer market. (Id. ¶ 20.) Cantor notes that, over the five year period from 2004 to 2009, Speedo and TYR accounted for 77% and 17% of the sales to Team Dealers of suits costing at least $40. (Id.) However, this is very misleading. Throughout the report, Cantor tallies the sales of championship and "high-end" championship suits; yet, in order to exclude all competitors other than TYR and Speedo, she tallies all suits costing more than $40, rather than the relevant championship suits. This has the effect of minimizing the relevant market share of manufacturers that concentrate on the higher-priced championship suits. Moreover, by averaging sales over a five-year period, Cantor minimizes the **[*23]** market share of recent entrants like blueseventy, which entered the market in the summer of 2008. (USA Swimming Reply Br., Ex. B ¶ 5.) Finally, by limiting the analysis to Team Dealer sales, Cantor excludes the relevant sales of manufacturers like Jaked and Arena, which concentrate on direct internet sales or on-site sales at swim competitions. (Id. ¶ 5.)

Thus, Cantor's report shows only that Speedo's sales in the Team Dealer market increased relative to TYR's sales. TYR has presented no evidence of the sales or market shares of any of the competitors. On this record, there is no way to determine whether TYR's lost sales were picked up by new entrants or whether Speedo actually lost overall market share to new entrants at any time during the relevant period. At best, Cantor's report is evidence of injury to TYR, Speedo's competitor, but does not show injury to competition, which is what the law requires.[11] *Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1036 (9th Cir. 2001)* (finding no antitrust injury because "[a] decrease in one competitor's market share . . . affects competitors, not competition"); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("The purpose of the antitrust laws, by contrast, is 'the protection of competition, not competitors.'" (quoting *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (emphasis in original)).

The Court also finds that Cantor's report should be excluded under *Federal Rule of Evidence 702* as unreliable and not based on sufficient facts or data. See *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-95, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. By not considering any data on the pricing, sales volume, or market share of manufacturers other than Speedo and TYR, Cantor simply cannot make a reliable analysis as to market impact. The report is therefore irrelevant to the issue of market impact.

Although not necessary to support the Court's conclusion, the Defendants have offered evidence that competition in the championship swimsuit market actually increased after Schubert's statements, in the form of new market entrants like blueseventy, Jaked, Arena, and Adidas. The success of the LZR Racer at the 2008 Olympics spurred

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[11] Because the supplemental export report by Jules H. Kamin ("Kamin") relies entirely on Cantor's report, it suffers from the same flaws. (See COE, Ex. 3 ¶ 1.) Kamin opines that:

> **[*24]** [t]he fact that Speedo was able to increase its market share, the absolute quantity of units sold, and its prices while the quality of its championship suits was not superior to that of TYR's . . . [shows] that the conduct of the defendants cause economic injury to consumers, sometimes called injury to competition.

(Id. ¶ 5.) However, as discussed above, Cantor's report does not measure actual market share; it only measures Speedo's sales relative to TYR's. And Cantor's report does not support the claim that Speedo increased prices. Cantor merely found that Speedo charged higher prices than TYR. (COE, Ex. 1. ¶¶ 39-40 & tbl. 8.) Thus, Kamin's assertion of "allocative inefficiency" is based on faulty assumptions. (See Kamin Decl. ¶ 5(b) & (c).)

these companies to produce new suits for the American market. (See Lord Decl. PP 26-28; Schubert Depo. at 94:3-96:8, 182:2-25; USA Swimming Reply Br., Ex. B ¶ 5; Furniss **[*25]** Decl. 85:20-86:8; Bielak Decl., Exs. L ¶ 4-7, M, N, P, V.) By the time of the U.S. World Championship trials in July 2009, one year after the 2008 Olympic Trials, these new entrants had made very significant traction among elite swimmers, as shown by the suit choice of swimmers in the finals of several competitions:

Manufacturer	2007 U.S. Nationals	2008 U.S. Olympic Trials (July 2008)	2009 U.S. World Championship Trials (July 2009)
Speedo	77	80	30
TYR	7	13	10
Nike	12	1	0
Arena	0	0	19
blueseventy	0	6	9
Jaked	0	0	32
Others	4	0	0

(Supp. Isaac Decl. ¶ 4, Exs. A-C.)

In addition, one of the country's largest swimsuit retailers noticed the dramatic penetration of blueseventy into the high-end swimsuit market. (See USA Swimming Reply Br., Ex. B PP 1, 4-7.) From May 2007 to May 2008, the retailer estimated its sales by manufactuer in the following percentages: 70% for Speedo, 15% for TYR, and 15% for Nike. (Id. ¶ 4.) After blueseventy entered the market in the summer of 2008, the retailer estimated its sales in the second half of 2008 and the first half of 2009 according to the following percentages: 75% for blueseventy, 12% for Speedo, and 3% combined for TYR and Nike.[12] (Id. ¶ 5.) The retailer estimates that the total sales volume **[*26]** for blueseventy during that period was $600,000. (Id. ¶ 7.) In that time period, the retailer sold to roughly 20% of all collegiate swim teams and between 85% to 90% of those customers purchased the blueseventy suit. (Id. ¶ 6.)

Finally, Speedo presents evidence that TYR had difficulty keeping up with demand for its championship suit. If Schubert's comments actually had the effect of excluding TYR from the market, one would ordinarily expect to see excess inventory, or greater supply than demand for TYR's goods, rather than the opposite. However, in January 2008, Steve Furniss, TYR's Executive Vice President, noted in an email that, "[o]n Tracer Light [TYR's high-end suit at the time] we are already behind in production schedule and Sales has already sold out initial allocation plus they are behind sample and promotional needs." (Richter Decl., Ex. E.) These production delays were confirmed by Matt Zimmer, TYR's Promotions Director, who laid out a plan of rationing the available inventory of Tracer Light suits among college teams, noting the "extremely frustrating situation [of] hav[ing] so few championship suits available for our many teams." (Id., Ex. F.) However, he also noted the **[*27]** high demand, stating that "we've got teams clammoring [sic] for our newest suits." (Id.) A month later, in March 2008, Zimmer stated—in an email titled "Tracer allocation"—that "our Tracer inventory is still well below what we hoped it would be," though "the demand has really ramped up once again." (Id., Ex. G.) Even after the Beijing Olympics, TYR acknowledged the limited availability of its championship suits to NCAA coaches, noting that "[w]e have experienced strong demand [for the Tracer Light] and continue to chase availability," and that the TYR Tracer Rise "will not be available until early 2009" due to a temporary NCAA ban. (Id., Ex. I.)

The Defendants' evidence of elite swimmers using suits by new entrants, significant sales volume and market share, and TYR's inability to keep up with demand appears to show not only that there was no significant impact on competition (as opposed to TYR individually), but also that any adverse effect on competition was short-lived and not enduring.[13]

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[12] These estimates also demonstrate the fallacy of the Cantor report. By excluding the sales of blueseventy, the new entrant, Cantor's analysis completely fails to account for 75% of the market, at least at this retailer.

[13] TYR contends that the "enduring impact" test is a low bar, citing *In re Remeron Antitrust Litigation, 335 F. Supp. 2d 522 (D.N.J. 2004)* and *Indiana Grocery Co. v. Super Valu Stores, 647 F. Supp. 254 (S.D. Ind. 1986)*, both of which allowed antitrust

TYR argues that evidence that top swimmers are wearing competitors' suits is not necessarily indicative of healthy competition in the Team Dealer market, where Speedo **[*28]** sells roughly 95% of its championship suits. (COE, Ex. 1 ¶ 19; Brommer Depo. at 90:5 17.) This may be true, but TYR misunderstands its burden on summary judgment—it must provide affirmative evidence of harm to competition. It has provided no evidence of Team Dealer sales of manufacturers other than Speedo and TYR, failing to meet its burden and also failing to rebut the Defendants evidence of major penetration by at least one new entrant at a major retailer.[14]

TYR also tries to dismiss the impact of new entrants by noting that many of the new suits have been banned by FINA, the international governing body of swimming. The Court fails to see the relevance of the FINA ban. TYR's theory was that the Defendants restrained trade and monopolized the high-end swimsuit market through Schubert's alleged false statements promoting the LZR Racer. The Defendants have presented some evidence that new competitors entered and took significant market share from both Speedo and TYR, thereby showing that the statements had little effect on competition and that any effect was short-lived. The fact that FINA banned all the suits—including Speedo's and TYR's—effectively terminating that entire market, **[*29]** does not rebut the Defendants' evidence of new competition prior to the ban. TYR does not allege any false statements regarding the post-ban suits. That market is simply irrelevant.[15]

Nor does Nike's exit from the market in September 2008 demonstrate that Schubert's statements had a significant and enduring impact on competition. (See COE, Ex. 28.) Ordinarily, the loss of a significant competitor from the market would signal a major adverse effect on competition and would harm consumers. However, the Defendants have shown evidence, unrebutted by TYR, that new entrants were producing suits of better quality that even Speedo's and TYR's by the time Nike exited. (See Lord Decl. PP 26-28; Schubert Depo. at 94:3-96:8, 182:2-25; USA Swimming Reply Br., Ex. B ¶ 5; Furniss Decl. 85:20-86:8; Bielak Decl., Exs. L ¶ 4-7, M, N, P, V.) These new suits were apparently gaining widespread acceptance among elite swimmers less than a year after Nike exited. (Supp. Isaac Decl. ¶ 4, Exs. A-C.)

Moreover, TYR fails to show any link between Schubert's statements and Nike's exit. On this record, Nike's exit is entirely consistent with normal competition: the well-publicized Olympic success of the LZR **[*30]** Racer combined with new suits developed by blueseventy, Arena, and Jaked may have forced Nike out. There is no allegation or evidence that Nike had a championship suit comparable to the Speedo LZR Racer, TYR Tracer Rise, or any of the new suits by the new entrants. Indeed, its willingness to let its top sponsored swimmers swim in Speedo suits at the Olympics suggests otherwise. (COE, Ex. 28.)

The Court also finds that the alleged false advertising does not even overcome the Harcourt Brace de minimis presumption. At the pleading stage, the Court was hesitant to apply the presumption because TYR had alleged that Schubert's position with USA Swimming gave his statements the appearance of objectivity. (See Docket No. 72 at 10.) ***HN13***[] The Harcourt Brace presumption rested partially on the rationale that buyers generally do not trust comments made by competitors. *Id. at 1152*. However, the Ninth Circuit also relied on the difficulty in distinguishing

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claims to proceed for relatively short periods of alleged unlawful conduct. However, neither of these cases involved a false advertising antitrust claim and, thus, neither applied the "significant and enduring impact" test set forth in Harcourt Brace. See *Remeron, 335 F. Supp. 2d at 526-27*; *Indiana Grocery, 647 F. Supp. at 256-57*. And although *Thompson's Gas & Elec. Serv. v. BP Am., 691 F. Supp. 2d 860 (N.D. Ill. 2010)*, cites the Harcourt Brace test, it neither applies the test, nor does it involve a false advertising claim. *691 F. Supp. 2d 860 at 862-865*.

[14] TYR also presents the declaration of Dean Jackson, Sales Director at blueseventy, noting that, for all of blueseventy's success, it has been unable to sign any NCAA teams to sponsorship contracts. (Jackson Decl. ¶ 5.) Jackson states that "Coach Schubert's influence and his relationship with Speedo created a barrier that was 'insurmountable.'" (Id. ¶ 6.) Jackson does not purport to be an expert on economics and, in any case, attributes the "insurmountable" barrier to Schubert's influence rather than any false advertising. This declaration is far from demonstrating a significant impact on competition.

[15] TYR does not rebut evidence that it had trouble meeting demand for its championship suits. It does submit a declaration that it has the capacity to produce 10,000-12,000 Tracer Light or Tracer Rise swimsuits per month, (Meng Decl. ¶ 2), but this hardly rebuts Speedo's evidence that the demand for TYR's suits outpaced its ability to supply the suits, despite its apparently strenuous efforts to do so.

actionable false statements from puffery and the speculative nature of the effects of false advertising, "especially when [it] is not systematic." Id. This would apply regardless of whether the speaker had the appearance of objectivity. That circumstance may be **[*31]** considered within the Harcourt Brace factors, such as the likelihood of inducing reliance or susceptibility of neutralization, but the Court does not find that it negates the application of the presumption entirely.

The Court finds that TYR cannot demonstrate that the statements "continued for prolonged periods." *Id. at 1152*. The only two actionable statements are Schubert's comment at the Manchester swim meet in April 2008 and his statement to two junior swimmers in January 2009. Two isolated statements to very limited audiences spaced by nearly a year are not the sort of sustained, systematic false advertising that would have more than a de minimis effect on competition. ***HN14***[] It is not enough to show that there was a long period between the statements; the advertising must be "continued," i.e., sustained, for a prolonged period. See *id. at 1152*.

Even if all five of the charged statements were considered, the Court still finds they does not meet the necessary test of sustained advertisement. One statement was made at a coaches meeting in December 2008, one in an email in March 2008, two at a swim meet in April 2008, and the last to two junior swimmers in January 2009. Five sporadic statements spread out over **[*32]** the course of more than a year are not the sort of systematic advertising capable of significantly affecting competition.

TYR argues that the "prolonged period" test is a very low burden to meet. However, it has no authority for this proposition. It argues that *National Ass'n of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories, Division of/and American Home Products Corp., 850 F.2d 904 (2d Cir. 1988)*, allowed an antitrust disparagement claim to overcome the de minimis presumption despite the fact that the disparagement was contained in a single letter. *Id. at 916-17*. However, unlike the Ninth Circuit, which requires a plaintiff to satisfy all of the six Harcourt Brace elements, *108 F.3d at 1152*, the Second Circuit apparently does not find each element mandatory. *Ayerst, 850 F.2d at 916-17*; see also *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 & n.6 (6th Cir. 2003)* (noting the ambiguity of the Second Circuit's test and declining to decide whether all elements must be met in Sixth Circuit). Ayerst did not find that the single letter was sufficient to meet the "prolonged period" requirement; rather, it allowed the case to proceed despite not meeting that element. *850 F.2d at 917*. Here in the Ninth Circuit, that is not a option. TYR must demonstrate that the statements continued for a prolonged period.

Because TYR has not provided evidence from which a reasonable jury could infer a "significant and enduring adverse impact on competition," the Defendants are entitled **[*33]** to summary judgment on the Sherman Act claims. Additionally, no triable issue of fact exists as to whether Schubert's "continued for a prolonged period." Therefore, TYR cannot overcome the presumption that Schubert's statements had only a de minimis effect on competition and the Defendants are entitled to summary judgment on that ground as well.

5. Remaining State Claims

TYR's remaining causes of action are brought under the Cartwright Act and the UCL, and TYR brings a separate claim for injunctive relief.

HN15[] "Where Cartwright Act claims are premised on the same facts as Sherman Act claims, and summary judgment is granted on the Sherman Act claims, summary judgment is also appropriate for Cartwright Act claims." *Breakdown Servs., Ltd. v. Now Casting, Inc., 550 F. Supp. 2d 1123, 1141 (C.D. Cal. 2007)* (citing *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*.) Here, the Cartwright Act claim is identical to TYR's Sherman Act claims. Because the Defendants are entitled to summary judgment on the Sherman Act claims, they are entitled to summary judgment on the Cartwright Act claim as well.

HN16[] The UCL prohibits three separate categories of conduct—"acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*; *Cal. Bus. & Prof. Code § 17200*. Conduct is "unfair" if it "threatens an incipient violation of an* ***antitrust law***, or violates the policy or spirit of **[*34]** one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*. Thus, in most cases, "where plaintiff's [UCL] claim is predicated on antitrust violations that fail to withstand summary judgment, the [UCL] claim must also fail." *Breakdown Servs., 550 F. Supp. 2d at 1142*. Because TYR's UCL claim is based on the same facts as its same failed antitrust claims, the Defendants are entitled to summary judgment on the UCL claim.

TYR's final remaining claim seeks only injunctive relief and does not state an independent cause of action. Because the Defendants are entitled to summary judgment on TYR's remaining claims, the injunctive relief claim fails as well.

III. RECONSIDERATION

TYR seeks reconsideration of the Court's order granting summary judgment on its false advertising claim under the Lanham Act. The Court granted summary judgment on the grounds that TYR did not have evidence of injury traceable to the alleged false statements. (Docket No. 154 at 25-26.)

A. Legal Standard

HN17[] Under *Rule 59(e)*, a party may move to alter or amend a judgment within 28 days. The grounds for reconsideration are set forth in *Local Rule 7-18*, which provides:

> A motion for reconsideration of **[*35]** the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

L.R. 7-18. The Court may disregard evidence or arguments on a motion for reconsideration that could reasonably have been presented prior to this Court's ruling. *Hopkins v. Andaya, 958 F.2d 881, 887 n.5 (9th Cir. 1992)*.

B. Discussion

TYR moves for reconsideration based on an expert report that it received after the due date for its opposition papers in the original round of summary judgment briefing. It contends that this report could not, with reasonable diligence, have been completed and submitted with TYR's opposition papers because the expert, Cantor, did not receive necessary data from Speedo until **[*36]** a week before TYR's opposition was due. (Cantor Decl. ¶ 7.) Speedo disputes this assertion and argues that TYR could have submitted the report prior to the Court's final order. The Court need not resolve this dispute, however, because the Court finds no prejudice in considering the new evidence given the second round of summary judgment briefing. The Court also finds that, even considering the new evidence, Speedo is entitled to summary judgment on the Lanham Act claim.

TYR's Lanham Act claim is premised on two remaining sets of statements: (1) Schubert's claim at the April 2008 Manchester meeting that the Speedo LZR Racer provided a 2% advantage, and (2) his statement to two junior swimmers in Guam in January 2009 that the LZR Racer was "faster" than the non-Speedo suits they were wearing.[16] (See Docket No. 154 at 24-28.) Given that both statements were made to a limited audience and none of those present switched to Speedo products as a result of the statement, the Court found that TYR had failed to demonstrate any actual deception or any actual injury as a result of the statements. (Id. at 25-26.) TYR now argues

[16] Speedo was granted summary judgment with respect to Schubert's statement to reporter Craig Lord because that statement was not commercial speech or advertising. (Docket No. 154 at 26-28.) TYR provides no grounds for reconsidering that ruling. The other statements that form the basis of TYR's antitrust disparagement claim were either not alleged to be the basis for the Lanham Act claim or were not raised by TYR in opposition to Speedo's prior summary judgment motion. (See Compl.; Docket No. 127 at 24-30.) It is too late for them to amend its Lanham Act now, on a motion to reconsider a grant of summary judgment.

that Cantor's report demonstrates a loss of sales that can be attributed to "the challenged **[*37]** conduct." (Cantor Decl., Ex. A.)

In the previous summary judgment order, the Court did not consider whether there was a triable issue as to whether Schubert's statements were false or misleading. (Docket No. 154 at 28 n.19.) With respect to the "2% advantage" statement in Manchester, there is some ambiguity as to what Schubert actually said. One of the swimmers testified that Schubert told him that the LZR Racer "was a two percent improvement on performance from other suits," but "[i]t wasn't specifically made clear that it was two percent in relation to anything else. It was just two percent improvement." (Marshall Depo. at 16:8-17.) Another swimmer who heard the 2% advantage statement at the meeting took it to mean that the LZR Racer was "2 percent better than any suit," but admitted that "[it] wasn't clear" what the 2 percent was being compared to. (Van Wie Depo. at 49:2-14.) A third swimmer testified that Schubert stated that the LZR Racer "would give you like a 2 percent advantage," and took that to mean "[t]he 2 percent advantage was 2 percent advantage over all the suits. It was the fastest suit on the market or something." (Descenza Depo. at 18:17-20, 19:8-12.) Schubert claims **[*38]** that he was referring to a 2% advantage over the prior generation of Speedo suits, the Speedo FS Pro. (Schubert Decl. ¶ 11; Supp. Schubert Decl. ¶ 6.) Schubert clarified what he was talking about during his interview with Craig Lord: "If you take [the] best times of world record holders and their new times [wearing the LZR Racer], the difference is 2 per cent." (COE Ex. 13.)

TYR argues that Schubert's statements at the Manchester meet are false because the LZR Racer does not offer a 2% advantage or is not 2% faster than the Tracer Rise. However, the Tracer Rise was not commercially available—not "on the market"—until later in April 2008, after Schubert's 2% advantage comment. (Furniss 9/3/09 Depo., Ex. 4.) Thus, even if it is accepted that Schubert was claiming a 2% advantage over all suit currently on the market, it is not reasonable to infer that Schubert was making a direct comparison to the Tracer Rise.[17] Indeed, in a TYR internal memorandum in April 2008, Matt Zimmer admitted that "very few people even know we have a new product such as Rise." (Richter Decl., Ex. H.)

TYR also argues that the statements can be shown to be literally false because they imply that testing was done to **[*39]** support the claim. See *Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 62 (2d Cir. 1992)*. However, TYR does not have evidence to rebut Schubert's claim to have analyzed the swimming times of world record holders wearing the LZR Racer and found a 2% difference.[18] (Supp. Schubert Decl. PP 3-5.) In fact, Schubert's analysis was confirmed by USA Swimming statistician Larry Herr, who found a average swim time improvement of 1.55%,[19] (Herr Decl. ¶ 3), by Craig Lord, who found that time improvements in a larger sample clustered in the range of 1.6% to 2.3%, (Lord Decl. ¶ 19), and by TYR-sponsored coach Steve Hutchinson, who also found a roughly 2% time improvement in his own review of swim times, (Zimmer 9/30/09 Depo. at 85:2-86:19, 87:2-88:9, 202:20-203:14).

Because TYR cannot show that Schubert's statement could be reasonably interpreted as a comparison of the LZR Racer against the Tracer Rise or that Schubert's statement was not backed by an informal statistical analysis, TYR has not raised a triable issue of fact as to whether the "2% advantage" statement was false or misleading.

Moreover, the newly-introduced expert report does not remedy TYR's inability to show a link between Schubert's statements and injury to TYR. TYR must show that the charged **[*40]** statements "actually deceived or [had] the

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[17] In fact, Schubert claims not to have known about the Tracer Rise at the time, (Supp. Schubert Decl. ¶ 6), though this is disputed.

[18] The testimony of Genadijus Sokolovas and Russell Mark that USA Swimming and Speedo did not do internal "testing" on swimsuits prior to Schubert's comments, (Sokolovas Depo. at 16:11-25; Mark Depo. at 30:18-31:12), does not rebut Schubert's claim to have informally analyzed swim times involving the LZR Racer.

[19] TYR argues that Schubert's statement is literally false because of the difference between 1.55% and 2%. The Court does not think that a statement can reasonably be found to be false because a number is rounded up to an integer according to commonly-accepted rules for rounding, the same used in the federal tax code. See, e.g., *26 U.S.C. § 3402(b)(4)* (allowing rounding to the nearest dollar for calculating withholding). More precisely, the Court does not think that the difference between 1.55% and the rounded number of 2% is a material difference.

tendency to deceive a substantial segment of its audience [and] is likely to influence the purchasing decision."[20] Southland Sod, 108 F.3d at 1139. Cantor's report states that its "results are consistent with the conclusion that the challenged conduct injured TYR sales." (Cantor Decl., Ex. A ¶ 50.) The "challenged conduct" is everything that TYR alleged in the Complaint, including the allegations of coercion, TYR's exclusion from Splash magazine, the exclusion of advertising at certain events, and all of the disparaging statements that have been dismissed as puffing or otherwise non-actionable. (See id. ¶ 18; Compl. PP 10-16.) Thus, Cantor never specifically links the Manchester statement or the Guam statement to the alleged injury, other than as part of the entire range of "challenged conduct." In other words, Cantor has failed to factor out any of the "challenged conduct,"—such as the alleged coercion, the exclusion from Splash magazine and events, the puffing statements, or the statement made to Craig Lord—that is not actionable under the Lanham Act. No reasonable juror could find, based on Cantor's report, that the loss of sales indentified in the report were caused by **[*41]** the statement at the closed meeting in Manchester or the statement to two junior swimmers in Guam. This is especially true where, as here, none of the audience to the charged statements changed their buying behavior as a result of the statements. (Docket No. 154 at 25-26.)

To avoid this failure of proof of actual causation, TYR argues that proof that the statement was spread by word-of-mouth creates a triable issue as to whether any customers were actually deceived.[21] TYR cites two unpublished district court cases for the proposition that injury can be presumed based on word-of-mouth dissemination in certain instances. *PBM Prods., LLC v. Mead Johnson & Co., No. 3:09-CV-269, 2010 U.S. Dist. LEXIS 18460 (E.D. Va. March 2, 2010)*; *Fla. Breckenridge, Inc. v. Solvay Pharms., Inc., No. 97-8417-CIV-RYSKAMP, 1998 U.S. Dist. LEXIS 14742 (S.D. Fla. March 18, 1998)*. Neither case is applicable here.

In PBM Products, the false advertising was disseminated through a mailer sent to roughly 1.6 million customers. *2010 U.S. Dist. LEXIS 18460, at *12-13*. In upholding the jury's damage award, the court noted that "[t]he jury heard evidence on the lost profits [the plaintiff] saw near the time the mailer was sent, [and] the 1.6 million individuals who received the mailer as well as those that would learn about it via word-of-mouth." Id. That case involved very **[*42]** widespread dissemination such that it can be assumed that a substantial section of the customer base heard the false statements, either directly or indirectly. Here, in contrast, the two statements were made to very limited audiences. The same presumption of widespread dissemination by word-of-mouth cannot be made.

In Florida Breckinridge, the defendant moved for summary judgment on a Lanham Act claim on the ground that oral statements are not commercial advertising. *1998 U.S. Dist. LEXIS 14742, at *20*. The court rejected the argument, noting testimony that, in the relevant market, the "product could not be adequately promoted without . . . in-person and word-of-mouth promotion." *1998 U.S. Dist. LEXIS 14742 at *21*. Thus, Florida Breckinridge merely stands for the proposition that oral statements, such as in-person or telephone sales calls, can constitute commercial advertising within the meaning of the Lanham Act. *1998 U.S. Dist. LEXIS 14742 at *20-22*. It does not stand for the proposition that a plaintiff can merely invoke "word-of-mouth" to overcome its burden of showing that customers actually heard and were deceived by the alleged false statement.

Here, TYR has evidence that Schubert made the "2% advantage" comment twice, both times at the 2008 Manchester meeting. (Marshall Depo. at 16:8-17; Descenza **[*43]** Depo. at 18:17-20.) Both were to a limited audience of 27 elite swimmers and several coaches, none of whom switched to Speedo as a result of the statement. TYR argues that it has evidence of dissemination through word-of-mouth, because one swimmer "heard from other swimmers and read in media articles that . . . Schubert[] was telling swimmers that the Speedo LZR would provide a 2% advantage to swimmers as compared to other swimsuits." (Florea Decl. ¶ 4.) However, this only establishes that one other swimmer heard the statement (and possibly from media sources like the Lord article, which is not actionable), and even he continued to wear TYR after a single experiment with the LZR.[22] (Id. PP 6-7.)

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[20] The Lanham Act also requires that the plaintiff prove that the defendant "caused its false statement to enter interstate commerce." *Southland Sod, 108 F.3d at 1139*. Given that the two charged statements were given personally at a closed meeting in Manchester and to two junior swimmers in Guam, respectively, it is doubtful that TYR could satisfy this requirement either.

[21] The Court rejects this new argument because it is not grounds for reconsideration. TYR has not demonstrated that it could not have raised this argument—which has nothing to do with the new expert report—on summary judgment.

TYR also argues that word-of-mouth is an important part of the swimsuit industry. (See COE, Ex. 14; Jackson Decl. ¶ 2; Bielak Decl., Ex. M.) This does not, however, meet TYR's burden of proving that Schubert's statement was actually disseminated.

Finally, even if TYR could show that the statement was disseminated, it has no evidence of deception, particularly in light of the fact that, of all those who actually heard the statement, not one switched to using the Speedo suit as a result. (Docket **[*44]** No. 154 at 25-26; Florea Decl. PP 6-7.)

Clearly, the statement by Schubert to the two junior swimmers in Guam fails on same grounds. There is no evidence that the statement was heard by anybody other than the two swimmers and their coach. As noted in the Court's prior order, neither of those two swimmers switched to Speedo. (Docket No. 154 at 26.)

Accordingly, Speedo is entitled to summary judgment on TYR's Lanham Act claim.

IV. CONCLUSION

For the foregoing reasons, the motions for summary judgment are GRANTED. TYR's motion for reconsideration is DENIED.

IT IS SO ORDERED.

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[22] TYR argues that it would be impossible to track "word-of-mouth" dissemination. However, the impact and dissemination of the statement could potentially be measured by consumer surveys, as recognized by courts in other Lanham Act claims. See, e.g., *Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 525 (10th Cir. 1987)* ("Actual consumer confusion may be shown by direct evidence, a diversion of sales or direct testimony from the public, or by circumstantial evidence such as consumer surveys."). TYR has provided no such evidence.

Advanced Ion Beam Tech., Inc. v. Varian Semiconductor Equip. Assocs.

United States District Court for the District of Massachusetts

April 27, 2010, Decided

CIVIL ACTION NO. 09-11448-NG

Reporter

721 F. Supp. 2d 62 *; 2010 U.S. Dist. LEXIS 68773 **

ADVANCED ION BEAM TECHNOLOGY, INC., Plaintiff, v. VARIAN SEMICONDUCTOR EQUIPMENT ASSOCIATES, INC., NORMAN L. TURNER, KENNETH H. PURSER, and ALICE W. ENGE and ELIZABETH DILL, as Co-Executrixes of the Estate of Harald A. Enge, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part *Advanced Ion Beam Tech., Inc. v. Varian Semiconductor Equip. Assocs., 2010 U.S. Dist. LEXIS 134913 (D. Mass., July 2, 2010)*

Prior History: *Varian Semiconductor Equip. Assocs. v. Advanced Ion Beam Tech., Inc., 2009 U.S. Dist. LEXIS 69667 (D. Mass., July 20, 2009)*

Core Terms

inventors, patent, allegations, infringement, prior art, Magnet, motion to dismiss, antitrust, defendants', invention, patent application, counterclaims, references, contends, customer, coils, implantation, recommends, dual, offer to sell, technology, disclose, omission, fraud claim, intentionally, Continuation, disclosures, embodiment, invalid, beam

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

When ruling on a motion to dismiss brought under *Fed. R. Civ. P. 12(b)(6)*, the court must accept as true all well-pleaded facts, and give the plaintiff the benefit of all reasonable inferences. Ordinarily, a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment. There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to the plaintiff's claim; or for documents sufficiently referred to in the complaint.

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

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

Motions to dismiss under *Fed. R. Civ. P. 12(b)(6)* test the sufficiency of the pleadings. Thus, when confronted with a motion to dismiss, the court accepts as true all well-pleaded facts and draws all reasonable inferences in favor of the non-moving party. Dismissal is only appropriate if the pleadings, so viewed, fail to support a plausible entitlement to relief. Two underlying principles must guide the court's assessment as to the adequacy of the pleadings to support a claim for relief. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Such conclusory statements are not entitled to the assumption of truth. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. This second principle recognizes that the court's assessment of the pleadings is context specific, requiring the reviewing court to draw on its judicial experience and common sense. Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief.

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

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

HN3[] **Bad Faith, Fraud & Nonuse, Fraud**

A patentee who brings an infringement suit may be subject to antitrust liability for the anticompetitive effects of that suit if the alleged infringer (the antitrust plaintiff) proves (1) that the asserted patent was obtained through knowing and willful fraud or (2) that the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

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

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

HN4[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

The issue whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law. However, issues involving other elements of ***antitrust law*** such as relevant market, market power, damages, etc., which are not unique to patent law, are governed by the law of the regional circuit.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

HN5[] **Pleading & Practice, Motion Practice**

Arguments raised only in a footnote or in a perfunctory manner are waived.

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

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

HN6[] **Bad Faith, Fraud & Nonuse, Fraud**

The first barrier for a Walker Process claimant to clear is the requirement that a patent be obtained through actual fraud upon the U.S. Patent and Trademark Office. This requires higher threshold showings of both materiality and intent than are required to show inequitable conduct. As applied to patent prosecution, fraud requires (1) a false representation or deliberate omission of a fact material to patentability, (2) made with the intent to deceive the patent examiner, (3) on which the examiner justifiably relied in granting the patent, and (4) but for which misrepresentation or deliberate omission the patent would not have been granted.

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

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

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

HN7[] **Bad Faith, Fraud & Nonuse, Fraud**

Fraud-related claims arising in a patent context must be pled with the specificity required by *Fed. R. Civ. P. 9(b)*. This means that the complaint must specify the time, place, and content of an alleged false representation. It also must identify the basis for inferring scienter. Thus, the courts have uniformly held inadequate a complaint's general averment of a defendant's knowledge of material falsity, unless the complaint also sets forth specific facts that make it reasonable to believe that the defendant knew that a statement was materially false or misleading. Where the case involves an alleged failure to disclose information to the U.S. Patent and Trademark Office (PTO), Walker Process and *Rule 9(b)* require that the plaintiff identify with particularity the reference or group of references that, but for their omission from the patentee's patent applications, the PTO would not have granted the applications.

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

HN8[] **Estoppel, Collateral Estoppel**

The principle of collateral estoppel, or issue preclusion, bars relitigation of any factual or legal issue that was actually decided in previous litigation between the parties, whether on the same or a different claim.

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

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

HN9[] **Bad Faith, Fraud & Nonuse, Fraud**

To establish Walker Process fraud, a misrepresentation or omission must evidence a clear intent to deceive the examiner and thereby cause the U.S. Patent and Trademark Office to grant an invalid patent.

Patent Law > US Patent & Trademark Office Proceedings > General Overview

HN10[] **Patent Law, US Patent & Trademark Office Proceedings**

An inventor's opinions regarding a prior art device known to the examiner are not within the domain of material that must be submitted to the U.S. Patent and Trademark Office.

Patent Law > US Patent & Trademark Office Proceedings > General Overview

HN11[] Patent Law, US Patent & Trademark Office Proceedings

Prior art has to be brought to the attention of the patent examiner in an adequate fashion.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN12[] Private Actions, Remedies

A private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, antitrust injury. Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause. A practice is not anticompetitive simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitor's. Rather, a practice is anticompetitive only if it harms the competitive process. It harms that process when it obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

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

HN13[] Conspiracy to Monopolize, Elements

To withstand a motion to dismiss a claim for conspiracy to monopolize, a plaintiff must allege facts showing a specific intent to monopolize.

Counsel: [1]** For Advanced Ion Beam Technology, Inc., Plaintiff: Dion M. Bregman, Michael F. Carr, Michael J. Lyons, LEAD ATTORNEYS, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Palo Alto, CA; John Clayton Everett, Jr., LEAD ATTORNEY, Morgan, Lewis, & Bockius LLP, Washington, DC; Todd S. Holbrook, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, Boston, MA; Daniel Johnson, Jr., LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius LLP, San Francisco, CA.

For Varian Semiconductor Equipment Associates, Inc., Alice W. Enge, Elizabeth Dill, Kenneth H. Purser, Norman L. Turner, Defendants: Christopher G. Lim, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA; Richard W. O'Neill, LEAD ATTORNEY, Wayne L. Stoner, Wilmer Hale LLP, Boston, MA.

Judges: Judith Gail Dein, United States Magistrate Judge.

Opinion by: Judith Gail Dein

Opinion

[*64] Nancy Gertner

Motion to Dismiss after review of Plaintiff's Objections and Defendant's Objections to the Magistrate Judge's Report and Recommendation.

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS

DEIN, U.S.M.J.

I. INTRODUCTION

Plaintiff **[**2]** Advanced Ion Beam Technology, Inc. ("AIBT") has brought this action against the defendants, Varian Semiconductor Equipment Associates, Inc. and the owners of U.S. Patent No. 7,301,156 (the "'156 Patent") (collectively, "Varian"), [1] claiming that Varian engaged in anti-competitive conduct, in violation of the Sherman Act, by filing a baseless patent infringement action (the "infringement action"). More specifically, AIBT asserts that Varian unlawfully attempted to create or maintain a monopoly in the ion implantation equipment market, and block AIBT from entering that market, by attempting to enforce a patent against AIBT that was known by Varian to be invalid and unenforceable because it was procured by fraud on the U.S. Patent and Trademark Office ("PTO").

This matter is presently before the court on "Defendants' Motion to Dismiss Plaintiff's Complaint" (Docket No. 8). For the reasons detailed herein, this court recommends to the District Judge to whom this case is assigned that the motion be ALLOWED IN PART and DENIED IN PART. **[**3]** Specifically, this court recommends that the plaintiff's claim that the defendants misled the PTO in connection with their disclosures concerning U.S. Patent No. 3,541,328 and an article authored by W.K.H. Panofsky, et al. be dismissed for failure to state a claim, as should the plaintiff's claim of conspiracy to monopolize. Since this is the second time the plaintiff has attempted to state a claim based on these grounds, this court recommends that these claims be dismissed with prejudice. However, this court further recommends that the motion to dismiss be denied with respect to plaintiff's claim that the defendants committed fraud on the PTO by failing to disclose a publication by Nicholas White, et al., the Ionex Quad Magnet, an offer by Nicholas White to sell certain technology to Varian, and the identity of Nicholas White as allegedly one of the inventors of the '156 Patent.

Background

Varian initiated the infringement action giving rise to this case on March 25, 2008. By its complaint in that action, Varian alleged that AIBT had infringed, contributed to, or induced infringement of the '156 Patent entitled "Controlling the Characteristics of Implanter Ion-Beams." AIBT responded **[**4]** by denying liability, asserting various affirmative defenses and filing three counterclaims consisting of claims for invalidity, non-infringement and **[*65]** unenforceability. On November 25, 2008, after the parties had engaged in initial discovery, Varian, for reasons that are in dispute, unilaterally granted AIBT a covenant not to sue on the '156 Patent, and moved to dismiss both its claims and AIBT's three counterclaims. Ultimately, the court allowed the parties' joint motion to dismiss, thereby dismissing Varian's claims with prejudice pursuant to its covenant not to sue, and dismissing AIBT's counterclaims with prejudice to the extent that those claims were directed to products that were the subject of Varian's covenant not to sue.

On December 24, 2008, after Varian had granted the covenant not to sue and while the motion to dismiss Varian's claim and AIBT's three counterclaims remained pending, AIBT filed a First Amended Answer and First Amended Counterclaims. Therein, AIBT reasserted its original counterclaims for invalidity, non-infringement and unenforceability, and added five antitrust counterclaims. The additional claims included *Walker Process* claims [2]

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[1] The individual defendants include Norman L. Turner, Kenneth H. Purser, and Alice W. Enge and Elizabeth Dill, as Co-Executrixes of the Estate of Harald A. Enge.

and "sham litigation" claims **[**5]** for monopolization and attempted monopolization, as well as a claim for conspiracy to monopolize. In support of these claims, AIBT alleged among other things that Varian had engaged in monopolization and attempted monopolization by seeking, through the infringement action, to enforce a patent that it knew was obtained by fraud on the PTO, and that it knew was invalid or otherwise unenforceable.

Varian moved to dismiss AIBT's amended counterclaims for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, and on July 20, 2009, this court issued a Report and Recommendation (the "2009 R&R") in which it recommended that Varian's motion be allowed. (See Docket No. 72 in C.A. No. 08-10487). In particular, this court determined that AIBT had failed to allege sufficient facts to establish an antitrust injury and **[**6]** therefore lacked standing to pursue its antitrust counterclaims. This court also concluded that AIBT had failed to allege fraud with sufficient particularity to support its *Walker Process* and "sham litigation" claims, and that AIBT had failed to allege adequate facts to support its claim for conspiracy to monopolize. Accordingly, this court recommended that all of AIBT's counterclaims be dismissed. [3] However, it also concluded that the record did not establish that AIBT would be unable to allege a cause of action. Therefore, this court further recommended that the dismissal be without prejudice. The 2009 R&R was adopted by the District Judge to whom this case is assigned on August 4, 2009.

Instead of filing a motion for leave to amend its counterclaims in the infringement action, AIBT chose to pursue its antitrust claims by filing a new action against Varian. Thus, on August 31, 2009, AIBT filed the instant action against Varian. The **[**7]** Complaint expands the factual allegations, but contains the same five antitrust claims that AIBT had asserted against Varian by way of its counterclaims **[*66]** in the infringement action. Accordingly, AIBT continues to contend that Varian engaged in anti-competitive conduct, in violation of federal ***antitrust law***, by "alleging infringement of a patent that they knew was obtained by fraud on the [PTO]." (Compl. (Docket No. 1) P 1). Varian has again filed a motion to dismiss, asserting that AIBT has failed to cure the deficiencies identified by this court with respect to AIBT's antitrust counterclaims in the infringement action, and that the Complaint in this action should be dismissed on the same grounds articulated in the 2009 R&R.

As detailed below, this court finds that the expanded factual allegations cure some, but not all of the deficiencies in AIBT's original counterclaims. Therefore, this court recommends that Varian's motion to dismiss be ALLOWED IN PART and DENIED IN PART.

II. STATEMENT OF FACTS

HN1[] When ruling on a motion to dismiss brought under *Fed. R. Civ. P. 12(b)(6)*, the court must accept as true all well-pleaded facts, and give the plaintiff the benefit of all reasonable inferences. **[**8]** See *Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999)*. "Ordinarily, a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001)*. "There is, however, a narrow exception 'for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiff['s] claim; or for documents sufficiently referred to in the complaint.'" Id. (quoting *Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993))*. [4] Applying these standards to the instant case, the relevant facts are as follows.

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[2] "A *Walker Process* claim arises when a patentee baselessly institutes litigation to enforce a patent known to be unenforceable because the patent was procured by fraud." *Novo Nordisk of N. Am., Inc. v. Genentech, Inc., 885 F. Supp. 522, 526 (S.D.N.Y. 1995)* (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*.

[3] Because AIBT's counterclaims for invalidity, non-infringement and non-enforceability had been dismissed by the District Court prior to this court's issuance of its R&R, this court addressed only the remaining five antitrust counterclaims in its decision.

[4] Consistent with the relevant standard, this court has considered the documents attached to AIBT's Complaint, as well as the exhibits attached to the Declaration of Christopher G. Lim ("Def. Ex. __"), which is attached to the defendants' memorandum in support of their motion to dismiss. (Docket No. 9). This court has also considered two letters from Kenneth H. Purser to Harald

The Ion Implantation Device Market

Varian manufactures and sells ion beam implantation devices, which are used to implant ions into a target, such as semiconductor wafers, and into materials on glass substrates used in Liquid Crystal Display screens. (Compl. (Docket No. 1) PP 11, 15). AIBT alleges, based on information and belief, that on or about 2003, Varian acquired the technology that is the subject matter of the '156 Patent pursuant to a technology license agreement with the inventors. (Id. P 90). The plaintiff contends, again on information and belief, that "Varian acquired the 156 Patent in an effort to obtain blocking intellectual property rights in order to increase its dominant market share and stifle competition." (Id.).

Varian allegedly has held a dominant position in the ion implantation equipment market since at least 2007, when it controlled 64% of the worldwide market. (Id. PP 16, 98). Moreover, according to AIBT, Varian is one of only three major competitors in the United States, which compete for a billion dollars worth of sales. (Id. P 16). Allegedly, one of the other two competitors is in the process **[**10]** of withdrawing from the market, and the remaining competitor has suffered a substantial reduction **[*67]** in market share. (Id.). AIBT claims that due to Varian's dominant position in the relevant market, it has been able to raise and maintain prices above competitive levels. (Id. P 100).

AIBT contends that there are significant barriers to entry into the ion implantation equipment market, such as the need for large capital costs and advanced technical know-how. (Id. P 97). Additionally, the plaintiff claims that "[i]on implantation equipment is very complicated to design and build and requires long lead times to obtain customer qualification for use in fabrication facilities. There are also very few customers, most of whom are tied to their existing suppliers. This makes it difficult for new competitors to enter the market." (Id. P 17). Notwithstanding these hurdles, AIBT has developed a product called iPulsar, which allegedly "offers the purest ion beam at the optimum beam current." (Id. P 20). AIBT has offered its product for sale, and is in the process of completing customer qualification. (Id.).

The '156 Patent Application

The application that resulted in the '156 Patent was filed on June **[**11]** 16, 2005, and the Patent was issued on November 27, 2007. (Id. PP 22, 28). The named inventors include defendants Kenneth H. Purser ("Purser"), Harald A. Enge ("Enge") and Norman L. Turner ("Turner") (collectively, the "defendant inventors"). (Compl. Ex. A at p.1). The '156 Patent issued from a continuation of U.S. Patent Application No. 11/154,085 (the "'085 Continuation Patent Application"), which claimed the benefit of U.S. Patent Application No. 10/619,702 (the "'702 Patent Application") filed on July 15, 2003. (Compl. PP 23, 25). The '702 Patent Application in turn claimed the benefit of U.S. Patent Application No. 60/396,322 (the "'322 Provisional Application"), which was filed on July 17, 2002. (Id. PP 23, 24).

The PTO allowed the claims in the '156 Patent because the Patent Examiner could not find a number of features of the claimed invention in the prior art. (Id. P 31; Compl. Ex. B at 2-5). Those features included but were not limited to "an upper magnetic core member," "a lower magnetic core member spaced apart from said upper core member," and "a plurality of focusing coil units distributed along" the core members. (Id.). AIBT claims that features of this "dual bar system" **[**12]** described in the '156 Patent were disclosed in the prior art, but that the Examiner was unable to find them due to the defendants' intentional misrepresentations and omissions. (See Compl. PP 32-33). In particular, AIBT alleges, based on information and belief, that

> since at least 2002 the Defendant inventors were aware of material prior art affecting the patentability of the claims applied for. The Defendant inventors included false and misleading statements regarding known invalidating prior art in their 322 Provisional Application, filed on July 17, 2002. The Defendant inventors repeated these same false and misleading statements in their 702 Patent Application, filed on July 15, 2003, as well as in their continuation application filed on June 16, 2005. Moreover, during the prosecution of the 702

A. Enge dated October 3, 2002 and February 12, 2003. Those letters are described **[**9]** in the Complaint and were submitted to the court during oral argument.

> Patent Application and the 085 Continuation Application which resulted in the 156 Patent, the Defendant inventors intentionally decided not to disclose their knowledge that certain inventions, including the dual bar configuration being claimed in the 085 Continuation Application, were not patentable in light of known prior art.

(Compl. P 29). As detailed below, the plaintiff contends that **[**13]** the alleged misstatements and omissions concerned U.S. Patent No. 3,541,328 (the "'328 Patent") **[*68]** that had been issued to Enge in 1970, as well as publications by Nicholas White, et al. and W.K.H. Panofsky, et al., a lens for ion beam control commonly known as the "Quad Magnet," an offer by Nicholas White to sell certain technology to Varian, and the identity of the inventors of the '156 Patent.

Alleged Misrepresentations Concerning the '328 Patent

The record shows that each of the applications submitted to the PTO contained references to the '328 Patent, and that the Patent Examiner considered the '328 Patent in connection with the issuance of the '156 Patent. (See Compl. Exs. E at 5 and G at 5; Def. Exs. 1-3). Nevertheless, AIBT alleges that the defendant inventors misled the PTO regarding the significance and scope of the '328 Patent.

AIBT claims, based on information and belief, that the inventors knew the '328 Patent anticipated one or more of the pending claims of the '156 Patent, but submitted Inventor Declarations to the PTO in which they attested that they were the true inventors of the subject matter claimed in the '156 Patent. (Compl. P 34). AIBT's belief is based upon two letters **[**14]** that Purser sent to Enge years before the issuance of the '156 Patent. (Id. PP 36-37). The first letter, which is dated October 3, 2002, provides in relevant part as follows:

> I have been talking to Varian about the possibility of acquiring the patents that we have worked on during the last year ....
>
> One of the things that they are concerned about is whether there may be patent problems. Some time ago Vandepot or Berrian went to Varian wanting to sell intellectual property, which included some type of focusing element probably that I sense was centered around your dual bar-type quadrupole system, described in your 1970 patent 3,541,328.
>
> Although our patent application, which has been filed as a provisional in the form that is attached, is based upon the Panofsky frame structure, the feature that distinguishes our system from Panofsky's is the inclusion of a multiplicity of independent windings that can be [sic] independently excite a variety of correcting fields. (see claims 1, 9 and 10).
>
> ... When I reviewed your 1970 patent 3,541,328 it clearly refers to a plurality of coil units (claim 5) and a plurality of power supplies. So that for us to claim this feature, as **[**15]** applied to a dual bar structure, as a feature of our most recent invention, is not possible ....

(Ltr. from Purser to Enge dated 10/03/02; see also Compl. P 36). The second letter, dated February 12, 2003, reads in relevant part:

> A review of a patent by you ... has turned up the distressing fact that while figure 6 within the patent shows individual multipole windings wound across the whole length of the corrector each of which is driven by an individual dedicated power supply, claim 4 clearly states that the currents through each of the individual primary coil modules is independently controllable.
>
> While I guess that this feature was never incorporated into an actual manufactured spectrograph, finding this claim at this late hour is unfortunate for our negotiations. The words, written so long ago, eliminate a major unique feature of the patent we have filed and are presently negotiating with Varian to purchase.

(Ltr. from Purser to Enge dated 2/12/03; see also Compl. P 37).

AIBT alleges that the inventors intentionally misled the PTO by failing to disclose **[*69]** their understanding, as revealed by the letters, that one or more of the claims of the '156 Patent were anticipated by the '328 Patent. **[**16]** (Compl. P 43). Additionally, the plaintiff claims that the inventors intentionally deceived the PTO when they executed the Inventor Declarations attesting to their status as the true and only inventors of the inventions claimed in the '156 Patent. (Id. P 38). According to AIBT, the PTO reasonably relied on the false and misleading statements and Declarations, and would not have issued the '156 Patent with coverage that included the dual bar system described therein if the inventors had not misled it about the '328 Patent. (Id. PP 41-42, 44).

In addition to its claims that the inventors misled the PTO concerning their belief that claims of the '156 Patent were anticipated by the '328 Patent, AIBT alleges that the inventors deliberately misrepresented the scope of the '328 Patent to the PTO. In particular, AIBT alleges that during the prosecution of the '156 Patent, questions were raised as to whether the prior art included "apparatus[es] used for ion implanting comprising: a structure of magnetic material with an upper core and a lower core having long dimensions between their ends and with parallel axis" and having "a plurality of independent current excited coil units." (Id. P 45 (quotations **[**17]** and citation omitted)). According to the plaintiff, the defendants were aware that the '328 Patent describes coils that are independently powered and controllable. (Id. P 47). However, because of the defendants' alleged misrepresentations, the PTO Examiner was unable to find this feature in the prior art. (Id. P 49).

AIBT contends that the defendant inventors carried out their deception by altering their description of the '328 Patent in the '085 Continuation Patent Application. [5] (Id. P 46). Originally, in their '322 Provisional Application, the inventors described Figure 6 of the '328 Patent as follows: "Referring to figure 6 of [the '328 Patent] it can be seen that for at least one embodiment the coils for each multipole are connected in series and powered as a single unit." (Compl., Ex. E at 5). According to AIBT, the defendants' use of the phrase "for at least one embodiment" illustrates their awareness that the '328 Patent describes two embodiments: one shown in Figure 6, and a second, more relevant embodiment, which is depicted in Figures 4 and 5 and described in Claim 4 of the '328 Patent as an apparatus "'wherein said variable magnetic means is arranged so that the current **[**18]** in each of said plurality of electromagnet means is independently controllable.'" (Compl. P 46 (emphasis in original)). However, in their '085 Continuation Patent Application, the defendant inventors altered their description of the prior art by removing the phrase "for at least one embodiment" and describing Figure 6 of the '328 Patent as follows: "Specifically, in figure 6 of this patent it can be seen the coils for each multipole are connected in series and powered as a single unit." (Compl., Ex. G at 5). AIBT contends that by doing so, the inventors misleadingly suggested to the PTO "that the '328 Patent as a whole only describes coils that must be powered as a single unit" and prevented the Patent Examiner from discovering that the prior art disclosed a dual bar system with coils that are independently powered and controllable. **[*70]** (Compl. PP 47, 49). It further claims that the PTO "would not have issued the 156 Patent with coverage that included the dual bar system as described in the 156 Patent" if the defendant inventors had not made these alleged misrepresentations. (Id. P 50).

Alleged Misrepresentations Regarding the White and Panofsky Publications

AIBT also claims that the defendant inventors made misrepresentations and omissions regarding a 1999 article by Nicholas White, et al. entitled "The Control of Uniformity in Parallel Ribbon Ion Beams up to 24 Inches in Size" (the "White Reference") and an article by L.N. Hand and W.K.H. Panofsky entitled "Magnetic Quadrupole with Rectangular Aperture" (the "Panofsky Reference"), which was published in 1959. (Id. PP 51-61; see also Compl. Exs. H & I). The record shows that the defendant inventors referred to both the White Reference and the Panofsky Reference in the specification of the '156 Patent, and that the inventors listed the Panofsky Reference on disclosure statements filed with the PTO. (Id. P 51; Compl. Ex. 1 at Col. 2, ll. 24-27; Def. Exs. 2 & 3). Nevertheless, the plaintiff **[**20]** contends that the defendant inventors failed to disclose these materials to the PTO as prior art and made material misrepresentations regarding their scope. (Compl. P 61).

AIBT claims that the White Reference discusses ion implantation devices comprised of "a structure of magnetic material with an upper core and a lower core having long dimensions between their ends and with a parallel axis

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[5] Although the plaintiff alleges that the defendants misled the PTO by changing their description of the **[**19]** '328 Patent in the "'702 Patent Application," the exhibits attached to the Complaint demonstrate that the defendants changed their description of the '328 Patent in the '085 Continuation Patent Application. (See Compl. PP 46-47; Compl. Exs. E at 5 and G at 5). This court has construed AIBT's allegations in accordance with the exhibits.

and having a plurality of independent current excited coil units." (Id. P 51). It further claims that despite their knowledge of the White Reference, the defendant inventors misled the PTO about the contents and scope of the article in the '156 Patent specification and otherwise failed to disclose the relevant portions of the Reference to the PTO. (Id. PP 53-55). Specifically, AIBT alleges that the full White Reference "was and remains material to the patentability of the 156 Patent" but that "[t]he Defendant inventors intentionally failed to disclose this reference to the PTO as required by *37 C.F.R. § 1.56(a)* [6] [R-2] in any Information Disclosure Statement PTO form 1449, including those filed on August 25, 2005 and November 7, 2006." (Id. PP 54-55). It also alleges, based on information and belief, **[**21]** that "the Defendant inventors intentionally failed to provide the PTO with a complete copy of this material reference." (Id.).

The Complaint contains nearly identical allegations concerning the Panofsky Reference. (See id. PP 56-60). Thus, AIBT claims that although the Panofsky Reference disclosed the same types of devices as the White Reference, and was material to the patentability of the '156 Patent, the defendant inventors misrepresented the contents and scope of the Panofsky Reference in their patent specification, and intentionally failed to disclose it to the PTO in connection with the patent application process. (Id.). AIBT contends that as a result of the defendant inventors' intentional misrepresentations and omissions regarding the White and Panofsky References, the PTO was unaware that the prior art disclosed a dual bar system with coils that are independently powered and controllable, and the defendant inventors were able "to fraudulently obtain **[**22]** issuance of the 156 Patent." (Id. PP 61, 63). It also asserts **[*71]** that the PTO "would not have issued the 156 Patent with coverage that included the dual bar system as described in the 156 Patent" if the defendant inventors had not misled it about these publications or if they had provided full copies of the References to the PTO. (Id. P 64).

Alleged Omissions Concerning the Quad Magnet and Offer to Sell Technology

In addition to the alleged misrepresentations and omissions described above, AIBT claims that the defendants acted fraudulently by failing to disclose material prior art known as the "Quad Magnet" and by failing to disclose information regarding Nicholas White's offer to sell Varian certain technology, which AIBT refers to as the "White 2 Bar Lens." It asserts that the PTO would not have issued the '156 Patent with coverage that included the dual bar system described in the Patent if the defendants had provided this information to the PTO. (Id. PP 73, 86).

According to the plaintiff, the Quad Magnet is a rectangular lens used for ion beam control, "which allowed the user to steer, deflect, or focus an ion beam, and to shut-off current to the excitable coils wrapping the short **[**23]** parallel magnetic cores that separated and joined the long parallel magnetic cores of the lens frame." (Id. P 65). AIBT claims that the Quad Magnet was manufactured and sold by General Ionex Corporation, a company that AIBT believes was founded and run by defendant Purser. (Id.). Purser allegedly sold a Quad Magnet to Nicholas White ("White") in 1984. (Id. P 66).

AIBT contends that the Quad Magnet was and remains material to the patentability of the '156 Patent because it anticipates or renders obvious the invention disclosed in the '156 Patent. (Id. PP 67-68). In particular, it alleges that the Quad Magnet discloses features that are found in the claimed invention, including "an upper magnetic core member, a lower magnetic core member, and a plurality of focusing coil units distributed along these core members." (Id. PP 71-72 (internal quotations omitted)). AIBT claims that despite Purser's and the other inventors' knowledge that the Quad Magnet constituted material prior art, they intentionally failed to list it on their disclosure statements filed with the PTO. (Id. P 69). According to the plaintiff, the defendant inventors were able to obtain issuance of the '156 Patent as a result **[**24]** of this omission. (Id. P 70).

The White 2 Bar Lens was invented by White and allegedly consists of "an apparatus for focusing, deflecting and aberration-correcting of ion optical components comprising a structure manufactured from only two magnetic cores." (Id. P 74). AIBT alleges that in about February 2003, White authored a PowerPoint presentation in which he

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[6] *37 C.F.R. § 1.56(a)* addresses the duty of "[e]ach individual associated with the filing and prosecution of a patent application … to disclose to the [PTO] all information known to that individual to be material to patentability …."

described the White 2 Bar Lens, and that on March 6, 2003, White delivered the PowerPoint presentation to Varian, thereby disclosing his invention to the defendants. (Id. PP 76-77). AIBT further alleges that from February to August 2003, White offered to sell the technology to Varian. (Id. P 78). Thus, Varian allegedly became aware of the invention, and White's offer to sell, prior to the July 15, 2003 priority date of the claims of the '156 Patent. (Id. P 80).

AIBT asserts that White's offer to sell "anticipates or renders obvious the purported invention(s) disclosed in the 156 Patent because it described an invention described in the 156 Patent, and, as such, was and remains highly material to the patentability of the 156 Patent." (Id. P 81). In particular, AIBT claims that as in the case of the Quad Magnet, the White 2 Bar **[**25]** Lens discloses "an upper magnetic core member, a lower magnetic core member **[*72]** spaced apart from said upper core member, and a plurality of coil units distributed along these core members." (Id. P 84 (internal quotations omitted)). Furthermore, AIBT contends that the defendants intentionally failed to include White's offer to sell his technology on its disclosure statements, as required by *37 C.F.R. § 1.56(a)*. (Id. P 82). According to the plaintiff, the defendant inventors were able "to fraudulently obtain issuance of the 156 Patent" as a result of this omission. (Id. PP 82-83).

Alleged Misrepresentations Regarding Identity of Inventors

Finally, AIBT claims that the defendant inventors misled the PTO by failing to identify White as one of the inventors of the subject matter claimed in the '156 Patent. Specifically, AIBT alleges that the defendants "knew, or should have known, that Nicholas White contributed to the conception of at least one claim limitation of the 702 Patent Application, the 085 Continuation Patent Application, and the 156 Patent." (Id. P 88). It further alleges, based upon information and belief, that the defendant inventors deliberately and knowingly, and with an intent **[**26]** to deceive the PTO, omitted to list White as a contributing inventor during prosecution of the '156 Patent, and failed to correct their omission thereafter. (Id. P 87). AIBT contends that as a result, Varian knew that the '156 Patent was unenforceable at the time it filed the infringement action. (Id. P 89).

The Infringement Action

As indicated above, Varian initiated its infringement action against AIBT on March 25, 2008. (See Docket No. 1 in C.A. No. 08-10487-NG). AIBT alleges, based on information and belief, that at the time it filed its lawsuit, Varian was aware that the defendant inventors had procured the '156 Patent by fraud on the PTO and that the Patent was invalid. (Compl. PP 91-93). However, Varian allegedly elected to proceed with the lawsuit in order to block AIBT, a start-up company, from competing in the ion beam equipment market and to preserve or increase its monopoly position in that market. (Id. PP 91, 101). In fact, according to the plaintiff, Varian filed the infringement action almost immediately after AIBT's only existing customer, Taiwan Semiconductor Manufacturing Company Limited ("TSMC"), agreed to purchase iPulsar equipment from AIBT. (Id. P 102). AIBT claims **[**27]** that TSMC is one of the biggest and most important customers in the market for ion beam equipment, and that AIBT competes directly with Varian for TSMC's business. (Id.).

At issue in this case is whether AIBT has alleged that it suffered antitrust harm as a result of Varian's infringement action. As detailed above, Varian's claims against AIBT in that action were dismissed with prejudice pursuant to a covenant not to sue. (See Docket No. 62 in C.A. No. 08-10487-NG). Nevertheless, AIBT alleges that it suffered harm because "the Defendants' baseless suit delayed AIBT's entry into the relevant market." (Compl. P 103).

Specifically, the plaintiff alleges that as a result of Varian's infringement action, its sole customer, TSMC, required the plaintiff to perform an in-depth analysis of its iPulsar product in order to demonstrate that there were no infringement issues. (Id. P 104). AIBT claims that this requirement delayed qualification of its product, and consequently, postponed AIBT's entry into the ion beam equipment market. (Id. PP 103-104). Additionally, AIBT allegedly had to divert personnel from its work integrating the iPulsar into TSMC's system in order to respond to Varian's infringement **[**28]** claims. (Id.). Thus, Varian's infringement action allegedly hindered AIBT's **[*73]** ability to provide TSMC with technical service and assistance. (Id. P 103).

Although TSMC was AIBT's only existing customer, the plaintiff alleges that Varian's infringement action also caused delay in the potential sale to an entity known as PowerChip Semiconductor Corporation ("PSC"). (Id. P 105). Specifically, AIBT claims that in 2008, it provided PSC with a demonstration plan of the iPulsar product. (Id.). However, due to PSC's concerns about AIBT's possible infringement of the '156 Patent, the demonstration plan was not activated until after the infringement action was dismissed. (Id.).

AIBT contends that the alleged delays caused by Varian's infringement action

> caused injury to AIBT and the relevant market by: (1) subjecting AIBT to the costs and burdens of defending itself against a patent infringement action based on the fraudulently-procured and invalid 156 Patent, the costs associated with providing its customer an analysis of AIBT's technology, and the costs created by AIBT's delayed entry into the relevant market, (2) creating doubt in the minds of AIBT's sole current customer, (3) causing delay to **[**29]** AIBT's negotiations with its sole current customer and slowing down AIBT's technical service and assistance to its sole current customer and the progress of research and development by depleting AIBT's human resources, (4) hindering AIBT's ability to convince its sole current customer to accept and purchase AIBT's product, thereby damaging AIBT's relationship with its sole current customer, which may ultimately prevent the qualification of AIBT's current product, and therefore, eliminate AIBT's current product from the market-place, (5) potentially preventing the introduction of a superior product with lower sale price into the marketplace, and (6) providing Defendant Varian with the ability to raise and maintain prices above competitive levels.

(Id. P 103). According to AIBT, it was only after the court dismissed Varian's infringement claims against it that TSMC began to accept its iPulsar product and PSC resumed its interest in evaluating AIBT's product. (Id. P 106).

Additional factual details relevant to this court's analysis are described below.

III. ANALYSIS

A. Motion to Dismiss Standard of Review

HN2[] Motions to dismiss under *Rule 12(b)(6)* test the sufficiency of the pleadings. Thus, when **[**30]** confronted with a motion to dismiss, the court accepts as true all well-pleaded facts and draws all reasonable inferences in favor of the non-moving party. *Cooperman, 171 F.3d at 46*. Dismissal is only appropriate if the pleadings, so viewed, fail to support "'a plausible entitlement to relief.'" *Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559, 127 S. Ct. 1955, 1967, 167 L. Ed. 2d 929 (2007))*.

Two underlying principles must guide the court's assessment as to the adequacy of the pleadings to support a claim for relief. *Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009)*. "'First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.' Such conclusory statements are 'not entitled to the assumption of truth.'" Id. (quoting *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009))* (internal citations omitted). "Second, only a **[*74]** complaint that states a plausible claim for relief survives a motion to dismiss." Id. **[**31]** (quoting *Ashcroft, 129 S. Ct. at 1950*). "This second principle recognizes that the court's assessment of the pleadings is 'context specific,' requiring 'the reviewing court to draw on its judicial experience and common sense.' '[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not show[n] -- that the pleader is entitled to relief.'" Id. (quoting *Ashcroft, 129 S. Ct. at 1950*) (internal quotations and citation omitted; alterations in original).

B. Sufficiency of AIBT's Fraud Allegations

Under the law of the Federal Circuit,

> HN3[] [a] patentee who brings an infringement suit may be subject to antitrust liability for the anti-competitive effects of that suit if the alleged infringer (the antitrust plaintiff) proves (1) that the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. at 350, 15 L. Ed. 2d 247, 147 USPQ 404, 407 (1965)*, or (2) that the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of **[**32]** a competitor.

Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998) (quotations and citations omitted). [7] In the instant case, AIBT claims that Varian is liable for *Walker Process* fraud and "sham litigation" because it attempted by way of its infringement action to enforce a patent that was procured by fraud on the PTO. (See Compl. PP 1, 90-93). By its motion to dismiss, Varian contends that all of AIBT's antitrust claims must be dismissed because AIBT has failed to plead fraud with particularity. For the reasons that follow, this court concludes that AIBT's allegations regarding the '328 Patent and the Panofsky Reference are insufficient to support a claim of fraud on the PTO, but that the plaintiff has stated a claim for fraud based on the defendants' alleged failure to disclose the White Reference, the Quad Magnet, White's offer to sell, and White's identity as an inventor. [8]

[*75] **Requirements for Pleading Fraud**

HN6[] "The first barrier for a *Walker Process* claimant to clear is the requirement that the patent be obtained through actual fraud upon the PTO." *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1346 (Fed. Cir. 2007)*. This requires "higher threshold showings of both materiality and intent than are required to show inequitable **[**35]** conduct." Id. Accordingly,

> [as a]pplied to patent prosecution, fraud requires (1) a false representation or deliberate omission of a fact material to patentability, (2) made with the intent to deceive the patent examiner, (3) on which the examiner justifiably relied in granting the patent, and (4) but for which misrepresentation or deliberate omission the patent would not have been granted.

C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998).

Additionally, "[i]t is undisputed that HN7[] fraud-related claims arising in a patent context must be pled with the specificity required by *Fed. R. Civ. P. 9(b)*." *The Hertz Corp. v. Enter. Rent-A-Car Co., 557 F. Supp. 2d 185, 194 (D. Mass. 2008)*. This "means that [the] complaint must specify the time, place, and content of an alleged false

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[7] HN4[] The issue "whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law." *Nobelpharma AB, 141 F.3d at 1068*. However, "issues involving other elements of ***antitrust*** **[**33]** ***law*** such as relevant market, market power, damages, etc.," which "are not unique to patent law," are governed by the law of the regional circuit. Id.

[8] In arguing that all of AIBT's antitrust claims are subject to dismissal for failure to plead fraud with particularity, Varian makes no distinction between AIBT's *Walker Process* claims and its sham litigation claims. (See Def. Mem. (Docket No. 9) at 10). Similarly, AIBT has made no such distinction in the body of its memorandum in opposition to the motion to dismiss, arguing instead that its Complaint contains sufficient allegations to plead fraud on the PTO. (See Pl. Opp. Mem. (Docket No. 11) at 6-15). Contrary to its position in the earlier litigation, AIBT argues in a footnote that the standards for these claims differ, and that it is not required to establish fraud in order to prevail on its sham litigation claims. (See id. at 7 n.3). However, the First Circuit has "repeatedly held that HN5[] arguments raised only in a footnote or in a perfunctory manner are waived." *Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 61 n.17 (1st Cir. 1999)*, aff'd sub nom. *Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000)*. **[**34]** See also *Redondo-Borges v. U.S. Dep't of Housing & Urban Dev., 421 F.3d 1, 6 (1st Cir. 2005)* ("Few principles are more sacrosanct in this circuit than the principle that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'") (quoting *United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)*). Accordingly, AIBT's passing argument is insufficient to warrant separate analyses of AIBT's fraud claims and its sham litigation claims. In any event, it is clear from the Complaint that the factual basis for all of AIBT's claims is that Varian, by its infringement action, was attempting to enforce a patent that it knew had been obtained by fraud on the PTO. (See Compl. PP 90-93). Therefore, the parties' arguments relating to AIBT's fraud claims control the sham litigation claims as well.

representation." U.S. ex rel. Gagne v. City of Worcester, 565 F.3d 40, 45 (1st Cir. 2009) (quotations and citations omitted). It also must identify "the basis for inferring scienter." N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 13 (1st Cir. 2009). Thus, "[t]he courts have uniformly held inadequate a complaint's general averment of the defendant's 'knowledge' of material **[**36]** falsity, unless the complaint *also* sets forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading." Id. (citations omitted). Furthermore, where, as here, the case involves an alleged failure to disclose information to the PTO, "*Walker Process* and FRCP 9(b) require" that the plaintiff "identify with particularity the reference or group of references that, but for their omission from [the patentee's] patent applications, the PTO would not have granted the applications." Netflix, Inc. v. Blockbuster, Inc., No. C 06-02361 WHA, 2006 U.S. Dist. LEXIS 63154, 2006 WL 2458717, at *4 (N.D. Cal. Aug. 22, 2006).

Allegations Concerning the '328 Patent

Varian contends that AIBT's allegations regarding the '328 Patent do not allege fraud as a matter of law because the inventors disclosed and accurately described the '328 Patent to the PTO. [9] This **[*76]** court agrees, and finds that the plaintiff cannot sustain a claim based on allegations that the inventors misled the PTO about the '328 Patent.

As described above, AIBT claims that the defendant inventors engaged in fraud by filing false Inventor Declarations with the PTO. It claims **[**38]** that the Declarations were false and misleading because by executing them, the individual defendants attested to their status as the true inventors of the '156 Patent even though they knew that one or more of the claims contained therein was anticipated by the '328 Patent. This court finds that any suggestion that the defendants were attempting to mislead or otherwise deceive the PTO by their conduct in filing the Inventor Declarations is defeated by the undisputed fact that they disclosed the '328 Patent to the PTO, and the Patent Examiner considered the '328 Patent before allowing the claims of the '156 Patent.

The record shows that the defendant inventors disclosed the '328 Patent in each of the applications that they submitted to the PTO, and in disclosure statements filed with the PTO. (See Compl. Exs. E at 5 and G at 5; Def. Exs. 1-3). The inventors even alerted the PTO to the fact that the '328 Patent described a "dual rod design" similar to the alleged configuration of the invention of the '156 Patent. (See Def. Ex. 1 at 5). In addition, the record shows that on March 31, 2005, and again on March 4, 2007, the Patent Examiner initialed references to the '328 Patent on the defendants' **[**39]** disclosure statements. (Def. Exs. 2-3). These facts compel the presumption "that the examiner did consider the reference." Molins PLC v. Textron, Inc., 48 F.3d 1172, 1184 (Fed. Cir. 1995). See also C.R. Bard, Inc., 157 F.3d at 1366-67 (rejecting charge of fraud where prosecution history revealed that patent holder disclosed prior art before issuance of patent and patent examiner initialed that he had considered the reference). Thus, the PTO was able to make a determination, based on the defendant inventors' own disclosures of the prior art, as to whether the '328 Patent anticipated the claims of the '156 Patent. Under these circumstances, the plaintiff has not stated a plausible claim that the defendant inventors, by signing and filing the Inventor Declarations, were attempting to deceive the PTO regarding the significance of the '328 Patent. See Nobelpharma AB, 141 F.3d at 1070 (**HN9**[]) to establish *Walker Process* fraud, "a misrepresentation or omission must evidence a clear intent to deceive the examiner and thereby cause the PTO to grant an invalid patent").

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[9] In its Reply memorandum, Varian suggests that collateral estoppel, or issue preclusion, applies to AIBT's claims concerning the '328 Patent "because AIBT has not added any substantively **[**37]** new facts or arguments about the '328 patent beyond those already held insufficient as a matter of law to allege fraud[.]" (Def. Reply Mem. (Docket No. 15) at 4-5). This court disagrees. The Complaint contains new factual allegations regarding the '328 Patent, including facts regarding the substance of two letters from Purser to Enge, as well as facts regarding the changes to the description of Figure 6 of the '328 Patent. No such allegations were included in Varian's counterclaim in the infringement action, and this court has not previously considered whether they support AIBT's claims of fraud on the PTO. Accordingly, application of collateral estoppel principles would not be appropriate. See ***Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 51 (1st Cir. 1997)*** (**HN8**[]) "The principle of collateral estoppel, or issue preclusion … bars relitigation of any factual or legal issue that was *actually* decided in previous litigation between the parties, whether on the same or a different claim.") (emphasis in original; quotations and citations omitted).

AIBT's reliance on the October 3, 2002 and February 12, 2003 letters from Purser to Enge does not compel a different conclusion. ***HN10***[] "An **[**40]** inventor's opinions regarding a prior art device known to the examiner are not within the domain of material that must be submitted to the PTO." *Mentor H/S, Inc. v. Med. Device Alliance, Inc., 244 F.3d 1365, 1378 (Fed. Cir. 2001)*. Therefore, the defendants' conduct in submitting the Inventor Declarations without divulging any earlier doubts about the patentability of their invention did not render their statements to the PTO misleading. See id. (district court erred by inferring an intent to deceive PTO based on applicant's failure to provide **[*77]** PTO with inventor opinions about prior art device). [10]

Nor do AIBT's allegations regarding the inventors' removal of the phrase "for at least one embodiment" from their description of Figure 6 of the '328 Patent support a plausible claim of fraud on the PTO. To the extent AIBT claims that the defendants chose to describe a less relevant embodiment, while remaining silent about other, more relevant embodiments, "[AIBT] has provided no support for the proposition that a patent holder who discloses a reference to the PTO can be found liable for *Walker Process* fraud solely based on an alleged failure to bring every detail of the disclosed reference to the examiner's attention." *Chip-Mender, Inc. v. Sherwin-Williams Co., No. C 05-3465 PJH, 2006 U.S. Dist. LEXIS 2176, 2006 WL 13058, at *7 (N.D. Cal. Jan. 3, 2006)*. Moreover, to the extent AIBT contends that the defendants' removal of language from the '085 Continuation Patent Application constituted an affirmative effort to deceive the Patent Examiner regarding the scope of the invention, **[**42]** this too is insufficient to support a claim of fraud on the PTO in this case. The inventors' original description of Figure 6 was before the PTO as part of the '322 Provisional Application, and nothing about the inventors' altered description of Figure 6 in their '085 Continuation Patent Application suggests that the '328 Patent describes only one embodiment. (See Compl. Exs. E at 5; G at 5). Moreover, as detailed above, it is undisputed that the entire Patent was before the PTO, and that the Patent Examiner considered it. Thus, the Patent Examiner would have seen that the '328 Patent describes more than one embodiment, including the alleged "more relevant embodiment" depicted in Figures 4 and 5, which appear on the same page of the Patent as Figure 6. (See Compl. Ex. F; Compl. P 46).

The facts alleged in this case are not analogous to the circumstances described in *Semiconductor Energy Lab. Co. v. Samsung Elecs. Co., 204 F.3d 1368 (Fed. Cir. 2000)*, on which AIBT relies. In Semiconductor Energy Lab., the applicant submitted a 29-page reference in its original Japanese, "along with a one-page, partial translation focusing on less material portions and a concise statement directed to **[**43]** these less material portions[.]" *Id. at 1377*. Based on this conduct, the court determined that the applicant had "left the examiner with the impression that the examiner did not need to conduct any further translation or investigation", and it concluded that the applicant had "deliberately deceived the examiner" and "constructively withheld the reference from the PTO." Id. The court also rejected the applicant's contention that the patent examiner must have read and understood the untranslated reference, stating

> [t]hough the examiner is indeed presumed to have done his job correctly, there is no support in the law for a presumption that the examiner will understand foreign languages such as Japanese or will request a costly complete **[*78]** translation of every submitted foreign language document, particularly in the absence of any reason to do so. Rather, as MPEP § 609C(2) reveals, the examiner's understanding of a foreign reference is generally limited to that which he or she can glean from the applicant's concise statement ….

Id. No similar situation would have restricted the Patent Examiner's ability to review the entire '328 Patent in this case, and there are no alleged facts to defeat **[**44]** the presumption that the Patent Examiner did just that.

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[10] The Inventor Declarations submitted to the PTO in this case are not comparable to declarations submitted to the PTO in *eSpeed, Inc. v. Brokertec USA, L.L.C., 480 F.3d 1129 (Fed. Cir. 2007)*, on which AIBT relies. There the court upheld the district court's conclusion that there was an intent to deceive the PTO where the applicant had filed a "blizzard of paper" describing the prior art, along with a declaration containing "an outright false statement" regarding that art. *eSpeed, Inc., 480 F.3d at 1137-38*. Here, the plaintiff alleges that the Declarations were false only because they were **[**41]** inconsistent with an opinion that had been expressed by an inventor, which opinion was not required to be disclosed to the PTO. Moreover, as detailed above, the facts provided to the PTO regarding the '328 Patent were not "outright false."

The plaintiff points to other cases in which the courts have found fraud based on the misleading disclosures of English language references. However, the applicants' deceptive conduct in those cases consisted of burying the most pertinent prior art among large volumes of less relevant prior art. See *eSpeed, Inc. v. BrokerTec USA, L.L.C., 480 F.3d 1129, 1137 (Fed. Cir. 2007)* ("blizzard of paper" submitted to PTO in conjunction with declaration containing outright false statement regarding significance of prior art "left the examiner with the impression that the examiner did not need to conduct any further … investigation") (quotations and citation omitted; punctuation in original); *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc., 837 F. Supp. 1444, 1477 (N.D. Ind. 1992)* (holding that it is "a violation of the duty of candor and fair dealing with the [PTO] for an applicant … to disclose a pertinent prior art patent reference to the examiner in such a way as to 'bury' it or its disclosures in a series of disclosures of less relevant prior art references, so that the examiner would be likely to ignore the entire list **[**45]** and permit the application to issue"), aff'd, *11 F.3d 1072 (Fed. Cir. 1993)*; *Penn Yan Boats, Inc. v. Sea Lark Boats, Inc., 359 F. Supp. 948, 964-65 (S.D. Fla. 1972)* (failure to cite most pertinent prior art, and attempt "to bury" relevant patent "in a long list of allegedly old prior art patents in the hope that the Patent Examiner … would ignore the list and permit the [applicant's] patent to issue" constituted deliberate misrepresentations to the patent office), aff'd, *479 F.2d 1328 (5th Cir. 1973)*. No such comparable conduct has been alleged here with respect to the '328 Patent. Accordingly, this court concludes that AIBT's allegations regarding the '328 Patent do not state a claim for fraud.

Allegations Regarding Other Prior Art References

Varian argues that this court should dismiss AIBT's fraud claims to the extent that they rely on allegations concerning the White and Panofsky References, the Quad Magnet, White's offer to sell and the failure to disclose White as an inventor. Specifically, it contends that the court has already considered these allegations in connection with the motion to dismiss AIBT's counterclaims in the infringement action, and found them insufficient to support **[**46]** a claim for fraud. (Def. Mem. at 14-15). Furthermore, Varian asserts that in any event, AIBT has failed to allege facts showing that the defendants "misrepresented or omitted material facts concerning these items with the specific intent to deceive the PTO." (Id. at 15). AIBT's Complaint, including its allegations relating to the various prior art references, is more detailed than its counterclaims in the infringement action. Moreover, in contrast to its memorandum in opposition to the motion to dismiss its counterclaims in the prior action, in the instant case AIBT has specifically addressed all of the prior art references, and not simply the '328 Patent, in its brief in opposition to the present motion to dismiss. Thus, the issue as to the sufficiency of the allegations regarding these other prior art references is squarely before the court for the first time **[*79]** here, and this court finds that it is appropriate to address it. For the reasons detailed below, this court concludes that the plaintiff's allegations regarding the Panofsky Reference fail to support a claim of fraud on the PTO, but its allegations regarding the remaining references are adequate to survive Varian's motion to **[**47]** dismiss.

The Panofsky Reference is attached as Exhibit I to the Complaint. It consists of an article entitled "Magnetic Quadrupole with Rectangular Aperture," which was written by L.N. Hand and W.K.H. Panofsky, and was published in the October 1959 issue of The Review of Scientific Instruments at Volume 30, Number 10. (Compl. Ex. I). Notwithstanding the plaintiff's allegations to the contrary, the record establishes that the defendant inventors included the Panofsky Reference on their list of prior art references disclosed to the PTO, and that the Patent Examiner considered it in connection with the application for the '156 Patent. (Def. Exs. 2-3). For the reasons detailed previously with respect to the '328 Patent, these facts belie the plaintiff's claim that the defendant inventors intended to mislead the PTO and defeat the plaintiff's effort to allege fraud on the PTO.

With respect to the White Reference, it is undisputed that the defendant inventors discussed it briefly in the background to the invention section of the '156 Patent. (See Compl. P 52; Compl. Ex. A at Col. 2, ll. 24-31). While this might suggest that the defendants did not intend to withhold the Reference from the PTO, **[**48]** AIBT claims that the inventors were obligated to disclose the full publication to the PTO, and that their failure to do so constituted fraud. (See Compl. P 64). Varian argues that AIBT's claims must be dismissed because it has failed to allege facts manifesting an intent to deceive the PTO. (Def. Mem. at 9; Def. Reply Mem. at 7). However, this court finds that the plaintiff's allegations are sufficient to support an inference that the defendants acted with the requisite intent.

AIBT claims that the full White Reference was material to the patentability of the '156 Patent because it disclosed a dual bar system with independently powered and controllable coils. (See Compl. PP 51, 54, 63). The fact that the inventors discussed the Reference in the '156 Patent specification indicates that they were aware of its contents, and consequently, its relevance. However, nothing in their discussion addressed the dual bar structure allegedly disclosed by the White Reference. (See Compl. Ex. A at Col. 2, ll. 24-31). Furthermore, as alleged in the Complaint, "[t]he Defendant inventors intentionally failed to disclose this reference to the PTO as required by *37 C.F.R. § 1.56(a)* . . . in any Information **[**49]** Disclosure Statement PTO form 1449 . . . ." (Compl. P 55). Thus, although it is undisputed that the defendant inventors disclosed the existence of the White Reference in their patent specification, this court concludes that the allegations of their failure to include it on their disclosure statements or to otherwise bring pertinent parts of the Reference to the Patent Examiner's attention, despite their knowledge of its significance, are sufficient to state a claim that the defendants intended to mislead the PTO. See *Golden Valley Microwave Foods, Inc., 837 F. Supp. at 1477* (***HN11***[] "prior art has to be brought to the attention of the examiner in an adequate fashion") (quotations and citations omitted).

This court also concludes that the plaintiff's allegations regarding the defendant inventors' failure to disclose the Quad Magnet and White's offer to sell the White 2 Bar Lens are sufficient to state a claim **[*80]** for fraud on the PTO. In both cases, AIBT has alleged facts indicating that the undisclosed information concerned technology containing features which anticipated the '156 Patent or would have rendered it obvious. (See Compl. PP 65, 67, 72, 74, 81, 85). It has also alleged facts showing **[**50]** that the defendant inventors knew of those features, and consequently, knew that the Quad Magnet and the offer to sell the White 2 Bar Lens were relevant to the patentability of the '156 Patent. (See id. PP 65-66, 69, 74-79). AIBT claims that nevertheless, the defendant inventors intentionally failed to cite the Quad Magnet and White's offer for sale "to the PTO as required by *37 C.F.R. § 1.56(a)* [R-2] in any Information Disclosure Statement PTO form 1449, . . . and did so with the intent to deceive." (Id. PP 69, 82). It also claims that the PTO would not have allowed the '156 Patent "with coverage that included the dual bar system as described in the 156 Patent" if the inventors had made the requisite disclosures. (Id. PP 73, 86). These allegations go "beyond a simple failure to disclose to the Patent Office prior art that the examiner would have deemed material." *Hydril Co. LP v. Grant Prideco LP, 474 F.3d 1344, 1349 (Fed. Cir. 2007)*. As the Federal Circuit determined when presented with similar claims in Hydril Co., such allegations are adequate to support a claim for *Walker Process* fraud. See *id*. (allegations that defendant had fraudulently obtained issuance of its patent "by failing **[**51]** to disclose to the USPTO material prior art of which it was aware (which the complaint described) and that the . . . Patent as issued would not have been granted to [defendant] had [defendant] not omitted from its disclosures such known information on the prior art" stated claim for violation of ***antitrust law***) (internal quotations and punctuation omitted).

Varian argues that Hydril is not controlling here because the Federal Circuit was not faced with a direct challenge to the suffficiency of the allegations of fraud, but, rather, had to determine whether the Hydril complaint alleged the minimal level of enforcement activity by the patent holder against the plaintiff to state a claim for *Walker Process* fraud. (Def. Reply Mem. at 6). Therefore, Varian contends, the Federal Circuit's analysis of the factual allegations of fraud and its conclusion that "the conduct alleged in Hydril's complaint could constitute *Walker Process* fraud is 'nothing more than dicta.'" Id.; see *Hydril, 474 F.3d at 1349*. This argument is without merit. Regardless whether the *Hydril* court's analysis of the fraud allegations before it is binding as precedent, its conclusion that the plaintiff had stated a claim **[**52]** for *Walker Process* fraud based on similar allegations as those alleged here is persuasive. This court finds that at this initial stage in the litigation, AIBT has pled enough to pursue its claims for fraud based on the alleged failure to disclose the Quad Magnet and White's offer to sell.

Varian also contends that Hydril is "legally irrelevant" because it was decided before the Supreme Court issued its decision in Bell Atl. Corp., which toughened the requirements for stating a cause of action under *Fed. R. Civ. P. 8(a)* by requiring plaintiffs to allege "a plausible entitlement to relief." (Def. Reply Mem. at 6-7). Again, Varian's argument is unpersuasive. As an initial matter, the fraud allegations in *Hydril* would have been subject to the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*. Moreover, Varian has not shown that AIBT's allegations fail to state "a plausible entitlement to relief." *Bell Atl. Corp., 550 U.S. 559, 127 S. Ct. at 1967*. As described above, AIBT has alleged facts, not merely conclusions, to show why the defendant inventors would have understood the relevance of the Quad Magnet **[*81]** and White's offer to sell to the patentability of their invention. It has also **[**53]** alleged facts showing that despite their disclosure obligations, the defendant inventors failed to include this information in their list of references submitted to the PTO. Those facts make it possible for a reasonable fact finder to conclude that the defendants were attempting to hide pertinent information from the PTO. Thus, they support a claim for relief under the applicable pleading standards.

Finally, this court concludes that AIBT has stated a claim based on the defendant inventors' failure to name White as an inventor of at least one claim limitation of the '156 Patent. In its Complaint, the plaintiff alleges that the White 2 Bar Lens consisted of a "structure manufactured from only two magnetic cores" and "described an invention described in the 156 Patent[.]" (Compl. PP 81, 85). Allegedly, defendant Purser became aware of these features when White disclosed his invention in a PowerPoint presentation that was delivered to Varian in March 2003. (Id. PP 76-77). However, the defendant inventors "knowingly and intentionally failed to name Nicholas White as a co-inventor of at least one claim limitation of the 156 Patent," thereby rendering it unenforceable. (Id. P 89). This court **[**54]** finds that the defendants' alleged failure to name White as a co-inventor despite their knowledge of his contribution to the claims of the '156 Patent is sufficient to state a claim that the defendants were attempting to deceive the PTO.

C. Sufficiency of Allegations of Antitrust Injury

Varian has also moved to dismiss all of AIBT's antitrust claims for failure to allege antitrust harm. As detailed below, this court finds that in its new Complaint AIBT has sufficiently alleged that Varian's infringement action harmed the competitive process by delaying AIBT's entry into the ion implantation equipment market. Therefore, this court recommends that Varian's motion to dismiss for failure to allege antitrust injury be denied.

HN12[] "A private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, 'antitrust injury.'" *In re Cardizem CD Antitrust Litig., 332 F.3d 896, 909 (6th Cir. 2003)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977))*. "Antitrust injury" is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' **[**55]** acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp., 429 U.S. at 489, 97 S. Ct. at 697-98* (quoting *Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 89 S. Ct. 1562, 1577, 23 L. Ed. 2d 129 (1969))*. As the First Circuit has explained,

> a practice is not "anticompetitive" simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitor's. Rather, a practice is "anticompetitive" only if it harms the competitive process. It harms that process when it obstructs the achievement of competition's basic goals -- lower prices, better products, and more efficient production methods.

Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 21-22 (1st Cir. 1990) (internal citations omitted).

AIBT argues that "Defendants' objectively baseless infringement lawsuit, seeking **[*82]** to enforce a patent that they knew was fraudulently obtained and invalid, harmed competition **[**56]** by delaying AIBT's entry into the relevant market." (Pl. Opp. Mem. at 15). It is undisputed that "one may violate the antitrust laws by bringing baseless litigation intended to delay entry into the market by a competitor." *In re Richard Roe, Inc., 168 F.3d 69, 72 (2d Cir. 1999)*. Nevertheless, Varian asserts that AIBT's claims must be dismissed because its Complaint fails to allege facts showing that any delay actually resulted in harm to the competitive process. (Docket No. 24 at 1). This court disagrees, and finds that AIBT has sufficiently alleged that the delay caused by Varian's infringement action had an anticompetitive impact on the market.

In its Complaint, AIBT has greatly expanded its allegations of harm. Specifically, AIBT alleges that as a result of the infringement suit, AIBT's sole customer, TSMC, required AIBT to conduct an in-depth analysis of its iPulsar product to assure it that there were no infringement issues. (Compl. P 104). This allegedly caused delay in the qualification process and in TSMC's ultimate acceptance of AIBT's product. (Id.). AIBT also alleges that TSMC's acceptance process was further delayed by the fact that AIBT had to divert personnel away from **[**57]** their work integrating the iPulsar product into the client's system in order to respond to the infringement action. (Id.). According to AIBT, the iPulsar is superior to Varian's products, and enables manufacturers "to produce consumer electronics in a more efficient and cost effective manner." (Id. P 106). Thus, by its infringement action, Varian allegedly was able to postpone its competitor's ability to compete in the ion implantation device market and to introduce a superior product to that market. In addition, Varian allegedly was able to "raise and maintain prices above competitive levels." (Id. P 103). This is the type of injury that the antitrust laws were intended to prevent. See *In re Cardizem CD Antitrust Litig., 332 F.3d at 910* (agreement that "effectively eliminated generic [drug] competition in the market for Cardizem CD from July 1998 through July 1999" constituted "'type of injury' the antitrust laws were meant to prevent"); *Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 431 (D. Del. 2006)* (allegations that market entry was delayed as a result of infringement litigation reflected "injury to competition" and alleged antitrust harm). Accordingly, AIBT has **[**58]** adequately alleged antitrust injury. [11]

Varian argues that "AIBT's new allegations of antitrust harm improperly include purported concerns expressed by AIBT's **[*83]** customers ***after*** Varian granted AIBT a covenant not to sue on November 25, 2008," and that "[a]s the Court previously found, post-November 25, 2008 events such as these are irrelevant to an antitrust harm analysis." (Def. Mem. at 17). Varian's argument does not alter this court's conclusion that AIBT has stated a claim for antitrust injury. As an initial matter, this court did not determine that post-November 25, 2008 events are irrelevant to the issue of antitrust harm. Rather, in its 2009 R&R, this court merely concluded that litigation expenses incurred by AIBT in connection with the prosecution of its own antitrust claims in the infringement action could not constitute harm resulting from having to defend against Varian's allegedly baseless infringement claims. (See 2009 R&R at 12). Furthermore, AIBT's allegations that TSMC expressed concern about the infringement action even after Varian **[**60]** granted AIBT a covenant not to sue, and did not begin to accept the plaintiff's iPulsar products until after Varian's claims in that action had been dismissed, (see Compl. PP 104, 106), support the plaintiff's claim that its entry into the market was delayed as a result of Varian's lawsuit. Therefore, Varian has not established that AIBT's claims should be dismissed for failure to allege antitrust harm.

D. Insufficiency of Conspiracy Allegations

In the infringement action, this court found that AIBT had failed to state a claim for conspiracy to monopolize because it had not alleged "any facts, as opposed to conclusory statements, indicating that the inventors and Varian entered into any agreement with the specific intent to monopolize the market." (2009 R&R at 21-22). Because AIBT has failed to cure this deficiency in its present Complaint, this court recommends that its conspiracy claim be dismissed with prejudice.

As it did in the infringement action, AIBT relies on allegations that the defendants filed a baseless patent infringement action as evidence of a conspiracy to monopolize. In particular, the plaintiff alleges in relevant part that

> Defendants agreed to engage in improper exclusionary **[**61]** conduct with the intent to monopolize the ion implantation equipment market. In particular, despite Defendants' knowledge that the 156 Patent was procured through fraud and is invalid, the Defendants agreed to file and then filed the baseless patent infringement

[11] AIBT's allegations regarding its potential customer, PSC, do not on their own allege antitrust injury. Although AIBT alleges that the infringement action caused a delay in the implementation of a demonstration plan that the plaintiff had planned for PSC, it does not allege that the delay resulted in harm to the competitive process. In particular, but without limitation, AIBT has not alleged facts showing that PSC ultimately accepted AIBT's product. Therefore, it has not shown that the infringement action, rather than AIBT's own inability to consummate a deal with PSC, impeded the plaintiff's ability to compete in the marketplace and deprived manufacturers of a superior product. Similarly, to the extent AIBT alleges other types of harm, such as increased costs or harm to its good will, it will need to show how any such harm obstructed the competitive process. It will also need to show that any damages it suffered occurred a result of Varian's conduct in pursuing baseless infringement claims and not as a result of its own decision to extend the infringement action by pursuing its antitrust counterclaims. In any event, because this court concludes **[**59]** that AIBT has alleged antitrust harm based on its allegations regarding its sale to TSMC, the precise contours of AIBT's antitrust injury do not need to be defined at this time.

> action against AIBT in Civil Action No. 08-10487-NG asserting the invalid 156 Patent with the intent to create and/or maintain a monopoly in the ion implantation market.

(Compl. P 137). AIBT argues that these facts, when taken as true, demonstrate "a conscious commitment to the common scheme of thwarting competition through the institution of baseless infringement litigation." (Pl. Opp. Mem. at 19). Once again, AIBT has provided no support for its position that the defendants' agreement to bring a lawsuit, without more, constitutes evidence of a conspiracy.

HN13[] To withstand a motion to dismiss a claim for conspiracy to monopolize, the plaintiff must allege facts showing a "specific intent to monopolize." *Boston Scientific Corp. v. Schneider (Europe) AG, 983 F. Supp. 245, 268 (D. Mass. 1997)*. See also *Standfacts Credit Servs., Inc. v. Experian Info. Solutions, Inc., 405 F. Supp. 2d 1141, 1152-53 (C.D. Cal. 2005)* (dismissing claim **[**62]** for conspiracy to monopolize where plaintiffs failed "to allege a specific intent by Defendants to empower one of them with monopoly power"). However, under AIBT's theory, there would be no need for a specific agreement to monopolize. Rather, **[*84]** any time two or more parties initiated an allegedly baseless infringement lawsuit against a competitor, that conduct standing alone would establish a specific intent to monopolize. As this court previously concluded in its 2009 R&R, "this is inconsistent with the applicable law." (2009 R&R at 22).

AIBT does allege that Varian entered into the technology license with the inventors and acquired the 156 Patent "in an effort to obtain blocking intellectual property rights in order to increase its dominant market share and stifle competition." (Compl. P 90). To the extent AIBT relies on these allegations to support its claim for conspiracy, they are merely conclusory and are insufficient to state a claim. See *Ashcroft, 129 S. Ct. at 1950* (pleadings that "are no more than conclusions, are not entitled to the assumption of truth"). There is nothing inherently suspect about a license agreement and AIBT has not provided any factual basis to support its **[**63]** contention of a sinister motive. Similarly, AIBT's allegations that "Defendants have conspired with one another in a deliberate effort to further Varian's monopoly power in the relevant market, exclude AIBT from the relevant market, and stifle competition" are equally inadequate to plead the necessary intent. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Id. Because AIBT has not alleged any facts which would support even the inference of a specific intent to monopolize, it has not stated a "plausible claim for relief[.]" Id.

IV. CONCLUSION

For all the reasons detailed herein, this court finds that AIBT's allegations that the defendants misled the PTO concerning the '328 Patent and the Panofsky Reference fail to support its claim for fraud on the PTO, and should be dismissed with prejudice, as should AIBT's renewed claim of conspiracy to monopolize, which also fails to state a claim. However, this court finds that AIBT has otherwise stated a claim for violation of the antitrust laws based on the defendants' alleged failure to disclose to the PTO the White Reference, the Ionex Quad Magnet, White's offer to sell Varian **[**64]** certain technology, and White's identity as allegedly one of the inventors of the '156 Patent. This court recommends to the District Judge to whom this case is assigned that the "Defendants' Motion to Dismiss Plaintiff's Complaint" (Docket No. 8) be ALLOWED IN PART and DENIED IN PART accordingly. [12]

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[12] The parties are hereby advised that under the provisions of *Fed. R. Civ. P. 72* any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this Rule shall preclude further appellate review. See *Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275 (1st Cir. 1988)*; *United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986)*; *Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604-605 (1st Cir. 1980)*; *United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982)*; **[**65]** *Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983)*; see also *Thomas v. Arn, 474 U.S. 140, 153-54, 106 S. Ct. 466, 474, 88 L. Ed. 2d 435 (1985)*. Accord *Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 3-4 (1st Cir. 1999)*; *Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994)*; *Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998)*.

/s/ Judith Gail Dein

Judith Gail Dein

United States Magistrate Judge

Pa. Dep't of Banking v. NCAS of Del., LLC

Commonwealth Court of Pennsylvania

November 5, 2009, Argued; April 28, 2010, Decided; April 28, 2010, Filed

No. 519 M.D. 2006

Reporter

995 A.2d 422 *; 2010 Pa. Commw. LEXIS 212 **

Pennsylvania Department of Banking, and Commonwealth of Pennsylvania, Acting by Attorney General Thomas W. Corbett, Jr., Plaintiffs v. NCAS of Delaware, LLC, d/b/a Advance America Cash Advance Centers, and Advance America Cash Advance Centers, Inc., Defendants

Prior History: [1]** Court of ORIGINAL JURISDICTION.

Pa. Dep't of Banking v. NCAS of Del., LLC, 596 Pa. 638, 948 A.2d 752, 2008 Pa. LEXIS 741 (2008)

Core Terms

amended complaint, parens patriae, borrowers, line of credit, consumers, charges, preliminary objection, unfair, cash advance, practices, alleges, powers, monetary relief, damages, Centers, loans, quasi-sovereign, Monthly, interest rate, Consumer Protection Law, authorizes, per se violation, sovereign, benefits, injunction, violations, deceptive, likelihood of confusion, declaratory judgment, Protection Law

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Evidence > Inferences & Presumptions > Inferences

HN1[] **Defenses, Demurrers & Objections, Demurrers**

A court's review of preliminary objections in the nature of a demurrer is limited to a determination of whether on the facts alleged the law states with certainty that no recovery is necessary. Further, the court must accept as true all well-pled facts, which are material and relevant, as well as all inferences reasonably deducible therefrom. And, in deciding whether to sustain a demurrer, the court is not required to accept as true legal conclusions, unwarranted factual inferences, allegations that constitute argument, or mere opinion. Moreover, a demurrer will not be sustained unless the court finds that on the face of the complaint the law will not allow recovery; furthermore, any doubts are to be resolved against sustaining the demurrer.

Banking Law > Bank Activities > Securities > Nonbank Banks

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN2[] Securities, Nonbank Banks

See *7 Pa. Stat. Ann. § 6218*.

Banking Law > Bank Activities > Securities > Nonbank Banks

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN3[] Securities, Nonbank Banks

The Consumer Discount Company Act (CDCA), *7 Pa. Stat. Ann. § 6218*. only provides for criminal sanctions for a violation of the CDCA and not a monetary remedy in the nature of damages.

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN4[] Interest & Usury, Rate & Recovery of Interest

See *41 Pa. Stat. Ann. § 504*.

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN5[] Interest & Usury, Rate & Recovery of Interest

See *41 Pa. Stat. Ann. § 502*.

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN6[] Interest & Usury, Rate & Recovery of Interest

The Loan Interest and Protection Law, *41 Pa. Stat. Ann. § 505*, provides that any person who knowingly and intentionally violates the provisions of the act shall be guilty of a misdemeanor of the third degree.

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN7[] **Interest & Usury, Rate & Recovery of Interest**

The Loan Interest and Protection Law, *41 Pa. Stat. Ann. § 506(c)(3)*, provides that if the Pennsylvania Department and the Attorney General determines that a person has violated the provisions of the act, the department may order the person to cease and desist any violation of the act and to make restitution for actual damages to any aggrieved person.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN8[] **Legislation, Interpretation**

The Statutory Construction Act of 1972, *1 Pa.C.S. § 1926*, provides that no statute shall be construed to be retroactive unless clearly and manifestly so intended by the Pennsylvania General Assembly.

Constitutional Law > ... > Bills of Attainder & Ex Post Facto Clause > Ex Post Facto Clause > Application & Interpretation

HN9[] **Ex Post Facto Clause, Application & Interpretation**

Pa. Const. art. I, § 17 provides that no ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

Governments > Legislation > Interpretation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN10[] **Legislation, Interpretation**

The Pennsylvania Supreme Court has reviewed the Statutory Construction Act of 1972, *1 Pa.C.S. § 1926*, and has noted that it is well settled, however, that legislation concerning purely procedural matters will be applied not only to litigation commenced after its passage, but also to litigation existing at the time of passage. The general rule in determining whether a statute will be applied retroactively is as follows: Legislation which affects rights will not be construed to be retroactive unless it is declared so in the act. But, where it concerns merely the mode of procedure, it is applied, as of course, to litigation existing at the time of its passage. In general terms, substantive laws are those which affect rights, while procedural laws are those which address methods by which rights are enforced.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

HN11[] **Public Enforcement, State Civil Actions**

The Pennsylvania General Assembly's intent with the enactment of the Loan Interest and Protection Law (LIPL), *41 Pa. Stat. Ann. § 506(c)(3)*, is to provide the Pennsylvania Department and the Attorney General with the authority to issue an enforcement action. In essence, a borrower may now proceed before the Department and seek restitution for his or her actual damages. The Department would then investigate the alleged illegal activity of the lender and pursuant to *§ 506(b)*, issue subpoenas and require the production of documents. If the Department concludes that the lender violated the LIPL, it may order restitution of the borrower's actual damages under *§ 506(c)(3)*. The lender then may request a hearing before the hearing officer who may review or revise determinations made by the department. 71 Pa. Stat. Ann. § 733-503E.(8). Last, the lender and/or the Department, as an aggrieved party, may appeal to the Commonwealth Court of Pennsylvania. *2 Pa.C.S. § 702*.

Governments > Legislation > Effect & Operation > Amendments

Governments > Legislation > Effect & Operation > Operability

Governments > Legislation > Enactment

HN12[] **Effect & Operation, Amendments**

1 Pa.C.S. § 1953 provides that the portions of statute which were not altered by the amendment shall be construed as effective from the time of their original enactment, and the new provisions shall be construed as effective only from the date when the amendment became effective.

Constitutional Law > Separation of Powers

Governments > State & Territorial Governments > Employees & Officials

Governments > State & Territorial Governments > Legislatures

HN13[] **Constitutional Law, Separation of Powers**

A basic precept of our form of government is that the executive, the legislative, and the judiciary are independent, co-equal branches of government. The dividing lines among the three branches are sometimes indistinct and are probably incapable of any precise definition. Under the principle of separation of powers of government, however, no branch should exercise the functions exclusively committed to another branch. *Pa. Const. art. II, § 1* provides that the legislative power of the Commonwealth of Pennsylvania shall be vested in the Pennsylvania General Assembly which shall consist of a Senate and House of Representatives. *Pa. Const. art. IV, § 1* provides that the Executive Department of the Commonwealth shall consist of an Attorney General and such other officers as the General Assembly may from time to time prescribe. *Pa. Const. art. IV, § 4*.1 provides that an Attorney General shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as imposed by law.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

HN14[] Public Enforcement, State Civil Actions

The Commonwealth Court of Pennsylvania has enunciated the necessary criteria in order for the Commonwealth to have parens patriae standing: The key to resolving this question is determining whether the Commonwealth has pleaded a quasi-sovereign interest rather than simply representing the interests of individuals who could have pursued their own claims. A state must assert an injury to what has been characterized as a quasi-sovereign interest, which is a judicial construct that does not lend itself to a simple or exact definition. The United States Supreme Court has noted that states may have three types of interest: those purely sovereign, those non-sovereign, and those that are quasi-sovereign. The first type consists of the state's power to develop and enforce civil and criminal codes, and the right to demand recognition from other sovereigns, such as might occur in a border dispute. The second type encompasses a state's proprietary interests and its pursuit of the interest of private parties, in which case the state is only a nominal party. The third category, quasi-sovereign interests, consist of a set of interests that the State has in the well-being of its populace.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

HN15[] Public Enforcement, State Civil Actions

As noted by the United States Supreme Court, within the spectrum of interests that the Court has regarded as quasi-sovereign is included a state's interest in the economic well-being of its people. The United States Supreme Court, while pointing out that a state claiming such standing must allege more than injury to an identifiable group of individuals residents, also has stated that the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population.

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

HN16[] Legislation, Interpretation

Where there is a clear statutory remedy, which is adequate, it is exclusive.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Grounds for Relief

Governments > Courts > Authority to Adjudicate

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Scope of Declaratory Judgments

HN17[] State Declaratory Judgments, Grounds for Relief

See *42 Pa.C.S. § 7532*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN18[] **Public Enforcement, State Civil Actions**

The Loan Interest and Protection Law, *41 Pa. Stat. Ann. § 506(a)* provides that when the Attorney General has reason to believe that any person has violated the provisions of the act, he shall have standing to bring a civil action for injunctive relief and other such relief as may be appropriate to secure compliance with the act.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Banking Law > Consumer Protection > State Law > Remedies

HN19[] **Public Enforcement, State Civil Actions**

The Banking Code, *71 Pa. Stat. Ann. § 733-503(C)*, provides that the Pennsylvania Department of the Attorney General may maintain an action in Commonwealth Court, or any other court of competent jurisdiction for an injunction or other process against any person to restrain and prevent the person from engaging in any activity violating the act or any other statute.

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Banking Law > Consumer Protection > State Law > Remedies

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN20[] **Interest & Usury, Rate & Recovery of Interest**

Although the Loan Interest and Protection Law (LIPL) does provide numerous remedies for the borrower, in addition to injunctive relief, the LIPL does not contain a provision that authorizes voiding the principal loan. As the Pennsylvania Supreme Court has noted, there is no doubt that the note loan called for a usurious rate of interest that defect, however, rendered the note loan not void, but only voidable as to the interest specified beyond the lawful rate.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > State & Territorial Governments > Claims By & Against

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

HN21[] **Public Enforcement, State Civil Actions**

The Unfair Trade Practices and Consumer Protection Law, *73 Pa. Stat. Ann. § 201-4*, provides that whenever the Attorney General has reason to believe that any person is using or about to use any method, act or practice declared by section 3 of the act to be unlawful, and that proceeding would be in the public interest, he may bring an action in the name of the Commonwealth against such person.

Evidence > Inferences & Presumptions > Presumptions

Governments > Legislation > Interpretation

HN22[] **Inferences & Presumptions, Presumptions**

It is a principle of statutory construction that when a legislature adopts a statute it must be presumed that it does so with full knowledge of existing statutes relating to the same subject. Thus, where a section of a statute contains a given provision, the omission of that provision from a similar section is significant to show a different intention existed.

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

Banking Law > ... > National Banks > Interest & Usury > Rate & Recovery of Interest

Banking Law > ... > Banking & Finance > Consumer Protection > Unfair & Deceptive Credit Practices

HN23[] **Deceptive & Unfair Trade Practices, State Regulation**

The Commonwealth Court of Pennsylvania concludes that the Pennsylvania General Assembly does not intend for a violation of either the Consumer Discount Company Act or the Loan Interest and Protection Law to constitute a per se violation of the Unfair Trade Practices and Consumer Protection Law.

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

Evidence > Burdens of Proof > Allocation

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN24[] **Deceptive & Unfair Trade Practices, State Regulation**

In order to state a claim under Unfair Trade Practices and Consumer Protection Law (UTPCPL), a plaintiff must allege one of the unfair or deceptive practices set forth in *73 Pa. Stat. Ann. § 201-2(4)(i)-(xxi)*. The general purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices, and the statute is the principal means for doing so in the Commonwealth. The elements of common law fraud that must be proven in order to recover under the catchall provisions of § 2(4)(xxi) of the UTPCPL: A plaintiff must demonstrate by clear and convincing evidence: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

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

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN25[] **Deceptive & Unfair Trade Practices, State Regulation**

The Commonwealth Court of Pennsylvania has adopted a less restrictive interpretation for pleading fraud after the 1996 amendments to the Unfair Trade Practices and Consumer Protection Law than pleading common law fraud.

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

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN26[] **Deceptive & Unfair Trade Practices, State Regulation**

An act or a practice is deceptive or unfair if it has the capacity or tendency to deceive. Neither the intention to deceive nor actual deception must be proved; rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way. The test for the court is to determine the overall impression arising from the totality of what is said, as well as what is reasonably implied, in the advertisement or solicitation. Moreover, the Pennsylvania Supreme Court has set forth a directive that the Unfair Trade Practices and Consumer Protection Law is to be construed liberally to effectuate its objective of protecting consumers of the Commonwealth from fraud and unfair or deceptive business practices.

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

HN27[] **Deceptive & Unfair Trade Practices, State Regulation**

See *73 Pa. Stat. Ann. § 201-2(4)*.

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN28[] **Consumer Protection, Truth in Lending**

See *15 U.S.C.S. § 1610(b)*.

Counsel: John M. Abel, Sr. Deputy Attorney General, Harrisburg and Robert L. Byer, Pittsburgh, for plaintiffs.

David H. Pittinsky, Philadelphia, for defendants.

Judges: BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge, HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE DAN PELLEGRINI, Judge, HONORABLE RENEE COHN JUBELIRER, Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE MARY HANNAH LEAVITT, Judge, HONORABLE JOHNNY J. BUTLER, Judge. OPINION BY JUDGE McGINLEY. Judge Butler dissents. CONCURRING OPINION BY JUDGE LEAVITT. CONCURRING and DISSENTING OPINION BY JUDGE SIMPSON. President Judge Leadbetter joins in this dissent.

Opinion by: BERNARD L. McGINLEY

Opinion

[*424] OPINION BY JUDGE McGINLEY

Presently before this Court are the preliminary objections (P.O.s) of NCAS of Delaware, LLC (NCAS) [1], Advance America Cash Advance Centers (Advance America) [2], and Advance America Cash Advance Centers, Inc (AA) [3] (collectively, Defendants) **[*425]** to the amended complaint filed by the Department and the Attorney General (collectively, Plaintiffs). [4]

I. Prior Matter: Original Complaint.

This matter first commenced on September 27, 2006, when the Department filed a complaint against NCAS d/b/a Cash Advance Centers and alleged Cash Advance Centers violated the Consumer Discount Company Act (CDCA) [5] and the Loan Interest and Protection Law (LIPL). [6]

> The complaint further alleges that on June 20, 2006, the Cash Advance Centers began to offer a new line of credit product in Pennsylvania that was not in partnership with a bank. Under Cash Advance Centers' new line of credit product, a $ 500 credit line is provided to qualifying Pennsylvania borrowers. Cash Advance Centers charges interest on the advances in the form of simple interest at a daily periodic rate that corresponds to an annual percentage rate of 5.98%. In addition, Cash Advance Centers charges borrowers a monthly participation **[**4]** fee of $ 149.50 per month (the Monthly Participation Fee).
>
> . . . Specifically, Section 3(A) of CDCA, *7 P.S. § 6203(A)* prohibits, with respect to loans or advances of money or credit of $ 25,000 or less, any business that has not obtained a license from the Secretary of Banking under the CDCA from charging, collecting, contracting for or receiving 'interest . . . . fees . . . charges or other consideration' which aggregate in excess of the maximum allowable interest rate that an unlicensed lender would be permitted to charge under Pennsylvania law on the amount loaned or advanced. The Department avers that the line of credit product offered by Cash Advance Centers is a loan or advance of money or credit within the meaning of section **[*426]** 3(A) of the CDCA, *7 P.S. § 6203(A)*. Cash Advance Centers has not obtained a license from the Secretary of Banking pursuant to the CDCA.
>
> Additionally, the Department alleges pursuant to *Section 201 of the LIPL*, *41 P.S. § 201*, that Cash Advance Centers is prohibited from charging for its line of credit products interest, fees, charges or other consideration which aggregate in excess of six percent (6%). (footnote omitted).

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[1] NCAS is a "Delaware limited liability company that was engaged in the lending business throughout the Commonwealth . . . ." Amended Complaint, December 16, 2008, Paragraph **[**2]** 8 at 4.

[2] Advance America is a fictitious name used by NCAS to conduct loans in Pennsylvania "and is registered as a foreign business corporation with the Commonwealth of Pennsylvania, Department of State, and Corporations Bureau . . . ." See Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections to the Amended Complaint at 4 and Amended Complaint, Paragraph 8 at 4. **The Pennsylvania Department of Banking's (Department) allegations are against "Advance America" in Count 1 and Count 2 of the Amended Complaint. Therefore, this Court shall use the word "Advance America" and the "Department" when addressing the P.O.s to those counts**.

[3] AA is a "Delaware corporation with its corporate headquarters at 135 North Church Street, Spartanburg, South Carolina 29306." Amended Complaint, Paragraph 9 at 4. "Advance America is a wholly owned subsidiary of AA that AA formed for the purpose of conducting trade or commerce in Pennsylvania." Amended Complaint, Paragraph 10 at 4. "AA has conducted trade or commerce in Pennsylvania through Advance America and through another subsidiary using the 'Advance America' brand . . . ." Amended Complaint, Paragraph 11 at 5. The Pennsylvania Attorney General's **[**3]** allegations in Count 3 and Count 4 of the Amended Complaint are against "Advance America" and "AA." **Therefore, this Court shall use the words "Advance America", "AA" and the "Attorney General" where appropriate when addressing the P.O.s to those counts**.

[4] **This Court shall use the words Plaintiffs and Defendants when addressing the P.O.s in general terms**.

[5] Act of April 8, 1937, P.L. 262, as amended, *7 P.S. §§ 6201-6219*.

[6] Act of January 30, 1974, P.L. 13, as amended, *41 P.S. §§ 101-605*.

Pennsylvania Department of Banking v. NCAS of Delaware, LCC (NCAS I), 931 A.2d 771, 774 (Pa. Cmwlth. 2007), **[**5]** affirmed, *596 Pa. 638, 948 A.2d 752 (2008)*.

Before this Court in NCAS I were the Department's motion for judgment on the pleadings and Cash Advance Centers' cross-motion for judgment on the pleadings:

> This Court must disagree with Cash Advance Centers' assertions. While Section 3(A) of the CDCA, *7 P.S. § 6203(A)*, limits charges on the 'amount actually loaned or advanced', clearly, the Monthly Participation Fee is a necessary condition before Cash Advance Centers provides a credit advance and is paid in connection with any advance. It is a charge inextricably related to the 'amount actually loaned or advanced.' Accordingly, Cash Advance Centers' unlicensed lending practices violate Section 3(A) of the CDCA, *7 P.S. § 6203(A)*. Department's motion for judgment on the pleadings with regard to the CDCA is granted and Cash Advance Centers' [Advance America's] cross-motion for judgment on the pleadings is denied as to the CDCA.
> . . . .
>
> Unlike Section 3(A) of the CDCA, which provides for the aggregation of fees and charges, the plain language of *Section 201 of the LIPL*, **[**6]** *41 P.S. § 201*, makes no mention of the aggregation of fees and charges, but instead refers only to the 'lawful rate of interest'. . . .
>
> Without the development of an evidentiary record, this Court is constrained to conclude at this early stage of the proceedings, the record does not establish that the Monthly Participation Fee of $ 149.95 should be considered sham interest which, combined with the stated interest rate of 5.98%, establishes a violation of *Section 201 of the LIPL*, *41 P.S. § 201*. Therefore, the Department's motion for judgment on the pleadings with regard to the LIPL is denied. Similarly, this Court does not have sufficient information before it to conclude that the LIPL does not prohibit Cash Advance Centers' current lending activities in Pennsylvania and therefore, Cash Advance Centers' cross-motion for judgment on the pleadings is denied as to the LIPL.
> . . . .
>
> The Department has requested injunctive relief to permanently enjoin Cash Advance Centers from continuing its lending activities in the Commonwealth of Pennsylvania and from collecting on lines of credit or loans currently outstanding in the Commonwealth of Pennsylvania pursuant to the CDCA violation. The Department's **[**7]** requested injunctive relief is granted for as long as the violation of the CDCA continues. [7] (emphasis in original and added and footnote omitted).

Id. at 779-81.

II. Present Matter: Amended Complaint.

On December 16, 2008, Plaintiffs filed an amended complaint and alleged:

> . . . .
>
> 11. AA has conducted trade or commerce in Pennsylvania through Advance America and through another subsidiary using the "Advance America" brand ("Subsidiary"). (emphasis added).
> . . . .
>
> 15. Until March 27, 2006, AA operated in Pennsylvania through the Subsidiary that had registered as a loan broker under the Credit Services Act [8] . . . *73 P.S. §§ 2181-2192*, in which capacity AA described itself as having operated "as marketing, processing, and servicing **[*427]** agent of a Federal Deposit Insurance

[7] In NCAS I, the permanent injunction enjoined Cash Advance Centers [Advance America] from charging Pennsylvania consumers Monthly Participation Fees and from engaging in any other business practice that violated the maximum interest rate or fee limitations under Pennsylvania law.

[8] Act of December 16, 1992, P.L. 1144, as amended.

Corporation ("FDIC") supervised institution that offered payday cash advances and installment loans." (Quoting from AA Form 8-K, filed with United States **[**8]** Securities and Exchange Commission June 19, 2006).
16. The FDIC-supervised institution described in paragraph 15, above, was a bank located outside the Commonwealth of Pennsylvania, and AA operated in the above-described manner on the theory that the out-of-state location of the bank would permit the Subsidiary to broker payday loans with interest rates determined by the laws of a state other than the Commonwealth of Pennsylvania pursuant to federal law and to avoid interest rate and fee caps imposed by Pennsylvania law on payday loans that the Subsidiary offered to Pennsylvania residents using this method.
17. As reported in the AA Form . . . "the FDIC instructed the lending bank for Pennsylvania ... to discontinue offering payday cash advances and alternative credit products if they could not adequately address the FDIC's concerns. In response to the FDIC's instructions, the lending bank for Pennsylvania ceased its payday cash advance and installment loan originations as of the close of business on March 27, 2006."

DEFENDANTS' BUSINESS PRACTICES

18. On June 20, 2006, Advance America began offering in Pennsylvania a new line of credit product, not in partnership with a bank, in place of **[**9]** its prior payday loan products. (emphasis added).
19. Under Advance America's line of credit product, Advance America provided a $ 500 credit line to qualifying Pennsylvania borrowers. Advance America charged interest on these advances in the form of simple interest at a daily periodic rate that corresponds to an annual percentage rate of 5.98%. In addition, Advance America charged borrowers a "Monthly Participation Fee" of $ 149.95 per month.
. . . .

22. At all times Advance America offered its line of credit product in Pennsylvania, Advance America was acting as AA's agent. (emphasis added).

23. AA directed, supervised, controlled, approved, formulated, authorized, ratified, benefitted from, and participated in Advance America's acts and practices in Pennsylvania. (emphasis added).

24. Advance America offered the line of credit product acting in concert with AA in furtherance of their common efforts and pursuant to a common design with AA to circumvent the maximum interest rate and fee limitations under Pennsylvania law, and with AA's substantial assistance toward this objective. (emphasis added).

25. Both Advance America and AA benefited financially through Advance America's offering **[**10]** of the line of credit products in Pennsylvania. (emphasis added).
COUNT I:

VIOLATION OF THE CONSUMER DISCOUNT COMPANY ACT
(Commonwealth vs. All Defendants)
. . . .

28. The line of credit product offered by Advance America was a loan or advance of money or credit within the meaning of Section 3.A of the Consumer Discount Company Act, . . . 7 P.S. § 6203.A (supp.2006). (emphasis added).

[*428] 29. Advance America has never obtained a license from the Secretary of Banking pursuant to the Consumer Discount Company Act. (emphasis added).
30. No other Pennsylvania or federal law applicable to Advance America authorized Advance America to charge a "Monthly Participation Fee" of $ 149.50 together with an interest rate of approximately 5.98% to consumers for a line of credit product.

31. Because Advance America was not licensed pursuant to the Consumer Discount Company Act, Advance America was prohibited from charging for its line of credit product interest, fees, charges or other consideration with aggregate in excess of the annual interest rate of 6 per cent under *Section 201* of the Loan Interest and Protection Law, Act of January 30, 1974, P.L. 13, *41 P.S. § 201*. (emphasis added).

. . . .

36. AA is bound **[**11]** by the claims or issues determined by the Order [July 31, 2007], because AA is in privity with Advance America and because Advance America acted as the agent of AA, under AA's control, with AA's authority, and at AA's direction. (emphasis added).

. . . .

38. Until the Commonwealth Court entered the Order of July 31, 2007, Advance America continued to do business at loan centers throughout the Commonwealth of Pennsylvania.

39. By illegally charging consumers of its line of credit product a "Monthly Participation Fee" of $ 149.50 together with an interest rate of approximately 5.98%, Advance America has injured the economic health and well-being of the Commonwealth's citizens.

. . . .

COUNT II:

VIOLATION OF THE LOAN INTEREST AND PROTECTION LAW

(Commonwealth vs. All Defendants)

. . . .

42. *Section 201* of the Loan Interest and Protection Law, . . . *41 P.S. § 201*, provides that the maximum lawful rate of annual interest for the loan or use of money in an amount of $ 50,000 or less is 6 per cent.

. . . .

44. In fact, the interest Advance America charged under the line of credit product was much higher than an annual percentage rate of 5.98% because the "Monthly Participation Fee" was a sham, the true **[**12]** nature of which was illegal, usurious interest in violation of the maximum allowable annual interest rate under *Section 201* of the Loan Interest and Protection Law, . . . *41 P.S. § 201*. (emphasis added).

45. AA rendered substantial assistance to Advance America to establish loan centers and offer the line of credit product in the Commonwealth knowing that, through the line of credit product, Advance America was charging illegal, usurious interest in violation of the Loan Interest and Protection Law. (emphasis added).

. . . .

COUNT III:

VIOLATION OF THE CONSUMER PROTECTION LAW

(Attorney General vs. All Defendants)

. . . .

49. Advance America's violation of the Consumer Discount Company Act, as found by the Commonwealth Court, as well as the violations of the Loan Interest and Protection Law, as set forth **[*429]** above, constitute *per se* violations of Section 2 of the Consumer Protection Law, *73 P.S. § 201-2*. (emphasis added).

. . . .

52. The above acts and practices constitute unfair methods of competition and unfair and deceptive acts and practices prohibited by *Section 201-3* of the Consumer Protection Law [9] by, among other things (emphasis added):

> (a) Causing likelihood of confusion or of misunderstanding **[**13]** as to the source, sponsorship, approval or certification of goods or services;
> (b) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

[9] Act of December 17, 1968, P.L. 1224, as amended, *73 P.S. § 201-1-201-9.3*.

(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have; and,

(d) Engaging in other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. (emphasis added).

. . . .

56. Advance America and AA have benefited by Advance America's unfair methods of competition and unfair and deceptive acts and practices in the Commonwealth and have retained these benefits unjustly. (emphasis added).

. . . .

COUNT IV:

VIOLATIONS OF THE CONSUMER PROTECTION LAW

(Attorney General vs. All Defendants)

. . . .

58. Defendants represented to consumers that the finance charge under the line of credit product was 5.98% when in fact the rate was much higher and was disguised as the $ 149.95 "Monthly Participation Fee" to hide the higher actual rate of interest.

. . . .

61. Defendants **[**14]** have injured the economic health and well-being of the Commonwealth's citizens by illegally charging Pennsylvania consumers an interest rate in excess of that allowed under the Loan Interest and Protection Law and by disguising the actual interest rate as a "Monthly Participation Fee" of $ 149.50.

62. Advance America and AA have benefited financially, to the detriment of Pennsylvania consumers, by operating illegally in the Commonwealth and have retained these benefits unjustly.

. . . .

65. The above acts and practices constitute unfair methods of competition and/or unfair and deceptive acts or practices prohibited by *Section 201-3* of the Consumer Protection Law by, among other things (emphasis added):

(a) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(b) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another;

(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, **[**15]** or connection that he does not have;

[*430] (d) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(e) Advertising goods and services with intent to sell them as advertised; and,

(f) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. (emphasis added).

73 P.S. §§ 201-2(4)(ii), *(iii)*, *(v)*, *(vii)*, *(ix)* & *(xxi)*.

63. [sic] [10] The above conduct on the part of Defendants is illegal and in violation of *Section 201-3* of the Consumer Protection Law, *73 P.S. § 201-3*. . . . (emphasis added).

---

[10] Following the sequence of paragraphs, the appropriate paragraph would be 66.

Amended Complaint, December 16, 2008, Paragraphs 11, 15-19, 22-25, 28-31, 36, 38-39, 42, 44-45, 49, 52, 56, 58, 61-62, and 65-66 at 4-11, 13-14, and 16-18.

III. Defendants' Preliminary Objections.

Defendants preliminarily objected to the amended complaint and asserted:

> . . . .
>
> 3. No statute authorizes the Commonwealth [Department] to seek the monetary relief **[**16]** associated with the violations alleged in Counts I and II of the Amended Complaint. The statute underlying Count I, the CDCA, does not provide the Commonwealth [Department] with the authority to seek monetary relief in a civil proceeding. The statute underlying Count II, the LIPL, authorizes monetary damages, including triple the amount of any excess interest charges a borrower may pay, attorneys' fees, and court costs, **but only when awarded in connection with an action brought by an individual borrower acting on his or her own behalf and not on behalf of other borrowers** . . . . The LIPL also relieves individual borrowers of the obligation to pay interest on an outstanding loan in excess of that permitted by law . . . . Additionally, the LIPL permits the AG [Attorney General] to seek injunctive relief, but not monetary damages or a declaratory judgment, and only when such relief is necessary "to secure compliance with this act" . . . . (emphasis in original and added and citations omitted).
>
> 4. The other statutes cited in the Amended Complaint in connection with Counts I and II similarly provide no authority for the relief the Commonwealth [Department] seeks. The Department of Banking **[**17]** Code [11] . . . merely authorizes an action by the Department for an injunction to restrain a violation of any of the laws under the Department's jurisdiction . . . . The DOB Code in no way authorizes suits for monetary damages or declaratory judgments. Similarly, the Commonwealth Attorneys Act . . . authorizes the AG [Attorney General] to represent the Commonwealth in lawsuits, but does not provide any affirmative authority to seek damages or declaratory judgments. (citations omitted and emphasis added).
>
> 5. The object of the Commonwealth's [Department's] requested declaratory judgment, *i.e.*, preventing NCAS [Advance America] from collecting principal and interest in the amount of 5.98 percent on its loans, also completely lacks statutory and case support. The CDCA does not create a civil cause of action in **[*431]** favor of the Commonwealth [Department] and the LIPL merely authorizes the AG [Attorney General] to seek an injunction "to secure compliance with this act . . ." (and ***not*** to prohibit the collection of principal or lawful interest) . . . . Similarly, the DOB Code only authorizes the Department to seek an injunction necessary to restrain and prevent a regulated party "from engaging in **[**18]** any activity violating [any law under the Department's jurisdiction]" . . . . While these statutes permit the Commonwealth [Department] to bring lenders into compliance with the CDCA and the LIPL, they do not authorize the Commonwealth to seek the sweeping declaratory judgment the Commonwealth requests. (emphasis added and citations omitted).
>
> . . . .
>
> 10. The Commonwealth [Department] lacks the capacity to sue in *parens patriae* because it has no quasi-sovereign interest at stake that justifies such standing. (emphasis added).
>
> 11. The law is clear that a state bringing a suit in *parens patriae* must establish a quasi-sovereign interest **apart** from the individual interests of a single citizen or group of citizens. . . . (emphasis in original and added and citations omitted).
>
> 12. The Commonwealth has failed to articulate any interest that is remotely quasi-sovereign to justify its *parens patriae* standing . . . . (citations omitted and emphasis added).

[11] Act of May 15, 1933, P.L. 565, as amended, *71 P.S. §§ 733-1-733-1101*.

13. If the potential claims of NCAS' [Advance America] borrowers are set aside, as the *parens patriae* case law directs, the Commonwealth is left with no "concrete," "independent" and "direct" interests to protect . . . . (citations omitted).

. . **[**19]** . .

15. *Parens patriae* standing is inappropriate in this case because the recognition of a quasi-sovereign interest under the facts as pled could expose NCAS [Advance America] to double liability. Individual customers who have already sued or seek to sue NCAS [Advance America] will surely argue that there is no privity between them and the Commonwealth [Department] and, as a result, any judgment in this litigation would not limit remedies available in such individual litigation
. . . .

PRELIMINARY OBJECTIONS TO THE ATTORNEY GENERAL'S CLAIMS IN COUNTS III AND IV OF THE AMENDED COMPLAINT ALLEGING VIOLATIONS OF THE UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

Demurrer Under *Pa. R. Civ. P. 1028 (a)(4)*: Counts III and IV Fail to State Claims Under the UTPCPL

18. In Counts III and IV of the Amended Complaint, the AG [Attorney General] alleges violations of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL") . . . . Specifically, in Count III, the AG [Attorney General] alleges that NCAS' violation of the CDCA, as found by this Court, and NCAS' alleged violation of the LIPL, on which this Court has not ruled, **[**20]** "constitute *per se* violations of [the UTPCPL]" . . . . (citations omitted).
. . . .

20. In Count III of the Amended Complaint, the AG [Attorney General] alleges that a violation of CDCA and the LIPL is a *per se* violation of the UTPCPL . . . .

21. This Court has previously rejected the AG's [Attorney General's] theory **[*432]** that violation of a consumer credit statute constitutes a *per se* violation of the UTPCPL . . . . (citations omitted and emphasis added).
. . . .

24. The General Assembly ensured that consumers' rights under the CDCA and the LIPL could be vindicated by including in those laws (and the Department of Banking Code) a variety of enforcement mechanisms, including a private right of action for consumers who pay interest or charges in excess of those permitted under Pennsylvania law. *See, e.g.*, *41 P.S. §§ 501-504*. However, neither the CDCA, the LIPL nor the Department of Banking Code provides that a violation of one of those laws is automatically and without more a violation of the UTPCPL . . . . (emphasis added).
. . . .

26. This Court has made clear that where a particular provision is omitted from a statute but provided for in other similar statutes, the omission of the provision **[**21]** is deemed intentional . . . .
. . . .

30. The AG claims that NCAS [Advance America] "held itself out" as a lawful lender offering a lawful credit product, *see* Exhibit A hereto, at [Paragraphs] 50-51, and that by doing so NCAS [Advance America] employed an unfair or deceptive act or practice as defined in subparagraphs *(ii)*,*(iii)*, *(v)* and *(xxi) of 73 P.S. § 201-2(4)*. *See id*. at [Paragraph] 52. This claim is completely without legal merit, since: (1) the AG has not identified--and cannot identify--any representation that NCAS made about the lawfulness of its operation or product; and (2) such a representation cannot be implied from NCAS' placing its product on the market. (emphasis added).
. . . .

34. Pursuant to TILA [Truth-in-Lending Act] [12], state law disclosure requirements are preempted to the extent they are inconsistent with TILA [Truth-in-Lending Act] disclosure requirements . . . .

. . . .

38. Even if the AG had asserted potentially actionable misrepresentations under the UTPCPL, he would still need to allege that these misrepresentations actually made a difference in the decision of Pennsylvania consumers to obtain a loan from NCAS. He has not done so.

. . . .

43. The Commonwealth **[**22]** has not pled and cannot show the facts necessary to permit this Court to exercise personal jurisdiction over AA, Inc. and, as a result, AA, Inc. should be dismissed from this case.

. . . .

47. Neither general nor specific jurisdiction over AA, Inc. exists. AA, Inc.'s contacts with Pennsylvania are far from "continuous and systematic" or even "minimum": **They are completely non-existent** . . . . (emphasis in original).

48. Given the absence of a single fact in the Amended Complaint that would show some minimal contact between AA, Inc. and Pennsylvania, the Commonwealth must necessarily argue that *in personam jurisdiction* over AA, Inc. can be premised on the alleged actions of its subsidiary, NCAS. However, the Commonwealth has failed to plead and will be unable to demonstrate the requisite facts showing the improper relationship between the two separate entities necessary to justify imputed jurisdiction.

49. The Pennsylvania Supreme Court has instructed that "there is a strong **[*433]** presumption in Pennsylvania against piercing the corporate veil" . . . . (citations omitted and emphasis added).

. . . .

52. The Commonwealth has failed to allege (and will not be able to show) that the relationship between **[**23]** AA, Inc. and NCAS [Advance America] justifies intrusion into the "sanctity of the corporate structure" . . . . There are no allegations in the Amended Complaint that NCAS and AA, Inc. failed to follow corporate formalities, operated without proper levels of capital, intermingled their affairs or used the corporate form to perpetrate fraud. Nor does the Commonwealth [Department] allege AA, Inc. completely dominated and controlled NCAS such that the latter was merely a sham corporation.

Preliminary Objections of Defendants, February 13, 2009, Paragraphs 3-5, 10-13, 15, 18, 20-21, 24, 26, 30, 34, 38, 43, 47-49, and 52 at 2-6, 8-9, 12, 14-15, 17-19, and 21.

Plaintiffs filed a brief in opposition to Defendants' preliminary objections to the amended complaint.

IV. Whether The Department Can Recover Damages From Advance America For Violation Of The CDCA And The LIPL As Alleged In Count 1 And Count 2

Initially, Advance America asserts that any violation of either the CDCA or the LIPL as alleged in Count 1 and Count 2 of the Amended Complaint fails to afford the Department monetary relief and the recovery of damages. [13]

---

[12] Section 1610(a)(1) of TILA, *15 U.S.C. § 1610(a)(1)*.

[13] ***HN1***[] This Court's review **[**24]** of preliminary objections in the nature of a demurrer is limited to a determination of whether on the facts alleged the law states with certainty that no recovery is necessary. *Hawks by Hawks v. Livermore, 157 Pa. Commw. 243, 629 A.2d 270, 271 n.3 (Pa. Cmwlth. 1993)*. Further, this Court must accept as "true all well-pled facts, which are material and relevant, as well as all inferences reasonably deducible therefrom." *Cohen v. City of Philadelphia, 806 A.2d 905, 912 (Pa. Cmwlth. 2002)*. "And, in deciding whether to sustain a demurrer, this Court is not required to accept as true legal conclusions, unwarranted factual inferences, allegations that constitute argument, or mere opinion." *Id. at 912*. "Moreover, a demurrer will not be sustained unless the Court finds that on the face of the complaint the law will not allow recovery; furthermore, any doubts are to be resolved against sustaining the demurrer." *Id. at 912*.

A. Did Advance America's Alleged Violation Of The CDCA Afford The Department The Requested Monetary Relief

The Department alleges in Count 1 of the Amended Complaint that Advance America violated Section 3.A of the CDCA, 7 P.S. § 6203.A, when it offered "loans or advances of money on credit" without **[**25]** "obtaining a license from the Secretary of Banking." The Department seeks, in addition to the injunctive relief granted in NCAS I, that "Advanced America is barred from collecting any principal, interest, or other charges in connection with the line of credit product . . . [and] [d]isgorgement of all revenues Advanced America and AA earned by Advance America's illegal operations . . . ." Count 1 of the Amended Complaint, Wherefore Clauses A. and C. at 10.

Defendants preliminarily object and assert that there is no provision in the CDCA that provides for the monetary relief requested by the Department for Advance America's violation of the CDCA. This Court agrees.

Section 18 (**Penalties**) of the CDCA, *7 P.S. § 6218*, provides:

> ***HN2***[] Any person who has not obtained a license from the Secretary of Banking . . . **[*434]** in accordance with the provisions of this act, and who shall engage in the business of negotiating or making loans or advances of money or credit, in the amount or value of fifteen thousand dollars ($ 15,000) or less, and charge, collect, contract for or receive interest, discount, bonus, fees, fines, commissions, charges or other considerations which aggregate in excess of the interest that **[**26]** the lender would otherwise be permitted by law to charge if not licensed under this act on the amount actually loaned or advanced, or on the unpaid principal balances when the contract is payable by stated installments, shall be guilty of a misdemeanor, upon conviction thereof shall be sentenced to pay a fine of not less than five hundred dollars ($ 500) or more than five thousand dollars ($ 5,000), and/or suffer imprisonment not less than six (6) months nor more than three (3) years, in the discretion of the court. (emphasis added).

Clearly, Section 18 of the CDCA, *7 P.S. § 6218*, ***HN3***[] only provides for criminal sanctions for a violation of the CDCA and not a monetary remedy in the nature of damages as requested by the Department. Therefore, this Court sustains Defendants' preliminary objections to Count 1 of the Amended Complaint.

B. Would Advance America's Alleged Violation Of The LIPL, If Established, Authorize The Requested Monetary Relief

The Department alleges in Count 2 of the Amended Complaint that Advance America violated Section 201 of the LIPL, *41 P.S. § 201*, when it charged interest on loans in excess of "six per cent per annum." The Department seeks, among other things, "damages **[**27]** in an amount three times the damages sustained by Advance America's customers in connection with Advance America's violation" of the LIPL and "[d]isgorgement of all revenues Advance America and AA earned . . . ." Count 2 of the Amended Complaint, Wherefore Clauses C. and D. at 12.

Defendants preliminarily object and assert that only individual borrowers can institute an action against Advance America for interest on the loan in excess of the six percent maximum mandated under Section 201 of LIPL, *41 P.S. § 201*.

Initially, *Section 504* (**Individual actions permitted**) of the LIPL, *41 P.S. § 504*, provides:

> ***HN4***[] Any person affected by a violation of the act shall have the substantive right to bring an action on behalf of himself individually for damages by reason of such conduct or violation, together with costs including reasonable attorney fees and such other relief to which such person may be entitled under law." (emphasis added).

Further, *Section 502* (**Usury and excess charges recoverable**) of the LIPL, *41 P.S. § 502*, provides:

> ***HN5***[] A person who has paid a rate of interest for the loan or use of money at a rate in excess of that provided for by this act or otherwise by law or has paid charges prohibited **[**28]** or in excess of those allowed by this act or otherwise by law may recover triple the amount of such excess interest or charges in a suit at law

> against the person who has collected such excess interest or charges . . . . Recovery of triple the amount of such excess interest or charges, but not the actual amount of such excess interest or charges, shall be limited to a four-year period of the contract. (emphasis added).

Finally, *Section 505* (**Penalties**) of the LIPL, *41 P.S. § 505*, ***HN6***[] provides that "[a]ny person who knowingly and intentionally violates the provisions of this act shall be **[*435]** guilty of a misdemeanor of the third degree." (emphasis added).

Defendants again preliminarily object to Count 2 of the Amended Complaint and assert that there is also no promulgated authority under the LIPL that authorizes the Department to seek declaratory relief and recovery of the principal and interest earned from loans to Pennsylvania borrowers from Advance America.

In opposition to Defendants' preliminary objection to Count 2 of the Amended Complaint, the Department presents a four-prong argument in support of its position that the Department is entitled to monetary relief under the LIPL.

First, the Department **[**29]** cites to Section 506(c)(3) of the LIPL, *41 P.S. § 506(c)(3)*, for the statutory authority to seek monetary relief in the nature of damages against Advance America. Second, the Department alleges that it possesses an inherent "sovereign interest" to protect the Pennsylvania borrower and recover damages from Advance America. Third, the Department cites to *parens patriae* standing as authority to seek monetary relief in order to protect the economic well-being of the citizens of the Commonwealth. Fourth, the Department claims that it is entitled to a declaratory judgment against Advance America. This Court shall seriately address the Department's arguments.

1. Whether Section 506(c)(3) Of The LIPL, 41 P.S. § 506(c)(3), Provides The Statutory Authority For The Department To Obtain Monetary Relief

Section 506(c)(3) of the LIPL ***HN7***[] provides that "[i]f the department determines that a person has violated the provisions of this act, the department may . . . [o]rder the person to cease and desist any violation of this act and to make restitution for actual damages to any aggrieved person." (emphasis added). Here, the Department contends that the General Assembly statutorily authorized the Department **[**30]** "to order restitution itself" and therefore the Department may seek restitution as a judicial remedy in an enforcement action. See Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections to Amended Complaint at 11. This Court disagrees.

First, Section 506(c)(3) of the LIPL, *41 P.S. § 506(c)(3)*, was added by the Act of July 8, 2008, P.L. 824, No. 57, effective in sixty days or September 8, 2008, more than one year after Advance America ceased operation in Pennsylvania. See Plaintiffs' Amended Complaint, Paragraph 38 at 10 (Advanced America ceased doing business in Pennsylvania pursuant to this Court's order of July 31, 2007).

Second, the retroactive application of Section 506(c)(3) of the LIPL, *41 P.S. § 506(c)(3)* to the present controversy would increase Advance America's exposure to civil penalties. *Section 1926* of the Statutory Construction Act of 1972 (Act), *1 Pa. C.S. § 1926*, ***HN8***[] provides that "[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly." [14] (emphasis added).

In *Morabito's Auto Sales v. Department of Transportation, 552 Pa. 291, 715 A.2d 384 (1998)*, ***HN10***[] our Pennsylvania Supreme Court reviewed *Section 1926* of the Act, *1 Pa. C.S. § 1926*, and noted:

> It is well settled, however, that legislation concerning purely procedural matters will be applied not only to litigation commenced after its passage, but also to **[*436]** litigation existing at the time of passage . . . .

---

[14] Also, *Article I, Section 17 of the Pennsylvania Constitution* ***HN9***[] provides that "[n]o *ex post facto* law, nor any law impairing the obligation of **[**31]** contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." (emphasis added).

> As stated in *Galant [v. Department of Environmental Resources, 534 Pa. 17, 21-22, 626 A.2d 496, 498-99 (1993)]*, The general rule in determining whether a statute will be applied retroactively is as follows: "Legislation which affects rights will not be construed to be retroactive unless it is declared so in the act. But, where it concerns merely the mode of procedure, it is applied, as of course, to litigation existing at the time of its passage . . . ." . . . .
>
> *534 Pa. at 21, 626 A.2d at 498*.
>
> . . . In general terms, substantive laws are those which affect rights, while procedural laws are those which address methods by which rights are enforced . . . .

Morabito's Auto Sales, 552 Pa. at 295, 715 A.2d at 386. **[**32]** (citations omitted and emphasis added).

Obviously, the Department's attempt to apply Section 506(c)(3) of the LIPL affects Advance America's substantive rights because it would increase its potential liability. [15] Presently, each individual borrower may institute an action against Advance America for monetary damages, costs, and attorney fees pursuant to Section 504 of the LIPL, *41 P.S. § 504*. Additionally, individual borrowers may recover triple the amount of the excessive interest or charges paid to Advance America pursuant to Section 502 of the LIPL, *41 P.S. § 502*. This Court will not conclude, without an express legislative intent by the General Assembly, that the Department possesses the same legal rights as an individual borrower. The retroactive application of Section 506(c)(3) of the LIPL would be unfair and highly prejudicial to Advance America's rights. Therefore, this Court must reject this argument.

2. Whether The Department Has An Inherent Sovereign Interest To Seek Monetary Relief Under The LIPL

The Department alleges **[**34]** that its ability to seek monetary relief is derived from its sovereign interest in enforcing Pennsylvania law. Specifically, the Department cites to Section 503.C of the Banking Code, 71 P.S. § 733-503.C for the proposition that the General Assembly granted it broad discretion to determine what judicial remedies to pursue to protect the citizens of Pennsylvania. [16]

[*437] Contrary to the Department's position, it may not claim an "inherent sovereign interest" as a basis to seek monetary relief against Advance America under the provisions of the LIPL. Such an interpretation runs afoul of the separation of powers under the Pennsylvania Constitution and would vest the Department and the Attorney General with **[**35]** unconstrained authority.

In *Sweeney v. Tucker, 473 Pa. 493, 507, 375 A.2d 698, 705 (1977)* our Pennsylvania Supreme Court cogently defined the separation of powers [17]:

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[15] ***HN11***[] The General Assembly's intent with the enactment of Section 506(c)(3) of the LIPL, *41 P.S. § 506(c)(3)*, was to provide the Department with the authority to issue an enforcement action. In essence, a borrower may now proceed before the Department and seek restitution for his **[**33]** or her actual damages. The Department would then investigate the alleged illegal activity of the lender and pursuant to Section 506(b) of the LIPL, *41 P.S. § 506(b)*, issue subpoenas and require the production of documents. If the Department concludes that that the lender violated the LIPL, it may order restitution of the borrower's actual damages under Section 506(c)(3) of the LIPL. The lender then may request a hearing before the hearing officer who "may review or revise determinations made by the department." See Section 503E.(8) of the Department of Banking Code, *71 P.S. § 733-503E.(8)*. Last, the lender and/or the Department, as an aggrieved party, may appeal to this Court. See *2 Pa. C.S. § 702*. Obviously, this procedure was not followed in the present matter. *Section 1953* of the Act, *1 Pa. C.S. § 1953*, ***HN12***[] provides that "the portions of statute which were not altered by the amendment shall be construed as effective from the time of their original enactment, and the new provisions shall be construed as effective only from the date when the amendment became effective."

[16] The Department contends that it may not ignore the fact that the Defendants have kept millions of dollars that were illegal obtained in violation of the CDCA and the LIPL which were promulgated to protect "weak and needy borrowers from extortion and outrageous demands of unscrupulous lenders." *Pollice v. National Tax Funding, L.P., 225 F.3d 379 (3d Cir. 2000)* (quoting 47 C.J.S. "Interest & Usury § 88 (1982)). See Plaintiffs' Brief In Opposition to Defendants' Preliminary Objections at 8.

> *HN13*[] A basic precept of our form of government is that the executive, the legislative, and the judiciary are independent, co-equal branches of government. *Carroll v. Tate, 442 Pa. 45, 274 A.2d 193 (1971)* (plurality opinion). The dividing lines among the three branches 'are sometimes indistinct and are probably incapable of any precise definition.' . . . . Under the principle of separation of powers of government, however, no branch should exercise the functions exclusively committed to another branch. (citations and footnote omitted and emphasis added).

Here, the General Assembly expressly granted the Department under the LIPL, and for that matter the CDCA, the authority to seek an injunction and to pursue criminal sanctions against a lender who violates these statutes. There is no express authority granted to the Department to seek monetary relief against a lender to recover alleged unlawful and ill gotten gains. The only inherent authority the Department retains is that "power which is inherent in the sense of being necessarily implied in an express grant of power." (emphasis added). *Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania, 318 Pa. 401, 416-17, 178 A. 291, 297 (1935)*. This Court must reject the Department's argument.

3. Whether The Department Has *Parens Patriae* Standing To Seek Monetary Relief Under The LIPL

The Department next claims that it has *parens patriae* standing to pursue an action for monetary relief and seek damages on behalf of individual borrowers in Pennsylvania. Advance America counters that there is no *parens patriae* standing on **[**37]** the behalf of individual borrowers.

In *Commonwealth v. TAP Pharmaceutical Products. Inc. (TAP II), 885 A.2d 1127 (Pa. Cmwlth. 2005)* [18], *HN14*[] this Court enunciated **[*438]** the necessary criteria in order for the Commonwealth to have *parens patriae* standing:

> The key to resolving this question is determining whether the Commonwealth has pleaded a quasi-sovereign interest rather than simply representing the interests of individuals who could have pursued their own claims. A

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[17] *Article II, Section 1 of the Pennsylvania Constitution* provides that "[t]he legislative power of this Commonwealth shall be vested in General Assembly which shall consist of a Senate and House of Representatives." *Article IV, Section 1 of the Pennsylvania Constitution* provides that "[t]he Executive Department of this Commonwealth shall consist of a[n] . . . Attorney General . . . and such other officers as the General Assembly may from time to time prescribe." *Article IV, Section 4.1 of the Pennsylvania Constitution* **[**36]** provides that "[a]n Attorney General . . . shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as imposed by law."

[18] In TAP II, the factual situation was as follows:

> As noted in this Court's earlier decision in this **[**39]** matter, TAP I [*Commonwealth v. TAP Pharmaceutical Products, Inc., 868 A.2d 624 (Pa. Cmwlth. 2005)* (TAP I)], the present controversy arose around the use of a pricing standard know as the Average Wholesale Price (AWP). The Commonwealth's claims are based generally on its assertion that all the Defendants knowingly inflated this self-reported AWP for inclusion in a pharmaceutical publication upon which the Commonwealth relied. The Commonwealth alleges that the reason the Defendants inflated the AWP, which in some cases reflected a price hundreds of times higher than what would constitute an actual average wholesale price, is that the Defendants would generate revenue by virtue of direct purchasers paying more for their products and such systematic inflation would also result increased market share.
>
> As stated above, AWPs are used by the Commonwealth to establish a basis for reimbursement to the middleman-such as physicians who administer drugs to patients directly (such as intravenous cancer drugs) and pharmacy benefit managers who buy in quantity for resale to customers . . . .
>
> . . . .
>
> The Commonwealth further points out that the AWP plays a significant role in budgeting strategies, and **[**40]** that it affects administrative decisions, we presume such as eligibility standards based on income and the scope of coverage.

Id. at 1132-33.

> "state must assert an injury to what has been characterized as a 'quasi-sovereign' interest, which is a judicial construct that does not lend itself to a simple or exact definition. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601, 102 S. Ct. 3260, 73 L. Ed. 2d 995 . . . (1982)*. [19] In Alfred L. Snapp & Son, Inc. the [United States] Supreme Court noted that states may have three types of interest: those purely sovereign, those non-sovereign, and those that are quasi-sovereign. The first type consists of the state's power to develop and enforce civil and criminal codes, and the right to demand recognition from other sovereigns, such as might occur in a border dispute. The second type encompasses a state's proprietary interests and its pursuit of the interest **[**38]** of private parties, in which case the state is only a nominal party. The third category, quasi-sovereign interests, "consist of a set of interests that the State has in the well-being of its populace." *458 U.S. at 601-602* . . . .
>
> ***HN15***[] As noted by the [United States Supreme] Court in that opinion, within the spectrum of interests that the Court has regarded as quasi-sovereign is included a state's interest in the economic well-being of its people. *458 U.S. at 606* (quoting *Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct. 716, 89 L. Ed. 1051 . . . (1945)* (in which the state of Georgia had asserted that a large number of railroad companies had conspired to fix rates in a discriminatory way that violated antitrust laws)). The [United States Supreme] Court, while pointing out that a state claiming such standing must allege more "than injury to an identifiable group of individuals residents[,]" also stated that "the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." *458 U.S. at 607*.

TAP II, 885 A.2d at 1143.

In TAP II, this Court determined that the Commonwealth asserted its own quasi-sovereign interest because "[t]he Complaint contends that the use of AWPs has affected the economic health and well-being of its citizens by requiring those purchasers and reimbursers of the Defendants' **[*439]** drugs to pay inflated amounts for the Defendants' drugs." *Id. at 1144*. Critical to this Court's determination that the Commonwealth had *parens patriae* standing was that had the drug companies not "inflated the AWPs the Commonwealth may have been better able to provide needed medications to more citizens than it has" and that the "inflated AWPs affected the extent of benefits to which those covered under the Commonwealth's programs could claim entitlement." *Id. at 1144 n.9*.

Here, this Court must conclude that the Department lacks *parens patriae* standing. **First**, unlike *TAP II*, the Department fails to allege that the violations of the CDCA and the LIPL affected the efficacy or reach **[**41]** of a Commonwealth-sponsored benefits program or government entitlement. Also, the Department fails to allege any other legitimate quasi-sovereign governmental interest. Specifically, if the potential claims of Advance America's borrowers are set aside, as the *parens patriae* case law directs, the Department is left without a concrete, independent, and direct interest to protect.

Second, the damages sought by the Department do not represent a quasi-sovereign interest but that of the individual borrower. The monetary relief the Department seeks in Count 2 of the Amended Complaint is premised on the numerous remedies available to individual borrowers under the LIPL. Specifically, an action for unlawful interest under Section 501 of the LIPL, with the right to claim three times the amount of unlawful interest charged under Section 502 of the LIPL, and finally, attorney fees and costs under *Section 503(a) of the LIPL*.

Last, if this Court were to conclude that the Department has *parens patriae* standing, Advance America would be exposed to liability once from the Department, and second from individual borrowers that have either filed an action or plan to file an action. [20] Again, the LIPL mandates **[**42]** a particular remedy for the wronged party. ***HN16***[]

[19] The Department cites this case to support its argument that it has *parens patraie* standing.

[20] Additionally, there are serious due process questions as to whether Advance America may face litigation a second time based upon the same transaction. In fact, Advance America directs this Court's attention to "[t]he Commonwealth's [Department's] concern about NCAS [Advance America] escaping with ill-gotten gains ignores pending class action lawsuits seeking to recover

"Where . . . there is a clear statutory remedy, which is adequate, it is exclusive." (footnote omitted). *Department of Environmental Resources v. Williams, 57 Pa. Commw. 8, 425 A.2d 871, 872-73 (Pa. Cmwlth. 1981)*.

4. Whether The Department May Seek Declaratory Relief To Enforce The CDCA And The LIPL

The Department alleges in Count 2 of the Amended Complaint that it is entitled to the following relief:

> A. declaratory **[**43]** judgment that (1) Advance America offered its line of credit product in violation of the Loan Interest and Protection Law; (2) the loan agreements that Advance America entered into with consumers [borrowers] in connection with its line of credit products were illegal, void, and unenforceable; and (3) Advance America is barred from collecting any principal, interest, or other charges in connection with the line of credit product.

[*440] Amended Complaint, the Wherefore Clause A. at 12. Alternatively, the Department asserts that Advance America waived its argument that the Department lacked the statutory authority to request declaratory relief [21] once there was a failure to object to the Department's request for declaratory relief in the original complaint.

Section 506(a) of the LIPL, *41 P.S. § 506(a)*, ***HN18***[] provides that "[w]hen the Attorney General has reason to believe that any person has violated the provisions of this act . . . he shall have standing to bring a civil action for injunctive relief and other such relief as may be appropriate to secure compliance with this act . . . ." (emphasis added).

Section 503.C of the Banking Code, *71 P.S. § 733-503.C*., ***HN19***[] provides that "[t]he department may maintain an action in Commonwealth Court, or any other court of competent jurisdiction for an injunction or other process against any person to restrain and prevent the person from engaging in any activity violating this act or any other statute . . . ." (emphasis added).

Advance America responds that the above-stated statutes clearly provide only such necessary relief as to bring a lender into compliance with the law. The LIPL and the Banking Code do not authorize "the backward-looking relief the Department is seeking." Reply Memorandum Brief of Defendants' Preliminary Objections to Amended Complaint at 21. This Court agrees.

The Department, under the LIPL and the Banking Code, sought and was granted injunctive relief to **[**45]** enjoin Advance America from continuing to offer its credit line of products to Pennsylvania borrowers. ***HN20***[] Although, as referred to earlier, the LIPL does provide numerous remedies for the borrower, in addition to injunctive relief, the LIPL does not contain a provision that authorizes voiding the principal loan. As our Pennsylvania Supreme Court noted, "[t]here is no doubt that the note [loan] called for a usurious rate of interest . . . this defect, however, rendered the note [loan] not void, but only voidable as to the interest specified beyond the lawful rate." (citation omitted and emphasis added). *Mulcahy v. Loftus, 439 Pa. 111, 112, 267 A.2d 872, 873 (1970)*. [22]

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three times the alleged overcharges NCAS [Advance America] generated in its loan program." Johnson v. Advance America, Cash Advance Centers, Inc., No. 07-3142 (E.D. Pa. filed August 1, 2007); and Clerk v. Cash America Net of Nevada, LLC, No. 09-02245 (E.D. Pa. filed May 19, 2009). See Defendants' Reply Memorandum in Support of Preliminary Objections to Amended Complaint at 19 n.10.

[21] *42 Pa. C.S. § 7532* provides:

> ***HN17***[] Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or degree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force **[**44]** and effect of a final judgment.

[22] In Mulcahy, our Pennsylvania Supreme Court interpreted *Section 1* of the Act of May 28, 1858, P.L. 622, *41 P.S. § 3* which was the predecessor to the LIPL.

Alternatively, Advance America rebuts that its failure to object to the request for declaratory relief in the original complaint precludes Advance America from now objecting. Cogently, Advance America maintains that "[t]he original Complaint was amended to include, *inter alia*, a new defendant, a new plaintiff and a new and different declaratory judgment request [where] [t]he **[**46]** original complaint sought only a 'declaratory judgment that Advance America's Monthly Participation Fee is not authorized by Pennsylvania law . . . .'" See Defendants' Reply Memorandum in Support of Preliminary Objections to the Amended Complaint at 20. Advance America properly concludes that "[given the radically different relief the Commonwealth [Department] now requests **[*441]** against both defendants [Advance America and AA] in the Amended Complaint, defendants [Advance America and AA] clearly did not waive the right to assert their Objection." See Reply Memorandum at 20. This Court rejects the Department's final argument and sustains Defendants' preliminary objection to Count 2 of the Amended Complaint.

V. Whether The Attorney General Has Adequately Pled A Per Se Violation Of The Unfair Trade Practices and Consumer Protection Law (UTPCPL) Under Count 3 Of the Amended Complaint

The Attorney General [23] first alleges in Count 3 of the Amended Complaint that Advance America's violation of the CDCA, as found by this Court in NCAS I, and Advance America's alleged violation of the LIPL in the present matter constitutes a *per se* violation of the UTPCPL. See Defendants' Memorandum of Law in Support **[**47]** of Preliminary Objections at 17 and Amended Complaint, Paragraph 49 at 13. Specifically, the Attorney General alleges that Advance America engaged in providing loans to Pennsylvania consumers/borrowers without a license and charged an interest rate to Pennsylvania consumers/borrowers in excess of the maximum lawful rate of six percent in violation of Section 3 of the CDCA, *7 P.S. § 6203*, and Section 201 of the LIPL, *41 P.S. § 201*, respectively.

A review of the provisions of the UTPCPL fail to establish that a violation of either the CDCA or the LIPL constitutes a *per se* violation of the UTPCPL. The Attorney General also fails to direct this Court to such a provision in the UTPCPL, or for that matter, any provision in the CDCA, the LIPL, or the Banking Code that expressly states a violation of these statutes automatically **[**48]** constitutes a *per se* violation of the UTPCPL.

To the contrary, Advance America directs this Court to numerous statutes [24] that specifically provide that a violation of a certain statute amounts to a violation of the UTPCPL. For example, *42 Pa. C.S. § 2524* (penalty for unauthorized practice of law) provides that (c) "[i]n addition to criminal prosecution, unauthorized practice of law may be enjoined in any county court of common pleas having personal jurisdiction over the defendant . . . [a] violation of subsection (a) is also a violation of the . . . Unfair Trade Practices and Consumer Protection Law." (emphasis added).

66 Pa. C.S. § 2905(g)(enforcement) provides that (3) "[f]ailure of a telephone message service to comply with this section shall be a violation of the . . . Unfair Trade Practices and Consumer Protection Law . . . and 18 Pa.C.S. Ch. 39 (relating to theft and related offenses). (emphasis added).

Also, *42 Pa. C.S. § 6909* (Lessor's liability for noncompliance) (a) **[**49]** (violation of the law) provides that "[a] violation of this chapter shall constitute a violation of the . . . Unfair Trade Practices and Consumer Protection Law, and shall be subject to **[*442]** the enforcement provisions and private rights of action contained in that act as limited in this section" and (e) (counterclaim or defense) "[a] lessee may not take any action to offset any amount for which a lessor is potentially liable under the Unfair Trade Practices and Consumer Protection Law . . . ." (emphasis added).

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[23] Section 4 of the UTPCPL, *73 P.S. § 201-4*, ***HN21***[] provides that "[w]henever the Attorney General . . . has reason to believe that any person is using or about to use any method, act or practice declared by section 3 of this act to be unlawful, and that proceeding would be in the public interest, he may bring an action in the name of the Commonwealth against such person . . . ."

[24] Defendants cite to nineteen other statutes that explicitly state a violation of that particular statute is a violation of UTPCPL. See Defendants' Memorandum of Law in Support of Preliminary Objections at 21-22.

HN22[] "It is a principle of statutory construction that when a legislature adopts a statute it must be presumed that it does so with full knowledge of existing statutes relating to the same subject." (citations omitted). *Seliga v. State Employes' Retirement System, 682 A.2d 77, 79 (Pa. Cmwlth. 1996)*. "Thus, where a section of a statute contains a given provision, the omission of that provision from a similar section is significant to show a different intention existed." (citation omitted). *Id. at 79*. ***HN23***[] This Court concludes the General Assembly did not intend for a violation of either the CDCA or the LIPL to constitute a *per se* violation of the UTPCPL. [25] Therefore, this Court must reject **[**50]** the Attorney General's position and sustain Defendants' preliminary objection to the *per se* violation allegations in Count 3 of the Amended Complaint.

VI. Whether The Attorney General Adequately Pled A Violation Of The UTPCPL Under Count 3 And Count 4 Of The Amended Complaint

Next, the Attorney General alleges in Count 3 of the Amended Complaint that Advance America "held itself out" as a lawful lender offering a lawful credit product and as a result Advance America employed an unfair or deceptive act or practice as defined in Section 2(4)(ii)-(iii), (v), and (xxi) of the UTPCPL, **[**52]** *73 P.S. § 201-2(4)(ii)-(iii)*, *(v)*, and *(xxi)*. See Amended Complaint, Count 3, Paragraphs 51 and 52 at 13-14. [26]

[*443] Additionally, in Count 4 of the Amended Complaint, the Attorney General alleges that Advance America represented to Pennsylvania consumers/borrowers that the finance charge on the loan was at a 5.98% interest when in fact it was at a much higher interest rate after the $ 149.95 monthly participation fee was added. See Amended Complaint, Count 4, Paragraphs 58-61 at 16. Again, the Attorney General alleges that Advance

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[25] Defendants in the reply brief memorandum persuasively distinguish the four cases that the Attorney General cites in support of the *per se* violation argument:

> The AG [Attorney General] relies on four cases to support that 'violation of other consumer protection legislation are deemed a violation of the CPL.' (Pl. Br. 32.) None of those cases, however, stands for so broad a proposition. *Hammer v. Nikol, 659 A.2d 617 (Pa. Commw. Ct. 1995)*, merely held that unlawful conduct that is also fraudulent violates the UTPCPL. Id. at 620 (conduct that violated a city ordinance also violated the UTPCPL because the trial court record showed all the elements of common fraud). And the three remaining cases, *Commonwealth v. Peoples Benefit Services, 923 A.2d 1230 (Pa. Commw. Ct. 2007)*, *Commonwealth v. Tolleson, . . . 14 Pa. Commw. 72, 321 A.2d 664 [(Pa. Cmwlth. 1974)]*, and *Commonwealth v. Armstrong, 74 Pa. D. & C.2d 579, 583 (C.P. Phila. Co. 1974)*, all involved violations of the Fictitious Names Act ("FNA") [the FNA is presently codified at *54 Pa. C.S. § [§] 301*. . . [*-332*] **[**51]** a law that is aimed at preventing one of the chief wrongdoings identified in the UTPCPL-confusing consumers about the 'source' of a good or service. *73 P.S. § 201-2(4)(ii)*].
>
> Unlike the FNA, neither the CDCA nor the LIPL has as its primary aim the prevention of fraud or deceit. The AG [Attorney General] concedes this, acknowledging that these laws protect consumers from paying too much interest. (footnotes and citations omitted and emphasis in original).

See Defendants' Reply Memorandum in Support of Preliminary Objections to the Amended Complaint at 29.

Defendants also distinguish the other cases cited by the Attorney General in support of *per se* liability. See Defendants' Reply Memorandum in Support of Preliminary Objections to the Amended Complaint at 30-32.

[26] The Attorney General also alleges in Count 3 of the Amended Complaint:

> . . . .
>
> 54. In furtherance of their common interests and pursuant to a common design, AA created Advance America and established its loan centers to offer the line of credit product in the Commonwealth, when it knew or should have known that Advance America was thereby violating the Consumer Protection Law [UTPCPL].
>
> 55. AA rendered substantial assistance to Advance America to establish and operate loan centers and offer the line of credit product in the Commonwealth . . . .

Amended Complaint, Paragraphs 54 and 55 at 14.

America's conduct was unfair and deceptive as defined in Section 2(4)(ii)-(iii), **[**53]** (v), and (xxi) of the UTPCPL, *73 P.S. § 201-2(4)(ii)-(iii)*, *(v)*, and *(xxi)*. [27]

Defendants preliminarily object and assert that the Attorney General has not identified any representation that Advance America made concerning the lawfulness of its operation or product and that such a representation may not be implied from Advance America's placement of its product on the market. This Court disagrees.

In *Feeney v. Disston Manor Personal Care Home, 2004 PA Super 114, 849 A.2d 590, 597 (Pa. Super.)*, appeal denied, *581 Pa. 691, 864 A.2d 529 (2004)*, our Pennsylvania Superior Court noted:

> ***HN24***[] In order to state a claim under UTPCPL, a plaintiff must allege one of the 'unfair or deceptive practices' set forth in *73 P.S. § 201-2(4)(i)-(xxi)* . . . .
>
> The general purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices, and the statute is the principal means for doing so in the Commonwealth . . . . [28] (citations omitted and emphasis added).

[*444] Further, in *Commonwealth v. Peoples Benefit Services, Inc., 923 A.2d 1230, 1236-37 (Pa. Cmwlth. 2007)*, this Court also noted:

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[27] The Attorney General again alleges that AA rendered substantial assistance to Advance America with knowledge that Advance America was violating the UTPCPL. Amended Complaint, Paragraphs 63 and 64 at 16-17.

[28] In Feeney, our Superior Court stated **[**54]** the elements of common law fraud that must be proven in order to recover under the catchall provisions of Section 2(4)(xxi) of the UTPCPL:

> [A] plaintiff must demonstrate by clear and convincing evidence: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance . . . .

Id. at 597.

However, ***HN25***[] this Court has adopted a less restrictive interpretation for pleading fraud after the 1996 amendments to the UTPCPL than pleading common law fraud. In *Commonwealth v. Percudani, 825 A.2d 743 (Pa. Cmwlth. 2004)*, this Court stated:

> This Court has not addressed the 1996 amendments to the Law [UTPCPL] and their effect on pleading fraud under Section 2(4)(xxi). In our research, we have uncovered two divergent views. The Superior Court of Pennsylvania has issued several opinions after the 1996 amendments in which it continues to state that a plaintiff must allege the elements of common law fraud in order to recover under **[**55]** the catchall provisions of Section 2(4)(xxi) . . . .
>
> Conversely, several decisions of the Bankruptcy Court for the Eastern District of Pennsylvania have rejected the Superior Court's adherence to the pre-1996 pleadings requirement . . . .In *Rodriguez v. Mellon Bank, N.A., 218 B.R. 764 (Bankr.E.D.Pa.1998)* . . . the Bankruptcy Court rejected the pre-1996 pleadings requirements noting that the Legislature's addition of the words 'or deceptive conduct' signals an approval of a less restrictive interpretation of the law and affirms the Supreme Court's position that the Law [UTPCPL] should be liberally construed.
>
> In *Flores [v. Shapiro & Kreisman, 246 F.Supp.2d 427* Bankr.E.D. 2002] the Bankruptcy Court . . . noted that maintaining the pre-1996 pleading requirements would render the words 'or deceptive conduct' redundant and superfluous, which is contrary to the rules of statutory construction . . . .
>
> Prior to 1996, the Law [UTPCPL] merely prohibited 'other fraudulent conduct.' The Legislature's intervention in 1996 in conjunction with the Supreme Court's pronouncement that the Law [UTPCPL] is to be liberally construed and the Superior Court's continuing . . . restrictive view of the Law [UTPCPL] **[**56]** leads us to conclude that the position adopted by the Bankruptcy Court is that which would be espoused by the Supreme Court. (citations omitted and emphasis added)

Id. at 746-47.

> HN26[] An act or a practice is deceptive or unfair if it has the 'capacity or tendency to deceive' . . . . Neither the intention to deceive nor actual deception must be proved; rather, it need only be shown that the acts and practices are capable of being interpreted in a misleading way . . . . The test for the court is to determine the overall impression arising from the totality of what is said, as well as what is reasonably implied, in the advertisement or solicitation . . . . Moreover, we are cognizant of our [S]upreme [C]ourt's directive that the UTPCPL is to be construed liberally to effectuate its objective of protecting consumers of this Commonwealth from fraud and unfair or deceptive business practices. (citations omitted and emphasis added).

Here, the Attorney General specifically alleges that Advance America's offering a line of credit product to the Pennsylvania consumer/borrower at **[**57]** an excessive rate of interest was unfair and deceptive conduct in violation of Section 2(4)(ii)-(iii), (v), and (xxi) of the UTPCPL, *73 P.S. § 201-2(4)(ii)-(iii)*, *(v)*, and *(xxi)*.

Section 2(4) of the UTPCPL, *73 P.S. § 201-2(4)*, provides:

> HN27[] (ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services; (emphasis added).
> (iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by another;
> . . . .
>
> (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that he does not have; (emphasis added).
> . . . .
>
> (xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. (emphasis added)

A fair reading of the Amended Complaint states that Advance America injured the economic health and well-being of the Pennsylvania consumer/borrower by illegally charging sham interest. The Attorney General's allegations strike at the core of Advance **[**58]** America's credit loan, i.e. that the monthly participation fee, as a matter of law, was tantamount to sham interest in excess of six percent. [29] Therefore, this Court must overrule Defendants' preliminary objections to Count 3 of the Amended Complaint. This Court concludes that the Attorney General adequately pled a violation of the UTPCPL. The same conclusion **[*445]** is reached regarding Count 4 of the Amended Complaint. [30]

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[29] The Attorney General illustrates to this Court that Defendants conduct was deceptive in that the use of the phony monthly participation fee resulted "in a real interest rate of 368%" which is plainly "unfair." See Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections at 43.

[30] Defendants contend that "any disclosure of the Monthly Participation Fee by Advance America as part of the finance charge would violate the disclosure requirements of TILA and Reg Z [*12 C.F.R. § 226.5(b)*]. The AG's [Attorney General's] claim is therefore, preempted by federal law." See Defendants' Preliminary Objections to Plaintiffs' Amended Complaint at 28.

Section 1610(b) of the TILA, *15 U.S.C. § 1610(b)* provides:

> HN28[] State credit charge statues. Except as provided in section 129 [*15 USCS § 1639*], **[**59]** this title . . . does not otherwise annul, alter or affect in any manner, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or charges, permissible under such laws in connection with the extension or use of credit, nor does this title . . . extend the applicability of those laws to any class of persons or transactions to which they would otherwise apply . . . . (emphasis added).
>
> Regulation Z, *12 CFR § 226.1* provides that "[t]he regulation does not govern charges for consumer credit." (emphasis added).

VII. Conclusion.

Accordingly, this Court sustains Defendants' preliminary objections to Count 1 and Count 2 of the Amended Complaint. Additionally, this Court sustains Defendants' preliminary objections to Count 3 of the Amended Complaint that Advance America's violation of the UTPCPL constituted a *per se* violation of the CDCA and the LIPL. Last, this Court overrules Defendants' preliminary objections to Count 3 and Count 4 of the Amended Complaint that the Attorney General failed to adequately plead a violation of the UTPCPL.

BERNARD L. McGINLEY, Judge

Judge Butler dissents.

ORDER

AND NOW, this 28th day of April, 2010, upon consideration of NCAS of Delaware, LLC, d/b/a Advance America Cash Advance Centers, and Advance America Cash Advance Centers, Inc.'s (Defendants') preliminary objections, this Court enters the following order: (1) Defendants' preliminary objections to Count 1 and Count 2 of the Pennsylvania Department **[**61]** of Banking and Commonwealth of Pennsylvania, Acting by Attorney General Thomas W. Corbett, Jr.'s (Plaintiffs') Amended Complaint are sustained; (2) Defendants' preliminary objection to Count 3 of Plaintiffs' Amended Complaint is sustained as to the Attorney General's allegations that Advance America's violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL) was a *per se* violation of the Consumer Discount Company Act and the Loan Interest Protection Law; (3) Defendants' preliminary objection to Count 3 and Count 4 of the Amended Complaint that the Attorney General failed to adequately plead a violation of the UTPCPL are overruled; and (4) Defendants are directed to file a responsive pleading within twenty (20) days of this order concerning the violation of the UTPCPL.

BERNARD L. McGINLEY, Judge

Concur by: MARY HANNAH LEAVITT; ROBERT SIMPSON

Concur

[*474contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

CONCURRING OPINION BY JUDGE LEAVITT

I join the majority's opinion, which I admire for its thorough and well reasoned analysis. I write separately to explain further why the Attorney General does not enjoy *parens patriae* authority in a usury case to seek damages on behalf of individual citizens, who may wish to pursue such actions on their own **[**62]** behalf.

The Attorney General cogently responds that there is "no claim that the Defendants [Advance America] failed to comply with TILA or the accompanying Reg Z with respect to its disclosure . . . Defendants' [Advance America's] argument assumes that the so-called 'Monthly Participation Fee' was in fact 'charged for participation in a credit plan on a monthly basis.'" See Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections at 43. "The Commonwealth, on the other hand, contends that this 'fee' was nothing more than a ruse, artifice, and a subterfuge that was actually 'interest' **[**60]** as defined by Pennsylvania law." See Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections at 43. This Court agrees with the Attorney General that Advance America may not raise the provisions of the TILA as a defense to avoid liability under the UTPCPL.

The powers of the Attorney General begin with the Pennsylvania Constitution, and it states, in relevant part, as follows:

> An Attorney General shall be chosen by the qualified electors of the Commonwealth …[.] [H]e shall be the chief law **[*448]** officer of the Commonwealth and shall exercise such powers and perform such duties *as may be imposed by law*.

PA. CONST. art. IV, § 4.1 (emphasis added). The law that imposes those powers and duties is the Commonwealth Attorneys Act, Act of October 15, 1980, P.L. 950, *as amended*, 71 P.S. §§ 732-101 - 732-506. Further, that act is the exclusive source of the Attorney General's powers; stated otherwise, the Attorney General's powers and duties have no basis in the common law, which is the source of the *parens patriae* doctrine. [1]

This was not always the case. Article IV, section 4.1 was added to the Pennsylvania Constitution by amendment in 1978. Prior to that amendment, the Attorney General was appointed by the governor; he, or she, served as a member of the governor's cabinet as head of the Department of Justice. Then, the Attorney General's powers and duties were set forth in the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 51 - 732, and they were augmented by common law powers. In a landmark case, Minerd v. Margiotti, 325 Pa. 17, 188 A. 524 (1936), our Supreme Court expounded at some length on the historic antecedents of the Attorney General's common law power. It concluded **[**64]** that Pennsylvania's Attorney General

> *is clothed with the powers and attributes which enveloped Attorneys General at common law*, including the right … to supersede and set aside the district attorney when in the Attorney General's judgment such action may be necessary.

Id. at 30-31, 188 A. at 530 (emphasis added).

The Attorney General's common law powers were not limited to the power to supersede a district attorney. The Attorney General also enjoyed the common law power to intervene in charitable trust cases on behalf of the citizens of Pennsylvania. *See, e.g.,* Commonwealth v. The Barnes Foundation, 398 Pa. 458, 467, 159 A.2d 500, 505 (1960) (holding that the Attorney General enjoys the common law power to participate in litigation involving charitable trusts).

In 1978, our Supreme Court overruled *Minerd*, finding "the reasoning in this line of decisions to be erroneous…." Commonwealth v. Schab, 477 Pa. 55, 60, 383 A.2d 819, 821 (1978). Accordingly, the Supreme Court held that the Attorney General lacked the power to supersede a district attorney in a criminal law enforcement matter. That same year the voters adopted Article IV, section 4.1 to institute the selection of our Attorney General **[**65]** by election, as opposed to gubernatorial appointment.

Thereafter, the newly elected Attorney General attempted to supersede a district attorney in a criminal case, arguing that the holding in *Schab* was no longer viable in light of the constitutional amendment. Specifically, in Commonwealth v. Carsia, **[*449]** 512 Pa. 509, 517 A.2d 956 (1986), the Attorney General argued that the

> Commonwealth Attorneys Act is but one source of the Attorney General's powers, and that, moreover, the language of Article 4, section 4.1, of our state constitution and that of the Act evidence *an intent to retain the common law powers* of the Attorney General.

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[1] The origin of the *parens patriae* doctrine can be traced to medieval England. Conceptually, the doctrine is derived from the king's royal prerogative to act as the guardian of an individual unable to protect his own interests. The attorney general, at common law, was the chief legal representative of the sovereign in the courts and was the only officer who could prosecute on behalf of the people in order to protect the interests **[**63]** of the crown. As in England, a colonial attorney general, acting as the chief legal officer of a British colony, enjoyed broad common law power to bring suit in *parens patriae* on behalf of colonial citizens. Jay L. Himes, *State Parens Patriae Authority: The Evolution of the State Attorney General's Authority* 1-2, 18-19 (The Institute for Law and Economic Policy Symposium paper, Apr. 23, 2004), *available at* http://www.abanet.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parens.pdf.

Id. at 512, 517 A.2d at 957-958 (emphasis added). The Supreme Court soundly rejected the claim that the Pennsylvania Constitution conferred any common law powers upon the elected Attorney General.

Our Supreme Court explained the meaning of Article IV, section 4.1 of the Pennsylvania Constitution as follows:

> In our view, the use of the language "as may be imposed" clearly shows an extension of power to the legislature to statutorily define and regulate the powers and duties of the Attorney General.
>
> The General Assembly utilized that grant of constitutional powers in **[**66]** 1980, and enacted the Commonwealth Attorneys Act. That Act made it clear that *the powers of the state Attorney General are* no longer an emanation from some bed of common law precepts, but are *now strictly a matter of legislative designation and enumeration*.

Id. at 513, 517 A.2d at 958 (emphasis added). In sum, under the Pennsylvania Constitution, the powers of the Attorney General are "strictly a matter of legislative designation and enumeration." *Id*.

In reaching this conclusion, the Supreme Court relied expressly upon a report of the Joint State Government Commission that had been prepared on the legislation needed to establish the scope and powers of the new Office of Attorney General. The Commission's final report explained that

> *[l]egislation* enacted by the General Assembly *is the exclusive source of the powers and duties of the elected Attorney General* pursuant to Article IV, Section 4.1....

JOINT STATE GOV'T COMM'N, OFFICE OF ELECTED ATTORNEY GENERAL, FINAL REPORT 4 (1978). The legislation that was the subject of the Joint State Government Commission's report became the Commonwealth Attorneys Act.

The Commonwealth Attorneys Act does not invest the Attorney General with the *parens patriae* **[**67]** power that may have existed as a matter of common law prior to the *Schab* decision. However, the Act has invested the Attorney General with this type of power, *i.e.*, the power to initiate actions on behalf of citizens, in two circumstances. The Attorney General is invested with authority to intervene in charitable matters on behalf of citizens. 71 P.S. § 732-204(c). [2] Likewise, the Attorney General is authorized to represent the Commonwealth "*and its citizens* in any action brought for violation of the antitrust laws of the United States and the Commonwealth." *Id*. (emphasis added). The Commonwealth has not enacted a state antitrust statute, as expected. [3]

[*450] In Commonwealth v. TAP Pharmaceutical Products, Inc., 885 A.2d 1127 (Pa. Cmwlth. 2005) (*TAP II*), the Attorney General filed suit against pharmaceutical companies under the Unfair Trade Practices and Consumer Protection Law, Act of December 17, 1968, P.L. 1224, *as amended*, 73 P.S. §§ 201-1 - 201-9.3. The Attorney General asserted that he had *parens patriae* authority to pursue damages on behalf of Pennsylvania's citizens for "common law claims and claims under [the Unfair Trade Practices and Consumer Protection Law]." Attorney General Brief, *TAP II*, at 48. In preliminary objections, the respondents asserted that the Attorney General had

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[2] It states, in relevant part:

> The Attorney General shall represent the Commonwealth and all Commonwealth agencies and upon request, the Departments of Auditor General and State Treasury and the Public Utility Commission in any action brought by or against the Commonwealth or its agencies, and *may intervene in any other action, including those involving charitable bequests and trusts* or the constitutionality of any statute.

71 P.S. § 732-204(c) (emphasis added).

[3] At the time the Joint State Government Commission filed its report, the General **[**68]** Assembly was considering 1977 House Bill 845, intended to create intrastate antitrust enforcement authority for the Attorney General. JOINT STATE GOV'T COMM'N, OFFICE OF ELECTED ATTORNEY GENERAL, FINAL REPORT 11 (1978). The bill died in committee and never passed the House. Pennsylvania General Assembly, Bill Information, Regular Session 1977-1978, House Bill 845, *available at* http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=1977&sind=0&body=H&type=B&BN=0845.

improperly invoked *parens patriae* powers because he had not identified a sovereign **[**69]** interest in the challenged conduct, *i.e*, overpricing. Finding that the Attorney General's complaint identified a quasi-sovereign interest in his claim for damages, we overruled the respondents' preliminary objections.

In considering the respondents' preliminary objections in *TAP II*, this Court relied upon the *parens patriae* analysis of *Snapp v. Puerto Rico, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*, the leading case on the scope of a state's *parens patriae* authority. Briefly, the United States Supreme Court held in *Snapp* that, generally, a state may not sue on behalf of its citizens without showing that a separate sovereign interest will also be served. *Id. at 607*. In this case, the majority concludes, correctly, that the Attorney General's complaint exceeds the bounds of *parens patriae* as enunciated in *Snapp* because the sovereign interest is not implicated in the complaint.

Snapp explains the ambit of a state's *parens patriae* powers. However, it does not require a state to exercise *parens patriae* authority on behalf of its citizens, and it does not identify which state official will exercise those powers. These questions can only be determined by each state in accordance with its own constitution. In Pennsylvania, **[**70]** our Constitution has limited the Attorney General's powers to those established by "legislative designation and enumeration." *Carsia, 512 Pa. at 513, 517 A.2d at 958*. [4] The legislature has authorized the Attorney General to bring suit "on behalf of citizens," a *parens patriae* power, but only for violations of the Federal antitrust laws. [5] Neither the Commonwealth Attorneys Act nor any of Pennsylvania's usury laws authorize the Attorney General to seek damages "on behalf of citizens" for violations of our usury statutes. [6]

[*451] The General Assembly has charged the Attorney General with responsibility for enforcement of the Commonwealth's usury laws. Notably absent from that authority is the power to recover damages on behalf of individual borrowers. Absent this legislative "designation and enumeration," the conclusion that the Attorney General lacks *parens patriae* authority in this case could not be clearer given our Supreme Court's holding in *Carsia, 512 Pa. 509, 517 A.2d 956*.

MARY HANNAH LEAVITT, Judge

Dissent by: ROBERT SIMPSON

Dissent

[*446] CONCURRING and DISSENTING OPINION BY JUDGE SIMPSON

I concur in the thoughtful majority opinion regarding Counts III and IV of the Amended Complaint. I respectfully dissent, however, as to Counts I (violation of the Consumer Discount Company Act (CDCA) [1]) and II (violation of

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[4] State agencies, which are creatures of statute, do not enjoy common law powers. *See* *Aetna Casualty and Surety Company v. Insurance Department, 536 Pa. 105, 118, 638 A.2d 194, 200 (1994)* (holding that an agency can "only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language") (quotation omitted).

[5] Should Pennsylvania ever enact a state ***antitrust law***, the Attorney General's power to bring suit on behalf of citizens will extend to that law as well.

[6] The usury statutes at issue in this appeal are: Consumer Discount Company Act, Act of April 8, 1937, P.L. 262, *as amended*, *7 P.S. §§ 6201-6219*; Unfair Trade Practices **[**71]** and Consumer Protection Law, Act of December 17, 1968, P.L. 1224, *as amended*, *73 P.S. §§ 201-1 - 201-9.3*; the act commonly known as the "Loan Interest and Protection Law," Act of January 30, 1974, P.L. 13, *as amended*, *41 P.S. §§ 101-605*.

[1] Act of April 8, 1973, P.L. 262, as amended, *7 P.S. §§ 6201-6219*.

the act commonly known as Loan Interest and Protection Law (LIPL) [2]). For the following reasons, I would overrule objections to those Counts, thereby allowing all the Counts to proceed through **[**72]** the pleadings.

I part company with the majority over whether the Plaintiffs, both of which are Commonwealth parties, may assert claims for declaratory relief and recovery of excessive interest from loans to Pennsylvania borrowers from Advance America. I believe claims for these types of relief are sufficiently stated.

I.

a.

Among other arguments, the Plaintiff Commonwealth parties assert statutory authority for their claims under Section 503(C) of the Department of Banking Code (**Quo warranto or injunction proceedings; conduct of administrative proceedings relating to institutions and credit unions**). [3] That Section provides:

> The [D]epartment may maintain an action in Commonwealth Court or any other court of competent jurisdiction for an injunction or other process against any person to restrain and prevent the person from engaging in any activity violating this act or any other statute or regulation within the [D]epartment's jurisdiction to administer or enforce.

71 P.S. § 733-503(C) (emphasis added). This provision expressly grants the Department of Banking authority **[**73]** to seek remedies beyond injunctions for statutes it is required to administer. The CDCA is such a statute.

b.

Further, the Plaintiff Commonwealth parties assert statutory authority for their claims under Section 506(a) of the LIPL (**Enforcement**), which provides:

> (a) When the Attorney General has reason to believe that any person has violated the provisions of this act, or the regulations promulgated hereunder, he shall have standing to bring a civil action for injunctive relief and such other relief as may be appropriate to secure compliance with this act or the regulations promulgated hereunder.

41 P.S. § 506(a) (emphasis added). This provision expressly gives the Attorney General authority to seek remedies beyond injunctions.

c.

The majority concludes that remedies beyond those seeking compliance are not authorized. Because prospective compliance has been secured by a previously entered injunction, no further remedies are available. Respectfully, I disagree.

The Plaintiff Commonwealth parties aver that Advance America collected tens of millions of dollars of illegal revenue from thousands of Pennsylvania residents. Am. Compl. **[**74]** at PP 21, 25. At this early stage of the litigation, we must accept **[*447]** these averments as true. I believe the ongoing retention by Advance America of tens of millions of dollars of revenue collected in violation of the CDCA and the LIPL is not in compliance with the statutes. Therefore, I would overrule the preliminary objections to Counts I and II.

II.

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[2] Act of January 30, 1974, P.L. 13, as amended, *41 P.S. §§ 101-605*.

[3] Act of May 15, 1933, P.L. 565, as amended, 71 P.S. § 733.503(C).

Furthermore, I believe the Plaintiff Commonwealth parties enjoy *parens patriae* standing to recover monetary damages in Counts I and II on behalf of the citizens of the Commonwealth. Our Court recently discussed *parens patriae* standing in *Commonwealth ex rel. Pappert v. TAP Pharmaceutical Products, Inc. 885 A.2d 1127, 1143-44 (Pa. Cmwlth. 2005)* (suit by Attorney General in *parens patriae* on behalf of Pennsylvania citizens injured by pharmaceutical companies through allegedly improper conduct that caused Commonwealth entities and citizens to pay inflated prices for pharmaceuticals).

Here, as in TAP Pharmaceutical Products, the Commonwealth's Amended Complaint alleges sufficient facts supporting the Commonwealth's position. Specifically, the Amended Complaint contains averments that the Commonwealth brought suit to protect its sovereign interest **[**75]** in enforcing the statutory scheme enacted by the General Assembly for the regulation of lenders and the Commonwealth's quasi-sovereign interest in the economic well-being of its citizens. Am. Compl. at P4. The Commonwealth further avers its belief that Advance America offered its line of credit product to thousands of customers in Pennsylvania, and that by illegally charging consumers the Monthly Participation Fee on its line of credit product, together with an interest rate of 5.98%, Advance America injured the economic health and well-being of the Commonwealth's citizens. Am. Compl. at PP21, 39.

Also, in TAP Pharmaceutical Products this Court relied heavily on a United States Supreme Court decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982)*. In that case, the United States Supreme Court offered an indication helpful in determining whether an alleged injury to the welfare of its citizens suffices to give a State standing to sue as *parens patriae*: whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers. *Id. at 607*. Here, the injury alleged, excessive interest and related charges, is one which **[**76]** the Commonwealth attempted to address through its sovereign lawmaking powers. Applying the indication suggested by the United States Supreme Court, standing to sue as *parens patriae* is sufficiently stated.

For all these reasons, I would overrule preliminary objections to Counts I and II of the Amended Complaint, thus allowing all the Counts to proceed through pleadings.

ROBERT SIMPSON, Judge

President Judge Leadbetter joins in this dissent.

Ark. Carpenters Health & Welfare Fund v. Bayer AG

United States Court of Appeals for the Second Circuit

April 28, 2009, Argued; April 29, 2010, Decided

Docket Nos. 05-2851-cv(L), 05-2852-cv(CON)

Reporter

604 F.3d 98 *; 2010 U.S. App. LEXIS 8865 **; 94 U.S.P.Q.2D (BNA) 1908 ***; 2010-1 Trade Cas. (CCH) P76,989

ARKANSAS CARPENTERS HEALTH AND WELFARE FUND, MARIA LOCURTO, PAPER, ALLIED-INDUS, UNITED FOOD AND COMMERCIAL WORKERS UNION-EMPLOYER, LOUISIANA WHOLESALE DRUG CO., INC., CVS PHARMACY, INC., RITE AID CORPORATION, ARTHUR'S DRUG STORE, INC., Plaintiffs-Appellants, v. BAYER AG, BAYER CORP., formerly doing business as Miles Inc., HOECHST MARION ROUSSEL, INC., THE RUGBY GROUP, INC., WATSON PHARMACEUTICALS, INC., BARR LABORATORIES INC., Defendants-Appellees.

Subsequent History: Rehearing, en banc, denied by *Ark. Carpenters Health & Welfare Fund v. Bayer AG, 625 F.3d 779, 2010 U.S. App. LEXIS 18893 (2d Cir., 2010)*

US Supreme Court certiorari denied by *La. Wholesale Drug Co. v. Bayer AG, 562 U.S. 1280, 131 S. Ct. 1606, 179 L. Ed. 2d 517, 2011 U.S. LEXIS 2090 (U.S., 2011)*

Costs and fees proceeding at *In re Ciprofloxin Hydrochloride Antitrust Litig., 2011 U.S. Dist. LEXIS 51682 (E.D.N.Y., May 13, 2011)*

Prior History: **[**1]** Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York (Trager, J.) granting summary judgment for defendants, manufacturers of the antibiotic ciprofloxacin hydrochloride ("Cipro") or generic bioequivalents of Cipro. Plaintiffs argue that defendants violated *Section 1* of the Sherman Act when they settled their dispute concerning the validity of Bayer's Cipro patent by agreeing to a reverse exclusionary payment settlement. Bayer agreed to pay the generic challengers, and in exchange the generic firms conceded the validity of the Cipro patent.

After the district court entered judgment below, a panel of this Court held that reverse payment settlements of patent lawsuits do not violate antitrust laws. See *Joblove v. Barr Labs., Inc., (In re Tamoxifen Citrate Antitrust Litig.), 466 F.3d 187, 208-12 (2d Cir. 2005)*. Because Tamoxifen is dispositive of plaintiffs' claims, we AFFIRM. However, because of the "exceptional importance" of the antitrust implications of reverse exclusionary payment settlements of patent infringement suits, we invite plaintiffs-appellants to petition for rehearing in banc. See *Fed. R. App. P. 35(a)(2)*.

In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514, 2005 U.S. Dist. LEXIS 5494 (E.D.N.Y., 2005)

Core Terms

patent, generic, settlements, manufacturers, challenges, antitrust, exclusionary, infringement, certification, lawsuit, anti trust law, district court, Hatch-Waxman Act, plaintiffs', branded, summary judgment, expiration, settlement agreement, effects, patent holder, non-infringing, manipulate, invalid, parties, settle

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN1[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Under the Hatch-Waxman Act, a pharmaceutical company can seek approval to market generic versions of an approved branded drug without having to re-establish the drug's safety and effectiveness by filing an Abbreviated New Drug Application (ANDA). *21 U.S.C.S. § 355(j)(2)(A)*, *(8)(B)*. Where a generic manufacturer seeks to enter the market before the expiration of the branded firm's patent, it must file a pre-expiration challenge (paragraph IV or ANDA-IV certification). *21 U.S.C.S. § 355(j)(2)(A)(vii)(IV)*. The ANDA-IV certification requires the generic firm to demonstrate the bioequivalence of its proposed version of the drug, *21 C.F.R. § 314.94(a)(9)*, and to state the basis for its claim of invalidity or noninfringement of the branded firm's patent, *21 U.S.C.S. § 355(j)(2)(B)(iv)(II)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN2[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

An Abbreviated New Drug Application (ANDA)-IV certification itself constitutes an act of patent infringement, triggering the branded manufacturer's right to sue. *35 U.S.C.S. § 271(e)(2)(A)*. Indeed, the branded manufacturer must sue within 45 days of receiving notice of the ANDA-IV in order to stay the generic firm's entry into the market. *21 U.S.C.S. § 355(j)(5)(B)(iii)*. Thus, the Hatch-Waxman Act redistributes the relative risks between the patent holder and the generic manufacturer, allowing generic manufacturers to challenge the validity of the patent without incurring the costs of market entry or the risks of damages from infringement.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN3[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The first generic firm to file an Abbreviated New Drug Application (ANDA)-IV is rewarded with a 180-day exclusive right to market its generic version of the drug. *21 U.S.C.S. § 355(j)(5)(B)(iv)*. However, only the first-filed ANDA-IV is eligible for the 180-day exclusivity period: even if the first filer loses, withdraws, or settles its challenge, subsequent filers do not become eligible for the exclusivity period.

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

A court of appeals reviews a district court's grant of summary judgment de novo, construing evidence in the manner most favorable to the nonmoving party.

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

HN5[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *15 U.S.C.S. § 1*.

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN7[] **Sherman Act, Scope**

Although by its terms, the Sherman Act prohibits "every" restraint of trade, the United States Supreme Court has long recognized that Congress intended to outlaw only unreasonable restraints. Agreements that have a predictable and pernicious anticompetitive effect, and limited potential for pro-competitive benefit are deemed per se unlawful. Most conduct, however, is subject to so-called "rule of reason" analysis.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Evidence > Burdens of Proof > Burden Shifting

HN8[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Rule of reason antitrust analysis proceeds in three steps. First, the plaintiff bears the initial burden of showing that the defendant's conduct had an actual adverse effect on competition as a whole in the relevant market. If the plaintiff satisfies this burden, the burden then shifts to the defendant to offer evidence that its conduct had pro-competitive effects. If the defendant is able to offer such proof, the burden shifts back to the plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives.

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

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

HN9[] **Sherman Act, Scope**

Patent settlements, like all private contracts, are subject to antitrust scrutiny. The limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act. The Sherman Act prevents patentees from obtaining a greater monopoly than was inherent in the relevant patent grant. Thus, like ordinary contracts, patent settlements cannot take the form of "market-sharing agreements." A market-sharing agreement is unlawful on its face. The law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition.

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN10[] **Exclusive Rights, Manufacture, Sale & Use**

The right to enter into reverse exclusionary payment agreements falls within the terms of the exclusionary grant conferred by a branded drug manufacturer's patent.

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN11[] **Exclusive Rights, Manufacture, Sale & Use**

A patent holder is entitled to protect its lawful monopoly over the manufacture and distribution of the patented product.

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN12[] **Private Actions, Remedies**

Unless and until a patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

HN13[] **Types of Contracts, Settlement Agreements**

A reverse exclusionary payment settlement agreement does not exceed the scope of a drug patent where (1) there is no restriction on marketing non-infringing products; (2) a generic version of the branded drug would necessarily infringe the branded firm's patent; and (3) the agreement does not bar other generic manufacturers from challenging the patent.

Patent Law > ... > Utility Patents > Product Patents > Compositions of Matter

HN14[] **Product Patents, Compositions of Matter**

Unlike "formulation patents," which cover only specific formulations or delivery methods for a compound, a "compound patent" "by its nature, excludes all generic versions of a drug.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

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

HN15[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

A plaintiff can have antitrust claims where a Hatch-Waxman settlement allows a generic drug manufacturer to manipulate the 180-day exclusivity period in a manner that bars subsequent challenges to the patent or precludes the generic manufacturer from marketing non-infringing products unrelated to the patent.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN16[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

In January 1997, an Abbreviated New Drug Application filer's right to 180-day exclusivity was contingent on its "successful defense" of a patent infringement suit. *21 C.F.R. § 314.107(c)(1)*. After courts rejected the Food and Drug Administration's (FDA's) "successful defense" requirement, the FDA permanently removed it. Effective Date and Approval of an *Abbreviated New Drug Application, 63 Fed. Reg. 59710, 57911 (Nov. 5, 1998)*.

Governments > Courts > Judicial Precedent

HN17[] **Courts, Judicial Precedent**

A panel of a federal court of appeals is bound by a prior decision of the court absent a change in law by higher authority or by way of an in banc proceeding.

Counsel: STEVE D. SHADOWEN, **[**2]** (Monica L. Rebuck, on the brief), Hangley Aronchick Segal & Pudlin, Harrisburg, PA (Bruce E. Gerstein, Barry S. Taus, and Jan Bartelli, Garwin, Gerstein, & Fisher LLP, New York, NY, on the brief), for Plaintiffs-Appellants.

PAUL E. SLATER, Sperling & Slater, P.C., of counsel to Amicus Curiae American Antitrust Institute, Chicago, IL, in support of Plaintiffs-Appellants.

STACY J. CANAN, (Bruce Vignery, on the brief), AARP Foundation Litigation, (Michael Schuster, AARP, on the brief), Washington, D.C., as Amici Curiae for Plaintiffs-Appellants.

DON L. BELL, II, National Association of Chain Drug Stores, Inc., Alexandria, VA, as Amicus Curiae for Plaintiffs-Appellants.

FRED H. BARTLIT, Jr., (Peter B. Bensinger, Jr., Michael J. Valaik, and Paul J. Skiermont, on the brief), Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL, (Philipp A. Proger, Kevin D. McDonald, and Lawrence D. Rosenberg, Jones Day, Washington, DC), for Defendants-Appellees Bayer AG and Bayer Corporation.

KAREN N. WALKER, (Edwin John U, Bridget K. O'Connor, and Gregory L. Skidmore, on the brief), Kirkland & Ellis LLP, Washington, DC, (David E. Everson, Heather S. Woodson, and Victoria L. Smith, Stinson Morrison Hecker LLP, **[**3]** Kansas City, MO, on the brief), for Defendants-Appellees Barr Laboratories, Inc., Hoechst Marion Roussel, Inc., The Rugby Group, Inc., and Watson Pharmaceuticals, Inc..

CHRISTINE A. VARNEY, Assistant Attorney General, (Philip J. Weiser, Deputy Assistant Attorney General, and Catherine G. O'Sullivan and David Seidman, Attorneys), U.S. Department of Justice, Washington, D.C., for the United States.

Judges: Before: NEWMAN, POOLER, PARKER, Circuit Judges.

Opinion

[*1909]** **[*100]** PER CURIAM:

Plaintiffs appeal from a judgment of the United States District Court for the Eastern District of New York (Trager, *J.*) granting summary judgment for defendants. Defendants Bayer AG and its subsidiary Bayer Corporation (collectively "Bayer") own the patent for the active ingredient in the antibiotic ciprofloxacin hydrochloride ("Cipro"). Defendants Barr Laboratories, Inc. ("Barr"), Hoechst Marion Roussel, Inc. ("HMR"), and Watson Pharmaceuticals, Inc. ("Watson") were potential generic manufacturers of Cipro. Plaintiffs are direct purchasers of Cipro, who allege that defendants violated federal ***antitrust law*** when they settled a patent infringement lawsuit by entering into collusive agreements that blocked the entry of low-cost **[***1910]** generic **[**4]** versions of Cipro into the prescription drug market.

BACKGROUND

Hatch-Waxman Settlement Agreements

Bayer is the owner of the patent relating to the active ingredient in Cipro, which has been described as the most prescribed antibiotic in the world. The Cipro patent, U.S. Patent No. 4,670,444, was issued on June 2, 1987 and was scheduled to expire on December 9, 2003. [1]

In 1991, Barr sought to market a generic version of Cipro pursuant to the expedited FDA approval process established by the Drug Price Competition and Patent **[*101]** Term Restoration Act of 1984 (the "Hatch-Waxman Act"), Pub. L. No. 98-417, 98 Stat. 1585. ***HN1***[] Under the Hatch-Waxman Act, a pharmaceutical company can seek approval to market generic versions of an approved branded drug without having to re-establish the drug's safety and effectiveness by filing an Abbreviated New Drug Application ("ANDA"). *21 U.S.C. § 355(j)(2)(A)*, *(8)(B)*. Where, as here, a generic manufacturer seeks to enter the market before the expiration of the branded firm's patent, it must file **[**5]** a pre-expiration challenge ("paragraph IV" or "ANDA-IV" certification). *21 U.S.C. § 355(j)(2)(A)(vii)(IV)*. The ANDA-IV certification requires the generic firm to demonstrate the bioequivalence of its

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[1] Bayer obtained an additional six-month period of pediatric exclusivity from the Food and Drug Administration (FDA) until June 9, 2004. *See* *21 U.S.C. § 355a(b)(1)(B)(i)(II)*.

proposed version of the drug, *see* 21 C.F.R. § 314.94(a)(9), and to state the basis for its claim of invalidity or noninfringement of the branded firm's patent, *see* 21 U.S.C. § 355(j)(2)(B)(iv)(II).

HN2[] An ANDA-IV certification itself constitutes an act of infringement, triggering the branded manufacturer's right to sue. 35 U.S.C. § 271(e)(2)(A). Indeed, the branded manufacturer *must* sue within 45 days of receiving notice of the ANDA-IV in order to stay the generic firm's entry into the market. 21 U.S.C. § 355(j)(5)(B)(iii). [2] Thus, the Hatch-Waxman Act redistributes the relative risks between the patent holder and the generic manufacturer, allowing generic manufacturers to challenge the validity of the patent without incurring the costs of market entry or the risks of damages from infringement. See Ark. Carpenters Health & Welfare Fund v. Bayer AG (In re Ciprofloxacin Hydrochloride Antitrust Litig.), 544 F.3d 1323, 1338 (Fed. Cir. 2008).

HN3[] The first generic firm to file an ANDA-IV is rewarded with a 180-day exclusive right to market its generic version of the drug. 21 U.S.C. § 355(j)(5)(B)(iv). [3] However, *only* the first-filed ANDA-IV is eligible for the 180-day exclusivity period: even if the first filer loses, withdraws, or settles its challenge, subsequent filers do not become eligible for the exclusivity period. [4]

The Bayer-Barr Lawsuit

Barr filed an ANDA-IV challenging Bayer's Cipro patent in October 1991. [5] **[*102]** Bayer sued Barr for patent infringement in the Southern District of New York within 45 days of its receipt of notice of Barr's filing, triggering the Hatch-Waxman statutory stay. [6] Barr subsequently entered into an agreement with other defendants herein, also potential generic manufacturers of Cipro, to share the costs and benefits of the patent litigation. **[***1911]**

In June 1996, the district court denied the parties' cross-motions for summary judgment. In January 1997 -- approximately two weeks prior to the scheduled trial -- Bayer and Barr entered into a "reverse exclusionary payment" (or "pay-for-delay") settlement: that is, the patent holder (Bayer) agreed to pay the alleged infringer to settle the lawsuit, and in exchange, the alleged infringer agreed not to enter the market. [7] Under the terms of the settlement agreement, Bayer agreed to (1) pay $ 49.1 million immediately; (2) make quarterly payments of between $ 12.5 and $ 17.125 million for the duration of the patent except for the last six months prior to the patent's

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[2] Although this statutory stay is typically called the **[**6]** "thirty-month stay," in fact the stay can last for over four years. *Compare* 21 U.S.C. § 355(j)(5)(B)(iii) (default maximum duration of stay is thirty months provided notice of ANDA IV is received more than five years after ANDA approval) *with* § 355(j)(5)(F)(ii) (result of earlier-filed ANDA IV is that stay is lengthened, ending five years plus thirty months after FDA approval of the branded drug).

[3] This 180-day exclusivity period became law without discussion in the relevant House Report and without debate. *See* H.R. Rep. No. 98-857, p. 1, at 28 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2661. Moreover, it was apparently not contemplated at the time of passage that the regulatory scheme would facilitate collusion between branded and generic firms. *See* e.g., S. Rep. No. 107-167, at 4 (2002) ("Agreeing with **[**7]** smaller rivals to delay or limit competition is an abuse of the Hatch-Waxman law . . . .").

[4] In Joblove v. Barr Labs. Inc, (In re Tamoxifen Citrate Antitrust Litig.), 466 F.3d 187 (2d Cir. 2005) (*Tamoxifen*"), the panel majority suggested otherwise, repeating the district court's claim that the exclusivity period cedes to the first ANDA filer to successfully defend. *Compare* Tamoxifen, 466 F.3d at 214, *with* In re Tamoxifen Citrate Antitrust Litig., 277 F. Supp. 2d 121, 134 (E.D.N.Y. 2003). As we discuss in Section 5, *infra*, this aspect of our *Tamoxifen* decision was erroneous. *See* C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement As a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553, 1583-86 (2006).

[5] Barr claimed that the **[**8]** patent was invalid on the following grounds: (1) obviousness; (2) obviousness type double counting; and (3) inequitable conduct.

[6] The parties subsequently agreed to extend the stay until after the entry of final judgment.

[7] To **[**9]** be more precise, the parties executed separate settlement agreements between: (1) Bayer and Barr, and (2) Bayer and HMR/Rugby, which was subsequently acquired by Watson. Bayer, Barr, and HMR also executed a supply agreement.

expiration; [8] and (3) provide the generic manufacturers a guaranteed license to sell brand-name Cipro at a reduced rate for six months prior to the patent's expiration. In exchange, Barr conceded the patent's validity and agreed not to market a generic version of Cipro prior to the patent's expiration. [9]

Plaintiffs' [10] Antitrust Lawsuit**

In 2000, direct and indirect purchasers of Cipro filed over thirty antitrust lawsuits against Bayer under federal and state law. These cases were consolidated by the Multi-District Litigation Panel in the Eastern District of New York. *See* *In re Ciprofloxacin Hydrocholoride Antitrust Litig., 166 F. Supp. 2d 740, 745 (E.D.N.Y. 2001) ("Cipro I")*. Plaintiffs allege that defendants' settlement exceeded the scope of Bayer's patent rights because Bayer effectively paid its potential competitors hundreds of millions of dollars not to challenge its patent. Plaintiffs also allege that the agreements were unlawful because Barr was permitted to reclaim the 180-day market exclusivity period if a subsequent challenger was successful in having the patent invalidated, and because the generic manufacturers agreed not to file any ANDA-IV certifications for products that relate to Cipro. But for the challenged agreements, plaintiffs assert that (1) Barr would have entered the market pending resolution of the patent litigation; (2) Barr would have prevailed in the litigation and entered the market; or (3) Bayer would have granted Barr a license to market a generic version **[*103]** of Cipro to **[**11]** avoid a trial on the patent's validity. On cross-motions for summary judgment, the district court granted summary judgment for the defendants. *In re Ciprofloxacin Hydrochloride Antitrust Litig., 363 F. Supp. 2d 514, 548 (E.D.N.Y. 2005) ("Cipro III")*. The court stated:

> The ultimate question -- and this is the crux of the matter -- is not whether Bayer and Barr had the power to adversely affect competition for ciprofloxacin as a whole, but whether any adverse effects on competition stemming from the Agreements were outside the exclusionary zone of the '444 Patent. It goes without saying that patents have adverse effects on competition. However, any adverse effects within the scope of a patent cannot be redressed by ***antitrust law***.

Id. at 523-24 (citations omitted). In eschewing a "*post hoc* determination of the potential validity of the underlying patent," the court reasoned that "such an approach would undermine the presumption of validity of patents in all cases, as it could not logically be limited to drug patents, and would work a revolution in patent law." *Id. at 529*.

The district court also found that the agreements did not allow Barr to manipulate the exclusivity period to obstruct **[**12]** subsequent challengers of the patent. *Id. at 540-41*; *see also* *Cipro II, 261 F. Supp. 2d at 243-47*. The court summarized as follows:

> [I]n the absence of any evidence that the Agreements created a bottleneck on challenges to the '444 Patent, or that they otherwise restrained competition beyond the scope of the claims of the '444 Patent, the Agreements have not had any anti-competitive effects on the market for ciprofloxacin beyond that which are permitted **[***1912]** under the '444 Patent. The fact that Bayer paid what in absolute numbers is a handsome sum to Barr to settle its lawsuit does not necessarily reflect a lack of confidence in the '444 Patent, but rather the economic realities of what was at risk. There is simply no precedent for plaintiffs' argument that the parties to a settlement are required to preserve the public's interest in lower prices. Such a rule would only result in parties being less likely to reach settlements, aside from undermining well-settled principles of patent law.

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[8] As an alternative to quarterly payments, the settlement gave Bayer the right to either provide Barr with a license to sell Bayer-manufactured Cipro at a royalty rate of 70% of Bayer's average selling price for brand-name Cipro. Bayer elected to make quarterly payments instead. Settlement payments ultimately totaled $ 398.1 million.

[9] Barr reserved its right to reinstate its ANDA-IV if Bayer's patent were later held to be invalid. Four generic manufacturers -- Ranbaxy, Schein, Mylan, and Carlsbad -- subsequently challenged the Cipro patent. Ranbaxy's challenge was dismissed as moot in October 1999. Mylan's and Schein's consolidated challenges were dismissed at summary judgment and this dismissal was affirmed on appeal. *Bayer AG v. Schein Pharm., Inc., 129 F. Supp. 2d 705 (D.N.J. 2001)*, *aff'd*, *301 F.3d 1306 (Fed. Cir. 2002)*. Carlsbad's challenge was rejected after a nine-day bench trial. *Bayer AG v. Carlsbad Tech., Inc*., No. Civ. 01-867-B (S.D. Cal. Aug. 26, 2002).

> Finally, to even attempt to quantify the public's interest in a patent settlement between private parties would require devaluing patents across the board, a result that would contravene the presumption **[**13]** of validity afforded by Congress and impact the very way patent licenses are handled in countless daily transactions.

Cipro III, 363 F. Supp. 2d at 540-41.

Plaintiffs timely appealed. This Court retained jurisdiction over the direct purchaser plaintiffs' appeals, but transferred the indirect purchaser plaintiffs' appeal to the Federal Circuit. [10]

[*104] DISCUSSION

HN4[] We **[**14]** review the district court's grant of summary judgment *de novo*, construing evidence in the manner most favorable to the nonmoving party. *Horvath v. Westport Library Ass'n, 362 F.3d 147, 151 (2d Cir. 2004)* (citation omitted). ***HN5***[] Summary judgment is appropriate only where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.

1. Section 1 of the Sherman Act

The Sherman Act provides that ***HN6***[] "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. ***HN7***[] Although by its terms, the Act prohibits "every" restraint of trade, the Supreme Court "has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Agreements that have a "predictable and pernicious anticompetitive effect, and . . . limited potential for pro-competitive benefit" are deemed per se unlawful. *Id*. Most conduct, however, is subject to so-called "rule of reason" analysis. *See Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*.

HN8[] Rule of reason analysis **[**15]** proceeds in three steps. First, the plaintiff bears the initial burden of showing that the defendant's conduct "had an *actual* adverse effect on competition as a whole in the relevant market." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)* (emphasis in original). If plaintiff satisfies this burden, the burden then shifts to defendant to offer evidence that its conduct had pro-competitive effects. *Id*. If defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives. *Id*.

2. Reverse Exclusionary Payment Settlements, *Antitrust Law*, and *Tamoxifen*

Plaintiffs argue that when Bayer paid Barr to withdraw its challenge to the Cipro patent, defendants effectively entered into a market-sharing agreement in restraint of trade. ***HN9***[] Patent settlements, like all private contracts, are subject to antitrust scrutiny. *Cf. Standard Oil Co. v. United States, 283 U.S. 163, 169, 51 S. Ct. 421, 75 L. Ed. 926 (1931)* ("The limited monopolies granted to patent owners do not exempt them from the prohibitions of the Sherman Act . . . ."); *see also B. Braun Med., Inc. v. Abbott Labs., 124 F.3d 1419, 1426-27 (Fed. Cir. 1997)*

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[10] The indirect purchaser plaintiffs amended their complaint to add state-law, *Walker Process* antitrust claims, so-called based on the Supreme Court's decision in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp*., which recognized an antitrust claim when patents are obtained by fraud. *382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. Because the *Walker Process* claims are preempted by patent law, *see Cipro III, 363 F. Supp. 2d at 543-44*, we transferred the indirect purchaser plaintiffs' appeal to the Federal Circuit, while retaining jurisdiction over the direct purchaser plaintiffs' appeals. The Federal Circuit ultimately affirmed the district court on the indirect purchaser plaintiffs' claims, agreeing with the district court's conclusion that the settlement did not restrain competition beyond the exclusionary zone of the Cipro patent. *544 F.3d 1323, 1333 (Fed. Cir. 2008)*.

[16]** (the Sherman Act prevents patentees from obtaining a greater monopoly than was inherent in the relevant patent grant). Thus, like ordinary contracts, patent settlements cannot take the form of "market-sharing agreements." *See* *Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (per curiam) (market-sharing agreement is unlawful on its face); *United States v. Sealy, Inc., 388 U.S. 350, **[***1913]** 357-58, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)* (same); *see also* 12 Herbert Hovenkamp, ***Antitrust Law*** P 2030b, at 213 (2d ed. 2005) ("[T]he law does not condone the purchase of protection from uncertain competition any more than it condones the elimination of actual competition").

The question, therefore, is whether patent settlements in which the generic firm agrees to delay entry into the market in exchange for payment fall within the scope of the patent holder's property rights, or whether such settlements are properly characterized as illegal market-sharing **[*105]** agreements. Authorities are divided on this question. The Federal Trade Commission ("FTC"), the U.S. antitrust enforcement agency charged with supervising the pharmaceutical industry, has long insisted that reverse exclusionary payment settlements violate ***antitrust law*** and has **[**17]** challenged numerous agreements as unreasonable restraints of trade. [11] Although it initially took a different view, the United States has since maintained that reverse exclusionary payment settlements may violate antitrust laws. *See* Brief for the United States as Amicus at 12, *Joblove v. Barr Labs., Inc*., No. 06-830, 2007 WL 1511527 (U.S. May 23, 2007). Many academic commentators share the United States's view. [12]

Most courts, by contrast, including this Court, *Joblove v. Barr Labs. Inc, (In re Tamoxifen Citrate Antitrust Litig.), 466 F.3d 187, 216 (2d Cir. 2005)* ("*Tamoxifen*"), have held that ***HN10***[] the right to enter into reverse exclusionary **[**19]** payment agreements fall within the terms of the exclusionary grant conferred by the branded manufacturer's patent. *See* *In re Ciprofloxacin Antitrust Litig., 544 F.3d at 1333*; *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1076 (11th Cir. 2005)*. *But see* *La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litig.), 332 F.3d 896, 908 (6th Cir. 2003)* (holding such agreements to be per se illegal); *In re Terazosin Hydrochloride Antitrust Litig., 352 F. Supp. 2d 1279 (S.D. Fla. 2005)* (same).

Particularly relevant here is this Court's decision in *Tamoxifen*. The plaintiffs in *Tamoxifen* challenged a reverse exclusionary payment settlement between Zeneca and Barr that the parties entered into after a district court had declared Zeneca's patent invalid. *466 F.3d at 193*. At the 12(b)(6) stage, *Tamoxifen* rejected as speculative plaintiffs' allegation that Barr would have prevailed on appeal but for the settlement agreement. *Id. at 203-04*. Assuming the truth of plaintiffs' allegation that the exclusion payments exceeded the profits Barr would have obtained upon entering the market as a generic competitor, the *Tamoxifen* court determined that the plaintiffs had no antitrust **[**20]** claim because ***HN11***[] a patent holder is entitled to protect its "lawful monopoly over the manufacture **[*106]** and distribution of the patented product." *Id. at 205, 208-09*.

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[11] *E.g. Anticompetitive Patent Settlements in the Pharmaceutical Industry: The Benefits of a Legislative Solution: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Jon Leibowitz, FTC Commissioner), available at http://www.ftc.gov/speeches/leibowitz/070117anticompetitivepatentsettlements_senate.pdf (criticizing the "extremely lenient view" taken by some toward reverse exclusionary agreements and alleging that reverse exclusionary agreements result in massive wealth transfers from consumers to pioneer drug producers); *see also Concurring Statement of Commissioner Jon Leibowitz, FTC v. Watson Pharmaceuticals et. al*. (Feb. 2, 2009), available at http://ftc.gov/speeches/leibowitz/090202watsonpharm.pdf.

[12] *See, e.g*., C. Scott Hemphill, *Paying for Delay*, **[**18]** *81 N.Y.U. L. Rev. at 1561-62 (2006)* (arguing that a settlement should be accorded a presumption of illegality if the settlement both restricts the generic firm's ability to market a competing drug and includes compensation from the innovator to the generic firm); Herbert Hovenkamp, Mark Janis, & Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, *87 Minn. L. Rev. 1719, 1759-60 (2003)* (proposing that a defendant would overcome the presumptive unlawfulness of a reverse payment settlement by "showing both (1) that the ex ante likelihood of prevailing in its infringement lawsuit is significant, and (2) the size of the payment is no more than the expected value of litigation and collateral costs attending the lawsuit"). *But see* Alan Devlin, *The Stochastic Relationship Between Patents and Antitrust*, 5 J. Competition L. & Econ. 75, 108 (2009) ("uncritical application of standard principles of competition law to information markets may be myopic.").

Notably, *Tamoxifen* expressly adopted aspects of the lower court's summary judgment decision in this case, holding:

> ***HN12***[] Unless and until the patent is shown to have been procured by fraud, or a suit for its enforcement is shown to be objectively baseless, there is no injury to the market cognizable under existing ***antitrust law***, as long as competition is restrained only within the scope of the patent.

Id. at 213 (citing *Cipro III, 363 F. Supp. 2d at 535*). The *Tamoxifen* court ruled that ***HN13***[] the settlement agreement did not exceed the scope of the patent where (1) there was no restriction on marketing non-infringing products; (2) **[***1914]** a generic version of the branded drug would necessarily infringe the branded firm's patent; and (3) the agreement did not bar other generic manufacturers from challenging the patent. *Id. at 213-15*; *cf. Cipro III, 363 F. Supp. 2d at 540-41*; *Cipro II, 261 F. Supp. 2d at 241-47*.

Since *Tamoxifen* rejected antitrust challenges to reverse payments as a matter of law, we are bound to review the Cipro court's rulings under the **[**21]** standard adopted in *Tamoxifen. See 466 F.3d at 208-12*. We therefore proceed to evaluate plaintiffs' claims under *Tamoxifen*. [13] Plaintiffs do not argue that the patent infringement lawsuit was a sham or that the Cipro patent was procured by fraud. Thus, the only reasonable basis for distinguishing *Tamoxifen* would be if plaintiffs demonstrated that the settlement agreement here, unlike in *Tamoxifen*, exceeded the scope of the Cipro patent. Plaintiffs cannot establish this because a generic version of Cipro would necessarily infringe Bayer's patent. *Tamoxifen* explained that ***HN14***[] unlike "formulation patents," which cover only specific formulations or delivery methods for a compound, a "compound patent" "by its nature, excludes all generic versions of the drug." *466 F.3d at 214*. Bayer's Cipro patent is a compound patent. *Id*. Thus, Barr's agreement to refrain from manufacturing generic Cipro encompasses only conduct that would infringe Bayer's patent rights.

Plaintiffs also claim that the challenged agreements contained ancillary restraints outside the scope of the patent: (1) Barr was permitted **[**22]** under the agreements to manipulate its rights to the 180-day market exclusivity period; and (2) Barr and HMR agreed to refrain from filing future ANDA-IV certifications related to Cipro. [14] *Tamoxifen* recognized that ***HN15***[] a plaintiff can have antitrust claims where a Hatch-Waxman settlement allows the generic manufacturer to manipulate the 180-day exclusivity period in a manner that bars subsequent challenges to the patent or precludes the generic manufacturer from marketing non-infringing products unrelated to the patent. *See Tamoxifen, 466 F.3d at 213-19*; *see also Cardizem CD, 332 F.3d at 907-09*. In this case, however, plaintiffs have not shown that the settlement agreements allowed manipulation of the exclusivity period or prohibited the marketing of non-infringing products.

Plaintiffs contend that Barr's insistence on its right to reclaim the 180-day exclusivity period caused other generic manufacturers **[*107]** to delay subsequent challenges. Specifically, they **[**23]** maintain that Mylan delayed its challenge because it perceived Barr's continued assertion of a right to the 180-day exclusivity as an obstruction to their entry into the market. This argument is unpersuasive. Although the settlement agreement allows Barr to reinstate its ANDA-IV if a subsequent patent challenge were successful, a reinstated ANDA-IV certification would not have entitled Barr to the 180-day exclusivity period based on the law in effect at the time of settlement. [15] Thus,

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[13] Our jurisdiction over plaintiffs' claims is also established by *Tamoxifen. See 466 F.3d at 199-200*.

[14] Plaintiffs argued below that the agreements were unlawful because Barr and HMR conceded the validity of several additional patents related to Cipro. *See Cipro II, 261 F. Supp. 2d at 254*. Plaintiffs do not press this argument on appeal.

[15] When Bayer and Barr entered the settlement ***HN16***[] in January 1997, an ANDA filer's right to 180-day exclusivity was contingent on their "successful defense" of a patent infringement suit. *See 21 C.F.R. § 314.107(c)(1)*. Since Barr did not successfully defend the lawsuit by entering a settlement, the court found it had no **[**24]** claim to the exclusivity period. *Cipro II, 261 F. Supp. 2d at 243, 247*. After courts rejected the FDA's "successful defense" requirement, *see, e.g., Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 329 U.S. App. D.C. 341 (D.C. Cir. 1998)*, the FDA permanently removed it. *See* Effective Date and Approval of an *Abbreviated New Drug Application, 63 Fed. Reg. 59710, 57911 (Nov. 5, 1998)*. But this occurred after the agreements in this case were executed. Plaintiffs argue that the questionable validity of the regulation suggests that Barr tried to

the district court properly determined that Barr forfeited its challenge to the patent and thus any right to 180-day exclusivity, and that other generic manufacturers were able to subsequently challenge the Cipro patent. *See* Cipro II, 261 F. Supp.2d at 243; [16] *cf.* *Tamoxifen,* **[***1915]** 466 F.3d at 218-19 (rejecting a claim that Barr manipulated the 180-day exclusivity period based on similar analysis).

Finally, plaintiffs argue that Barr and HMR unlawfully agreed to refrain from filing ANDA-IVs even after the Cipro patent expired. The agreement states that Barr and HMR are "not to . . . file any [ANDA] relating to Cipro with . . . a certification made pursuant to Paragraph IV of the Act." The district court reasonably interpreted the agreement to mean that Barr and HMR would not file any ANDA-IV certifications challenging the validity **[**26]** of the Cipro patent. *See* Cipro II, 261 F. Supp. 2d at 253. This reading was consistent with Barr's concession of validity and with the fact that there could not be an ANDA-IV certification for a non-infringing version of the drug since Bayer had a compound patent.

Plaintiffs contend that *Tamoxifen* is distinguishable because, by relying on the district court's *Cipro III* decision, *Tamoxifen* adopted an erroneous view of the facts **[*108]** of this case *i.e.22, Tamoxifen* was based on an erroneous view of the facts of *Cipro*. This argument is not persuasive. *Tamoxifen* relied on Cipro III not for its facts, but rather for its legal and policy analysis. The Tamoxifen majority urged against addressing the probability that a patent was invalid and deferred to a patent holder's desire to settle patent challenges, concluding that a patent holder could reasonably decide to pay money, even more than a generic manufacturer would make on the market, to guarantee protection of its patent. *See* Tamoxifen, 466 F.3d at 210 ("[A] rule [limiting the amount of exclusion payments] would . . . fail to give sufficient consideration to the patent holder's incentive to settle . . . .").

Plaintiffs and amici also argue that **[**27]** *Tamoxifen* runs afoul of the purpose of the Hatch-Waxman Act. The purpose of the Hatch-Waxman Act, 21 U.S.C. § 355, was "to make available more low cost generic drugs." H.R. Rep. No. 98-857, pt. 1, at 14 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647. The Act sought to accomplish this objective by providing an incentive through the ANDA-IV certification procedure for generic manufacturers to challenge presumptively valid patents, which, if successful, would result in exclusivity for the first successful challenger and the entry of generic drugs into the market. The market entry of generic drugs arising from successful Hatch-Waxman challenges can result in significant savings to consumers. *See* Brief for AARP as Amicus at 8-9 (discussing generic manufacturers' challenges to the Prozac patent and Paxil patent where generic entry resulted in $ 2.5 and $ 2 billion in consumer savings, respectively). [17]

These **[**28]** policy arguments cannot be addressed here. As defendants note, ***HN17***[] this panel is bound by *Tamoxifen* "absent a change in law by higher authority or by way of an in banc proceeding." United States v. Snow, 462 F.3d 55, 65 n.11 (2d Cir. 2006). However, there are several reasons why this case might be appropriate for reexamination by our full Court.

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exploit it in order to keep other manufacturers from the market, but *Tamoxifen* specifically rejected this argument. 466 F.3d at 218-19. Plaintiffs assert that the *Tamoxifen* panel did not consider a district court case that found an earlier FDA exclusivity requirement contrary to the Hatch-Waxman statute. *See* Inwood Labs., Inc. v. Young, 723 F. Supp. 1523 (D.D.C. 1989), *vacated as moot*, ***43 F.3d 712, 310 U.S. App. D.C. 61 (D.C. Cir. 1989)***. However, this argument is unavailing because the FDA promulgated the "successful defense" requirement in effect at the time of the agreements here after the *Inwood Labs* decision. See Abbreviated New Drug Application Regulations; Patent and Exclusivity Provision, 59 Fed. Reg. 50338 (Oct. 3, 1994). **[**25]** The established law at the time of the agreement precluded Barr from retaining a right to exclusivity.

[16] Plaintiffs contend that the district court erred in *Cipro III* when it admitted that, based on its ruling in *Cipro II*, it need not consider this claim "anew." *See* 363 F. Supp. 2d at 540 (citing Cipro II, 261 F. Supp. 2d at 243-47). *Cipro II* considered the claim in the context of plaintiffs' motion for partial summary judgment. When addressing defendants' motion for summary judgment in *Cipro III*, the district court was required to view the evidence in plaintiffs' favor. Because the district court's analysis is consistent with *Tamoxifen*, which was decided at the 12(b)(6) stage, the district court did not err by incorporating its analysis from *Cipro II*.

[17] One study found that generic manufacturers prevailed in 73% of the Hatch-Waxman lawsuits that were tried to verdict. See Brief for American Antitrust Institute ("AAI") as Amicus at 3 (citing *Generic Drug Entry Prior to Patent Expiration*, at vii (2002), available at http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf).

First, the United States has itself urged us to repudiate *Tamoxifen*, arguing that *Tamoxifen* adopted an improper standard that fails to subject reverse exclusionary payment settlements to appropriate antitrust scrutiny. Brief for the United States as Amicus at 6, 14-15; [18] *see also* Brief for the United States as Amicus in *Joblove v. Barr Labs., Inc*., No. 06-830, 2007 WL 1511527, at *1 (U.S. May 23, 2007) (describing the *Tamoxifen* standard as "incorrect"). In the pending case, the United States argues:

> This Court's *Tamoxifen* standard inappropriately permits patent holders to contract their way out of the statutorily imposed risk that patent litigation could lead to invalidation of the patent while claiming antitrust immunity for that private contract. . . . [T]his standard effectively bars considering whether the agreement might violate the antitrust **[**29]** laws, and so offers no protection to the public interest in eliminating undeserved patents.

[*109] Brief for the United States as Amicus at 14-15. [19] While acknowledging that patent-holders **[***1916]** are entitled to settle disputes over the validity of their patent, the United States proposes that excessive reverse payment settlements be deemed presumptively unlawful unless a patent-holder can show that settlement payments do not greatly exceed anticipated litigation costs. *Id*. at 27-32.

Second, there is evidence that the practice of entering into reverse exclusionary payment settlements has increased since we decided *Tamoxifen*. Prior to our *Tamoxifen* decision, there were fourteen settlements of Hatch-Waxman lawsuits, none of which involved reverse payments to a generic manufacturer. Brief for American Antitrust Institute as Amicus at 3 (citing Fed. Trade Comm'n, *Generic Drug Entry: Prior to Patent Expiration* 31-32, 34 (July 2002), *available at* *http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf*). After *Tamoxifen*, however, plaintiffs represent that twenty of twenty-seven Hatch-Waxman settlements have involved reverse payments.

Third, after *Tamoxifen* was decided, a principal drafter of the Hatch-Waxman Act criticized the settlement practice at issue here. *See* 148 Cong. Rec. S7565 (July 30, 2002) (remarks of Sen. Hatch) ("As coauthor of the [Hatch-Waxman Act], I can tell you that I find these type[s] **[**31]** of reverse payment collusive arrangements appalling"); see also 146 Cong. Rec. E1538-02 (Sept 20, 2000) (remarks of Rep. Waxman) ("[R]equir[ing] companies seeking to reach secret, anticompetitive agreements to disclose them to the FTC . . . . [would] ensure that existing antitrust and drug approval laws are enforced to the letter."). [20]

Fourth and finally, *Tamoxifen* relied on an unambiguous mischaracterization of the Hatch-Waxman Act. *Tamoxifen* was based in no small part on the panel majority's belief that reverse exclusionary settlements "open[] the [relevant] patent to immediate challenge by other potential generic manufacturers . . . spurred by the **[**32]** additional incentive . . . of potentially securing the 180-day exclusivity period available upon a victory in a subsequent infringement lawsuit." *466 F.3d at 214*. The panel majority's claim that the statutory exclusivity period cedes to the first ANDA filer to successfully defend was erroneous. *See* C. Scott Hemphill, *Paying for Delay: Pharmaceutical*

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[18] The Department of Justice provided a brief at the request of the panel. Though the United States argues that our *Tamoxifen* decision was wrongly decided, it "takes no position on the ultimate merits of this appeal." Brief for the United States as Amicus at 9.

[19] Amici similarly argue that the *Tamoxifen* court's permissive approach to reverse payments offers protection to patent holders beyond that envisioned by patent law, is inconsistent with the principle that antitrust cases be decided "based upon demonstrable economic effect rather than . . . formalistic line drawing," Brief for AAI as Amicus at 5, (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*, and did not give sufficient consideration **[**30]** to the public interest in "authoritative testing of patent validity." Brief for Nat'l Assoc. of Chain Drug Stores, Inc. as Amicus at 20 (quoting *Blonder-Tongue Lab. v. University of Illinois Found., 402 U.S. 313, 343, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971))*.

[20] We are not insensitive to "the oft-repeated warning that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980)* (quotation marks omitted). However, remarks by an Act's author do not trigger the typical concern about post-enactment legislative history, namely that "the losers in the legislative arena hope to persuade the courts to give them the victory after all." Richard A. Posner, *How Judges Think* 344 (2008).

Patent Settlement As a Regulatory Design Problem, 81 N.Y.U. L. Rev. 1553, 1583-86 (2006). Contrary to our suggestion in *Tamoxifen*, later **[*110]** ANDA-IV filers are not eligible for the 180-day exclusivity period. *Id. at 1584*; *cf*. *21 C.F.R. § 314.107(c)(1)-(2)* (only first-filer eligible for exclusivity period); 180-*Day Generic Drug Exclusivity for Abbreviated New Drug Applications, 64 Fed. Reg. 42,873, 42,874 (Aug. 6, 1999)* (revisiting and re-endorsing FDA interpretation of exclusivity provisions); *21 U.S.C. § 355(j)(5)(D)(iii)* (codifying FDA interpretation).

In addition, unlike *Tamoxifen*, which was decided at the 12(b)(6) stage, this case involves a summary judgment decision based on a full record. This case could provide our full Court with an opportunity to revisit the issues in play in *Tamoxifen* and to analyze the competing interests that underlie **[**33]** antitrust challenges to reverse payment settlements in light of the full record and the arguments of the parties and amici, including the United States, that have been raised in this appeal. We therefore invite plaintiffs-appellants to petition for in banc rehearing.

CONCLUSION

In sum, as long as *Tamoxifen* is controlling law, plaintiffs' claims cannot survive. Accordingly, we AFFIRM the judgment of the district court. However, we believe there are compelling reasons to revisit *Tamoxifen* with the benefit of the full Court's consideration of the difficult questions at issue and the important interests at stake. We therefore invite the plaintiffs-appellants to petition for rehearing in banc. **[***1917]**

POURfect Prods. v. KitchenAid

United States District Court for the District of Arizona

May 3, 2010, Decided; May 3, 2010, Filed

No. CV-09-2660-PHX-GMS

Reporter
2010 U.S. Dist. LEXIS 42890 *; 2010-2 Trade Cas. (CCH) P77,148

POURfect Products, a division of DYCE LLC, an Arizona limited liability company, Plaintiff, vs. KitchenAid, a division of Whirlpool Corporation, a Delaware corporation, Defendant.

Notice: NOT FOR PUBLICATION

Subsequent History: Count dismissed at *POURfect Prods. v. KitchenAid, 2010 U.S. Dist. LEXIS 90869 (D. Ariz., Aug. 30, 2010)*

Core Terms

alleges, customers, fails, relevant market, aftermarket, Sherman Act, alleged facts, attachments, disparaging, antitrust, monopoly power, competitors, geographic, retailers, mixers, rivals, anticompetitive conduct, comments, effects, brand, consumers, prices

Counsel: **[*1]** For POURfect Products, a division of DYCE LLC, an Arizona limited liability company, Plaintiff: Richard A Segal, Gust Rosenfeld PLC, Phoenix, AZ.

For KitchenAid, a division of Whirlpool Corporation, a Delaware corporation, Defendant: David Daniel Weinzweig, Randall Papetti, Lewis & Roca LLP, Phoenix, AZ; Robert H Brunson, Nelson Mullins Riley & Scarborough LLP, Charleston, SC; Stephen G Morrison, Nelson Mullins Riley & Scarborough, Columbia, SC.

Judges: G. Murray Snow, United States District Judge.

Opinion by: G. Murray Snow

Opinion

ORDER

Pending before the Court is Defendant's Motion to Dismiss (Dkt. # 8.) For the following reasons, the Court grants Defendant's Motion to Dismiss with leave to amend.

BACKGROUND

Defendant KitchenAid ("KitchenAid") manufactures and sells stand mixers and mixer attachments directly to consumers and through retailers. (Dkt. # 1 at 2.) Plaintiff POURfect Products ("POURfect") makes and sells an aftermarket beater attachment (the "Scrape-A-Bowl") for use with KitchenAid stand mixers. (*Id.*) In early 2009, POURfect had existing and prospective contracts with unspecified retailers to supply Scrape-A-Bowl. (*Id.*)

POURfect alleges that these existing and prospective contracts would have resulted **[*2]** in sales of not less than $ 8,000,000 in 2010. (*Id.*) But, in May 2009, KitchenAid advised its trade customers (i.e., retailers) that "bowl-scraper accessories" may shorten the life of the stand mixer motor and cause damage that would be excluded from warranty coverage. (*Id.*) KitchenAid advised its retailers that it had performed tests that showed that the use of bowl-scraper accessories caused motor temperatures to exceed those allowed under the Underwriter Laboratories' requirements. (*Id.* at 3.) The Complaint alleges, however, that KitchenAid's tests did not conform to the Underwriter Laboratories' testing requirements and did not fairly test the bowl-scraper beaters in a manner generally representative of actual service conditions. (*Id.*) Further, the Complaint alleges that the use of KitchenAid attachments caused greater motor problems than did Scrape-A-Bowl beaters under actual service conditions. (*Id.*) POURfect claims that KitchenAid's false and misleading statements to its retailers, with a specific intent to destroy competition, has caused POURfect to lose profits of an amount not less than $ 6,000,000. (*Id.* at 4.)

Count One of POURfect's Complaint alleges that KitchenAid violated **[*3]** Section 2 of the Sherman Act (*15 U.S.C. § 2*). It seeks both injunctive relief and treble damages as authorized by Section 4 of the Clayton Act (*15 U.S.C. § 15*). (*Id.*) Counts Two and Three allege state law claims based on product disparagement and interference with contractual relations. (*Id.*)

LEGAL STANDARD FOR MOTION TO DISMISS

To survive dismissal for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a complaint must contain more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "raise a right of relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While "a complaint need not contain detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008)* (quoting *Twombly, 550 U.S. at 570*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* **[*4]** (citing *Twombly, 550 U.S. at 556*). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly, 550 U.S. at 555*) (internal citations omitted). Similarly, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998)*.

DISCUSSION

I. The Court Grants KitchenAid's Motion to Dismiss

POURfect's Complaint fails to plead facts sufficient to make any of its federal claims plausible.

A. POURfect Fails to State a Plausible Claim For Relief Under Section 2 of the Sherman Act For Actual Monopolization.

To show actual monopolization under § 2 of the Sherman Act, a Plaintiff must show "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence **[*5]** of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. The first prong can be broken down into two parts: (1) whether the defendant possessed monopoly power (2) in a properly defined relevant market. The Supreme Court has clarified that the second *Grinnell* factor applies only where the defendant engaged in "anticompetitive conduct." *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. In addition to the above elements, a plaintiff who, as here, seeks damages under Section 4 of the Clayton Act must allege "causal antitrust injury," indicating that the plaintiff's "loss flows from an anticompetitive aspect or effect of the defendant's behavior." *Rebel Oil Co., Inc., v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. The Complaint fails to allege facts sufficient to support any of these elements.

i. POURfect's Complaint Fails To Allege Plausible Facts With Sufficient Detail To Show That KitchenAid Possesses Monopoly Power.

"Monopoly power, for the purpose of section 2 of the Sherman Act, is "'the power to control prices or exclude competition.'" *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 (9th Cir. 1997)* **[*6]** (quoting *Grinnell, 384 U.S. at 571*). "A plaintiff may demonstrate market power either by direct evidence or by circumstantial evidence." *Forsyth, 114 F.3d at 1475* (citing *Rebel Oil, 51 F.3d at 1434*). "Direct proof of market power may be shown by evidence of restricted output and supracompetitive prices." *Forsyth, 114 F.3d at 1475*. Here, POURfect has not alleged any facts showing direct proof of market power.

Meanwhile, "[c]ircumstantial evidence . . . requires the plaintiff to: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id. at 1476* (internal quotations omitted). POURfect fails to allege facts sufficient to meet any of these elements. First, as discussed *infra* Section I-A-ii, POURfect does not allege facts defining the relevant market. Furthermore, POURfect does not allege facts showing that the defendant owns a dominant share of the market, that there are significant barriers to entry into the relevant market, or that existing competitors lack the capacity to increase their output **[*7]** in the short run. Instead, POURfect makes only a conclusory allegation regarding monopoly power, stating, "By virtue of its influence over its trade customers at the retail level of the market, KitchenAid possessed monopoly power in the relevant market of aftermarket attachments." (Dkt. # 1 at 3.) This type of "formulaic recitation of the elements of a cause of action" is insufficient under the *Twombly* pleading requirements. *550 U.S. at 555*; *see also* *Korea Kumho Petrochem. v. Flexsys America LP, 2008 U.S. Dist. LEXIS 68559, 2008 WL 686834, at *9 (N.D. Cal. March 11, 2008)* (dismissing plaintiff's attempted monopolization claim because the complaint made only a blanket allegation that the defendants had a dangerous probability of achieving monopoly power).

ii. POURfect's Complaint Fails To Allege a Relevant Market.

"Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*. The "relevant market" includes both the relevant geographic market, as well as the relevant product market, including "product use, quality, and description." *Id.* (internal quotation omitted).

First, the Complaint does not sufficiently allege the geographic **[*8]** market. "The geographic market extends to the area of effective competition . . . where buyers can turn for alternative sources of supply." *Tanaka, 252 F.3d at 1063* (internal quotation omitted). Only one paragraph of the Complaint refers to the geographic market, alleging that "KitchenAid has market power to exclude competition in the aftermarket for stand mixer attachments in the United States and other countries." (Dkt. # 1 at 2.) This statement, by not alleging *which* other countries or which parts of the United States are included in the geographic market, fails to set the parameters for a relevant geographic market necessary to survive a *Rule 12(b)(6)* motion.

In addition to the geographic market, the Complaint fails to allege sufficient facts relating to the relevant product market. In general, a product market is "the pool of goods or services that qualify as economic substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand[,]" although "[i]n limited settings . . . the relevant product market may be narrowed beyond the boundaries of physical interchangeability and cross-price elasticity to account for identifiable submarkets or product **[*9]** clusters." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)*. In other words, a product market typically exists where a group of products may be used interchangeably and where an increase in the price of one good causes a corresponding increase in the demand for other goods.

A single brand of product, such as attachments for a single brand of product, may constitute the relevant product market in limited circumstances. Univ. Avionics Sys. Corp. v. Rockwell Int'l Corp., 184 F. Supp. 2d 947, 954 (D. Ariz. 2001). POURfect's Response urges the Court to define the relevant product market as only aftermarket products for KitchenAid stand mixers. (Dkt. # 12 at 3.) While under certain conditions, a plaintiff may limit the relevant market to the aftermarket for a single brand of product, the rule is not as broad as POURfect implies. The relevant product market may be limited to the aftermarket for a single brand of product only in "very limited circumstances." Univ. Avionics, 184 F. Supp. 2d at 954. The very limited circumstances will occur when "'switching costs,' 'information costs,' and a 'lock-in' [] create a potential for aftermarket power in the derivative **[*10]** aftermarkets for the manufacturer's own equipment[,]" such as where a manufacturer markets its own equipment and subsequently changes its policies to "lock-in" existing customers. *Id.* (citing Kodak, 504 U.S. at 477); *see also* PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 820 (6th Cir. 1997). Specifically, for such a lock-in to occur, the Complaint must allege facts making the following four factors plausible:

1. High "switching costs": A substantial number of customers must have made brand-specific investments that still have a useful life but that are substantially unrecoverable if they shift to other brands;
2. High "information costs": A substantial number of those customers must be too ignorant of "lifecycle" prices to protect themselves by judicious interbrand comparisons or by contract before they become locked in;
3. Ability to exploit ignorant customers: The knowledgeable customers who can protect themselves must either be unimportant to the defendant or be protected by effective price discrimination from above market prices paid by the ignorant; and

4. Ability to exploit must be "substantial": The defendant's resulting ability to exploit the ignorant must be "substantial."

Univ. Avionics, 184 F. Supp. 2d at 955 **[*11]** (citing Kodak, 504 U.S. at 467-73; X Areeda et al., ***Antitrust Law*** P 1740 at 138 (1996)). Here, POURfect fails to allege a KitchenAid policy shift that would "lock-in" customers. An unfavorable report regarding POURfect's attachment does not, of itself, constitute a change in policy that would require the owners of KitchenAid mixers to purchase only KitchenAid aftermarket attachments. Moreover, POURfect has not plausibly alleged facts that would make any of the above four factors plausible. Therefore, the "very limited circumstances" in which courts may limit the relevant product market to the aftermarket for a single brand of product does not apply to this case. [1]

iii. POURfect's Complaint Fails To Allege Plausible Facts Indicating That KitchenAid Engaged In Anticompetitive Conduct.

An act is deemed *anticompetitive* under the Sherman Act only when it harms both the overall efficiency in the market and either raises the prices of goods or diminishes their quality. Rebel Oil, 51 F.3d at 1433. **[*13]** Here, POURfect's Complaint does not properly allege anticompetitive conduct because it fails to allege facts showing that KitchenAid's conduct either raised prices or diminished quality.

POURfect alleges that KitchenAid disparaged POURfect's product to trade customers. The Ninth Circuit, however, has held that "[w]hile the disparagement of a rival or compromising a rival's employee may be unethical and even

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[1] The Complaint also fails to allege a relevant market that extends beyond the KitchenAid attachment aftermarket. "'Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.'" **[*12]** In re eBay Seller Antitrust Litig., 545 F. Supp. 2d 1027, 1031 (N. D. Cal. 2008) (quoting Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir.1997)). Here, POURfect has failed to allege any facts indicating that the Scrape-a-Bowl is interchangeable with either the KitchenAid brand or other similar products on the market, nor has POURfect alleged facts regarding how the prices of some aftermarket attachments affect the demand for other attachments. Therefore, POURfect's Complaint does not survive a Rule 12(b)(6) motion. *See* Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999) (affirming dismissal of plaintiff's antitrust complaint where plaintiff failed to allege "that there are no other goods or services that are reasonably interchangeable with lodging accommodations or ski packages within this geographic market").

impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act." Am. Prof'l Testing Servs., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'n, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997). The Ninth Circuit requires a "'preliminary showing of significant and more-than-temporary harmful effects on *competition* (and not merely upon a competitor or customer)' before [disparaging comments about a rival's product] can rise to the level of [anticompetitive] conduct." *Id.* (quoting 3 P. Areeda & D. Turner, ***Antitrust Law*** *P* 737b at 278 (1978)).

Specifically, *Am. Prof'l Testing* laid out six elements that a plaintiff making an antitrust claim based on disparaging comments must affirmatively **[*14]** allege through specific facts in order to overcome the presumption that defendant's disparaging comments had only a "de minimus" effect on competition. Id. at 1152. Plaintiff must allege facts showing that Defendant's comments about the Scrape-a-Bowl were "'(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.'" Id. at 1152 (quoting Nat'l Ass'n of Pharm. Mfrs. v. Ayerest Labs., 850 F.2d 904, 916 (2d Cir. 1988)).

POURfect has not alleged that KitchenAid caused significant and more-than-temporary harmful effects on competition generally (as opposed to alleging harmful effects merely on itself). *See* LiveUniverse, Inc. v. MySpace, Inc., 2007 U.S. Dist. LEXIS 43739, 2007 WL 6865852, at *11 (C.D. Cal. June 5, 2007) (granting a Rule 12(b)(6) motion for failure to allege anticompetitive conduct and explaining that "'[t]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect[,]'" meaning that it "'must harm the competitive process and thereby harm consumers[,]'" but mere "'harm to **[*15]** one or more competitors will not suffice'") (quoting United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)), *aff'd,* 304 F. App'x 554 (9th Cir. 2008).

Nor has POURfect sufficiently pleaded facts constituting the fifth element that the disparagement "continued for prolonged periods" because the Complaint alleges only that KitchenAid made disparaging comments to its trade customers in May 2009. POURfect also does not plead the sixth element that the comments were "not readily susceptible of neutralization or other offset by rivals." For example, POURfect has not stated in its Complaint why it would be unable to communicate statements about its product quality to KitchenAid retailers, thus offsetting the effect of KitchenAid's allegedly faulty tests. *See, e.g.,* Tate v. Pac. Gas & Elec. Co., 230 F. Supp. 2d 1072, 1080 (N.D. Cal. 2002) (dismissing claims where plaintiff did not allege that the violations were not readily susceptible to neutralization or offsets by rivals). Therefore, POURfect has not properly alleged anticompetitive conduct.

iv. POURfect's Complaint Fails To Allege With Sufficient Detail That Show KitchenAid Has Caused Antitrust Injury.

Because POURfect seeks damages **[*16]** under Section 4 of the Clayton Act for violation of Section 2 of the Sherman Act, POURfect must allege "causal antitrust injury," indicating that its "loss flows from an anticompetitive aspect or effect of the defendant's behavior." Rebel Oil, 51 F.3d at 1433. The Ninth Circuit has identified four requirements for antitrust injury: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999). Here, the Complaint does not allege any injury to competition or consumer welfare. Rather, POURfect alleges only harm to itself. Harm to a competitor, however, without harm either to competition or to consumer welfare, is not sufficient to establish antitrust injury. *See* LiveUniverse, Inc., 2007 U.S. Dist. LEXIS 43739, 2007 WL 6865852, at *15 (granting defendant's Rule 12(b)(6) motion and stating that "[h]arm to one or more competitors is not sufficient to constitute antitrust injury unless a plaintiff alleges harm to the competitive process, which in turn harms consumers"). [2]

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[2] To the extent POURfect alleges *attempted* **[*17]** monopolization under Section 2 of the Sherman Act, that claim also fails because an attempted monopolization claim also requires a plaintiff to allege predatory or anticompetitive conduct and causal antitrust injury, which, as discussed above, POURfect has not done. *See* Rebel Oil Co., 51 F.3d at 1433 (stating that an attempted monopolization claim includes four elements: (1) specific intent to control prices or destroy competition; (2) predatory

II. The Court Declines To Exercise Pendant Jurisdiction.

When a district court "dismisses [federal claims] leaving only state claims for resolution, the court should decline jurisdiction over the state claims and dismiss them without prejudice." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989)*. Only in the "unusual case" should federal courts retain jurisdiction over the state law claims. *Gini v. Las Vegas Metro. Police Dept., 40 F.3d 1041, 1046 (9th Cir. 1994)*. In this determination, courts consider "economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*. **[*18]** This is not an unusual case, and it is appropriate to dismiss the state law claims without prejudice to allow state courts to decide state law. Moreover, economy, convenience, and fairness all favor remand because this case is only at the motion-to-dismiss stage, so presumably the parties have not yet conducted substantial discovery. [3]

III. Dismissal Is Without Prejudice.

Federal Rule of Civil Procedure 15(a) "declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)* (citing *Fed. R. Civ. P. 15(a)*). The Court finds that amendment may cure some of the Complaint's defects.

CONCLUSION

POURfect's Complaint does not set forth sufficient facts to state a claim for a Sherman Act violation.

IT IS THEREFORE ORDERED that KitchenAid's Motion to Dismiss (Dkt. # 8) is **GRANTED** with leave to file an amended complaint on or before **May 14, 2010** at **5:00 p.m.**

IT IS FURTHER ORDERED that If no amended complaint **[*19]** is filed by that date, the Clerk of the Court is directed to **terminate** this action.

DATED this 3rd day of May, 2010.

/s/ G. Murray Snow

G. Murray Snow

United States District Judge

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or anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability of achieving 'monopoly power'; and (4) causal antitrust injury").

[3] Although the Court does not address the state law claims, a cursory reading of the Complaint indicates that the state law claims may also suffer from insufficient pleading requirements under *Twombly* and *Iqbal.*

TYR Sport, Inc. v. Warnaco Swimwear, Inc.

United States District Court for the Central District of California

May 3, 2010, Decided

CASE NO: SACV 08-529 JVS(MLGx)

Reporter

709 F. Supp. 2d 821 *; 2010 U.S. Dist. LEXIS 47582 **; 2011-1 Trade Cas. (CCH) P77,495

TYR Sport, Inc., Plaintiff(s), v. WARNACO SWIMWEAR, INC., ET AL, Defendant(s).

Prior History: *TYR Sport, Inc. v. Warnaco Swimwear, Inc., 709 F. Supp. 2d 802, 2010 U.S. Dist. LEXIS 27566 (C.D. Cal., Mar. 16, 2010)*

Core Terms

Swimming, swimmers, suits, sales, competitors, swimsuit, coaches, summary judgment, Team, false advertising, disparagement, championship, manufacturers, advertising, argues, Lanham Act, reconsideration, wearing, products, testing, email, antitrust claim, market share, blueseventy, antitrust, entrants, puffery, inferior product, false statement, promotion

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)(2)*.

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

HN2[] **Burdens of Proof, Movant Persuasion & Proof**

The burden initially is on the party moving for summary judgment to demonstrate an absence of a genuine issue of material fact.

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

HN3[] **Burdens of Proof, Nonmovant Persuasion & Proof**

If the party moving for summary judgment meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. If the nonmoving party meets this burden, then the motion will be denied.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN4[] **Entitlement as Matter of Law, Materiality of Facts**

For summary judgment purposes, material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN5[] **Entitlement as Matter of Law, Genuine Disputes**

For summary judgment purposes, a fact issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN6[] **Burdens of Proof, Nonmovant Persuasion & Proof**

To demonstrate a genuine issue, the party opposing summary judgment must do more than simply show that there is some metaphysical doubt as to the material facts. The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN7[] **Summary Judgment, Evidentiary Considerations**

In deciding a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn.

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

HN8[] **Sherman Act, Scope**

For a disparagement-based antitrust claim, case law sets a high burden of proof; the United States Court of Appeals for the Ninth Circuit insists on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer) before these practices can rise to the level of exclusionary conduct.

Antitrust & Trade Law > Sherman Act > Claims

HN9[] Sherman Act, Claims

The First Amendment does not allow antitrust claims to be predicated solely on protected speech.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] Sherman Act, Claims

An antitrust plaintiff must demonstrate that the false statement was made in commercial advertising or promotion, as under the Lanham Act.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN11[] Consumer Protection, False Advertising

Classic puffery include exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely. For a statement to be actionable, it must make a specific and measurable advertisement claim of product superiority.

Antitrust & Trade Law > Consumer Protection > False Advertising > General Overview

HN12[] Consumer Protection, False Advertising

Whether a statement is puffery does not depend on the truth or falsity of a statement; it depends on the degree of generality or specificity. The puffing rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN13[] False Advertising, Lanham Act

Where the context of an advertising statement may lend greater specificity to an otherwise vague representation, the court should not succumb to the temptation to hastily rule a phrase to be unactionable under the Lanham Act.

Antitrust & Trade Law > Sherman Act > Claims

HN14[] Sherman Act, Claims

In order to state a valid Sherman Act claim under a false advertising theory, the plaintiff must make a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer). Because of the difficulties in distinguishing actionable false statements from puffing, the speculative effect that advertising has on consuming behavior, and buyer distrust of a seller's disparaging comments, the United States Court of Appeals for the Ninth Circuit has set forth a presumption that commercial speech or advertising has a de minimis effect on competition. A plaintiff may overcome this presumption by showing that the charged speech meets a six-factor test: the statements must be (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.

Antitrust & Trade Law > Sherman Act > Claims

HN15[] **Sherman Act, Claims**

United States Court of Appeals for the Ninth Circuit's case law first sets out the requirement that disparagement must have a significant and enduring adverse impact on competition itself in the relevant markets to rise to the level of an antitrust violation. The plaintiff has the burden of proving this significant and enduring impact in order to proceed on the claim.

Antitrust & Trade Law > Sherman Act > Claims

HN16[] **Sherman Act, Claims**

According to the United States Court of Appeals for the Ninth Circuit, antitrust claims based on false advertising should presumptively be ignored; that is, the defendant is entitled to a presumption that false advertising has a de minimis effect on competition before the introduction of any evidence of actual market impact. The six-factor test, which focuses on the characteristics of the charged speech and not on any evidence of actual market effect, is the plaintiff's means of overcoming this first hurdle. It does not, however, satisfy the plaintiff's burden of proving an actual significant and enduring adverse impact on competition. In other words, a plaintiff that has discharged the de minimis presumption is not automatically entitled to its own presumption of significant market effect. In addition to showing that the speech is of the type that could have a significant effect on competition, the plaintiff has the burden of showing that it actually did affect competition.

Antitrust & Trade Law > Sherman Act > Claims

HN17[] **Sherman Act, Claims**

The Harcourt Brace presumption rests partially on the rationale that buyers generally do not trust comments made by competitors. However, the United States Court of Appeals for the Ninth Circuit also relied on the difficulty in distinguishing actionable false statements from puffery and the speculative nature of the effects of false advertising, especially when it is not systematic. This would apply regardless of whether the speaker had the appearance of objectivity. That circumstance may be considered within the Harcourt Brace factors, such as the likelihood of inducing reliance or susceptibility of neutralization, but the United States District Court for the Central District of California does not find that it negates the application of the presumption entirely.

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

HN18[] **State Regulation, Claims**

Where Cartwright Act, *Cal. Bus. & Prof. Code § 16720 et seq.*, claims are premised on the same facts as Sherman Act claims, and summary judgment is granted on the Sherman Act claims, summary judgment is also appropriate for Cartwright Act claims.

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

HN19[] **State Regulation, Claims**

California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, prohibits three separate categories of conduct: acts or practices which are unlawful, or unfair, or fraudulent. *Cal. Bus. & Prof. Code § 17200*. Conduct is unfair if it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Thus, in most cases, where a plaintiff's UCL claim is predicated on antitrust violations that fail to withstand summary judgment, the UCL claim must also fail.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN20[] **Relief From Judgments, Altering & Amending Judgments**

Under *Fed. R. Civ. P. 59(e)*, a party may move to alter or amend a judgment within 28 days.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN21[] **Relief From Judgments, Altering & Amending Judgments**

See C.D. Cal. Civ. R. 7-18.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN22[] **Relief From Judgments, Altering & Amending Judgments**

A court may disregard evidence or arguments on a motion for reconsideration that could reasonably have been presented prior to the court's ruling.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN23[] **False Advertising, Lanham Act**

A plaintiff asserting a false advertising claim under the Lanham Act must show that the charged statements actually deceived or had the tendency to deceive a substantial segment of its audience and is likely to influence the purchasing decision.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN24[] **False Advertising, Lanham Act**

The Lanham Act requires that the plaintiff asserting a false advertising claim prove that the defendant caused its false statement to enter interstate commerce.

Antitrust & Trade Law > Consumer Protection > False Advertising > Lanham Act

HN25[] **False Advertising, Lanham Act**

Case law from the United States District Court for the Southern District of Florida merely stands for the proposition that oral statements, such as in-person or telephone sales calls, can constitute commercial advertising within the meaning of the Lanham Act. It does not stand for the proposition that a plaintiff can merely invoke word-of-mouth to overcome its burden of showing that customers actually heard and were deceived by the alleged false statement.

Counsel: **[**1]** For Tyr Sport Inc, a California corporation, Plaintiff: Christopher W Arledge, LEAD ATTORNEY, One LLP, Costa Mesa, CA; Jennifer Sun, Lawrence J Hilton, William E Halle, LEAD ATTORNEYS, O'Neil LLP, Irvine, CA.

For Warnaco Swimwear Inc, a Delaware corporation doing business as Speedo USA, Defendant: Stuart M Richter, Zia F Modabber, LEAD ATTORNEYS, Gregory S Korman, Katten Muchin Rosenman, Los Angeles, CA.

For United States Swimming Inc, an Ohio corporation, Mark Schubert, an individual, Defendants: Adam Paul Brezine, Jonathan G Fetterly, LEAD ATTORNEYS, Holme Roberts & Owen LLP, Los Angeles, CA; Jennifer Bielak, LEAD ATTORNEY, PRO HAC VICE, Holme Roberts & Owen LLP, Colorado Springs, CO; Richard R Young, LEAD ATTORNEY, PRO HAC VICE, Holme Roberts and Owen LLP, Colorado Springs, CO.

For Erik Vendt, an individual, Defendant: Richard J Foster, LEAD ATTORNEY, Law Office of Richard J Foster, Seal Beach, CA.

Judges: JAMES V. SELNA, UNITED STATES DISTRICT JUDGE.

Opinion by: JAMES V. SELNA

Opinion

[*825] ORDER RE MOTIONS FOR SUMMARY JUDGMENT AND RECONSIDERATION

Defendant Warnaco Swimwear, Inc. dba Speedo USA ("Speedo") moves for for summary judgment under *Federal Rule of Civil Procedure 56* on the remaining claims for relief asserted **[**2]** against it by Plaintiff TYR Sport, Inc. ("TYR"). Defendants United States Swimming, Inc. ("USA Swimming") and Mark Schubert ("Schubert") also move for summary judgment under *Rule 56* on TYR's remaining claims. Speedo and USA Swimming and Schubert (collectively, "Defendants") join each others' respective motions. TYR opposes both motions.

TYR also moves under *Rule 59* and *Local Rule 7-18* for reconsideration of the Court's order granting summary judgment on TYR's Fourth claim for relief under the Lanham Act. Speedo opposes.

I. PROCEDURAL BACKGROUND

On March 3, 2010, the Court granted in part and denied in part the Defendants' initial motions for summary judgment. (Docket Nos. 149, 154.) The Court granted summary judgment on TYR's claims for false advertising under the Lanham Act and intentional interference with contractual relations. (Docket No. 154 at 28, 32.) The Court also granted summary adjudication on the remaining antitrust claims to the extent they were based on a coercion theory of antitrust liability--that the Defendants conspired to force or coerce swimmers to purchase Speedo swimsuits. (Id. at 24.) However, because the Defendants had failed to address TYR's disparagement theory **[**3]** of liability, the Court denied summary judgment on the antitrust claims. (Id. at 20.) Recognizing the high threshold that a plaintiff must overcome to show that speech rises to the level of an antitrust violation, the Court invited a second round of briefing on the disparagement issue before the matter went to trial. (Id. at 33.) The Defendants now seek summary judgment on the remaining disparagement theory.

As set forth in the Court's prior order on summary judgment, this case revolves around the "swimsuit wars" of 2008 and 2009. (Id. at 2.) Speedo and TYR are competing manufacturers of high-end swimwear and accessories. (Id.) USA Swimming is the national governing body of the sport of swimming in the United States and has an exclusive sponsorship agreement with Speedo. (Id.) Schubert was, at all relevant times, employed by USA Swimming as the National and Olympic Team head coach and general manager and a paid spokesperson for Speedo. (Id.)

TYR's antitrust claims, under Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1* & *2*, the Cartwright Act, *Cal. Bus. & Prof. Code § 16720 et seq.*, and the California Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200 et seq.*, rest on **[**4]** TYR's theory that Speedo, USA Swimming, and Schubert all conspired to unfairly promote Speedo's products and disparage competitors from Schubert's position of clout within the swimming community.

II. SUMMARY JUDGMENT

A. Legal Standard

HN1[] Summary judgment is appropriate only where the record, read in the light most favorable to the nonmoving party, indicates "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)(2)*; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. ***HN2***[] The **[*826]** burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323*. ***HN3***[] If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. See *id. at 322-23*. If the nonmoving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000)*.

HN4[] Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. **[**5]** "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex, 477 U.S. at 322*.

HN5[] A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248*. ***HN6***[] To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (internal quotation marks and citations omitted). ***HN7***[] In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, 477 U.S. at 255*. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *Am. Int'l Group, Inc. v. Am. Int'l Bank, 926 F.2d 829, 837 (9th Cir. 1991)*.

B. Discussion

As discussed above, TYR's remaining claims against **[**6]** Speedo, USA Swimming, and Schubert all depend on its disparagement theory of antitrust liability. TYR bases this claim on a series of statements made by Schubert to elite swimmers and coaches touting the benefits of Speedo's LZR Racer swimsuit and disparaging the suits of Speedo's competitors.

TYR points to five sets of statements that it contends violate the antitrust laws: (1) a statement by Schubert at the December 2007 National Team Coaches Meeting that "athletes [should] wear the Speedo equipment if they wanted to compete at the highest level," and references made by a fellow USA Swimming employee to NASA testing and "4% less drag"; (2) a March 2008 email from Schubert to twenty swimming coaches stating that "only one company [Speedo] is putting millions into research and development" and "the trailing companies . . . [offer] an inferior product"; (3) a statement by Schubert to swimmers at a National Team meeting before an April 2008 swim meet in Manchester, England, that the Speedo LZR Racer "would give you a 2% advantage"; (4) a statement by Schubert to reporter Craig Lord at the same April 2008 meet that "if you take the best times of world record holders and their new times **[**7]** [in the Speedo LZR], the difference is 2 percent," and that "some [swimmers] are contracted to an inferior product"; and (5) a statement by Schubert in January 2009 to two Junior National Team swimmers in Guam that they should wear the Speedo LZR because it was "faster" than the non-Speedo suits they were wearing.

1. False Advertising Under Section 1

As a preliminary matter, USA Swimming and Schubert contend that TYR cannot **[*827]** maintain an antitrust claim for false advertising under *Section 1* of the Sherman Act. They note the Court's previous order on a motion to dismiss that, in order to distinguish *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989)*, TYR would have to prove that Schubert used his influence to coerce swimmers into wearing Speedo products. (Docket No. 72 at 8-9.) However, as pointed out by TYR, Schachar's analysis rests partially on the fact that the Seventh Circuit does not recognize a theory of antitrust liability based on false advertising. *870 F.2d at 399*; see also *Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005)*. In contrast, the Ninth Circuit does. See *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1151-52 (9th Cir. 1997)*. **[**8]** Thus *Schachar*, which is only persuasive authority in this Court, need not be entirely distinguished, especially where it may conflict with Harcourt Brace. This leaves open the question of whether a Section 1 claim can be based on false advertising in the Ninth Circuit.

USA Swimming and Schubert note that Harcourt Brace is a Section 2 decision and that no Ninth Circuit decision has extended it to a Section 1 conspiracy claim. However, the Ninth Circuit has never expressly precluded false advertising as a Section 1 claim either. And to the extent that Harcourt Brace recognizes that false advertising may constitute exclusionary conduct under *Section 2*, the Court is hesitant to find that it can never constitute a restraint of trade under *Section 1*.

In fact, the Eighth Circuit has recognized a Section 1 claim based on a conspiracy between a market participant and an ostensibly neutral non-market participant to disparage a competitor. See *Impro Prods., Inc. v. Herrick, 715 F.2d 1267, 1271, 1273 (8th Cir. 1983)*. In Impro, the plaintiff alleged that:

> in return for compensation from the corporate defendants, [defendant] Dr. Herrick used his various positions [as a U.S. Department of Agriculture **[**9]** veterinarian and an Iowa State University professor] to promote the products of the corporate defendants, to disparage [plaintiff's] products, and to influence various federal and state governmental officials to deny [plaintiff] necessary licensing for its products.

Id. at 1271. The court recognized this as a cognizable theory under *Section 1*, though it granted summary judgment because there was no evidence of a conspiracy. *Id. at 1273, 1279-80*.

However, ***HN8***[] for a disparagement-based antitrust claim, Harcourt Brace sets a high burden of proof--the Ninth Circuit "insist[s] on a preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer) before these practices can rise to the level of exclusionary conduct." *108 F.3d at 1151* (citing 3 Phillip Areeda & Donald F. Turner, ***Antitrust Law*** P 737b (1978)) (emphasis in original) (internal quotation marks omitted). Because TYR has not made this requisite preliminary showing, the Court need not decide whether a Section 1 claim can ever be based on false advertising. [1]

[1] USA Swimming and Schubert also argue that TYR did not plead a *Section 1* false advertising or disparagement claim **[**10]** against them. This is incorrect. (See Compl. P 13 ("USA SWIMMING, SPEEDO and SCHUBERT have also combined to engage in a campaign of falsely disparaging the products of SPEEDO'S competitors, including TYR . . . .").)

USA Swimming and Schubert also appear to contend that TYR should be estopped from asserting a disparagement-based claim against them under *Section 1* because in TYR's opposition to a motion to dismiss, it stated that Harcourt Brace "is irrelevant to the standards for pleading a Section 1 claim." (Docket No. 49 at 13.) However, TYR appears to have been arguing that the limitations set forth in Harcourt Brace do not apply to a Section 1 claim, not that the Section 1 claim was not based on disparagement. Because this argument is not inconsistent with its current argument, TYR is not estopped from asserting a

[*828] 2. Disparagement Versus Promotion

The Defendants argue that many of the statements TYR complains of only involve promotion of Speedo and do not directly disparage TYR or other competitors. Although *Harcourt Brace* itself involved the direct **[**11]** disparagement of a rival, the Court sees no reason why false statements of promotion could not be actionable under similar reasoning. "[M]isrepresentations encouraging the purchase of [a] product can fit [the] general test for an exclusionary practice when the impact on rivals is significant; deception of buyers can impede the opportunities of rivals." 3A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 782b (2007). The claims should not be dismissed on this basis.

3. Protected Statements

The Defendants also argue that several of the statements upon which TYR rests its claims are protected by the *First Amendment* or constitute puffery and thus cannot be the basis for an antitrust claim. See *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 860 (10th Cir. 1999)* (***HN9***[] "[T]he *First Amendment* does not allow antitrust claims to be predicated solely on protected speech."). For example, in the order on the initial motions for summary judgment, the Court found that Schubert's statements to reporter Craig Lord ("Lord") were not commercial speech and thus not actionable under the Lanham Act. (Docket No. 154 at 26-28.) The Court also previously found several **[**12]** statements by Schubert to be puffery. (Docket No. 72 at 16-18.)

Statements to Lord

TYR contends that Schubert's statements to Lord are commercial speech actionable under the antitrust laws. [2] That ship has sailed; the Court already made the determination that the statements to Lord did not constitute commercial speech in the context of TYR's Lanham Act claim--TYR failed to even oppose Speedo's argument. (Docket No. 154 at 26-28.) TYR cannot resurrect these statements as a basis for its antitrust claim absent some grounds for reconsideration, see *Local Rule 7-18*, which TYR has not provided.

In any case, the Court is not persuaded by TYR's attempt to distinguish *Boule v. Hutton, 328 F.3d 84 (2d Cir. 2003)*, which **[*829]** the Court relied upon in granting summary judgment on TYR's Lanham Act claim. As discussed in the Court's prior order, Boule involved allegedly false statements made by art collectors about the authenticity of another collection. *Id. at 86, 88*. The statements were made to a reporter writing an article in an industry publication about the prevalence of fraud in the art market. Id. The Second Circuit **[**14]** found that the statements were not commercial speech and therefore not actionable under the Lanham Act. *Id. at 91-92*.

TYR argues that Schubert's statements to Lord promoting the virtues of Speedo and stating that competitors had "inferior products" are distinguishable because they are not "inextricably intertwined" with the issue of public concern that Lord was writing about--"the evolution of swimsuit technology and its impact on the sport of

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disparagement-based theory against USA Swimming and Schubert. See *Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001)*.

[2] Though the parties do not explicitly address the issue and assume that Lanham Act cases are applicable to a false advertising-based antitrust claim, the Court finds that ***HN10***[] an antitrust plaintiff must demonstrate that the false statement was made in commercial advertising or promotion, as under the Lanham Act. See, e.g., *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1052 (9th Cir. 2008)*. The Ninth Circuit's rationale for allowing false advertising-based antitrust claims--to prevent the deception of buyers to the detriment of rivals--is the same as the policy behind the Lanham Act. Indeed, **[**13]** Harcourt Brace's de minimis presumption test tracks several of the elements of a Lanham Act claim. Compare *Harcourt Brace, 108 F.3d at 1152* (antitrust plaintiff must show statements are "(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization"), with *Newcal Indus., 513 F.3d at 1052* (Lanham Act plaintiff must show that statement is (1) false, (2) in commercial advertising or promotion, (3) likely to deceive, (4) material, (5) in interstate commerce, and (6) that plaintiff had been injured).

competitive swimming." (TYR's Compendium of Exs. ("COE"), Ex. 12 P 13.) The Court disagrees. Schubert's discussion of the Speedo LZR Racer, its effect on swimming times, and his concern that swimmers who wore what he considered "inferior products" would be at a competitive disadvantage closely relates to the topic of swimsuit technology and its impact on the sport. Indeed, when read in the full context and not just as carefully plucked snippets, Schubert's statements reflect a desire for more competition in swimsuit technology, which he hoped would prolong the careers of swimmers. [3]

The Court is not persuaded by the two cases cited by TYR. In *Semco, Inc. v. Amcast, Inc., 52 F.3d 108 (6th Cir. 1995)*, the Sixth Circuit found that an article in a trade journal written by a manufacturer could constitute commercial speech because it contained gratuitous promotions of the manufacturer's product, "which [did] not contribute to [the article's] intellectual or technical value." *Id. at 113*. Here, in contrast, the SwimNews.com article was written by Lord, not Schubert; Lord chose what to include in the article, and Schubert's comments came only in response to Lord's apparently unsolicited questions. **[**16]** See *Boule, 328 F.3d at 91*. Moreover, unlike the comments at issue in Semco, Schubert's comments about competing swimsuit manufacturers are inextricably related to the subject of Lord's article--the evolution of swimsuit technology. It is difficult to fathom how Schubert could have discussed the subject without addressing the products currently on the market.

In *Fuente Cigar Ltd. v. Opus One, 985 F. Supp. 1448 (M.D. Fla. 1997)*, the court, on a motion for leave to amend a pleading, held that a competitor's statements made to a reporter in a trade publication about pending litigation was commercial speech actionable under the Lanham Act. *Id. at 1450, 1456*. The court primarily relied on the fact that the comments were made in a trade publication and not a general news publication or magazine. *Id. at 1456*. The Court finds this case distinguishable because SwimNews.com is not a trade publication. Fuente Cigar involved statements in a cigar industry publication about competing **[*830]** cigar manufacturers. *Id. at 1450*. SwimNews.com, by contrast, is a general news publication about the sport of swimming, providing news about swim meets, specific swimmers and coaches, controversies in the swimming community, **[**17]** and other relevant news. [4] Its intended audience is not swimsuit manufacturers or vendors. No reasonable juror would mistake the website for a trade journal or industry publication. Moreover, to the extent Fuente Cigar's reasoning conflicts with Boule--which also involved an industry publication--the Court finds *Boule*, a more recent Court of Appeals decision, more persuasive.

Accordingly, the Court affirms its prior decision that the statements to Lord are not commercial speech and therefore not actionable as an antitrust violation.

2007 Coaches Meeting and 2008 Email

The Defendants contend that the comments made by Schubert at the December 2007 coaches meeting and Schubert's March 2008 email to coaches constitute puffery. One of the coaches at the 2007 meeting recalls "Coach Schubert stat[ing] that coaches should advise their athletes to wear Speedo equipment if they wanted to compete at the highest level." [5] (COE, Ex. 7 P 3.) The Court finds this to be ***HN11***[] classic puffery--"exaggerated advertising,

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[3] Schubert's full statement, as quoted by Lord, is as follows;

> The fact is that there is nothing more important than having the manufacturers be competitive because they **[**15]** do provide the living for the athletes and that's what's really helped the sport of swimming to allow the athletes to swim to older ages, more like track and field. I have always felt that swimming should be like track and field (in terms of the ages and longevity of athletes) but the problem we have now is that everyone is contracted to one suit and some are contracted to an inferior product and those manufacturers need to let go and everyone can compete on a level playing field with a product that is the same and then they need to put the effort in and catch up.

(COE, Ex. 13.)

[4] The Court takes judicial notice of SwimNews.com. *Fed. R. Evid. 201(b)*.

blustering, and boasting upon which no reasonable buyer would rely." Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997) **[**18]** (citing 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27.04[4][d] at 27-52 (3d ed. 1994)). For a statement to be actionable, [6] it must make a "specific and measurable advertisement claim of product superiority." Id. at 1145. The statement attributed to Schubert is a general statement of superiority and contains nothing about the specific attributes of Speedo equipment. No reasonable buyer would rely on this statement in making a purchasing decision.

TYR argues that the statement is not puffery because it is capable of being proven false, as demonstrated by the fact that swimmers wearing TYR suits successfully competed at the Olympics, "the highest level." TYR misses the point. ***HN12***[] Whether a statement is puffery does not depend on the truth or falsity of a statement; it depends on the degree of generality or specificity. "The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific." *Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 945 (3d Cir. 1993)* (quoting W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 109, at 756-57 (5th ed. 1984)); accord *Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir. 2000)*. The statement here is unquestionably hyperbole, but it is a general one. No reasonable person would think that they would be incapable of competing without the Speedo suit.

TYR also attempts to analogize to two Second Circuit decisions, *Castrol and Time* ***[*831]*** *Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144 (2d Cir. 2007)*. In Castrol, the defendant claimed that its motor oil "outperforms any leading **[**20]** motor oil against viscosity breakdown." *987 F.3d at 941*. The court found this to be literally false, as demonstrated by a battery of comparative tests of viscosity breakdown. Id. *at 943-44*. The analogy to this case is very weak; the Castrol statement singled out a specific attribute of motor oil--viscosity breakdown--that could be proven false by specific testing, whereas the statement here amounts to a general statement that Speedo's swimsuits are superior without any comparisons of any specific attributes of the suits.

Likewise, the analogy to Time Warner Cable is weak. There, the court found that statements in television advertisements that "[y]ou're just not gonna get the best picture out of some fancy big screen TV without DIRECTV. It's broadcast in 1080i," and that "settling for cable would be illogical," were likely to be shown literally false on a motion for a preliminary injunction. *497 F.3d at 154, 158*. The court found that, in the context of the advertisements, the statements made the claim that the picture quality of satellite was better than cable. Id. Again, this case is distinguishable because the statements made assertions about a specific attribute of the product--picture **[**21]** quality--whereas the general statement attributed to Schubert does not.

The Defendants also argue that the statements in Schubert's March 2008 email are puffery. Schubert, giving his "personal opinion" on the swimsuit controversy, stated that:

> [Speedo] is putting millions into research and development. . . . To combat this, the trailing companies [TYR and Nike] pay more money to sign our new pros to big contracts wearing an inferior product. We need our coaches and athletes to pressure the other manufacturers to "get in the game." Three competitive companies (or more) is to all our advantage.

(COE, Ex. 10 (emphasis in original).) The statement that TYR provided "an inferior product" is clearly puffery. See, e.g., *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 926 (3d Cir. 1990)* (finding "better than" statement to be "the most innocuous kind of 'puffing'").

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[5] Although TYR has a video recording of the coaches meeting, (see Hilton Decl. P 2), it is unable to point out where Schubert actually made such an assertion. The only evidence of this statement is the coach's declaration, executed over two years after the meeting took place. However, because this is a motion for summary judgment, the Court may not weigh this evidence against the actual recording of the coaches meeting. *Balint v. Carson City, Nev., 180 F.3d 1047, 1054 (9th Cir. 1999)*.

[6] As discussed above, the Court finds that an alleged false advertisement must, at a minimum, be actionable non-puffery under the Lanham Act. See *Harcourt Brace, 108 F.3d at 1152* (noting the difficulty of distinguishing actionable false **[**19]** statements from puffing in setting for the de minimis presumption).

However, TYR argues that the "inferior product" statement is actionable because it came within the context of previous statements about testing and therefore gave the impression that the claim was based on independent testing. See *Southland Sod, 108 F.3d at 1145*; *Pizza Hut, 227 F.3d at 495 n.5* (***HN13***[] "Where the context **[**22]** of an advertising statement may lend greater specificity to an otherwise vague representation, the court should not succumb to the temptation to hastily rule a phrase to be unactionable under the Lanham Act." (quotation omitted)). TYR points to comments made by Jonty Skinner ("Skinner"), a USA Swimming employee, at the December 2007 coaches meeting that the Speedo suit was tested by NASA and achieved a 4% reduction in drag, (Hilton Decl. P 2), a reference in Schubert's email to research and development, (COE, Ex. 10), and a note in Craig Lord's SwimNews.com article that the technology was developed by NASA, (COE, Ex. 13).

The Court finds that none of these references even remotely implies that the "inferior product" statement was based on any testing. First of all, Skinner's statements were clearly based on comparative testing of previous generations of swimsuits and could not be reasonably interpreted as comparative testing of Speedo's current products against competitors' current products. [7] They are irrelevant to **[*832]** Schubert's statement months later about "inferior products." [8] Second, Schubert's reference to Speedo spending millions on research in no way implies any sort of comparative **[**23]** testing. And finally, Lord's article can give no context to the March 13 email because it was published nearly a month after the email. (COE, Ex. 13.) Moreover, it was written by Lord, a swimming reporter who is not alleged to be an agent of Speedo, USA Swimming, or Schubert.

Accordingly, the Court finds that Schubert's statements at the December 2007 coaches meeting and the March 2008 email are non-actionable puffery. [9]

4. Effect on Competition

HN14[] In order to state a valid Sherman Act claim under a false advertising theory, the plaintiff must make a "preliminary showing of significant and more-than-temporary harmful effects on competition (and not merely upon a competitor or customer)." *Harcourt Brace, 108 F.3d at 1151* (emphasis in original). Because of the difficulties in distinguishing actionable false statements from puffing, the speculative effect that advertising has on consuming behavior, and buyer distrust of a seller's disparaging comments, the Ninth Circuit has set forth a presumption that commercial speech or advertising has a de minimis effect on competition. *Id. at 1152*. A plaintiff may overcome this presumption by showing that the charged speech meets a six-factor test: the statements must be "(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable **[**25]** reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals." *Id.* (citation omitted).

TYR argues that it must only demonstrate that the charged speech meets the Harcourt Brace six-factor test. In other words, TYR's position is that the de minimis presumption is the only hurdle that an antitrust plaintiff must overcome to get to a jury on a false advertising claim. The Court disagrees with TYR's reading of Harcourt Brace.

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[7] Skinner's full statement at the meeting is as follows;

> In the testing that they [Speedo] do, and they go all the way to NASA and they test with a device at NASA, test the friction of the suit . . . . And you quantify the suit that evolved in Melbourne as being 4% less friction as the one that they had in Sydney . . . . And they quantify the suit that's going to come out in Beijing as being 3% faster than the suit that came out in Melbourne, or 3% less friction than the suit that came out in Melbourne.

(COE, Ex. 8 [Recording of National Team Coaches Meeting, Dec. 16-17, 2007, Disk 4] at 39:05.)

[8] The Court reads TYR's argument as using Skinner's comments to provide the context for statements by Schubert, and not as providing a separate instance of false advertising. (See Opp'n Br. 9.) In any case, Defendants would be entitled to summary judgment, as TYR admits that it cannot prove that Skinner's statements are false. **[**24]** (Id. at 5:13-15; COE, Exs. 22, 23.)

[9] The Defendants do not argue that the statement at the 2008 Manchester team meeting and the statement to the junior swimmers in 2009 are puffery.

HN15[] Harcourt Brace first sets out the requirement that disparagement "must have a significant and enduring adverse impact on competition itself in the relevant markets to rise to the level of an antitrust violation." *Id. at 1152*. The plaintiff has the burden of proving this "significant and enduring impact" in order to proceed on the claim. *Id. at 1151*.

The court then specified that **HN16**[] antitrust claims based on false advertising "should presumptively be ignored"--that is, the defendant is entitled to a presumption that false advertising has a de minimis effect on competition before the introduction **[*833]** of any evidence of actual market impact. See *id. at 1152*. **[**26]** The six-factor test--which focuses on the characteristics of the charged speech and not on any evidence of actual market effect--is the plaintiff's means of overcoming this first hurdle. It does not, however, satisfy the plaintiff's burden of proving an actual "significant and enduring adverse impact on competition." In other words, a plaintiff that has discharged the de minimis presumption is not automatically entitled to its own presumption of significant market effect. In addition to showing that the speech is of the type that could have a significant effect on competition, the plaintiff has the burden of showing that it actually did affect competition. [10]

Therefore, the Defendants having asserted TYR's lack of evidence of a "significant and enduring adverse impact," TYR has the burden of coming forward with evidence to create a triable issue of fact. *Celotex, 477 U.S. at 323*. TYR points to four alleged market circumstances **[**27]** as evidence of an adverse effect on competition: (1) from February 2008 to June 2009, Speedo increased market share while charging a higher price than TYR; (2) Speedo controlled 95% of the market by June 2009; (3) during that time period, TYR lost market share; and (4) Nike completely exited the market in September 2009.

The first three circumstances are based on a report prepared by Robin Cantor ("Cantor"). (COE, Ex. 1.) Cantor's report compared the sales of "championship suits," such as the Speedo LZR Racer and the TYR Tracer Rise, in "benchmark periods" prior to the alleged unlawful conduct against the "injury period" of February 2008 to July 2009. (Id. PP 15, 18.) Cantor limited her analysis to sales to "Team Dealers"--retailers who sell suits to competitive swimmers and teams--where TYR and Speedo generated a majority of their championship suit revenue. (Id. PP 15, 19.) Cantor studied the sales data from three Team Dealers. (Id. P 20.) Cantor also limited her analysis to sales of TYR and Speedo products only, because those two manufacturers "dominated" the Team Dealer market. (Id.) Cantor found that Speedo increased its relative share of the Team Dealer market after the introduction **[**28]** of the LZR Racer while charging higher prices than TYR's Tracer Rise. (Id. PP 48-50.) Cantor concludes that this is "consistent with the conclusion that the challenged conduct injured TYR sales and competition in championship suits." (Id. P 50.)

The one major flaw in Cantor's analysis--and the reason it does not provide evidence of significant injury to competition--is that it completely omits the sales of any other swimsuit manufacturers. Cantor defined a market where TYR is Speedo's only competitor, thereby allowing her to assert that injury to TYR is injury to competition. The supposed "market share" is actually a measure of the relative sales volume of Speedo as compared to TYR, and says nothing about Speedo's or TYR's actual market share because there is no evidence of the sales of other competitors like Nike, blueseventy, Arena, Jaked, or Adidas.

Cantor justifies the exclusion of other competitors from the analysis on the assertion that TYR and Speedo "dominate" the Team Dealer market. (Id. P 20.) Cantor notes that, over the five year period from 2004 to 2009, Speedo and TYR accounted for 77% and 17% of the sales to Team Dealers of suits costing at least $ 40. (Id.) **[*834]** However, this **[**29]** is very misleading. Throughout the report, Cantor tallies the sales of championship and "high-end" championship suits; yet, in order to exclude all competitors other than TYR and Speedo, she tallies all suits costing more than $ 40, rather than the relevant championship suits. This has the effect of minimizing the relevant market share of manufacturers that concentrate on the higher-priced championship suits. Moreover, by averaging sales over a five-year period, Cantor minimizes the market share of recent entrants like blueseventy,

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[10] This holding is supported by the fact that the Ninth Circuit has applied the "significant and enduring impact" test for claims outside the context of false advertising. *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998)*

which entered the market in the summer of 2008. (USA Swimming Reply Br., Ex. B P 5.) Finally, by limiting the analysis to Team Dealer sales, Cantor excludes the relevant sales of manufacturers like Jaked and Arena, which concentrate on direct internet sales or on-site sales at swim competitions. (Id. P 5.)

Thus, Cantor's report shows only that Speedo's sales in the Team Dealer market increased relative to TYR's sales. TYR has presented no evidence of the sales or market shares of any of the competitors. On this record, there is no way to determine whether TYR's lost sales were picked up by new entrants or whether Speedo actually lost overall market share **[**30]** to new entrants at any time during the relevant period. At best, Cantor's report is evidence of injury to TYR, Speedo's competitor, but does not show injury to competition, which is what the law requires. [11] *Pool Water Prods, v. Olin Corp., 258 F.3d 1024, 1036 (9th Cir. 2001)* (finding no antitrust injury because "[a] decrease in one competitor's market share . . . affects competitors, not competition"); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("The purpose of the antitrust laws, by contrast, is 'the protection of competition, not competitors.'" (quoting *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (emphasis in original)).

The Court also finds that Cantor's report should be excluded under *Federal Rule of Evidence 702* as unreliable and not based on sufficient facts or data. See *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589-95, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. By not considering any data on the pricing, sales volume, or market share of manufacturers other than Speedo and TYR, Cantor simply cannot make a reliable analysis as to market impact. The report is therefore irrelevant to the issue of market impact.

Although not necessary to support the Court's conclusion, the Defendants have offered evidence that competition in the championship swimsuit market actually increased after Schubert's statements, in the form of **[**32]** new market entrants like blueseventy, Jaked, Arena, and Adidas. The success of the LZR Racer at the 2008 **[*835]** Olympics spurred these companies to produce new suits for the American market. (See Lord Decl. PP 26-28; Schubert Depo. at 94:3-96:8, 182:2-25; USA Swimming Reply Br., Ex. B P 5; Furniss Depo. at 85:20-86:8; Bielak Decl., Exs. L P 4-7, M, N, P, V.) By the time of the U.S. World Championship trials in July 2009, one year after the 2008 Olympic Trials, these new entrants had gained very significant traction among elite swimmers, as shown by the suit choice of swimmers in the finals of several competitions:

Manufacturer	2007 U.S. Nationals	2008 U.S. Olympic Trials (July 2008)	2009 U.S. World Championship Trials (July 2009)
Speedo	77	80	30
TYR	7	13	10
Nike	12	1	0
Arena	0	0	19
blueseventy	0	6	9
Jaked	0	0	32

[11] Because the supplemental export report by Jules H. Kamin ("Kamin") relies entirely on Cantor's report, it suffers from the same flaws. (See COE, Ex. 3 P 1.) Kamin opines that:

> [t]he fact that Speedo was able to increase its market share, the absolute quantity of units sold, and its prices while the quality of its championship suits was not superior to that of TYR's . . . [shows] that the conduct of the defendants cause economic injury to consumers, sometimes called injury to competition.

(Id. P 5.) **[**31]** However, as discussed above, Cantor's report does not measure actual market share; it only measures Speedo's sales relative to TYR's. And Cantor's report does not support the claim that Speedo increased prices. Cantor merely found that Speedo charged higher prices than TYR. (COE, Ex. 1. PP 39-40 & tbl. 8.) Moreover, there is nothing in the record indicating the prices charged by other competitors. Thus, Kamin's assertion of "allocative inefficiency" is based on faulty assumptions. (See Kamin Decl. P 5(b) & (c).)

Manufacturer	2007 U.S. Nationals	2008 U.S. Olympic Trials (July 2008)	2009 U.S. World Championship Trials (July 2009)
Others	4	0	0

(Supp. Isaac Decl. P 4, Exs. A-C.)

In addition, one of the country's largest swimsuit retailers noticed the dramatic penetration of blueseventy into the high-end swimsuit market. (See USA Swimming Reply Br., Ex. B PP 1, 4-7.) From May 2007 to May 2008, the retailer estimated its sales by manufactuer in the following percentages: 70% for Speedo, 15% for TYR, and 15% for Nike. (Id. P 4.) After blueseventy entered **[**33]** the market in the summer of 2008, the retailer estimated its sales in the second half of 2008 and the first half of 2009 according to the following percentages: 75% for blueseventy, 12% for Speedo, and 3% combined for TYR and Nike. [12] (Id. P 5.) The retailer estimates that the total sales volume for blueseventy during that period was $ 600,000. (Id. P 7.) In that time period, the retailer sold to roughly 20% of all collegiate swim teams and between 85% to 90% of those customers purchased the blueseventy suit. (Id. P 6.)

Finally, Speedo presents evidence that TYR had difficulty keeping up with demand for its championship suit. If Schubert's comments actually had the effect of excluding TYR from the market, one would ordinarily expect to see excess inventory, or greater supply than demand for TYR's goods, rather than the opposite. However, in January 2008, Steve Furniss, TYR's Executive Vice President, noted in an email that, "[o]n Tracer Light [TYR's high-end suit at **[**34]** the time] we are already behind in production schedule and Sales has already sold out initial allocation plus they are behind sample and promotional needs." (Richter Decl., Ex. E.) These production delays were confirmed by Matt Zimmer, TYR's Promotions Director, who laid out a plan of rationing the available inventory of Tracer Light suits among college teams, noting the "extremely frustrating situation [of] hav[ing] so few championship suits available for our many teams." (Id., Ex. F.) However, he also noted the high demand, stating that "we've got teams clammoring [sic] for our newest suits." (Id.) A month later, in March 2008, Zimmer stated--in an email titled "Tracer allocation"--that "our Tracer inventory is still well below what we hoped it would be," though "the demand has really ramped up once again." (Id., Ex. G.) Even after the Beijing Olympics, TYR acknowledged the limited availability of its championship suits to NCAA coaches, noting that "[w]e have experienced strong demand [for the Tracer Light] and continue to chase availability," and that the TYR Tracer Rise "will not be available until early 2009" **[*836]** due to a temporary NCAA ban. (Id., Ex. I.)

The Defendants' evidence of **[**35]** elite swimmers using suits by new entrants, significant sales volume and market share, and TYR's inability to keep up with demand appears to show not only that there was no significant impact on competition (as opposed to TYR individually), but also that any adverse effect on competition was short-lived and not enduring. [13]

TYR argues that evidence that **[**36]** top swimmers are wearing competitors' suits is not necessarily indicative of healthy competition in the Team Dealer market, where Speedo sells roughly 95% of its championship suits. (COE, Ex. 1 P 19; Brommer Depo. at 90:5-17.) This may be true, but TYR misunderstands its burden on summary

[12] These estimates also demonstrate the fallacy of the Cantor report. By excluding the sales of blueseventy, the new entrant, Cantor's analysis completely fails to account for 75% of the market, at least at this retailer.

[13] TYR contends that the "enduring impact" test is a low bar, citing *In re Remeron Antitrust Litigation, 335 F. Supp. 2d 522 (D.N.J. 2004)* and *Indiana Grocery Co. v. Super Valu Stores, 647 F. Supp. 254 (S.D. Ind. 1986)*, both of which allowed antitrust claims to proceed on the basis of relatively short periods of alleged unlawful conduct. However, neither of these cases involved a false advertising antitrust claim and, thus, neither applied the "significant and enduring impact" test set forth in Harcourt Brace. See *Remeron, 335 F. Supp. 2d at 526-27*; *Indiana Grocery, 647 F. Supp. at 256-57*. And although *Thompson's Gas & Elec. Serv. v. BP Am., No. 08 CV 2693, 691 F. Supp. 2d 860, 2010 U.S. Dist. LEXIS 16906 (N.D. Ill. Feb. 25, 2010)*, cites the Harcourt Brace test, it neither applies the test, nor does it involve a false advertising claim. *Id. at *2-4, *7-10*.

judgment--it must provide affirmative evidence of harm to competition. It has provided no evidence of Team Dealer sales of manufacturers other than Speedo and TYR, failing to meet its burden and also failing to rebut the Defendants evidence of major penetration by at least one new entrant at a major retailer. [14]

TYR also tries to dismiss the impact of new entrants by noting that many of the new suits have been banned by FINA, the international governing body of swimming. The Court fails to see the relevance of the FINA ban. TYR's theory was that the Defendants restrained trade and monopolized the high-end swimsuit market through Schubert's alleged false statements promoting the LZR Racer. The Defendants have presented some evidence that new competitors entered and took significant market share from both Speedo and TYR, thereby showing that the statements had little effect on competition and that any effect was short-lived. The fact that FINA banned all the suits--including Speedo's and TYR's--effectively terminating that entire market, does not rebut the Defendants' evidence of new competition prior to the ban. TYR does not allege any false statements regarding the post-ban suits. That market is simply irrelevant. [15]

Nor does Nike's exit from the market in September 2008 demonstrate that Schubert's statements had a significant and enduring impact on competition. (See **[*837]** COE, Ex. 28.) Ordinarily, the loss of a significant competitor from the market would signal a major adverse effect on competition and would harm consumers. However, the Defendants have shown evidence, unrebutted by TYR, that new entrants were producing suits of better quality than even Speedo's and TYR's by the time Nike exited. (See Lord Decl. PP 26-28; Schubert Depo. at 94:3-96:8, 182:2-25; USA Swimming Reply Br., Ex. B P 5; Furniss Decl. 85:20-86:8; Bielak Decl., Exs. L P 4-7, M, N, P, V.) These new suits were apparently gaining widespread acceptance among elite swimmers less than a year after Nike exited. (Supp. Isaac Decl. P 4, Exs. A-C.)

Moreover, TYR fails to show any link between Schubert's statements and Nike's exit. On this record, Nike's exit is entirely consistent **[**39]** with normal competition: the well-publicized Olympic success of the LZR Racer combined with new suits developed by blueseventy, Arena, and Jaked may have forced Nike out. There is no allegation or evidence that Nike had a championship suit comparable to the Speedo LZR Racer, TYR Tracer Rise, or any of the new suits by the new entrants. Indeed, its willingness to let its top sponsored swimmers swim in Speedo suits at the Olympics suggests otherwise. (COE, Ex. 28.)

The Court also finds that the alleged false advertising does not even overcome the Harcourt Brace de minimis presumption. At the pleading stage, the Court was hesitant to apply the presumption because TYR had alleged that Schubert's position with USA Swimming gave his statements the appearance of objectivity. (See Docket No. 72 at 10.) ***HN17***[] The Harcourt Brace presumption rested partially on the rationale that buyers generally do not trust comments made by competitors. *108 F.3d at 1152*. However, the Ninth Circuit also relied on the difficulty in distinguishing actionable false statements from puffery and the speculative nature of the effects of false advertising, "especially when [it] is not systematic." Id. This would apply regardless **[**40]** of whether the speaker had the appearance of objectivity. That circumstance may be considered within the Harcourt Brace factors, such as the likelihood of inducing reliance or susceptibility of neutralization, but the Court does not find that it negates the application of the presumption entirely.

The Court finds that the alleged misrepresentations fail the Harcourt Brace test because TYR cannot demonstrate that the statements "continued for prolonged periods." *Id. at 1152*. The only two actionable statements are

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[14] TYR also presents the declaration of Dean Jackson, Sales Director at blueseventy, noting that, for all of blueseventy's success, it has been unable to sign any NCAA teams to sponsorship contracts. (Jackson Decl. P 5.) Jackson states that "Coach Schubert's influence and his relationship with Speedo created a barrier that was 'insurmountable.'" (Id. P 6.) Jackson does not purport to be an expert on economics and, in any case, attributes the "insurmountable" barrier **[**37]** to Schubert's influence rather than any false advertising. This declaration is far from demonstrating a significant impact on competition.

[15] TYR also does not rebut evidence that it had trouble meeting demand for its championship suits. It does submit a declaration that it has the **[**38]** capacity to produce 10,000-12,000 Tracer Light or Tracer Rise swimsuits per month, (Meng Decl. P 2), but this hardly rebuts Speedo's evidence that the demand for TYR's suits outpaced its ability to supply the suits, despite its apparently strenuous efforts to do so.

Schubert's comment at the Manchester swim meet in April 2008 and his statement to two junior swimmers in January 2009. Two isolated statements to very limited audiences spaced by nearly a year are not the sort of sustained, systematic false advertising that would have more than a de minimis effect on competition. TYR cannot meet its burden where the statements it relies upon are separated by long periods; the advertising must be "continued," i.e., sustained, for a prolonged period. See *id. at 1152*.

Even if all five of the charged statements were considered, the Court still finds they does not meet the necessary test of sustained advertisement. One statement was made at a coaches **[**41]** meeting in December 2008, one in an email in March 2008, two at a swim meet in April 2008, and the last to two junior swimmers in January 2009. Five sporadic statements spread out over the course of more than a year are not the sort of systematic advertising capable of significantly affecting competition.

TYR argues that the "prolonged period" test is a very low burden to meet. However, it has no authority for this proposition. It argues that *National Ass'n of Pharmaceutical **[*838]** Manufacturers, Inc. v. Ayerst Laboratories, Division of/and American Home Products Corp., 850 F.2d 904 (2d Cir. 1988)*, allowed an antitrust disparagement claim to overcome the de minimis presumption despite the fact that the disparagement was contained in a single letter. *Id. at 916-17*. However, unlike the Ninth Circuit, which requires a plaintiff to satisfy all of the six Harcourt Brace elements, *108 F.3d at 1152*, the Second Circuit apparently does not find each element mandatory. *Ayerst, 850 F.2d at 916-17*; see also *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery. Inc., 323 F.3d 366, 371 & n.6 (6th Cir. 2003)* (noting the ambiguity of the Second Circuit's test and declining **[**42]** to decide whether all elements must be met in Sixth Circuit). Ayerst did not find that the single letter was sufficient to meet the "prolonged period" requirement; rather, it allowed the case to proceed despite not meeting that element. See *850 F.2d at 917*. This is not an option in the Ninth Circuit. TYR must demonstrate that the statements continued for a prolonged period.

Because TYR has not provided evidence from which a reasonable jury could infer a "significant and enduring adverse impact on competition," the Defendants are entitled to summary judgment on the Sherman Act claims. Additionally, no triable issue of fact exists as to whether Schubert's statements "continued for a prolonged period." Therefore, TYR cannot overcome the presumption that Schubert's statements had only a de minimis effect on competition and the Defendants are entitled to summary judgment on that ground as well.

5. Remaining State Claims

TYR's remaining causes of action are brought under the Cartwright Act and the UCL, and TYR brings a separate claim for injunctive relief.

HN18[] "Where Cartwright Act claims are premised on the same facts as Sherman Act claims, and summary judgment is granted on the Sherman Act claims, **[**43]** summary judgment is also appropriate for Cartwright Act claims." *Breakdown Servs., Ltd. v. Now Casting, Inc., 550 F. Supp. 2d 1123, 1141 (C.D. Cal. 2007)* (citing *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001))*. Here, the Cartwright Act claim is identical to TYR's Sherman Act claims. Because the Defendants are entitled to summary judgment on the Sherman Act claims, they are entitled to summary judgment on the Cartwright Act claim as well.

HN19[] The UCL prohibits three separate categories of conduct--"acts or practices which are unlawful, or unfair, or fraudulent." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*; *Cal. Bus. & Prof. Code § 17200*. Conduct is "unfair" if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187*. Thus, in most cases, "where plaintiff's [UCL] claim is predicated on antitrust violations that fail to withstand summary judgment, the [UCL] claim must also fail." *Breakdown Servs., 550 F. Supp. 2d at 1142*. Because **[**44]** TYR's UCL claim is based on the same facts as its same failed antitrust claims, the Defendants are entitled to summary judgment on the UCL claim.

TYR's final remaining claim seeks only injunctive relief and does not state an independent cause of action. Because the Defendants are entitled to summary judgment on TYR's remaining claims, the injunctive relief claim fails as well.

[*839] III. RECONSIDERATION

TYR seeks reconsideration of the Court's order granting summary judgment on its false advertising claim under the Lanham Act. The Court granted summary judgment on the grounds that TYR did not have evidence of injury traceable to the alleged false statements. (Docket No. 154 at 25-26.)

A. Legal Standard

HN20[] Under *Rule 59(e)*, a party may move to alter or amend a judgment within 28 days. The grounds for reconsideration are set forth in *Local Rule 7-18*, which provides:

> ***HN21***[] A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the **[**45]** emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

L.R. 7-18. ***HN22***[] The Court may disregard evidence or arguments on a motion for reconsideration that could reasonably have been presented prior to this Court's ruling. *Hopkins v. Andaya, 958 F.2d 881, 887 n.5 (9th Cir. 1992)*.

B. Discussion

TYR moves for reconsideration based on an expert report that it received after the due date for its opposition papers in the original round of summary judgment briefing. It contends that this report could not, with reasonable diligence, have been completed and submitted with TYR's opposition papers because the expert, Cantor, did not receive necessary data from Speedo until a week before TYR's opposition was due. (Cantor Decl. P 7.) Speedo disputes this assertion and argues that TYR could have submitted the report prior to the Court's final order. The Court need not resolve this dispute, however, because the Court **[**46]** finds no prejudice in considering the new evidence given the second round of summary judgment briefing. The Court also finds that, even considering the new evidence, Speedo is entitled to summary judgment on the Lanham Act claim.

TYR's Lanham Act claim is premised on two remaining sets of statements: (1) Schubert's claim at the April 2008 Manchester meeting that the Speedo LZR Racer provided a 2% advantage, and (2) his statement to two junior swimmers in Guam in January 2009 that the LZR Racer was "faster" than the non-Speedo suits they were wearing.[16] (See Docket No. 154 at 24-28.) Given that both statements were made to a limited audience and none of those present switched to Speedo products as a result of the statement, the Court found that TYR had failed to demonstrate any actual deception or any actual injury **[*840]** as a result of the statements. (Id. at 25-26.) TYR now argues that Cantor's report demonstrates a loss of sales that can be attributed to "the challenged conduct." (Cantor Decl., Ex. A.)

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[16] Speedo was granted summary judgment with respect to Schubert's statement to reporter Craig Lord because that statement was not commercial speech or advertising. (Docket No. 154 at 26-28.) **[**47]** TYR provides no grounds for reconsidering that ruling. The other statements that form the basis of TYR's antitrust disparagement claim were either not alleged to be the basis for the Lanham Act claim or were not raised by TYR in opposition to Speedo's prior summary judgment motion. (See Compl.; Docket No. 127 at 24-30.) It is too late to amend the Lanham Act claim now, on a motion to reconsider a grant of summary judgment.

In the previous summary judgment order, the Court did not consider whether there was a triable issue as to whether Schubert's statements were false or misleading. (Docket No. 154 at 28 n. 19.) With respect to the "2% advantage" statement in Manchester, there is some ambiguity as to what Schubert actually said. One of the swimmers testified that Schubert told him that the LZR Racer "was a two percent improvement on performance from other suits," but "[i]t wasn't specifically made clear that it was two percent in relation to anything else. It was just two percent improvement." (Marshall Depo. at 16:8-17.) Another swimmer who heard the 2% advantage statement at the meeting took it to mean that the LZR Racer was "2 percent better than any suit," but admitted that "[it] **[**48]** wasn't clear" what the 2 percent was being compared to. (Van Wie Depo. at 49:2-14.) A third swimmer testified that Schubert stated that the LZR Racer "would give you like a 2 percent advantage," and took that to mean "[t]he 2 percent advantage was 2 percent advantage over all the suits. It was the fastest suit on the market or something." (Descenza Depo. at 18:17-20, 19:8-12.) Schubert claims that he was referring to a 2% advantage over the prior generation of Speedo suits, the Speedo FS Pro. (Schubert Decl. P 11; Supp. Schubert Decl. P 6.) Schubert clarified what he was talking about during his interview with Craig Lord: "If you take [the] best times of world record holders and their new times [wearing the LZR Racer], the difference is 2 per cent." (COE Ex. 13.)

TYR argues that Schubert's statements at the Manchester meet are false because the LZR Racer does not offer a 2% advantage or is not 2% faster than the Tracer Rise. However, the Tracer Rise was not commercially available--not "on the market"--until later in April 2008, after Schubert's 2% advantage comment. (Furniss 9/3/09 Depo., Ex. 4.) Thus, even if it is accepted that Schubert was claiming a 2% advantage over all suits currently **[**49]** on the market, it is not reasonable to infer that Schubert was making a direct comparison to the Tracer Rise. [17] Indeed, in a TYR internal memorandum in April 2008, Matt Zimmer admitted that "very few people even know we have a new product such as Rise." (Richter Decl., Ex. H.)

TYR also argues that the statements can be shown to be literally false because they imply that testing was done to support the claim. See *Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 62 (2d Cir. 1992)*. However, TYR does not have evidence to rebut Schubert's claim to have analyzed the swimming times of world record holders wearing the LZR Racer and found a 2% difference. [18] (Supp. Schubert Decl. PP 3-5.) In fact, Schubert's analysis was confirmed by USA. Swimming statistician Larry Herr, who found a average swim time improvement of 1.55%, [19] (Herr **[*841]** Decl. P 3), by Craig Lord, who found that time improvements in a larger sample clustered in the range of 1.6% to 2.3%, (Lord Decl. P 19), and by TYR-sponsored coach Steve Hutchinson, who also found a roughly 2% time improvement in his **[**50]** own review of swim times, (Zimmer 9/30/09 Depo. at 85:2-86:19, 87:2-88:9, 202:20-203:14).

Because TYR cannot show that Schubert's statement could be reasonably interpreted as a comparison of the LZR Racer against the Tracer Rise or that Schubert's statement was not backed by an informal statistical analysis, TYR has not raised a triable **[**51]** issue of fact as to whether the "2% advantage" statement was false or misleading.

Moreover, the newly-introduced expert report does not remedy TYR's inability to show a link between Schubert's statements and injury to TYR. ***HN23***[] TYR must show that the charged statements "actually deceived or [had] the tendency to deceive a substantial segment of its audience [and] is likely to influence the purchasing decision." [20] *Southland Sod, 108 F.3d at 1139*. Cantor's report states that its "results are consistent with the conclusion that

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[17] In fact, Schubert claims not to have known about the Tracer Rise at the time, (Supp. Schubert Decl. P 6), though this is disputed.

[18] The testimony of Genadijus Sokolovas and Russell Mark that USA Swimming and Speedo did not do internal "testing" on swimsuits prior to Schubert's comments, (Sokolovas Depo. at 16:11-25; Mark Depo. at 30:18-31:12), does not rebut Schubert's claim to have informally analyzed swim times involving the LZR Racer.

[19] TYR argues that Schubert's statement is literally false because of the difference between 1.55% and 2%. The Court does not think that a statement can reasonably be found to be false because a number is rounded up to an integer according to commonly-accepted rules for rounding, the same used in the federal tax code. See, e.g., *26 U.S.C. § 3402(b)(5)* (allowing rounding to the nearest dollar for calculating withholding). More precisely, the Court does not think that the difference between 1.55% and the rounded number of 2% is a material difference.

the challenged conduct injured TYR sales." (Cantor Decl., Ex. A P 50.) The "challenged conduct" is everything that TYR alleged in the Complaint, including the allegations of coercion, TYR's exclusion from Splash magazine, the exclusion of advertising at certain events, and all of the disparaging statements that have been dismissed as puffing or otherwise non-actionable. (See id. P 18; Compl. PP 10-16.) Thus, Cantor never specifically links the Manchester statement or the Guam statement to the alleged injury, other than as part of the entire range of "challenged conduct." In other words, Cantor has failed to factor out any of the "challenged conduct,"--such as the alleged **[**52]** coercion, the exclusion from Splash magazine and events, the puffing statements, or the statement made to Craig Lord--that is not actionable under the Lanham Act. No reasonable juror could find, based on Cantor's report, that the loss of sales indentified in the report were caused by the statement at the closed meeting in Manchester or the statement to two junior swimmers in Guam. This is especially true where, as here, none of the audience to the charged statements changed their buying behavior as a result of the statements. (Docket No. 154 at 25-26.)

To avoid this failure of proof of actual causation, TYR argues that proof that the statement was spread by word-of-mouth creates a triable issue as to whether any customers were actually deceived. [21] TYR cites two unpublished district court cases for the proposition that injury **[**53]** can be presumed based on word-of-mouth dissemination in certain instances. *PBM Prods., LLC v. Mead Johnson & Co., No. 3:09-CV-269, 2010 U.S. Dist. LEXIS 18460 (E.D. Va. March 2, 2010)*; **[*842]** *Fla. Breckenridge, Inc. v. Solvay Pharms., Inc., No. 97-8417-CIV-RYSKAMP, 1998 U.S. Dist. LEXIS 14742 (S.D. Fla. March 18, 1998)*. Neither case is applicable here.

In PBM Products, the false advertising was disseminated through a mailer sent to roughly 1.6 million customers. *2010 U.S. Dist. LEXIS 18460, at *12-13*. In upholding the jury's damage award, the court noted that "[t]he jury heard evidence on the lost profits [the plaintiff] saw near the time the mailer was sent, [and] the 1.6 million individuals who received the mailer as well as those that would learn about it via word-of-mouth." Id. That case involved very widespread dissemination such that it can be assumed that a substantial section of the customer base heard the false statements, either directly or indirectly. Here, **[**54]** in contrast, the two statements were made to very limited audiences. The same presumption of widespread dissemination by word-of-mouth cannot be made.

In Florida Breckinridge, the defendant moved for summary judgment on a Lanham Act claim on the ground that oral statements are not commercial advertising. *1998 U.S. Dist. LEXIS 14742, at *20*. The court rejected the argument, noting testimony that, in the relevant market, the "product could not be adequately promoted without . . . in-person and word-of-mouth promotion." *Id. at *21*. Thus, ***HN25***[] Florida Breckinridge merely stands for the proposition that oral statements, such as in-person or telephone sales calls, can constitute commercial advertising within the meaning of the Lanham Act. *Id. at *20-22*. It does not stand for the proposition that a plaintiff can merely invoke "word-of-mouth" to overcome its burden of showing that customers actually heard and were deceived by the alleged false statement.

Here, TYR has evidence that Schubert made the "2% advantage" comment twice, both times at the 2008 Manchester meeting. (Marshall Depo. at 16:8-17; Descenza Depo. at 18:17-20.) Both were to a limited audience of 27 elite swimmers and several coaches, **[**55]** none of whom switched to Speedo as a result of the statement. TYR argues that it has evidence of dissemination through word-of-mouth, because one swimmer "heard from other swimmers and read in media articles that . . . Schubert[] was telling swimmers that the Speedo LZR would provide a 2% advantage to swimmers as compared to other swimsuits." (Florea Decl. P 4.) However, this only establishes that one other swimmer heard the statement (and possibly from media sources like the Lord article, which is not actionable), and even he continued to wear TYR after a single experiment with the LZR. [22] (Id. PP 6-7.) TYR also

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[20] ***HN24***[] The Lanham Act also requires that the plaintiff prove that the defendant "caused its false statement to enter interstate commerce." *Southland Sod, 108 F.3d at 1139*. Given that the two charged statements were given personally at a closed meeting in Manchester and to two junior swimmers in Guam, respectively, it is doubtful that TYR could satisfy this requirement.

[21] The Court rejects this new argument because it is not grounds for reconsideration. TYR has not demonstrated that it could not have raised this argument--which has nothing to do with the new expert report--on summary judgment.

argues that word-of-mouth is an important part of the swimsuit industry. (See COE, Ex. 14; Jackson Decl. P 2; Bielak Decl., Ex. M.) This does not, however, meet TYR's burden of proving that Schubert's statement was actually disseminated.

Finally, even if TYR could show that the statement was disseminated, it has no evidence of deception, particularly in light of the fact that, of all those who actually heard the statement, not one switched to **[*843]** using the Speedo suit as a result. (Docket No. 154 at 25-26; Florea Decl. PP 6-7.)

For the same reasons, the statement by Schubert to the two junior swimmers in Guam fails as a Lanham Act claim. There is no evidence that the statement was heard by anybody other than the two swimmers and their coach. As noted in the Court's prior order, neither of those two swimmers switched to Speedo. (Docket No. 154 at 26.)

Accordingly, Speedo is entitled to summary judgment on TYR's Lanham Act claim.

IV. CONCLUSION

For the foregoing reasons, the motions for summary judgment are GRANTED. TYR's motion for reconsideration is DENIED.

IT IS SO ORDERED.

DATED: May 3, 2010

/s/ James V. Selna

JAMES V. SELNA

UNITED STATES DISTRICT JUDGE

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[22] TYR argues that it would be impossible to track "word-of-mouth" dissemination. However, the impact and dissemination of the statement could potentially be measured by consumer surveys, as recognized by courts in other Lanham Act claims. See, e.g., *Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 525 (10th Cir. 1987)* ("Actual consumer confusion **[**56]** may be shown by direct evidence, a diversion of sales or direct testimony from the public, or by circumstantial evidence such as consumer surveys."). TYR has provided no such evidence.

LexisNexis

Chavez v. Bank of Am., N.A.

United States District Court for the Eastern District of California

May 5, 2010, Decided; May 6, 2010, Filed

NO. CV-F-09-2133 OWW/SKO

Reporter

2010 U.S. Dist. LEXIS 44369 *; 2010 WL 1854087

JUVENAL CHAVEZ and VERONICA CHAVEZ, Plaintiffs, vs. BANK OF AMERICA, N.A., PRLAP, INC., et al., Defendants.

Core Terms

loans, Plaintiffs', cause of action, fraudulent, motion to dismiss, allegations, conversion, unfair, borrower, lender, mortgage, interest rate, misrepresentations, default, risky, consumer, monthly payment, terms, loan package, inflated, induced, conspiracy, originated, appraisal, teaser, leave to amend, refinance, balloon, damages, business practice

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests the sufficiency of the complaint. Dismissal is warranted under *Rule 12(b)(6)* where the complaint lacks a cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to plead essential facts under that theory.

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

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

In reviewing a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations.

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

HN3[] **Motions to Dismiss, Failure to State Claim**

A district court should grant a motion to dismiss if plaintiffs have not pled enough facts to state a claim to relief that is plausible on its face. Factual allegations must be enough to raise a right to relief above the speculative level. While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

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

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

HN4[] **Motions to Dismiss, Failure to State Claim**

The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Fed. R. Civ. P. 8* marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

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

HN5[] **Complaints, Requirements for Complaint**

Only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief.

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

HN6[] **Motions to Dismiss, Failure to State Claim**

A court considering a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

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

HN7[] **Motions to Dismiss, Failure to State Claim**

Immunities and other affirmative defenses may be upheld on a motion to dismiss only when they are established on the face of the complaint.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN8[] Defenses, Demurrers & Objections, Motions to Dismiss

When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court takes judicial notice.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN9[] Statute of Limitations, Time Limitations

See *Cal. Code Civ. Proc. § 338(d)*.

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

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN10[] Motions to Dismiss, Failure to State Claim

Where the facts and dates alleged in a complaint demonstrate that the complaint is barred by the statute of limitations, a *Fed. R. Civ. P. 12(b)(6)* motion should be granted. There is no requirement, however, that affirmative defenses, including statutes of limitation, appear on the face of the complaint. When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN11[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) requires that, in all averments of fraud, the circumstances constituting fraud be stated with particularity. One of the purposes behind *Rule 9(b)*'s heightened pleading requirement is to put defendants on notice of the specific fraudulent conduct in order to enable them to adequately defend against such allegations. Furthermore, *Rule 9(b)* serves to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect defendants from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN12[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) requires that allegations of fraud be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. As a general rule, fraud allegations must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN13[] Heightened Pleading Requirements, Fraud Claims

The United States Court of Appeals for the Ninth Circuit has held that the general rule that allegations of fraud based on information and belief do not satisfy Fed. R. Civ. P. 9(b) may be relaxed with respect to matters within the opposing party's knowledge. In such situations, plaintiffs cannot be expected to have personal knowledge of the relevant facts. However, this exception does not nullify Rule 9(b); a plaintiff who makes allegations on information and belief must state the factual basis for the belief.

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN14[] Judicial Notice, Adjudicative Facts

See Fed. R. Evid. 201(b).

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN15[] Judicial Notice, Adjudicative Facts

See Fed. R. Evid. 201(c).

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN16[] Judicial Notice, Adjudicative Facts

See Fed. R. Evid. 201(d).

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN17[] Judicial Notice, Adjudicative Facts

See Fed. R. Evid. 201(e).

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN18[] Adjudicative Facts, Public Records

The court may take judicial notice of matters of public record, including duly recorded documents, and court records available to the public through the PACER system via the internet. Fed. R. Evid. 201(b).

Torts > Intentional Torts > Conversion > Elements

HN19[] Conversion, Elements

A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff. Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.

Torts > Intentional Torts > Conversion > Elements

HN20[] Conversion, Elements

According to the California Court of Appeals, conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property or that the alleged converter has applied the property to his own use. Money can be the subject of an action for conversion if a specific sum capable of identification is involved.

Torts > Intentional Torts > Conversion > Elements

HN21[] Conversion, Elements

For purposes of a conversion claim, neither legal title nor absolute ownership of the property is necessary. A party need only allege it is entitled to immediate possession at the time of conversion. However, a mere contractual right of payment, without more, will not suffice.

Real Property Law > ... > Contracts of Sale > Enforceability > Undue Influence

HN22[] Enforceability, Undue Influence

See *Cal. Civ. Code § 1575*.

Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions

HN23[] Adverse Claim Actions, Quiet Title Actions

Quiet title is an equitable claim, a plaintiff in equity must do equity in order to obtain relief. In these circumstances, this means repaying the money borrowed before voiding the security for the loan.

Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions

HN24[] Adverse Claim Actions, Quiet Title Actions

A basic requirement of an action to quiet title is an allegation that the plaintiffs are the rightful owners of the property, i.e., that they have satisfied their obligations under the deed of trust. A mortgagor cannot quiet his title against the mortgagee without paying the debt secured.

Banking Law > Consumer Protection > Fair Credit Reporting > Liability for Violations

Torts > ... > Defenses > Privileges > Statutory Privileges

HN25[] **Fair Credit Reporting, Liability for Violations**

See *15 U.S.C.S. § 1681h(e)*.

Banking Law > Consumer Protection > Fair Credit Reporting > Identity Theft

HN26[] **Fair Credit Reporting, Identity Theft**

See *15 U.S.C.S. § 1681t(a)*.

Banking Law > Consumer Protection > Fair Credit Reporting > Consumer Reports

HN27[] **Fair Credit Reporting, Consumer Reports**

See *15 U.S.C.S. § 1681t(b)(1)(F)(ii)*.

Torts > ... > Defamation > Elements > General Overview

Torts > ... > Defamation > Defenses > Truth

HN28[] **Defamation, Elements**

Defamation is the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injury or which causes special damage. A credit report, even one that causes harm, is not defamatory if it is true. A plaintiff's admission of truth will bar a claim for defamation.

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

HN29[] **Deceptive & Unfair Trade Practices, State Regulation**

California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, prohibits any unlawful, unfair, or fraudulent business act or practice. Because *§ 17200* is written in the disjunctive, it establishes three varieties of unfair competition, acts or practices which are unlawful, or unfair, or fraudulent. An act can be alleged to violate any or all of the three prongs of the UCL: unlawful, unfair, or fraudulent.

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

HN30[] Deceptive & Unfair Trade Practices, State Regulation

Under its unlawful prong, California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, borrows violations of other laws and makes those unlawful practices actionable under the UCL. Thus, a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong.

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

HN31[] Deceptive & Unfair Trade Practices, State Regulation

The independent unfairness prong of California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud. It has been said that a business practice may be unfair within the meaning of the UCL even if it is not unlawful; it is enough if the conduct in question offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. However, the Supreme Court of California recently found that this formulation of unfairness is too amorphous and disapproved its use, at least with respect to claims of unfair competition between two direct competitors. The court required that any finding of unfairness to competitors under *§ 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.

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

HN32[] Deceptive & Unfair Trade Practices, State Regulation

For purposes of California's Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, when a plaintiff who claims to have suffered injury from a direct competitor's unfair act or practice invokes *§ 17200*, the word unfair in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

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

HN33[] Deceptive & Unfair Trade Practices, State Regulation

A fraudulent business practice is one in which members of the public are likely to be deceived. The fraudulent business practice prong of California's Unfair Competition Law (UCL), *Cal. Bus. & Prof. Code § 17200 et seq.*, has been understood to be distinct from common law fraud. A common law fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief under the UCL. This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices.

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

HN34[] Deceptive & Unfair Trade Practices, State Regulation

An action under California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., is equitable in nature; damages cannot be recovered. The California Court of Appeals has stated under the UCL, prevailing plaintiffs are generally limited to injunctive relief and restitution.

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

HN35[] Deceptive & Unfair Trade Practices, State Regulation

To establish a claim under the fraudulent prong of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 et seq., a plaintiff must demonstrate that members of the public are likely to be deceived. The gravamen of plaintiff's claim is that defendant fraudulently failed to disclose all the terms of her loan. However, absent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN36[] Concerted Action, Civil Conspiracy

Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other conspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability coequal with the immediate tortfeasors.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN37[] Concerted Action, Civil Conspiracy

Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort. A civil conspiracy, however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN38[] Heightened Pleading Requirements, Fraud Claims

As to allegations of conspiracy, heightened pleading is required by Fed. R. Civ. P. 9(b) when the object of the conspiracy is fraudulent. To survive a motion to dismiss, plaintiff must allege with sufficient factual particularity that defendants reached some explicit or tacit understanding or agreement. It is not enough to show that defendants might have had a common goal unless there is a factually specific allegation that they directed themselves towards the wrongful goal by virtue of a mutual understanding or agreement.

Counsel: **[*1]** For Juvenal Chavez, Veronica Chavez, Plaintiffs: Douglas J. Brown, LEAD ATTORNEY, Chapin Fitzgerald SullivanLLP, San Diego, CA.

For Bank of America, N.A., PRLAP, Inc., Defendants: Andrew W. Noble, LEAD ATTORNEY, Severson & Werson, San Francisco, CA.

Judges: Oliver W. Wanger, UNITED STATES DISTRICT JUDGE.

Opinion by: Oliver W. Wanger

Opinion

MEMORANDUM DECISION GRANTING IN PART WITH LEAVE TO AMEND AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (Doc. 8)

On October 16, 2009, Plaintiffs Juvenal and Veronica Chavez, represented by Chapin Fitzgerald Sullivan LLP (formerly Chapin Wheeler LLP), filed in the Merced County Superior Court a Complaint for Damages and Equitable Relief for (1) fraud, (2) fraud in the inducement, (3) conversion, (4) quiet title, (5) defamation, (6) violation of *California Business and Professions Code §§ 17200*, and (7) civil conspiracy. The Complaint also contains a "Petition for Interlocutory Injunctive Relief," which seeks to enjoin foreclosure of the Subject Property. Defendants are the Bank of America and PRLAP, Inc., and Does 1-50. The action was removed to this Court on December 4, 2009.

Plaintiffs allege that they own property at 1231 Center Lane, Los Banos, California (the "Subject Property"). **[*2]** Paragraphs 19-56 of the Complaint set forth allegations concerning subprime loans and Defendants' alleged participation in that market. Paragraphs 57-77 set forth allegations pertaining to Plaintiffs:

> 57. The loans at issue were the product of a home purchase, through which Plaintiffs were attempting to obtain a safe, affordable residential mortgage loan. Plaintiffs had received advertisement for refinancing from Defendant BoA marketing its ability to refinance quickly, purportedly at the best interest rates and with the best loan terms. This marketing prompted Plaintiffs to contact and speak with a representative of BoA, whose name is Ms. Fong, primarily over the telephone.
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> 58. From the outset of these conversations, Defendants' representative aggressively marketed the company's stated-income lending program and made clear to Plaintiffs that Defendants required no verification of their financial status to issue a quick approval for a refinance. Defendants' representative reassured Plaintiffs that, even without any financial verification, they would obtain a loan package appropriate for their financial status, that they would obtain the loan package with the best terms available, and **[*3]** that they had no other options.
> 59. Defendants' representative submitted a loan application on Plaintiffs' behalf on merely a stated-income basis, which Defendants approved. This approval, communicated by BoA's representative, with the full knowledge and consent of its trustees, insurers, underwriters, servicers, and assignees, constituted a misrepresentation to Plaintiffs that the loan package they obtained was in fact appropriate for their financial condition.
> 60. On April 25, 2006, Plaintiffs purchased the Subject Property, through a primary loan they purchased from BoA for $ 260,000 and a secondary loan, also with BoA, for $ 32,500, with 100% financing. Defendants induced Plaintiffs to purchase a hybrid ARM with a piggyback balloon loan, even though Plaintiffs qualified for other loan options that were safer and more reasonable. This piggyback balloon loan provided for payments that covered only interest during the entire loan term meaning that Plaintiffs could find themselves owing the entire original loan balance at the end of the interest-only period.
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> 61. As was typical of piggyback balloon loans Defendants sold, the length of Plaintiffs' secondary loan here was fifteen years, **[*4]** shorter than the thirty year term of Plaintiffs' primary loan. This meant that Plaintiffs' balloon payment, for the entire balance of the secondary loan, would come due while Plaintiffs were still making payments on their primary loan.
> 62. Defendants steered Plaintiffs into such a risky loan package in order to increase their own profits, knowing that the loan package provided to Plaintiffs was complicated and deceiving, the actual cost and risk of a default inherent in which Plaintiffs would not understand.
> 63. Plaintiffs' primary loan provided for an initial 'teaser' interest rate of 6.375% for a temporary period of five years. Thereafter, Plaintiffs' yearly interest rate could adjust up to 11.375% with a margin of 2.25% plus prime.

64. Plaintiffs' secondary loan provided for an interest rate of 8.25% with interest-only payments for ten years, at which time a balloon payment for the total amount of the loan was due.
65. Defendant PRLAP served as the trustee for the loans BoA originated to Plaintiffs.

66. Defendants offered Plaintiffs only this single lending option. By offering Plaintiffs only one lending option and then approving, closing on, and servicing these loans, Defendants misrepresented **[*5]** that this loan package, with its particular terms, was the only one available, was appropriate, and was the most effective for Plaintiffs.
67. Contrary to these representations, Defendants offered Plaintiffs only this risky lending package even though Plaintiffs qualified for other lending options that were safer and more reasonable. Defendants bundled this package with additional risky features that made it ever riskier, including illusory interest rates, a high LTV ratio, loan qualification based on a 'teaser' interest rate, and illusory underwriting procedures. These features all worked together to guarantee Plaintiffs' eventual default and foreclosure.

68. Defendants' representative misrepresented to Plaintiffs that the loans' rate structure was extremely cheap and low-risk, focusing on the temporary, fixed 'teaser' rate period and falsely stating that the adjustable interest rate structure was not relevant to what Plaintiffs would later have to pay. Defendants made this representation despite their awareness that this adjustable rate structure would cause Plaintiffs' monthly payment amount to increase sharply, setting Plaintiffs up for default and foreclosure. Defendants did this **[*6]** to induce Plaintiffs into purchasing the loans for Defendants' own immediate profit.
69. None of Defendants ever provided Plaintiffs with any disclosures or estimates prior to closing. In addition, no one ever explained to them the inherent risks of an Option ARM loan coupled with an initial 'teaser' interest rate, interest-only payments, and a piggyback balloon loan, especially the devastating effect of negative amortization.
70. When entered into loan agreements with Plaintiffs, Defendants, by and through their representatives, employees, fiduciaries, and agents, again failed to disclose and knowingly misrepresented key terms of the loans sold to Plaintiffs, including the risks inherent in a Hybrid ARM coupled with an initial 'teaser' interest rate, interest-only payments, and a piggyback balloon loan. At closing, Defendants simply told Plaintiffs to sign without any explanation, brief or otherwise, as to the terms and risks of such a loan package.

71. Defendants disregarded and ignored Plaintiffs' actual ability to pay off the loans they sold by failing to conduct meaningful underwriting. Plaintiffs did not realize or understand that they were being sold a loan package that they could **[*7]** not afford and were not qualified to receive until they were facing default and foreclosure.
72. Defendants also grossly inflated the value of the Subject Property in order to give Plaintiffs the false impression that they had substantial equity above and beyond the loan amounts. Defendants never provided Plaintiffs with documentation supporting their valuation.
73. When Plaintiffs expressed any apprehension about their ability to afford the loans long-term, Defendants misrepresented to Plaintiffs their ability to afford the loans, should the terms later become unaffordable. Defendants told Plaintiffs, throughout the loan application and approval process, that their purported equity in the property would allow then to refinance with a lower interest rate and at a principal amount lower than the property's market value. Defendants also assured Plaintiffs that the Subject Property's value would continue to rise, and that Defendants would approve any subsequent refinance request due to the inevitable and perpetual rise of Plaintiffs' property value.

74. Defendants knew or should have known that Plaintiffs' loans would likely result in default and foreclosure, particularly in light of their **[*8]** qualifying Plaintiffs in reliance on a false promise of serial refinancing, which in turn relied on a false promise of perpetual property price appreciation. In conjunction with their employees, agents, sale representatives, and mortgage brokers, Defendants failed to meaningfully account for payment adjustments in approving and selling Plaintiffs' loans, thereby failing to meaningfully account for Plaintiffs' ability to repay the loans long-term. This illusory underwriting inevitably led to Plaintiffs' defaulting on their loans.

75. Defendants, along with their employees, agents, brokers, appraisers, and co-defendants, sold these loans to Plaintiffs with the intent and design to fraudulently maximize profits. Defendants, along with their employees,

> agents, brokers, appraisers, and co-defendants, induced Plaintiffs to accept this risky loan package with misleading and false statements and by withholding material information as to the loans' true costs and risks. For their role, Defendants rewarded their agents and brokers with excessive commissions and passed this compensation on to Plaintiffs in the form of increased origination fees, higher interest rates, and credit spreads above **[*9]** the index value of their loans.
> 76. These activities of Defendants combined to inflate the value of the Subject Property, further increasing Defendants' revenues at the severe expense of Plaintiffs' financial health. Because of the high LTV ratio on the loans Defendants sold and the characteristics of Plaintiffs' loan package, Plaintiffs were acutely susceptible to being turned 'upside down' on their mortgage and incurring substantial negative equity in their property, which is precisely what occurred as soon as the real estate market flattened. Plaintiffs are now faced with monthly payments that they cannot afford, and are unable to refinance the Subject Property.
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> 77. Defendants, and each of them, acted with full knowledge of the terms of Plaintiffs' loans and that these terms were inappropriate given the Subject Property's actual value and Plaintiffs' actual financial qualifications. In particular, Defendants, and each of them, acted with full knowledge as to how misleading, deceptive, and unduly risky such loan packages were, particularly when sold on a stated-income basis with only illusory underwriting procedures. Defendants where [sic] therefore fully aware that Plaintiffs were **[*10]** likely to become trapped in a loan for which they were not appropriately qualified and would certainly become unaffordable once the 'teaser' period reset. Most importantly for Defendants, they had full knowledge of the opportunities available to them on the securities market, where the transfer and dispersal of risk meant that profits derived from indiscriminate volume and costly loan terms [sic].

Defendants move to dismiss the Complaint for failure to state a claim upon which relief can be granted. Defendants did not file a reply brief. The parties submitted the motion for resolution on the papers without oral argument.

A. GOVERNING STANDARDS.

HN1[] A motion to dismiss under *Rule 12(b)(6)* tests the sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir.2001)*. Dismissal is warranted under *Rule 12(b)(6)* where the complaint lacks a cognizable legal theory or where the complaint presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.1984)*. ***HN2***[] In reviewing a motion to dismiss under *Rule 12(b)(6)*, the court must assume the truth of all factual allegations and must construe all inferences **[*11]** from them in the light most favorable to the nonmoving party. *Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.2002)*. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir.2003)*. ***HN3***[] "A district court should grant a motion to dismiss if plaintiffs have not pled 'enough facts to state a claim to relief that is plausible on its face.'" *Williams ex rel. Tabiu v. Gerber Products Co., 523 F.3d 934, 938 (9th Cir.2008)*, quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "'Factual allegations must be enough to raise a right to relief above the speculative level.'" *Id.* "While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic, id. at 555*. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct **[*12]** alleged. *Id. at 556*. The plausibility standard is not akin to a "probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully, *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id. at 557*. In *Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009)*, the Supreme Court explained:

> Two working principles underlie our decision in *Twombly.* First, ***HN4***[] the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice … *Rule 8* marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, ***HN5***[] only a complaint that states a plausible claim for relief survives a motion to dismiss … Determining whether a

complaint states a plausible claim for relief will ... be a context-specific task that requires **[*13]** the reviewing court to draw on its judicial experience and common sense ... But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' - 'that the pleader is entitled to relief.' ....

In keeping with these principles, ***HN6***[] a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

HN7[] Immunities and other affirmative defenses may be upheld on a motion to dismiss only when they are established on the face of the complaint. *See* *Morley v. Walker, 175 F.3d 756, 759 (9th Cir.1999)*; *Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980)* ***HN8***[] When ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached **[*14]** to the complaint when authenticity is not contested, and matters of which the court takes judicial notice. *Parrino v. FHP, Inc, 146 F.3d 699, 705-706 (9th Cir.1988)*.

B. FIRST CAUSE OF ACTION FOR FRAUD AND SECOND CAUSE OF ACTION FOR FRAUD IN THE INDUCEMENT.

The First and Second Causes of Action for fraud and fraud in the inducement allege:

79. As set forth herein, Defendants misrepresented and concealed from Plaintiffs, via advertisements, conduct, and affirmative statements, key facts related to the loans here at issue. When Defendants made these misrepresentations to Plaintiffs, Defendants made them without regard for the truth, with knowledge of their falsity, and deceptive nature, and with the intent that Plaintiffs would rely on these misrepresentations and, as a product of this reliance, sign loan documents and secure the Subject Property for said loans.

80. Each defendant, by and through its agents and representatives, engaged in these misrepresentations and/or concealments and profited from this deception. Defendants, and all of them, acted in concert, participated in, had full knowledge of, and wrongfully benefitted from the fraudulent acts described in this Complaint.

81. Specifically, **[*15]** Defendants fraudulently induced Plaintiffs to accept Defendants' risky loan products by (1) failing to clearly and conspicuously disclose the risks and eventual 'payment shock' inherent in a Hybrid ARM that provided an initial 'teaser' interest rate and interest-only payments coupled with a piggyback balloon loan; (2) failing to clearly and conspicuously disclose whether Plaintiffs' stated monthly payments included amounts due for insurance and taxes, which they generally did not; (3) failing to clearly and conspicuously disclose closing costs and fees; (4) making false promises that Defendants would refinance the loan prior to a rate increase; (5) failing to disclose the true costs and risks associated with the false promise that refinancing would be available as an exit strategy when Plaintiffs' loans became unaffordable; (6) fraudulently promising that the value of the Subject Property would increase and, therefore, that Plaintiffs could easily refinance; (7) steering Plaintiffs away form safer, fixed interest rate prime loans that they could afford and instead toward a Hybrid ARM providing for an initial 'teaser' interest rate and interest-only payments, coupled with a piggyback **[*16]** balloon loan that was based on an inflated loan amount; (8) false marketing acts designed to mask the true costs and risks of Plaintiffs' loans and to hide the benefits of other, safer loan products, and (9) inducing Plaintiffs to accept an adjustable, teaser interest rate loan, coupled with interred-only payments and a piggyback loan, with the false promise of a lower interest rate.

82. Defendants represented to Plaintiffs that all the statements made to them during the origination and underwriting of the loans at issue, including those concerning the purported value of the property supporting the loans, were true, and Defendants did so while concealing their mortgage lending scheme from Plaintiffs.

83. These misrepresentations, deceptions, false promises, and concealments of material information occurred during the loan application process, the underwriting process, at the time of the loans' subsequent approval, at the loans' closing, and even post-closing. These misrepresentations and concealments in fact continue, as

> Defendants insist on collecting on the loans and pursuing their purported interest in the Subject Property based on loans that Defendants know were and continue to be **[*17]** fraudulent.
> 84. Plaintiffs justifiably relied on Defendants' statements as true and complete because Defendants purported to be duly licensed professionals and corporations authorized to broker, issue, process, and purchase residential mortgage loans, subject to and purportedly following the laws and regulations particular to their practice of engaging consumers in mortgage lending. Defendants had resources, knowledge, and expertise in mortgage lending far surpassing that of Plaintiffs and, moreover, Defendants represented themselves, their employees, and their agents to be experts in the field.
>
> 85. Defendants, and all of them, knew of and participated in this system of fraud, acting in concert to communicate their misrepresentations to Plaintiffs via conduct, lack of disclosure, and false statements. Defendants effectuated this fraud via a system obsessed with their own profit, rewarding agents, brokers, and fiduciaries that produced the highest volume of loans with the most costly terms as to borrowers, while turning a blind eye to reckless and desceptive misconduct via their illusory underwriting procedures. The secondary mortgage market enabled and incentivized this systemized fraud **[*18]** by enabling Defendants o she the risk of the loans at issue and maximize their own short terms gain, all at Plaintiffs' expense. Without Defendants working together, such a fraud would have been neither possible nor profitable.

Defendants move to dismiss these causes of action on the grounds that they are barred by the statute of limitations and the Complaint does not allege any fraudulent conduct with the required particularity.

1. Statute of Limitations.

Defendants move to dismiss these causes of action as barred by the three year statute of limitations in *California Code of Civil Procedure § 338(d)*: [1]

> ***HN9***[] Within three years:
> …
> (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Defendants note that the loans were originated on April 25, 2006 and that this action was not filed until October 16, 2009, more than three years later.

Plaintiffs **[*19]** respond that dismissal on this ground is not appropriate because Plaintiffs were not aware of Defendants' allegedly fraudulent conduct until on or about September of 2009.

As explained in *Neveu v. City of Fresno, 392 F. Supp. 2d 1159, 1169 (E.D.Cal.2005)*:

> ***HN10***[] 'Where the facts and dates alleged in a complaint demonstrate that the complaint is barred by the statute of limitations, a *Federal Rule of Civil Procedure 12(b)(6)* motion should be granted.' … There is no requirement, however, that affirmative defenses, including statutes of limitation, appear on the face of the complaint … 'When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'

Defendants' motion to dismiss the First and Second Causes of Action as barred by the statute of limitations is DENIED because the allegations present factual issues to be resolved at summary judgment or trial.

2. Particularity.

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[1] Defendants' brief refers to *Section 338(j)*, which provides for a three year statute of limitations for "[a]n action to recover for physical damage to private property under *Section 19 of Article I of the California Constitution*."

Defendants move to dismiss these causes of action on the ground that the alleged fraud is not pleaded with the particularity required by *Rule 9(b), Federal Rules of Civil Procedure*.

HN11[] *Rule 9(b)* **[*20]** requires that, in all averments of fraud, the circumstances constituting fraud be stated with particularity. One of the purposes behind *Rule 9(b)*'s heightened pleading requirement is to put defendants on notice of the specific fraudulent conduct in order to enable them to adequately defend against such allegations. *See In re Stac Elecs. Litig., 89 F.3d 1399, 1405 (9th Cir.1996)*. Furthermore, *Rule 9(b)* serves "to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Id.*

HN12[] *Rule 9(b)* requires that allegations of fraud be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. *Celador Int'l, Ltd. v. Walt Disney Co., 347 F. Supp. 2d 846, 855 (C.D.Cal.2004)*; *see also Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir.1993)*. As a general rule, fraud allegations must state "the **[*21]** time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Schreiber Distrib. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir.1986)*. As explained in *Neubronner v. Milken, supra, 6 F.3d at 672*:

> ***HN13***[] This court has held that the general rule that allegations of fraud based on information and belief do not satisfy *Rule 9(b)* may be relaxed with respect to matters within the opposing party's knowledge. In such situations, plaintiffs cannot be expected to have personal knowledge of the relevant facts ... However, this exception does not nullify *Rule 9(b)*; a plaintiff who makes allegations on information and belief must state the factual basis for the belief.

Defendants assert that Plaintiffs' fraud allegations lack any of the "who, what, when, where, and how" required for pleading fraud and that the Complaint "simply sets forth allegations that appear, often verbatim, in countless other complaints involving different borrowers and different lenders." Defendants contend that, other than the allegations in Paragraphs 57-77 quoted above:

> The remaining allegations are mere filler that appear in every complaint that Chapin **[*22]** Wheeler [sic] has filed against mortgage lenders in California this year, including the following: *Diaz v. America's Servicing Co., et al.,* (Super.Ct. Santa Clara Co., 2009, No. 109-CV-155020); *Lim v. HSBC Mortgage Corp, (USA), et al.* (Super.Ct.San Joaquin Co., 2009 39-2009-00215519-CU-OR-STK); *Nguyen v. Wells Fargo Bank, N.A., et al.* (Super.Ct. Santa Clara Co., 2009, No. 199-CV-144605); *Parent v. Bank of America, N.A., et al.* (Super.Ct. Santa Clara Co., 2009, No. 109-CV-143479); *Va v. Wells Fargo Bank* (Super.Ct. Santa Clara Co., 2009 No. 109-CV-143478).

Defendants do not request the Court take judicial notice of the Complaints filed in these other listed actions and do not provide copies of these Complaints. Plaintiffs, citing *Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 17 Cal.4th 553, 577 n.13, 71 Cal. Rptr. 2d 731, 950 P.2d 1086*), that """[m]atters otherwise subject to judicial notice must be relevant to an issue in the action,""" argue that Defendants should not be allowed to request judicial notice of these Complaints:

> Defendants cannot show that the other complaints are relevant to the present action. Defendants have failed to explicitly assert or prove that the facts, circumstances, or legal issues in the present **[*23]** case are similar to the facts, circumstances, or legal issues presented in other complaint [sic]. Indeed, Defendants' action in referencing other complaints that have no bearing to this case is a deliberate distortion of the facts, is highly and improperly prejudicial to Plaintiffs' case, and should not be permitted. Contrary to the Defendants' implicit allegation of similarity, this case is distinguishable in numerous regards, including the facts, loans at issue, and parties from other complaints. Indeed, it is readily apparent that there is no co-relation between the other complaints and the present action, other than loans being made by lenders on a broad level.

Rule 201, Federal Rules of Evidence, provides:

HN14[] (b) Kinds of facts. A judicially noticed fact must be one not dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

> ***HN15***[] (c) When discretionary. A court may take judicial notice, whether requested or not.
>
> ***HN16***[] (d) When **[*24]** mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
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> ***HN17***[] (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

HN18[] The Court may take judicial notice of matters of public record, including duly recorded documents, and court records available to the public through the PACER system via the internet. *See* *Fed. R. Evid. Rule 201(b)*; *United States v. Howard, 381 F.3d 873, 876, fn.1 (9th Cir. 2004)*.

Because the Court is not provided copies of the Complaints in the described actions, Defendants' assertions concerning them are unverifiable. If these Complaints contain allegations similar to those in this action, that does not, *ipso facto,* establish that Plaintiffs have not pleaded fraud in this action with the specificity required by *Rule 9(b)*.

Plaintiffs argue that the Complaint sufficiently alleges fraud pursuant to the *Rule 9(b)* standards.

Plaintiffs have not satisfied *Rule 9(b)*. Other than Ms. Fong, no one associated **[*25]** with Defendants is named and the alleged misrepresentations are very generically described as are the times when the misrepresentations were made, i.e., at every stage of the loan process and thereafter. As an example, it is alleged that Defendants *promised* that the value of the Subject Property would increase and that Plaintiffs could then refinance; who made this promise and when. Plaintiffs allege that Defendants inflated the value of the Subject Property; who did so and when (and do Plaintiffs mean that the market value was incorrectly stated at the time of the appraisal or are they stating that the market value subsequently fell and Defendants should have anticipated that).

Defendants' motion to dismiss the First and Second Causes of Action is GRANTED WITH LEAVE TO AMEND to specifically allege fraud and fraud in the inducement in compliance with *Rule 9(b)*.

C. THIRD CAUSE OF ACTION FOR CONVERSION.

The Third Cause of Action, after incorporating all preceding allegations, alleges:

> 89. As set forth herein, Defendants induced Plaintiffs to accept the unduly risky loans at issue in this case through fraud, deceit, and unfair business practices, in violation of California law. Defendants **[*26]** also set the interest rate on Plaintiffs' loans unjustly high and artificially inflated the value of the Subject Property so as to fraudulently justify larger loans, increasing Plaintiffs' monthly mortgage payments in the process.
> 90. By increasing Plaintiffs' monthly mortgage payments, Defendants extracted from Plaintiffs more money than they legitimately should have paid. Further, as Defendants' own policies require, any payments Plaintiffs made in excess of the amount they owed should have been applied directly to the loans' principal. Defendants violated California law, and their own policies, by applying the excess amount of Plaintiffs' monthly payments to interest that they did not legitimately owe and improperly converting said funds to Defendants' own use and benefit.
>
> 91. Defendants knew that Plaintiffs' loans posed a very high risk of default, and Defendants mitigated this risk for themselves by simply calculating uncollected interest on Plaintiffs' loans as additional principal. In so doing, Defendants violated California law, as well as their own policies, by applying a portion of Plaintiffs' monthly payments to interest that Plaintiffs did not legitimately owe, improperly **[*27]** converting said funds for their own use and benefit.

97. Defendants' conversion has caused Plaintiffs to suffer severe financial hardship resulting in damages to be proved at trial.

Defendants move to dismiss the Third Cause of Action. Defendants cite *McKell v. Washington Mutual, Inc., 142 Cal.App.4th 1457, 49 Cal. Rptr. 3d 227 (2006)*. In *McKell,* home mortgagors brought a class action against the lender, alleging various causes of action, including conversion, in connection with alleged overcharging of underwriting, tax services, and wire transfer fees in connection with their home loans. The Court of Appeal ruled:

> ***HN19***[] A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff … Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment … Thus, in *Chavez v. Centennial Bank (1998) 61 Cal.App.4th 532, 542, 71 Cal. Rptr. 2d 462* …, the plaintiffs stated a cause of action for conversion where the bank **[*28]** took funds from trust accounts to pay the trustee's personal indebtedness.
>
> Here …. plaintiffs did not allege that defendants were holding their payments on behalf of another, in essence in trust for the third party vendors. Plaintiffs cite no authority for the proposition that a cause of action for conversion may be based on an overcharge. Consequently, they have failed to demonstrate that they have stated a cause of action for conversion.

Defendants assert that Plaintiffs owed their loan payments to Bank of America and lost title to the payments when they were made and cannot recover their loan payments because they no longer have title to the money.

Plaintiffs respond that California Courts recognize that "[m]oney can be the subject of an action for conversion if a specific sum capable of identification is involved." *Farmers Ins. Exchange v. Zerin, 53 Cal.App.4th 445, 452, 61 Cal. Rptr. 2d 707 (1997)*. Plaintiff also cite *McCaffey Canning Co. v. Bank of America, 109 Cal.App. 415, 424, 294 P. 45 (1930)*, that "[a]n unjustified claim of title may amount to conversion." Plaintiffs argue:

> Plaintiffs specifically plead that they are the owners of the [Subject Property] … Plaintiffs also state that, 'by increasing Plaintiffs' **[*29]** monthly payments, Defendants extracted from Plaintiffs more money than they legitimately should have paid.' … Because of Defendants' conduct, Plaintiffs have a right to the monies that were unlawfully converted as payments to Defendants. Each time Plaintiffs rendered payments under the loans, Defendants took such inflated payments under their control for their own profit. Plaintiffs argue that the initial rate and principal on the loans were inflated and did not correlate with Plaintiffs' income. BOA is liable for conversion because it is the originator and servicer of both the primary and secondary loans if a more specific amount of conversion is warranted then Plaintiff [sic] should be allow [sic] to amend the complaint. Moreover, BOA continues to demand payments from the Plaintiffs pursuant to the unlawful loans. PRLAP is named as trustee of the subject loans.

In *Zerin,* Farmers Insurance Exchange sued an attorney for reimbursement of money received from third-party tortfeasors on behalf of defendant clients injured in automobile accidents involving plaintiff's insureds, who had been paid medical benefits by plaintiff, pursuant to a policy provision stating: "When a person has been **[*30]** paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment." The trial court sustained a demurrer to the cause of action for conversion. The Court of Appeals ruled:

> ***HN20***[] 'Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property or that the alleged converter has applied the property to his own use …' … Money can be the subject of an action for conversion if a specific sum capable of identification is involved ….

> *HN21*[] Neither legal title nor absolute ownership of the property is necessary … A party need only allege it is '*entitled to immediate possession at the time of conversion* …' … However, a mere contractual right of payment, without more, will not suffice ….

53 Cal.App.4th at 451-452. **[*31]** The Court of Appeals rejected Farmers' contention that it had a sufficient property interest in the third party recoveries by virtue of the policy language which, it argued, created an actual or equitable lien on the funds and sustained the demurrer to the conversion causes of action. *Id. at 452-457*.

In *McCaffey,* the plaintiff had brought an action in which it obtained a judgment and had caused a writ of attachment to issue to the sheriff to attach certain enumerated canned goods in the judgment debtor's possession. The sheriff took custody of the canned goods pursuant to the writ. Thereafter, the Bank of America made a third-party claim to certain of the canned goods, averring that it had a security interest in those goods. Upon receipt of the bank's claim the sheriff notified plaintiff. The plaintiff refused to furnish an indemnity bond to the sheriff on the ground that the bank's claim was legally insufficient and that there had been no change of possession required by law for consummation of a pledge. The sheriff released from his custody all of the canned goods, including those subject to the writ of attachment. The canned goods were subsequently sold by the bank for its own account, **[*32]** the entire proceeds being applied toward satisfaction of its loans. The Court of Appeals held that "unless the Bank of America was in fact legally justified in claiming as a pledgee, the plaintiff should be entitled to recover in conversion for the nullification of its attachment lien." *Id. at 426*.

In *Kelley v. Mortgage Electronic Registration Systems, Inc., 642 F.Supp.2d 1048, 1057 (N.D.Cal.2009)*, the District Court held:

> Here, the alleged conversion is that defendants 'established an unwarranted high monthly payment by artificially inflating the value of the property to fraudulently justify a larger mortgage.' … This is not a conversion because it does not constitute an exercise of dominion by defendants over plaintiffs' property. Plaintiffs have not alleged any of the elements of a conversion.

In *Montoya v. Countrywide Bank, 2009 U.S. Dist. LEXIS 53920, 2009 WL 1813973 at *8-9 (N.D.Cal., June 25, 2009)*, the District Court addressed a motion to dismiss a claim for conversion:

> In this case, Plaintiffs allege as follows:
>
>> Defendants … entered a conspiracy to induce the Plaintiffs to agree to the [residential mortgage loan] through fraud, deceit, and unfair business practices … Defendant Countrywide, at the direction **[*33]** of all Defendants as part of this conspiracy, set an unjustly high monthly payment by artificially inflating the value of the property to fraudulently justify a larger mortgage.
>>
>> By raising the monthly payment rate, Defendants extracted from the Plaintiffs Montoya [sic] a higher amount than the Plaintiffs legitimately should have paid … [A]s required by Defendant Countrywide's own policies, any payments made in excess of the amount owed should [have been] applied directly to the principle of the account. Defendant Countrywide violated the RML contract and their own policies by applying the extra payments to interest that was not legitimately owed by the Plaintiff. The Defendants as part of their conspiracy, improperly converted said funds of Plaintiffs Montoya for their own use.
>
> … Plaintiffs' conversion allegations fails to allege facts that make it plausible that Defendants exercised dominion and control over Plaintiffs' personal property in manner [sic] that was inconsistent with Plaintiffs' rights at the time. Plaintiffs' claim is premised on a fraudulently obtained loan by Defendants. However, as discussed above, Plaintiffs have not adequately alleged any causes of action sounding **[*34]** in fraud. Further, the allegations of the Complaint make it clear that Plaintiffs entered into multiple loans that required interest-only payments to Defendants for the first ten years … Based on these allegations, Defendants' acceptance of Plaintiffs' monthly payments could not plausibly be deemed wrongful. Thus, the Court finds Plaintiffs have not adequately alleged a claim for conversion.

In *Somsanith v. Bank of America, 2009 U.S. Dist. LEXIS 103488, 2009 WL 3755593 at *4 (E.D.Cal., Nov. 6, 2009)*, the District Court ruled:

> [P]laintiff's conversion allegations fail to allege facts that make it plausible that Bank of America exercised dominion over plaintiff's personal property in manner [sic] that was inconsistent with plaintiff's rights at the time. Plaintiff's claim is premised on a fraudulently obtained loan by defendants … While plaintiff does allege that Bank of America 'set an unjustly high monthly payment by artificially inflating the value to the property to fraudulently justify a larger mortgage,' … this allegation does not constitute an exercise of dominion by Bank of America over plaintiff's property.

Plaintiffs' allegations are no different from those in *McKell*. The cases upon which Plaintiffs rely are **[*35]** significantly different from Plaintiffs' claimed conversion in this action. As noted, District Courts addressing similar allegations have ruled that a conversion claim does not lie. Plaintiffs have not stated a claim for conversion. The motion to dismiss is GRANTED WITH LEAVE TO AMEND.

D. FOURTH CAUSE OF ACTION FOR QUIET TITLE.

The Fourth Cause of Action is for quiet title. Plaintiff alleges that they own the Subject Property and further allege:

> 96. As described herein, Defendants have committed acts of misrepresentation and fraud with respect to the terms of Plaintiffs' loans and the value of the Subject Property, with the intent to exert undue influence.
> 97. Defendants' acts subjected Plaintiffs to unfair persuasion amounting to undue influence because the parties had a relationship by which Plaintiffs were justified in assuming that Defendants would not act in a manner inconsistent with Plaintiffs' welfare and best interests.
> 98. Defendants gained unfair persuasion over and undue influence of Plaintiffs by improper means, including but not limited to misrepresentation, undue flattery, and fraud.
>
> 99. As a result of this unfair persuasion over and undue influence of Plaintiffs, Defendants **[*36]** received a Deed of Trust to the Subject Property for loans that Plaintiffs should not ever have been given or allowed to take. Plaintiffs would not have received these loans but for Defendants' wrongful deceptive conduct.
> 100. Defendants have all worked and colluded together, acting individually in their respective roles as lender, trustee, fiduciary agent, beneficiary, debt collector, and foreclosing agent in clouding Plaintiffs' title to the Subject Property. Defendants now seek possession of the Subject Property via default and foreclosure. In the process, they seek to cloud title and/or have already clouded Plaintiffs' title by acting on a wrongful security deed that is based on wrongful loans, specifically by recording notices of default and notices of sale on the Subject Property's deed records, thus creating wrongful title.
> 101. Defendants' actions were intentional, oppressive, and conducted with fraud or malice, in conscious disregard of Plaintiffs' consumer protection rights, justifying an award of punitive damages ….
>
> 102. Defendants' unfair persuasion over and undue influence of Plaintiffs has caused Plaintiffs to suffer severe financial hardship and forced Plaintiffs to grant **[*37]** deeds of trust to Defendants. Plaintiffs request that this Court invalidate the deeds of trust on the Subject Property.

Defendants move to dismiss the Fourth Cause of Action on several grounds.

Defendants argue that the Complaint does not allege facts sufficient to demonstrate undue influence, citing *California Civil Code § 1575*:

> ***HN22***[] Undue influence consists:
> 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
> 2. In taking an unfair advantage of another's weakness of mind; or,
> 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Defendants contend that the Complaint does not allege that Plaintiffs were of unsound mind or that they had "necessities or distress" that Defendants to grossly oppressive and unfair advantage. With respect to the allegation that "the parties had a relationship by which Plaintiffs were justified in assuming that Defendants would not act in a manner inconsistent with Plaintiffs' welfare and best interests," Defendants note that, under California law, no such special relationship **[*38]** exists between a bank and a borrower from a bank. *See Kim v. Sumitomo Bank, 17*

Cal.App.4th 974, 979-981, 21 Cal. Rptr. 2d 834 (1993); Nymark v. Heart Fed. Savings & Loan Assn., 231 Cal.App.3d 1089, 1093, 283 Cal. Rptr. 53 n.l (1991); Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 476, 261 Cal. Rptr. 735 (1989).

Plaintiffs do not respond to this aspect of the motion to dismiss the Fourth Cause of Action and thereby concede that the Complaint does not allege facts from which undue influence within the meaning of Section 1575 may be inferred or that a special relationship existed between them and the Bank of America.

Defendants further argue that Plaintiffs cannot rescind their loans or the Deeds of Trust securing those loans without repaying the money they borrowed. *See* California Civil Code § 1691. **HN23**[] Quiet title is an equitable claim, a plaintiff in equity must do equity in order to obtain relief. In these circumstances, this means repaying the money borrowed before voiding the security for the loan. *See* 4 Miller & Starr, Cal. Real Estate § 10:212, pp. 686-87 (3d ed. 2003). As explained in Gaitan v. Mortgage Electronic Registration System, 2009 U.S. Dist. LEXIS 97117, 2009 WL 3244729 at *12 (C.D.Cal.2009):

> **HN24**[] A basic requirement of an action to quiet title is an allegation that **[*39]** plaintiffs 'are the rightful owners of the property, *i.e.,* that they have satisfied their obligations under the Deed of Trust.' Kelley v. Mortgage Elec. Reg. Sys., Inc. ..., 642 F. Supp. 2d 1048, 2009 WL 2475703 at *7 (N.D.Cal., 2009). '[A] mortgagor cannot quiet his title against the mortgagee without paying the debt secured.' Watson v. MTC Financial, Inc. ..., 2009 U.S. Dist. LEXIS 63997, 2009 WL 2151782 (E.D.Cal., Jul. 17, 2009), quoting Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934).

Plaintiffs respond:

> [I]t would be inequitable to require Plaintiffs to first tender amounts owed in order to quiet title in this instance since Plaintiffs' consent to the alleged security deed was procured by Defendants through fraud and violation of California's unfair Competition laws. Thus, Plaintiff's tender obligations are excused. In essence, Defendants are wrongfully attempting to prevent Plaintiffs from having their day in court by attempting to dismiss Plaintiffs' case on the basis that they have failed to tender amounts owed on a fraudulent loan. Moreover, such an argument is not the basis for dismissal but at a minimum requires a hearing on Plaintiffs' grounds for temporary injunctive relief and Defendants to prove which if any damage **[*40]** they may incur by the prevention of foreclosure during the resolution of the issues at hand.

Plaintiffs cite no authority for their position that their tender obligation is excused and that Plaintiffs can keep both the Subject Property and the loan amounts. Plaintiffs' response infers that they are unable to make the tender, i.e., they do not have the present financial ability to make it.

Defendants' motion to dismiss the Fourth Cause of Action is GRANTED WITH LEAVE TO AMEND. Plaintiffs shall plead facts, if they can, from which it may be ascertained, consistent with Rule 11, Federal Rules of Civil Procedure, that they were subjected to undue influence or had a legally cognizable special relationship with the Bank of America, and that they have the present ability to tender the loan payments.

E. FIFTH CAUSE OF ACTION FOR DEFAMATION.

The Fifth Cause of Action for defamation, after incorporating all preceding allegations, alleges:

> 104. Defendants threatened to report and actually reported to credit agencies and other third parties that Plaintiffs were in default on their loans with respect to monthly payments that Defendants incorrectly assessed.
>
> 105. These reports were false, and Defendants **[*41]** made these statements with clear knowledge of their wrongful acts: that they issued Plaintiffs loans illegally: and that they incorrectly assessed Plaintiffs' monthly payments.
> 106. Despite this knowledge, Defendants made false statements to third parties concerning the amount Plaintiffs owed and did not pay. Defendants made these false statements in an attempt to defame Plaintiffs' reputations and lower their credit scores.

107. Defendants' purported right to report to credit bureaus as creditors does not bestow upon them a right to report to credit bureaus as creditors of wrongfully obtained debt upon which a borrower exercises its legal right not to pay. Reporting to credit agencies late payment or nonpayment on a loan known to be fraudulent manifests a specific intent to defame, with malice against the borrower.

108. Defendants have also attempted to foreclose by recording a notice of default on the Subject Property's deed records, publicizing false and very damaging information about Plaintiffs in the process. Defendants conducted these acts with the specific intent to damage Plaintiffs, knowing their false statements would be exposed to the public, for not making monthly mortgage **[*42]** payments that Plaintiffs believe in good faith to be fraudulent.

Defendants move to dismiss the Fifth Cause of Action on the ground that "the federal Fair Credit Reporting Act preempts state law defamation claims arising from inaccurate reports to credit reporting agencies, at least absent a pleading of facts showing malice - i.e., publication with knowledge that the defamatory credit report was false or with reckless disregard of whether it was false or not."

15 U.S.C. § 1681h(e) provides:

HN25[] Except as provided in sections 1681n and 16810 of this title, no consumer may bring any action or proceeding in the nature of defamation … with respect to the reporting of information against any … person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title …, except as to false information furnished with malice or willful intent to injure such consumer.

15 U.S.C. §§ 1681t(a) and *(b)(1)(F)* provide:

HN26[] (a) Except as provided in subsection[](b) … of this section, this subchapter does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State **[*43]** with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.

HN27[] (b) No requirement or prohibition may be imposed under the laws of any State -
(1) With respect to any subject matter regulated under -
…
(F) SECTION 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply -
…

(ii) with respect to *section 1785.25(a) of the California Civil Code* (as in effect on September 30, 1996)
…

Defendants cite *Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1165-1168 (9th Cir.2009)*, *petition for cert. filed* March 15, 2010 (No. 09-1142). [2] In *Gorman,* a cardholder instituted a lawsuit against his credit card issuer, alleging violations of the Fair Credit Reporting Act (FCRA), libel, and violations of California's credit reporting law. The Ninth Circuit, addressing FCRA preemption, stated in *dicta:*

Although *§ 1681t(b)(1)(F)* appears to preempt all state law claims based on a creditor's **[*44]** responsibilities under *§ 1681s-2*, *§ 1681h(e)* suggests that defamation claims can proceed against creditors as long as the plaintiff alleges falsity and malice. Attempting to reconcile the two sections has left district courts in disarray.

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[2] Defendants cited *Gorman* as *552 F.3d 1008*. However, the opinion at that citation was amended and superseded by the opinion reported at ***584 F.3d 1147***.

> The district court in this case held that *§ 1681h(e)*, the more specific preemption provision, trumped the more general preemption provision of *§ 1681t(b)(1)(F)* … Other district courts have followed different approaches. Some have concluded that the later-enacted *§ 1681t(b)(1)(F)* effectively repeals the earlier preemption provision, *§ 1681h(e)* … Attempting to give meaning to both sections, other courts have observed that *§ 1681t(b)(1)(F)* relates to 'any subject matter regulated under *section 1681s-2*,' the section which regulates the responses to furnishers to notices of dispute. Hence, these courts apply a 'temporal approach,' holding that 'causes of action predicated on acts that occurred *before* a furnisher of information had notice of any inaccuracies are not preempted by *§ 1681t(b)(1)(F)*, but are instead governed by *§ 1681h(e)*.' ….
>
> Gorman advocates a still different 'statutory' analysis, under which '*t(b)(1)(F)* preempts only state law claims against **[*45]** credit information furnishers brought under state statutes, just as *1681h(e)* preempts only state tort claims.' … Finally, MBNA argues that *§ 1681h(e)* is not a broad preemption provision at all, but simply a 'grant of protection for statutorily required disclosures.' … But, of course, granting entities immunity from state law tort suits is just another way of saying that certain state law claims are preempted.
>
> In the end, we need not decide this issue. As we conclude below, even if Gorman could bring a state law libel claim under *§ 1681h(e)*, and such a claim were not preempted by *§ 1681t(b)(1)(F)*, he has not introduced sufficient evidence to survive summary judgment on this claim.

Id. at 1166-1167. The Ninth Circuit further ruled:

> The FCRA does not define the appropriate standard for 'malice.' The two circuits that have interpreted *§ 1681h(e)* have applied the standard enunciated in *New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686* … (1964), requiring the publication be made 'with knowledge that it was false or with reckless disregard of whether it was false or not.' … Under *New York Times,* to show 'reckless disregard,' a plaintiff must put forth 'sufficient evidence to permit the conclusion **[*46]** that the defendant in fact entertained serious doubts as to the truth of his publication.' … We agree with the courts that have adopted the *New York Times* standard for purposes of *§ 1681h(e)* and so apply it here.

Id. at 1168.

Plaintiffs, relying on *Section 1681t(a)* and *Sanai v. Saltz, 170 Cal.App.4th 746, 88 Cal. Rptr. 3d 673 (2009)*, argues that there is no implied or field preemption under the FCRA.

In *Sanai,* the Court of Appeals held that the trial court erred in granting a motion for judgment on the pleadings as to plaintiff's cause of action for violation of the California Consumer Reporting Agencies Act, *California Civil Code § 1785.1, et seq.*, but properly granted the motion as to the state common law causes of action for slander, libel, intentional and negligent interference with prospective economic advantage, and intentional and negligent infliction of emotional distress. Because Plaintiffs have not alleged a violation of *Section 1785.1*, *Sanai* is of no assistance to Plaintiffs. Nonetheless, the law concerning preemption by the FCRA of Plaintiffs' defamation **[*47]** claim is too unsettled to resolve at this stage of the proceedings. Defendants' motion to dismiss on this ground is DENIED WITHOUT PREJUDICE.

Defendants further argue that, even if the Fifth Cause of Action is not preempted by the FCRA, Plaintiffs have not stated a claim upon which relief can be granted:

> The defamation claim is based on their contention that the loans were issued illegally … As explained above, there is no factual allegation of illegality or other wrongful conduct in the origination of these loans.
> Plaintiffs are now faced with monthly payments that they cannot afford, and are unable to refinance the Subject Property.

In *Montoya v. Countrywide Bank, supra, 2009 U.S. Dist. LEXIS 53920, 2009 WL 1813973 at *10-11*, the Northern District held:

> Defendants move to dismiss Plaintiffs' defamation claim on the ground that reporting a true statement to a credit agency is not defamation ….
>
> *HN28*[] Defamation is 'the intentional publication of a statement of fact which is false, unprivileged, and has a natural tendency to injury or which causes special damage.' … A credit report, even one that causes harm, is not defamatory if it is true … A plaintiff's admission of truth will bar a claim for defamation ….
>
> Here, Plaintiffs **[*48]** allege that they 'are no longer able to make the required payments' on their loans … Plaintiffs also allege that:
>
>> [i]n an attempt to coerce payments out of the Plaintiffs in regards to the fraudulently obtained [residential mortgage loans], the Defendant Countrywide threatened and actually reported to credit agencies and other third parties that Plaintiffs were in default on the [residential mortgage loan] for a payment that was incorrectly assessed.
>>
>> …
>>
>> Defendants … conspired to make these statements with full knowledge of Defendants' wrongful and fraudulent conduct and the Defendants were full [sic] aware that the [residential mortgage loan] was obtained illicitly.
>
> Based on these allegations, Plaintiffs' defamation claim is premised on Defendants' statements to credit agencies that Plaintiffs were in default on their loan despite knowing the loan was obtained illicitly. However, as the Complaint also alleges, Plaintiffs were unable to pay their mortgage, and therefore, regardless of how the loan was obtained, Defendants' reports to credit agencies, as alleged, are true. Thus, the Court finds Plaintiffs have failed to allege a publication of a false statement.

See also Fortaleza v. PNC Financial Services Group, Inc., 642 F.Supp.2d 1012, 1026 (N.D.Cal.2009) **[*49]** ("Critically, however, plaintiff does not allege, and has not contested, the truthfulness of the fact of plaintiff's default on the subject loans … Thus, plaintiff cannot demonstrate the requisite 'falsity' of any alleged statements by defendants.'). Here, the Complaint alleges "Plaintiffs are now faced with monthly payments that they cannot afford, and are unable to refinance the Subject Property." This allegation implies that Plaintiffs are in default on the loan, thereby making the reports to the credits agencies true. This pleads the Plaintiffs out of a defamation claim.

Defendants' motion to dismiss the Fifth Cause of Action on this ground is GRANTED WITH LEAVE TO AMEND.

F. SIXTH CAUSE OF ACTION FOR VIOLATIONS OF CALIFORNIA BUSINESS AND PROFESSIONS CODE.

The Sixth Cause of Action, after incorporating all preceding allegations, alleges:

> 112. As described herein, Defendants, via deceptive and misleading advertising and sales practices, misrepresentations, deceptive conduct, and the withholding of information, unfairly, unlawfully, and fraudulently induced Plaintiffs into purchasing the mortgage loans here at issue, to Plaintiffs' great detriment and Defendants' wrongful profit.
>
> 113. **[*50]** Defendants' fraudulent acts, business model, and illusory underwriting standards were designed to perpetuate a scheme of unfair business practices, in violation of *California Business and Professions Code §§ 17200 et seq.*, through which Defendants wrongfully profited. The components of this scheme as applied to Plaintiffs included, but were not limited to, artificially inflating the Subject Property's value in order to increase the loan amount and misleading Plaintiffs through the use of a Hybrid ARM that provided an initial 'teaser' interest rate and interest only payments coupled with a piggyback balloon loan. Defendants' intended for their misrepresentations to unfairly prejudice Plaintiffs in order that Defendants would profit from Plaintiffs' loss.
>
> 114. When issuing this loan package, Defendants disregarded Plaintiffs' ability to repay the loans and failed to disclose the true cost of the loans, as required by law.
>
> 115. Defendants have violated and continue to violate *California Business and Professions Code §§ 17200 et seq.* by making untrue or misleading statements, or by causing untrue or misleading statements to be made to Plaintiffs, with the intent of inducing Plaintiffs to **[*51]** enter into the risky loans that are the subject of this Complaint. These untrue or misleading statements include but are not limited to:

a. statements regarding the true terms and payment obligations pertaining to the loans, including statements obfuscating the risks of Plaintiffs' loan package;

b. statements as to the Subject Property's value at the time of origination, when the stated value was in fact inflated, and to the effect that said property value would continue to rise and enable Plaintiffs to refinance; and

c. statements indicating that Defendants did not render any illegal kickbacks, fees, or other things of value.

116. Defendants knew, or by the exercise of reasonable care should have known that these statements or omissions were untrue or misleading at the time they were made.

117. Defendants' unfair business practices have caused Plaintiffs to suffer severe financial hardship resulting in damages in an amount to be proven at trial.

"The UCL is codified in Business and Professions Code *section 17200 et seq.* ***HN29***[] The UCL prohibits any 'unlawful, unfair or fraudulent business act or practice.' Because Business and Professions Code *section 17200* is written in the disjunctive, it establishes **[*52]** three varieties of unfair competition - acts or practices which are unlawful, or unfair, or fraudulent … An act can be alleged to violate any or all of the three prongs of the UCLA - unlawful, unfair, or fraudulent." *Berryman v. Merit Property Management, 152 Cal.App.4th 1544, 1554, 62 Cal. Rptr. 3d 177 (2007)*, citing *Podolsky v. First Healthcare Corp., 50 Cal.App.4th 632, 647, 58 Cal. Rptr. 2d 89 (1996)*.

Defendants move to dismiss the Sixth Cause of Action to the extent it alleges that Defendants' practices were "unlawful." As explained in *Berryman, supra:*

HN30[] Under its 'unlawful' prong, 'the UCL borrows violations of other laws … and makes those unlawful practices actionable under the UCL.' … Thus, a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong.

Here, the Complaint does not specifically allege a violation of another law. Defendants motion to dismiss is GRANTED WITH LEAVE TO AMEND to the extent the Sixth Cause of Action alleges that Defendants' acts were "unlawful" within the meaning of the UCL.

As to the unfairness prong, as explained in *Schnall v. Hertz Corp., 78 Cal.App.4th 1144, 1166-1167, 93 Cal. Rptr. 2d 439 (2000)*:

HN31[] 'The independent "unfairness" prong of the UC[L] 'intentionally broad, thus allowing **[*53]** courts maximum discretion to prohibit new schemes to defraud …' … It has been said that a business practice may be 'unfair' within the meaning of the UCL even if it is not 'unlawful'; it is enough if the conduct in question ""offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' …"' … However, in *Cel-Tech,* our Supreme Court recently found that this formulation of unfairness is 'too amorphous' and disapproved its use, at least with respect to claims of unfair competition between two direct competitors. (*Cel-Tech, supra, 20 Cal.4th at pp. 184-185*.) The *Cel-Tech* court required 'that any finding of unfairness to competitors under *section 17200* be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.' (*Id. at pp. 186-187*.)<<FN 14>

<<FN 14> The *Cel-Tech* court adopted the following test: ***HN32***[] 'When a plaintiff who claims to have suffered injury from a direct competitor's "unfair' act or practice invokes *section 17200*, the word "unfair" in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or **[*54]** spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.' (*Cel-Tech, supra, 20 Cal.4th at p.187*.).

Plaintiff citing *Scripps Clinic v. Superior Court, 108 Cal.App. 4th 917, 939, 134 Cal. Rptr. 2d 101 (2003)*, asserts that "unfair" conduct is conduct that "offends an established public policy or … is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

There is a conflict among the California Courts of Appeal whether the *Cel-Tech* standard of "unfairness" applies to consumer cases. *See, e.g.,* *Gregory v. Albertson's, Inc., 104 Cal.App.4th 845, 854, 128 Cal. Rptr. 2d 389 (2002)* (reading *Cel-Tech* 'to require that the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions' in consumer cases'); *Smith v. State Farm Mut. Auto. Ins., Co., 93 Cal.App.4th 700, 720 n.23, 113 Cal. Rptr. 2d 399 (2001)* ('[W]e are not to read *Cel-Tech* as suggesting that such a restrictive definition of "unfair" should be applied in the case of an alleged *consumer* injury[.]'); *see also* *Kilgore v. Keybank, 2010 U.S. Dist. LEXIS 35592, 2010 WL 1461577 at *8 (N.D.Cal., April 12, 2010)*; *Davis v. Ford Motor Credit Co., 179 Cal.App.4th 581, 594-597, 101 Cal. Rptr. 3d 697 (2009)*.

HN33[] "A **[*55]** fraudulent business practice is one in which ""members of the public are likely to be "deceived."""' *Morgan v. AT & T Wireless Services, Inc., 177 Cal.App.4th 1235, 1254, 99 Cal. Rptr. 3d 768 (2009)*. As explained in *In re Tobacco II Cases, 46 Cal.4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (2009)*:

> The fraudulent business practice prong of the UCL has been understood to be distinct from common law fraud. 'A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief' under the UCL … This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices.

Plaintiffs cite and quote *In re Tobacco Cases II* but delete by ellipsis "injunctive" and imply that this standard applies to all claims for fraudulent business practices under the UCL. However, as stated in *In re Tobacco II Cases,* ***HN34***[] "'[a] UCL action is equitable in nature; damages cannot be recovered … We have stated under the UCL, "[p]revailing plaintiffs are generally limited **[*56]** to injunctive relief and restitution." ….'" *46 Cal.4th at 312*. *See also* *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*:

> While the scope of conduct covered by the UCL is broad, its remedies are limited … A UCL action is equitable in nature; damages cannot be recovered … We have stated that under the UCL, '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'

Defendants cite *Rangel v. DHI Mortg. Co., Ltd., 2009 U.S. Dist. LEXIS 65674, 2009 WL 2190210 at *4 (E.D.Cal., July 21, 2009)*, where Judge O'Neill, in dismissing a claim for negligence, alleging that defendants breached their "professional services" duty in that "plaintiff was placed into a loan that were [sic] inappropriate for her personal financial circumstances," ruled:

> DHI Mortgage correctly notes the absence of an actionable duty between a lender and borrower in that loan transactions are arms-length and do not invoke fiduciary duties. Absent 'special circumstances' a loan transaction 'is at arms-length and there is no fiduciary relationship between the borrower and lender.' … Moreover, a lender 'owes no duty of care to the [borrowers] in approving their loan. Liability to a borrower for negligence arises **[*57]** only when the lender "actively participates" in the financed enterprise "beyond the domain of the usual money lender."' … '[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.' …
>
> DHI Mortgage further notes the absence of a lender's duty to ensure a loan is suitable for a borrower. 'No such duty exists' for a lender 'to determine the borrower's ability to repay the loan … The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's.' *Renteria v. United States, 452 F. Supp. 2d 910, 922-923 (D.Ariz.2006)* (borrowers 'had to rely on their own judgment and risk assessment to determine whether or not to accept the loan').

See also *Abelyan v. OneWest Bank, 2009 U.S. Dist. LEXIS 108140, 2009 WL 3784610 at *4 (C.D.Cal., Nov. 9, 2009)*:

> ***HN35***[] To establish a claim under the 'fraudulent' prong of the UCL, a plaintiff must demonstrate that 'members of the public are likely to be deceived.' *Williams v. Gerber Products Co., 523 F.3d 934, 938 (9th Cir.2008)*. The gravamen of plaintiff's claim is that **[*58]** defendant fraudulently failed to disclose all the terms of her loan. However, 'absent a duty to disclose, the failure to do so does not support a claim under the

> fraudulent prong of the UCL.' *Buller v. Sutter Health, et al., 160 Cal.App.4th 981, 987, 74 Cal. Rptr. 3d 47 (2008)*. In her complaint, plaintiff does not specifically allege any required duty to disclose on the part of defendant. Accordingly, the Court concludes that dismissal of plaintiff's UCL claim is appropriate.

Defendants also cite *Nymark v. Heart Federal Savings & Loan Assn., supra, 231 Cal.App.3d at 1095-1096, 1099-1100*. In *Nymark,* a property owner brought an action against a lending institution alleging negligence in the institution's appraisal of the property uses as security for a loan. The institution appraised the property and approved the loan, finding the property was in good condition. The owner subsequently discovered the property needed costly repairs. The Court of Appeals held:

> The parties have not identified, nor have we found, any California case specifically addressing whether a lender has a duty of care to a borrower in appraising the borrower's collateral to determine if it is adequate security for a loan. However, as a general **[*59]** rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money
> ….
>
> Here, defendant performed the appraisal of plaintiff's property in the usual course and scope of its loan processing procedures to protect *defendant's* interest by satisfying it that the property provided adequate security for the loan. The complaint does not allege, nor does anything in the summary judgment papers indicate, that the appraisal was intended to induce plaintiff to enter into the loan transaction or to assure him that his collateral was sound. Accordingly, in preparing the appraisal, defendant was acting in its conventional role as a lender of money to ascertain the sufficiency of the collateral as security for the loan. 'Normal supervision of the enterprise by the lender for the protection of its security interest in loan collateral is not "active participation" [in the financed enterprise beyond that of the ordinary role of a lender in a loan transaction.' … Thus, we conclude that defendant owed no duty of care to plaintiff in the preparation of the property appraisal.
> …
>
> … **[*60]** In California, the test for determining whether a financial institution owes a duty of care to a borrower-client 'involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.' ….
> …
>
> While it was foreseeable the appraisal might be considered by plaintiff in completing the loan transaction, the foreseeability of harm was remote. Plaintiff was in as good a position as, if not better position than, defendant to know the value and condition of the property. One who seeks financing to purchase real property has many means available to assess the property's value and condition, including comparable sales, advice from a realtor, independent appraisal, contractors' inspections, personal observation and opinion, and the like. Here, plaintiff already had purchased the house and had lived in it for two years, apparently without **[*61]** complaint, before applying to defendant for a refinancing loan. We believe it is not reasonably foreseeable that a borrower will be influenced to his or her detriment by an appraisal prepared by the lender for its own benefit because the borrower is in a position in which he or she knows or should know the value and condition of the property independent of the appraisal made for the lender's protection. Stated another way, the borrower should be expected to know that the appraisal is intended for the lender's benefit to assist it in determining whether to make the loan, and not for the purpose of ensuring that the borrower has made a good bargain, i.e., not to insure the success of the investment.

Plaintiffs argue that they have stated a claim upon which relief can be granted:

> Plaintiffs sufficiently allege how Defendants conducted fraudulent business practices likely to mislead and deceive the consumer, including Plaintiffs, with their teaser interest rates, inflation of property value,

> misrepresentation as to affordability, misrepresentations as to true risk factors and costs of loans, unscrupulous incentivizing of brokers and agents to aggressively and deceptively market, and concealment **[*62]** of Defendants' system of transfer and securitization of the Plaintiffs' loans which offset BOA's liability and inflated Defendants' profitability while burdening Plaintiff [sic] with undue cost and risk. BOA is the originator and servicer of the loans, and PRLAP is the trustee per deed of trust. As the originator, BOA has full knowledge of the loan terms that these terms were inappropriate for the Subject Property and Plaintiffs' actual financial qualifications when BOA approved, closed, and serviced the loan [sic]. BOA also had full knowledge of how misleading, deceptive, and unduly risky the loans were for Plaintiffs. However, rather than warn Plaintiffs, BOA steered Plaintiffs into a Hybrid ARM loan originated from the stated income program because these loans were highly profitable, thereby perpetuating the misrepresentation that Plaintiffs were qualified for the loan. Most importantly, BOA and PRLAP had full knowledge of the profitability of the secondary securities market where the margin of profit was driven by indiscriminate volume and risky loans. This margin of profit was Defendants' only consideration when selling Plaintiff's loan [sic].

Defendants' motion to dismiss the **[*63]** Sixth Cause of Action is GRANTED WITH LEAVE TO AMEND as to the "unfair" and "fraudulent" prongs of the UCL. Plaintiffs shall plead specific facts from which it may be inferred that Defendants owed a legal duty to Plaintiffs.

G. <u>SEVENTH CAUSE OF ACTION FOR CIVIL CONSPIRACY.</u>

After incorporating all preceding allegations, the Seventh Cause of Action alleges:

> 119. Defendants acted in concert and partnership with one another to commit the wrongful acts alleged in this Complaint. Defendants created this multi-party system and scheme in order to facilitate and perpetuate their unlawful profiteering through subprime residential home mortgage lending, on a national scale. Plaintiffs are merely two of many injured as a consequence of Defendants' systemized conduct.
>
> 120. Defendants knowingly participated in a conspiracy to violate laws protecting consumers, including Plaintiffs, from fraud and unfair competition. Specifically, this conspiracy related to the processing of loan applications in a manner that each defendant knew or should have known was malicious, wrongful, and unlawful. Defendants intentionally created and perpetuated risky loan products, including the loan package at issue in this **[*64]** action, and aggressively marketed their risky loan products to consumers. In their interactions with Plaintiffs concerning these risky loan products, Defendants, and each of Defendants, purposely concealed or failed to disclose their risky and dangerous nature, including the risks inherent in a Hybrid ARM that provided an initial 'teaser' interest rate and interest-only payments, coupled with a piggyback balloon loan, to Plaintiffs' detriment.
>
> 121. All Defendants turned a blind eye to this known fraud and to the risks inherent in the loans BoA originated because they all profited, and even now continue to profit off of such loans, despite their astronomical default and foreclosure rates.
>
> 122. Defendants' business relationships allowed Defendants to perpetuate and to expand this conspiracy, as they provided for one another the right to service, assign, sell, or otherwise transfer for a profit, which each defendant did, in turn, acquire.
>
> 123. Defendants' conspiracy included their collective efforts to profit through the securitization process, which was beneficial to all of Defendants because it both generated massive capital and allowed Defendants to shed credit risk from the likely failure **[*65]** of the underlying mortgage loans, including Plaintiffs'. Defendants often securitized their risky loan products themselves, that is they sold, purchased, aggregated, and issued securities based on the loans themselves. Defendants had strong incentives to securitize the loans quickly, and in fact the same corporate executives often signed off on securitization contracts as both the originator and purchaser of the same underlying mortgage loan.
>
> 124. Defendants' scheme was to profit through the securitization of their loans fed their motivation to commit the unlawful acts described herein. For example, in order for an asset-backed security to ostensibly satisfy Securities and Exchange Commission regulations, such a security may not contain non-performing loans and delinquent loans may not constitute 50% or more of the asset's pool on the date that pool is readied for sale. Because their risky loan products ultimately default at a rate exceeding 50%, Defendants needed to perpetually

> originate more and more of such risky loans, including the loan package here at issue, in order to give a false impression of a lower delinquency rate.

Defendants move to dismiss the Seventh Cause of Action on **[*66]** the ground that civil conspiracy is not a cause of action, citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd, 7 Cal.4th 503, 510-511, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (1994)*:

> ***HN36***[] Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration … By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other conspirators within the ambit of the conspiracy … In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.
>
> ***HN37***[] Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort. "'A civil conspiracy, however atrocious, does not per se give rise to a cause of action unless a civil wrong has been committed resulting in damage.'"

Defendants assert that "[a]s the complaint does not otherwise allege a viable claim, these appendages have no body on which to hang, and so must be dismissed along with the rest of the complaint."

Because Defendants' motion to dismiss is granted with leave to amend, the motion to dismiss **[*67]** the Seventh Cause of Action is GRANTED WITH LEAVE TO AMEND. ***HN38***[] As to allegations of conspiracy, heightened pleading is required by *Rule 9(b)* when the object of the conspiracy is fraudulent. *See* *Wasco Products v. Southwell Technologies, 435 F.3d 989, 991 (9th Cir.)*, *cert. denied, 549 U.S. 817, 127 S. Ct. 83, 166 L. Ed. 2d 30 (2006)* ("Based on these precedents and the plain language of *Rule 9(b)*, we hold that under federal law a plaintiff must plead, at a minimum, the basic elements of a civil conspiracy if the object of the conspiracy is fraudulent."). As explained in *Alfus v. Pyramid Technology Corp., 745 F.Supp. 1511, 1521 (N.D.Cal.1990)*:

> To survive a motion to dismiss, plaintiff must allege with sufficient factual particularity that defendants reached some explicit or tacit understanding or agreement … It is not enough to show that defendants might have had a common goal unless there is a factually specific allegation that they directed themselves towards the wrongful goal by virtue of a mutual understanding or agreement.

Plaintiffs have not satisfied the requirements of *Rule 9(b)* with regard to the Seventh Cause of Action. Defendants' motion to dismiss the Seventh Cause of Action is GRANTED WITH LEAVE TO AMEND.

CONCLUSION

For **[*68]** the reasons stated:

1. Defendants' motion to dismiss is DENIED IN PART AND GRANTED IN PART WITH LEAVE TO AMEND as described above;

2. Counsel for Defendants shall prepare and lodge a form of order consistent with this Memorandum Decision within five (5) court days following service of this Memorandum Decision

2. Plaintiffs shall file a First Amended Complaint in accordance with the rulings herein within thirty (30) days of the filing date of the Order.

IT IS SO ORDERED.

Dated: May 5, 2010

/s/ Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

LexisNexis

Wynne Sys. v. Mobile Storage Grp., Inc.

United States District Court for the Central District of California

May 5, 2010, Decided; May 5, 2010, Filed

CV 10-1460 SVW (FFMx)

Reporter

2010 U.S. Dist. LEXIS 153722 *

WYNNE SYSTEMS, INC., a California Corporation, Plaintiff, v. MOBILE STORAGE GROUP, INC., a Delaware Corporation; MOBILE MINI, INC., a Delaware Corporation; and DOES 1 through 100, inclusive, Defendants.

Core Terms

Mobile, software, Storage, trade secret, cause of action, licensing, unfair competition, conversion, breach of contract, misappropriation, alleges, motion to dismiss, misappropriation of trade secrets, forum selection clause, witnesses, parties, weighs, economic loss rule, confidential, transferring, unfair, authorization, fraudulent, breaching, convenience, superseded, documents, motion to transfer, business practice, conversion cause

Counsel: **[*1]** For Wynne Systems, Inc A California Corporation, Plaintiff: J Brian Urtnowski, Lisamarie Graham, Urtnowski and Associates PC, Irvine, CA USA.

For Mobile Storage Group, Inc A California Corporation, Mobile Mini, Inc A Delaware Corporation, Defendants: Bernard E Lesage, Buchalter Nemer LLP, Los Angeles, CA USA; Geoffrey M Ezgar, Geoffrey R Unger, Leo Spooner, III, King & Spalding LLP, Redwood Shores, CA USA.

Judges: STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

Opinion by: STEPHEN V. WILSON

Opinion

ORDER GRANTING-IN-PART AND DENYING-IN-PART DEFENDANTS' MOTION TO DISMISS [10]; ORDER DENYING MOTION TO TRANSFER VENUE [24]

I. INTRODUCTION

A. Background

Plaintiff Wynne Systems Inc. filed a complaint against Defendants Mobile Storage Group, Inc. and Mobile Mini Inc. for breach of contract, quantum meruit, misappropriation of trade secrets, unfair competition, and conversion.

Plaintiff Wynne Systems is a software company that licenses two computer programs in dispute in this action. The "RentalMan" software is used by businesses in the equipment rental industry to assist in creating invoices, maintaining customer information, and coordinating equipment logistics. (Compl. 6.) The "InfoManager" software is used in "developing, **[*2]** marketing and implementing business intelligence software and services." (Compl. 6.)

Defendants Mobile Storage Group and Mobile Mini are in the business of providing portable storage container units and mobile offices.

B. The Dispute

On December 1, 1998, Wynne Systems licensed its RentalMan software to Defendant Mobile Storage Group. (Compl. 7.)

On September 30, 2003, Wynne Systems's predecessor-in-interest InfoManager licensed the InfoManager software to Defendant Mobile Storage Group. (Compl. 8.)

The crux of Wynne Systems's Complaint is that Mobile Storage Group and Mobile Mini merged in June 2008, and that following the merger, Mobile Mini began using Wynne Systems's software without Wynne Systems's permission. Wynne Systems alleges that, although **Mobile Storage Group** had a license to use the RentalMan software and InfoManager software, **Mobile Mini** did not have a license to use either piece of software.

Wynne Systems therefore alleges that Mobile Mini is using the RentalMan and InfoManager software without Wynne Systems's authorization, and that Mobile Storage Group transferred that software to Mobile Mini in violation of the licensing agreements between Mobile Storage Group and Wynne **[*3]** Systems.

On the basis of these three interrelated facts — (1) the licensing agreements between Wynne Systems and Mobile Storage Group, (2) the subsequent merger between Mobile Storage Group and Mobile Mini, and (3) Mobile Mini's subsequent use of the RentalMan and InfoManager software — Wynne Systems has filed six causes of action:

(1) breach of contract against Mobile Storage Group for transferring the RentalMan software to Mobile Mini without authorization and by breaching confidentiality conditions of the contract;

(2) breach of contract against Mobile Storage Group for transferring the InfoManager software to Mobile Mini without authorization and by breaching confidentiality conditions of the contract;

(3) quantum meruit against Mobile Mini for wrongfully obtaining an economic benefit at Wynne Systems's expense;

(4) misappropriation of trade secrets:

(a) against Mobile Storage Group for disclosing Wynne Systems's trade secrets to Mobile Mini, and

(b) against Mobile Mini for using Wynne Systems's trade secrets without authorization;

(5) unfair competition:

(a) against Mobile Mini for illegally receiving and using the software and other confidential information without Wynne Systems's authorization, **[*4]** and

(b) against Mobile Storage Group for breaching the software licensing contracts and disclosing Wynne Systems's secret information;

(6) conversion against both Mobile Mini and Mobile Storage Group for assuming control over Wynne Systems's confidential software for the benefit of Mobile Mini and Mobile Storage Group, and to the detriment of Wynne Systems.

Wynne Systems requests approximately $68,000 or more with respect to the RentalMan software, $14,000 with respect to the InfoManager software, and injunctive relief, punitive damages, and attorneys' fees with respect to the tort causes of action.

II. MOTION TO DISMISS

A. LEGAL STANDARD

In order to comply with the notice pleading standards of *Fed. R. Civ. P. 8(a)*, a plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will **[*5]** not do." Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 129 S.Ct. at 1951).

Generally, the Court's analysis is limited to the contents of the complaint. See Schneider v. Cal. Dept. Of Corrections, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (citations omitted). However, "[w]hen a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal [i]s proper." Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995) (citation omitted); see also United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003).

Under Rule 15(a), a plaintiff has a right to amend the complaint once as a matter of course, but this right "terminates 21 days after service of a motion under 12(b), (e), or (f)," or by service of a responsive pleading. Fed. R. Civ. P. 15(a)(1)(B) & cmt. to 2009 Amendment. Once this period expires, the plaintiff may only amend with the court's permission. See Fed. R. Civ. P. 15(a)(2). "Five factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (citing Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)).

B. DISCUSSION

Defendants filed a Motion to Dismiss certain causes of action for various theories. For clarity, each cause of action will be addressed individually.[1]

(1) breach of contract against Mobile Storage Group for transferring the RentalMan software to Mobile Mini without authorization [*6] and by breaching confidentiality conditions of the contract

Defendants do not challenge the sufficiency of this cause of action.

(2) breach of contract against Mobile Storage Group for transferring the InfoManager software to Mobile Mini without authorization and by breaching confidentiality conditions of the contract

Defendants argue that this cause of action fails because Wynne Systems has been paid for the 2003 InfoManager license.

Defendants attach to their Motion a "Sale Agreement/Invoice" from November 23, 2009, and a "Purchase Order" from December 14, 2009. (Mot. Ex. 1.) Defendants assert that these documents are properly considered with respect to the Motion to Dismiss because Plaintiffs attached to the Complaint a copy of the 2003 InfoManager licensing contract.

According to Defendants, it is appropriate to consider the "Sale Agreement/Invoice" and "Purchase Order" under the rule that "Ninth Circuit law permits the Court to consider documents not specifically incorporated by reference [into the complaint] if the 'plaintiff's claim depends on the contents of the document, the defendant attaches the

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[1] Following the parties' lead, the Court analyzes the causes of action under California law. However, the parties are on notice that the tort claims at issue in this case present potentially difficult conflict-of-law issues, and they should either stipulate as to the applicable law or be prepared to fully litigate the matter. (The contract claims, in contrast, appear to be governed by choice-of-law clauses: one agreement is governed by California law, the other by Texas law.)

document to its motion to dismiss, and the parties do not dispute the authenticity **[*7]** of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint.'" (Mot. at 12, quoting *Zella v. E.W. Scripps Co., 529 F. Supp. 2d 1124, 1131 (C.D. Cal. 2007)* (quoting *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005))*.

In its Opposition, Wynne Systems disputes the authenticity of the "Sale Agreement/Invoice" and "Purchase Order," and properly points out that its Complaint does not "depend[] on the contents of th[os]e document[s]." See *Zella, 529 F. Supp. 2d at 1131*.

The Court agrees with Wynne Systems. This is not a situation in which the plaintiff alleges the existence of a contract and the defendant, on the motion to dismiss, provides a copy of the contract for the court's consideration. Rather, the documents attached to the Motion to Dismiss are completely extrinsic to the Complaint and the documents discussed in the Complaint.

This issue is improper for adjudication on a Motion to Dismiss. The breach of contract cause of action adequately pleads a claim for which relief may be granted.

(3) quantum meruit against Mobile Mini for wrongfully obtaining an economic benefit at Wynne Systems's expense

Defendants argue that this cause of action fails because Wynne Systems has in fact been paid for the 2003 InfoManager license. (Mot. at 11-12.) Further, Defendants argue that Mobile Mini **[*8]** has the right to use the 1998 RentalMan license "by virtue of the Mobile Storage acquisition." (Mot. at 13.)

Both of these arguments rely on facts outside the Complaint. For the reasons set forth with respect to the second cause of action, Defendants' arguments fail to show Plaintiff is not entitled to relief on the quantum meruit claim.

Further, to the extent that Defendants assert that the Mobile Mini is permitted to use the licensing agreement entered into by Mobile Storage Group, this argument requires detailed consideration of the mechanics of the Mobile Mini-Mobile Storage Group merger and /or acquisition.[2] Those details are not presently before the Court, and are not a proper basis for a *12(b)(6)* motion to dismiss.

(4) misappropriation of trade secrets against Mobile Storage Group for disclosing Wynne Systems's trade secrets to Mobile Mini, and against Mobile Mini for using Wynne Systems's trade secrets without authorization

Defendants assert that Wynne Systems's trade secret misappropriation claim fails to state sufficient facts to satisfy the *Rule 8* pleading requirements as interpreted by Twombly v. Bell Atlantic and Iqbal v. Ashcroft. Defendants claim that Wynne Systems merely recites **[*9]** the elements of the cause of action without first establishing "how its software programs actually constitute trade secrets." (Mot. at 8.)

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[2] In the Complaint, Wynne Systems tends to view the transaction as a merger, in which Mobile Mini and Mobile Storage Group became a single legal entity. Specifically, the Complaint alleges that "Mobile Storage Group . . . and Mobile Mini merged," and "[b]y virtue of the merger . . . Mobile Storage Group ceased to exist as an entity." (Compl. 11.)

In the Motion to Dismiss, Defendants characterize the transaction as an acquisition by Mobile Mini of Mobile Storage Group: "Mobile Mini acquired Mobile Storage Group, Inc. on June 27, 2008. Through the transaction, Mobile Storage retained its individual legal status and became a subsidiary of Mobile Mini." (Motion to Dismiss at 1.)

The Court previously determined for jurisdictional purposes that both Mobile Mini and Mobile Storage are Delaware corporations, thus adopting Defendants' characterization of the transaction. However, for purposes of the present Motion, the Court must take the factual allegations of the Complaint as true.

Contrary to Defendants' argument, Wynne's Complaint adequately alleges that the software programs were trade secrets. It is well-established that computer programs can constitute trade secrets under California law. See, e.g., *MAI Systs. Corp. v. Peak Comp., Inc., 991 F.2d 511, 522 (9th Cir. 1993)* ("computer software can qualify for trade secret protection under the UTSA"). In order to constitute a trade secret under California law, computer software must "(1) Derive[] independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [Be] the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Cal. Civ. Code § 3426.1(d)(1)-(2)*.

Wynne alleges that its software licenses prohibited licensees from transferring the software or related training manuals to third parties without Wynne's permission. (Compl. P 41, 42, 44.) Wynne also alleges that Wynne undertook efforts to limit access to the software, for example by limiting Wynne's employees' access to the software, installing security systems, and informing its **[*10]** employees that internal information was confidential and proprietary. (Compl. P 45.) Wynne further alleges that its software derived economic value from being secret - namely, because if the software were freely available to third parties, Wynne would be unable to generate licensing fees from the software. (See Compl. PP 45, 47, 48.)

These factual allegations provide a sufficient basis for concluding that Wynne's software (1) derives independent economic value from its secrecy, and (2) is the subject of reasonable efforts to maintain secrecy. Wynne has done more than simply reciting the elements of the cause of action. Wynne has alleged sufficient facts to establish the existence of a trade secret under California law.

(5) unfair competition against Mobile Mini for illegally receiving and using the software and other confidential information without Wynne Systems's authorization, and against Mobile Storage Group for breaching the software licensing contracts and disclosing Wynne Systems's secret information

Defendants argue that Wynne "fails to identify the acts of Mobile Storage and Mobile Mini that it believes are prohibited by *§ 17200*, much less why it believes the acts are unlawful, unfair, **[*11]** or fraudulent." (Mot. at 9.) Defendants further argue that the Unfair Competition claim is superseded by the California Uniform Trade Secrets Act. (Mot. at 14-15.)

Wynne's unfair competition cause of action is premised on (1) Mobile Mini's "receipt and use" of the software, which allowed Mobile Mini "to gain an economic advantage at Wynne Systems' expense," and (2) Mobile Storage Group's breach of its contract obligation not to disclose or transfer the software to third parties or to use such information for its own benefit." (Compl. P 54.)

Cal. Bus. & Prof. Code § 17200 "broadly prohibit[s] unlawful, unfair, and fraudulent business acts. Unlawful acts are anything that can properly be called a business practice and that at the same time is forbidden by law[,] be it civil, criminal, federal, state, or municipal, statutory, regulatory, or court-made. . . . Unfair acts among competitors means conduct that threatens an incipient violation of an ***antitrust law***, or violates the spirit or policy of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Finally, fraudulent acts are ones where members of the public are likely to be **[*12]** deceived." *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1151-52 (9th Cir. 2008)* (citations and quotations omitted).

Wynne Systems's Complaint alleges that Mobile Mini's "receipt and use" of the software was "illegal," that Mobile Systems Groups's transfer of the software was one act "among other illegal acts," and that such conduct "constitute[s] unfair competition in violation of California's Unfair Competition Laws." (Compl. P 54.)

As a whole, the Unfair Competition cause of action does not identify any conduct taken by Defendants other than the conduct alleged to constitute breach of contract, unjust enrichment, misappropriation of trade secret, and conversion. Such conclusory assertions fail to state a viable cause of action under *Cal. Bus. & Prof. Code § 17200*.

A breach of contract alone cannot constitute an "unlawful, unfair, or fraudulent" business practice. *Sybersound Records, 517 F.3d at 1152* (citations omitted). That is because "[c]ontractual duties are voluntarily undertaken by the parties to the contract, not imposed by state or federal law." *Boland, Inc. v. Rolf C. Hagen (USA) Corp., 685 F. Supp. 2d 1094, 2010 WL 493422, at *13 (E.D. Cal. 2010)* (quoting *Smith v. Wells Fargo Bank, N.A., 135 Cal. App. 4th 1463, 1484, 38 Cal. Rptr. 3d 653 (2005))*. Thus, to constitute an unlawful, unfair, or fraudulent business practice for purposes of *§ 17200*, the breach of contract must be "**independently** unlawful, unfair, or fraudulent." *Sybersound, 517 F.3d at 1152* (emphasis added).

Likewise, a trade-secret misappropriation claim alone cannot constitute **[*13]** an "unlawful, unfair, or fraudulent" business practice unless the misappropriation involves wrongful acts extending beyond mere misappropriation. *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc., 171 Cal. App. 4th 939, 961-62, 90 Cal. Rptr. 3d 247 (2009)* (citing *Digital Envoy, Inc. v. Google, Inc., 370 F. Supp. 2d 1025, 1034-35 (N.D. Cal. 2005))*. That is because California's trade secret statute provides the exclusive remedy for trade secret misappropriation claims. *K.C. Multimedia, 171 Cal. App. 4th at 954-58* (analyzing *Cal. Civ. Code § 3426.7*); see also *Silvaco Data Systems v. Intel Corp., 184 Cal. App. 4th 210, 109 Cal. Rptr. 3d 27, 2010 WL 1713241, at *13-15 (Cal. App. 2010)* (same).[3] As a result, the Trade Secrets Act broadly supersedes other "claims that are based on the same nucleus of facts as the misappropriation of trade secrets claim for relief." *K.C. Multimedia, 171 Cal. App. 4th at 958*; see also *Gabriel Technologies Corp. v. Qualcomm Inc., No. 08cv1992-MMA(POR), 2009 U.S. Dist. LEXIS 98379, 2009 WL 3326631, at *11 (S.D.Cal. Sept. 3, 2009)* ("The preemption inquiry for those causes of action not specifically exempted by *§ 3426.7(b)* focuses on whether other claims are no more than a restatement of the same operative facts supporting trade secret misappropriation. . . . If there is no material distinction between the wrongdoing alleged in a UTSA claim and that alleged in a different claim, the UTSA preempts the other claim."). Applying this principle, courts routinely hold that *§ 17200* unfair competition claims are "superseded" by the Trade Secrets Act. E.g., *K.C. Multimedia, 171 Cal. App. 4th at 961-62* ("appellant's statutory unfair competition claim rests squarely on its factual allegations of trade secret misappropriation. As a legal **[*14]** basis for its unfair competition claim, appellant asserts a violation of CUTSA. As a factual basis for its claim, appellant alleges the same conduct that gives rise to trade secrets claim. That being so, this claim is also preempted.") (citations omitted); *Gabriel Technologies, 2009 U.S. Dist. LEXIS 98379, 2009 WL 3326631, at *12* ("Plaintiffs' statutory unfair competition claim rests squarely on the factual allegations of trade secret misappropriation. Plaintiffs allege the same conduct that gives rise to the trade secrets claim. That being so, this claim is also preempted."); *Digital Envoy, 370 F. Supp. 2d at 1035* ("California's [Trade Secrets] statute . . . preempts Digital's claims for unfair competition and unjust enrichment since those claims are based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.").[4]

Here, Wynne Systems has not pleaded any facts establishing that Mobile Storage Group's conduct was independently "unlawful, unfair, or fraudulent" so as to state an unfair competition claim. The Complaint avers that Mobile Storage Group's conduct either breached the parties' licensing contracts and/or constituted misappropriation of trade secrets. As discussed above, neither breach of contract nor misappropriation of trade **[*15]** secret constitutes an "unlawful" or "unfair" business practice for purposes of *§ 17200*. Wynne Systems therefore fails to

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[3] It should be noted that the California Uniform Trade Secrets Act does not supersede **contract**-based causes of action. The Act specifically refrains from superseding "contractual remedies, whether or not based upon misappropriation of a trade secret." *Cal. Civ. Code § 3426.7(b)(1)*.

It should also be noted that, while the caselaw tends to characterize the Trade Secrets Act as "preempting" other causes of action, "[t]he [California] Supreme Court has criticized the use of 'preempt' to describe the supersession of one state law by another." *Silvaco Data Syst., 184 Cal. App. 4th 210, 109 Cal. Rptr. 3d 27, 2010 WL 1713241, at *13 n.14* (quoting *Zengen, Inc. v. Comerica Bank, 41 Cal.4th 239, 247 n.5, 59 Cal. Rptr. 3d 240, 158 P.3d 800 (2007))*. The Court of Appeal has therefore stated its preference for the term "supersede" rather than "preempt." Id.

[4] To the extent that Wynne Systems's Unfair Competition claim is premised on the unlawful act of conversion, the Court finds that the conversion cause of action is superseded by the trade secret misappropriation cause of action. (See *infra*.) The unfair competition claim is therefore superseded by the Trade Secrets Act to the extent that the unfair competition claim is premised on a superseded conversion claim. See, e.g., *Gabriel Technologies, 2009 U.S. Dist. LEXIS 98379, 2009 WL 3326631, at *12-13* (dismissing conversion and unfair competition causes of action where both were premised on misappropriation of trade secrets).

state a claim under *§ 17200* for which relief may be granted. To the extent that Wynne Systems alleges that Mobile Storage Group engaged in "other illegal acts" (Compl. 54), this bare legal conclusion is insufficient to satisfy the *Rule 8* pleading requirements as construed in *Twombly* and *Iqbal*.

Likewise, Wynne Systems has not pleaded any facts establishing that Mobile Mini's conduct was independently "unlawful, unfair, or fraudulent" sufficient to state an unfair competition claim. The Complaint simply avers that Mobile Mini "recei[ved] and use[d]" Wynne Systems's software without its permission. (Compl. 54.) The Complaint's discussion of "receipt and use" of software is in fact a claim for misappropriation of trade secrets. As discussed above, *§ 17200* claim may not be premised on misappropriation of trade secrets, and Wynne Systems therefore fails to state a *§ 17200* for which relief may be granted. To the extent that Wynne Systems baldly alleges that that Mobile Mini's conduct was "illegal" (Compl. 54), this bare legal conclusion is insufficient to satisfy the *Rule 8* pleading requirements as construed in **[*16]** *Twombly* and *Iqbal.*

Accordingly, Defendants' Motion to Dismiss the cause of action under California's Unfair Competition Law is GRANTED. Furthermore, because Wynne Systems has not identified how it would seek to amend this claim -- and, indeed, because Wynne Systems insists that "no details have been omitted" from this claim (Opp. at 7) --- Wynne Systems may not amend this cause of action.

(6) conversion against both Mobile Mini and Mobile Storage Group for assuming control over Wynne Systems's confidential software for the benefit of Mobile Mini and Mobile Storage Group, and to the detriment of Wynne Systems

"The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property right; and damages." *Oakdale Village Group v. Fong, 43 Cal. App. 4th 539, 543-544, 50 Cal. Rptr. 2d 810 (1996)*. Conversion applies with equal force to *intangible* property as well as to *tangible* property, provided that the intangible property satisfies a three-part test for determining if a property right exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established **[*17]** a legitimate claim to exclusivity." *Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003)* (quoting *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 903 (9th Cir. 1992))*.

Defendants argue that the conversion cause of action is barred by the economic loss rule to the extent that the conversion is premised on a breach of contract. (Mot. at 5.) Defendants further argue that the conversion cause of action is superseded by the California Uniform Trade Secrets Act, *Cal. Civ. Code § 3426.7(b)*. (Mot. at 14-16.) Defendants' arguments are sound.

Under the economic loss rule, a party may not recover in tort for economic harms that flow from breaches of contractually-owed duties. The economic loss rule provides:

> Where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic' losses. This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. The economic loss rule requires a purchaser to recover in contract for purely **[*18]** economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. Quite simply, the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other.

Robinson Helicopter Co. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004) (citations, quotations, and alterations omitted).

As can be inferred from the California Supreme Court's summary of the economic loss rule, the rule most often arises in the products liability context. In products liability cases, the plaintiff may recover only in contract if he has suffered economic harms; however, if he suffers physical harms, he may bring a tort action.

The economic loss rule has been applied to conversion claims in addition to products liability torts. In cases involving conversion causes of action, courts turn to the economic loss rule to bar conversion claims that are based solely on breaches of contractual duties. The basic principle at issue in such cases is that "[c]onduct amounting to a breach of contract becomes tortious only when it also violates an independent duty arising from principles of tort law. In other words, an omission to perform a contract obligation is never a tort, unless that omission is also an omission **[*19]** to perform a legal duty." *McGehee v. Coe Newnes/McGehee ULC, No. C 03-5145 MJJ, 2004 U.S. Dist. LEXIS 32786, 2004 WL 2452855, at *2 (N.D.Cal. Feb. 10, 2004)* (citations and quotations omitted).

A useful example of this principle can be found in *Textainer Equipment Management (U.S.) Ltd. v. TRS. Inc., No. C 07-01519 WHA, 2007 U.S. Dist. LEXIS 47527, 2007 WL 1795695 (N.D. Cal. June 20, 2007)*. In Textainer, the parties had entered a lease agreement in which the plaintiff leased shipping containers to the defendant. The plaintiff discovered that the defendant had sold some of the containers to a third party. *2007 U.S. Dist. LEXIS 47527 at *1*. The court held that the plaintiff had stated a viable claim for both breach of contract and conversion. The court explained that the economic loss rule did not bar the conversion claim because the defendant "had an independent duty not to misappropriate the containers. This duty existed outside the contract." *2007 U.S. Dist. LEXIS 47527 at *3*.

Textainer is generally applicable to the present case. As Wynne Systems correctly points out, Defendants owed Wynne a non-contractual duty not to misappropriate the RentalMan and InfoManager software. This duty existed separate and independent from Defendants' obligations under the licensing agreements.[5]

That said, Wynne Systems is hoisted on its own petard. It is true, as Wynne urges **[*20]** the Court to conclude, that Defendants owed a duty not to misappropriate the software. However, this duty exists solely under the California Uniform Trade Secrets Act, and, as is noted supra, the California Uniform Trade Secrets Act provides for the exclusive tort-based cause of action for misappropriation of trade secrets. Courts uniformly hold that conversion causes of action are barred where the underlying act involves interference with or misappropriation of information protected by the Trade Secrets Act. See, e.g., *Silvaco Data Syst., 184 Cal. App. 4th 210, 109 Cal. Rptr. 3d 27, 2010 WL 1713241, at *17-18*; *Gabriel Technologies, 2009 U.S. Dist. LEXIS 98379, 2009 WL 3326631, at *12*; *AirDefense, Inc. v. AirTight Networks, Inc., No. C 05-04615JF, 2006 U.S. Dist. LEXIS 55364, 2006 WL 2092053, at *6 (N.D. Cal. July 26, 2006)*; *Hirel Contractors, Inc. v. United States, No. CV 01-11069 DSF (VBKx), 2004 U.S. Dist. LEXIS 31036, 2004 WL 5639770, at *26 (C.D. Cal. Jan. 23, 2004)*.

Accordingly, because Wynne's Complaint is premised on Defendants' misappropriation of Wynne's proprietary and confidential software, which, as discussed supra is protected by the California Trade Secrets Act, Wynne's conversion cause of action is "superseded" by the Trade Secrets Act.[6]

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[5] It should be noted in this respect that, as stated in the Complaint, only Defendant Mobile Storage Group entered into a contractual relationship with Plaintiff Wynne Systems. Because Mobile Mini and Wynne did not have a contractual relationship, the economic loss rule is entirely inapplicable to Wynne's causes of action against Mobile Mini.

[6] Further, the Court has *sua sponte* identified two other reasons that the Complaint fails to state a viable conversion claim. (Because these issues were not raised in the parties' briefings, the Court wishes to emphasize that these theories are not the basis for the Court's holding.) To the extent that Wynne Systems seeks to premise its conversion claim on an intangible property right to its software *aside from* its rights under the Trade Secrets Act, Wynne Systems's Complaint fails to allege sufficient facts (per Twombly and Iqbal) to show that such an intangible property right exists under the Ninth Circuit's three-part test. See *Kremen, 337 F.3d at 1030*; *G.S. Rasmussen, 958 F.2d at 903*.

Also, even if Wynne Systems *had* satisfied the governing three-part test for establishing intangible property rights, the conversion claim would be preempted by the Copyright Act. See *Firoozye v. Earthlink Network, 153 F. Supp. 2d 1115, 1129-30 (N.D. Cal. 2001)* (in dispute involving alleged conversion of computer software, holding that elements of claim for conversion of

In summary, Wynne's cause of action for conversion is (1) barred by the economic loss rule to the extent that it is based on the alleged breach of Mobile Storage **[*21]** Group's breach of contract, (2) superseded by the California Trade Secret Act to the extent it is based on the alleged misappropriation of Wynne's proprietary information protected by the Trade Secrets Act. Defendants' Motion is accordingly GRANTED.

C. CONCLUSION RE: MOTION TO DISMISS

In sum: the breach of contract claims are viable; the unjust enrichment claim is viable; the trade secrets claim is viable; the unfair competition claim must be dismissed; and the conversion claim must be dismissed.

III. MOTION TO TRANSFER

A. BACKGROUND

Defendants seek to transfer the action to the District of Arizona. Defendants are both headquartered in Arizona. Plaintiff is headquartered in California.

Notably, the RentalMan agreement contains a forum-selection clause calling for any disputes to be resolved within Los Angeles County. Although the forum-selection clause is not dispositive, it places a thumb on the scale in favor of retaining the case. Defendants have not identified sufficiently compelling reasons for transferring the action to Arizona.

> In full, the RentalMan Agreement's forum selection clause states: All claims or disputes regarding the breach or interpretation of, or arising from or relating **[*22]** to the Agreement shall be determined under the applicable Federal laws and/or the laws of the State of California, and shall be venued in the State of California, County of Los Angeles.

(Pl.'s Opp. Ex. A, P 10.4.) The other contract (the InfoManager Agreement) does not contain a forum selection clause.

B. LEGAL STANDARD

Pursuant to *28 U.S.C. 1404(a)* "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Whether to grant transfer is within the sound discretion of the court and is determined on an individualized basis. *Vu v. Ortho-McNeil Pharm., Inc., 602 F. Supp. 2d 1151, 1155 (N.D. Cal. 2009)* (citing *Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000))*.

In addressing a motion to transfer venue, the moving party must make "a **strong** showing of inconvenience to warrant upsetting [the plaintiff's] choice of forum." *Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986)* (emphasis added).

The factors considered in the analysis include: (1) convenience of witnesses; (2) convenience of parties; (3) ability to compel attendance of non-party witnesses; (4) contacts with the forum relating to the causes of action and the

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intangible property under California law are identical to elements of claim for copyright infringement under Federal law, and are therefore preempted by the Copyright Act); *Meridian Project Syst., Inc. v. Hardin Const. Co., LLC, No. CIV. S-04-2728 FCD DAD, 2006 U.S .Dist. LEXIS 34092, 2006 WL 1062070, at *3-4 (E.D. Cal. Apr. 21, 2006)* (same); see also *Doody v. Penguin Group (USA) Inc., 673 F. Supp. 2d 1144, 1164-65 (D. Haw. 2009)* (collecting cases); *Apparel Business Syst., LLC v. Tom James Co., No. 06-1092, 2008 U.S. Dist. LEXIS 26313, 2008 WL 858754, at *18 n.9 (E.D. Pa. Mar. 28, 2008)* ("Most courts that have addressed the [copyright preemption] question have found such software conversion claims preempted.") (collecting cases).

forum's interest in the action; (5) ease of access to sources of proof; (6) differences in litigation costs; (7) the preliminary stage of **[*23]** litigation; and (8) relative docket congestion. *Jones, 211 F.3d at 498-99*. Additional considerations include the location where any agreements were negotiated and executed; forum selection clause; and plaintiff's choice of forum. Id.

A forum selection clause is presumptively valid. *Hendricks v. Bank of America, N.A., 408 F. 3d 1127, 1137 (9th Cir. 2005)* ("we presume that the shareholder agreement's forum selection clause is prima facie valid and enforceable . . ."); see also *Ingenieria Alimentaria Del Matatipac, S.A. de C.V.v. Ocean Garden, 320 Fed. Appx. 549, 549 (9th Cir. 2009)* (citable pursuant to *Fed. R. App. P. 32.1*) (citing *Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1140 (9th Cir. 2004))*. The party challenging the validity of a forum selection clause bears a "heavy burden of proof" and must "clearly show that enforcement would be unreasonable and unjust." *Ingenieria Alimentaria, 320 Fed. Appx. at 549* (quoting *M/S Bremen v. Zapata Off Shore Co., 407 U.S. 1, 15, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972))*; see also *Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 325 (9th Cir. 1996)* ("Although Bremen is an admiralty case, its standard has been widely applied to forum selection clauses in general.").

Here, Defendants have not identified any basis for ignoring the forum-selection clause as a matter of contract law. Accordingly, it is valid and must be taken into account in deciding whether to transfer the case.

A summary inquiry into the relevant factors reveals that the action must remain in California.

(1) convenience of witnesses

Plaintiffs assert that their witnesses are located in California; Defendants assert that their witnesses are located in Arizona. Defendants **[*24]** provide more factual detail about their witnesses than Plaintiff does, and Defendants further identify one witness who is not an employee of either party and thus would not be subject to the compulsory process of the Central District.

Because Defendants have shown that one of their witnesses might be unavailable for trial, this factor weighs slightly in favor of transferring the action to Arizona.

(2) convenience of parties

Plaintiffs are located in California, Defendants in Arizona. This factor is neutral.

(3) ability to compel attendance of non-party witnesses

As noted with respect to the first factor (convenience of witnesses), this factor weighs slightly in Defendants' favor.

(4) contacts with the forum relating to the causes of action and the forum's interest in the action

California has an interest in ensuring that harms to its citizens are remedied in California courts. Furthermore, California has an interest in having its laws applied in California-based courts. (The RentalMan agreement contains a California choice-of-law clause; the InfoManager contains a Texas choice-of-law clause.)

On the other hand, the alleged wrongful acts flowing from Mobile Mini's acquisition of Mobile Storage **[*25]** occurred in Arizona. Arizona therefore has more contacts with the dispute.

This factor is neutral.

(5) ease of access to sources of proof

Defendants assert that the key documents are related to Mobile Mini's and Mobile Storage Group's conduct, and that these documents are in Arizona.

This factor weighs in favor of transfer.

(6) differences in litigation costs

As Defendants point out, it is less expensive to litigate in Arizona than Los Angeles.

This factor weighs slightly in favor of transfer.

(7) the preliminary stage of litigation

Because the action has only started, this factor does not weigh against transfer.

(8) relative docket congestion

Somewhat surprisingly, this factor weighs in favor of retaining the action in Los Angeles. Defendants submit caseload information from 2009. (Pl.' Ex. 1.) Although the Central District has a greater overall volume of case filings than the District of Arizona, the Central District has fewer case filings per judge (578 in Central District, 713 in Arizona) and cases proceed to trial more quickly in the Central District than in Arizona (19 months to trial in Central District, 29 months to trial in Arizona).

This factor weighs against transferring the case.

(9) [*26] location where any agreements were negotiated and executed

Both agreements were negotiated and executed in California. (Defs.' Mot. at 12.)

This factor weighs against transfer.

(10) forum selection clause

The parties to the RentalMan agreement selected a Los Angeles-based forum. The parties are sophisticated entities capable of evaluating the implications of their contractual choices. It is true that the InfoManager agreement does not contain any forum selection clause, but this fact merely suggests that the RentalMan agreement's clear and explicit choice should control.

Although forum selection clauses are not dispositive, the forum selection clause "is a **significant** factor that should figure **centrally** in the calculus of a district court when considering a motion to transfer venue." Wright & Miller, 15 Fed. Prac. & Proc. § 3854.1 (3d ed.).

This factor weighs strongly against transferring the action.

(11) plaintiff's choice of forum

Plaintiff elected to bring this case in Los Angeles. This factor weighs against transfer.

CONCLUSION RE: MOTION TO TRANSFER

Having weighed all of the relevant factors, the Court concludes that this action must remain in this Court. Neither the "interests of justice," nor **[*27]** the "convenience of the witnesses and parties" compel the conclusion that this case should be litigated in Arizona. Defendants have not met their burden of showing that transfer is appropriate.

IV. CONCLUSION

For the foregoing reasons, the Motion to Dismiss is GRANTED as to the fifth and sixth causes of action and DENIED as to the first, second, third, and fourth causes of action. The Motion to Transfer Venue is DENIED.

IT IS SO ORDERED.

DATED: May 5, 2010

/s/ Stephen V. Wilson

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

[Antoine v. Star Ledger]

United States District Court for the District of New Jersey

May 6, 2010, Filed

Civil Action No. 09-1827 (KSH)

Reporter
2010 U.S. Dist. LEXIS 44294 *; 2010 WL 1838611

MAX DENIS ANTOINE, Plaintiff, v. STAR LEDGER OF NEW JERSEY, PAUL BRUBAKER, Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Appeal dismissed by *[Antoine v. Star Ledger of N.J., 2010 U.S. App. LEXIS 22967 (3d Cir. N.J., Nov. 3, 2010)]*

Core Terms

allegations, arrest, rights, defendants', color of state law, immigrants, Video, defamation, antitrust, asserts

Counsel: **[*1]** DR. MAX DENIS ANTOINE, Plaintiff, Pro se, BLOOMFIELD, NJ.

For STAR LEDGER OF NEW JERSEY, REPORTER PAUL BRUBAKER, Defendants: KEITH J. MILLER, LEAD ATTORNEY, ROBINSON, WETTRE & MILLER LLC, NEWARK, NJ.

Judges: Katharine S. Hayden, United States District Judge.

Opinion by: Katharine S. Hayden

Opinion

Katharine S. Hayden, U.S.D.J.

I. Introduction

The instant matter comes to the Court upon a motion to dismiss [D.E. 6] the complaint filed by plaintiff Dr. Max Antoine acting *pro se* [D.E. 1] against defendants Newark Morning Ledger Company, publisher of the New Jersey newspaper The Star-Ledger (the "Ledger"), and a reporter for the Ledger, Paul Brubaker (collectively, "defendants").

a. Background Information

The following is drawn from Antoine's complaint:

On April 8, 2009, Antoine was arrested--an arrest that he claims was falsely made and based on an unconstitutional search and seizure. (Compl. PP 7-8.) Two days later, on April 10, 2009, the Ledger published an article written by

Brubaker, titled "Police allege Belleville man bilked immigrants in Essex," detailing the arrest. [1] Antoine claims that the Ledger and Brubaker published lies in the article and did so with an "extreme" bias against him, as they did not verify with **[*2]** him the circumstances of his arrest or conduct an independent investigation of the facts. (Compl. PP 8, 11.)

The complaint makes apparent that Antoine believes that defendants' bias emanates from their interconnectedness with local and state law enforcement officials, with whom Antoine has an extensive and litigious history. (*See generally id.*) Antoine asserts that he has incriminating evidence linking the Essex County, New Jersey Prosecutor's Office to criminal activity, such as their "planting, fabricating, [and] digital transferring of fake mug shots [sic] photographs" of him so that it could refute allegations that he made in 1996 charging the Irvington Police Department with police brutality and corruption. **[*3]** (*Id.* P 17.) Antoine contends that defendants published the April 10, 2009 article to ruin him professionally because of a lawsuit he filed against the Irvington, New Jersey "Police Brutality Squad Dept" and the Essex County Prosecutors Office based on his brutality and corruption claim. (*Id.* PP 12, 19.) He alleges that the suit is pending before the Third Circuit. (*Id.*) Antoine thus asserts that the article was an act of defamation and a violation of his civil rights.

As a result of the allegedly false report, Antoine claims to have sustained "great irreparable harms and extended losses including personal and business losses, irreversible damages to his personal name, and employer's transnational name, business ethics, social class, strata and his apparent once venerated character." (*Id.* P 20.) He seeks $ 77,777,777.00 in damages. (*Id.* P 21.)

Antoine asserts federal claims under *42 U.S.C. § 1983* for violations of his *First*, *Fourth*, *Fifth*, and *Fourteenth Amendment* rights, Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e, et seq.* ("Title VII"), unspecified federal antitrust laws and regulations, the Federal Video Privacy Protection Act, *18 U.S.C. § 2710*, as well as asserting **[*4]** unspecified violations of Federal Trade Commission and Federal Communications Commission protocols. The complaint also asserts an employment discrimination claim under the New Jersey Law Against Discrimination ("NJLAD"), *N.J.S.A. 10:5-1, et seq.* Defendants have moved to dismiss under *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure* ("FRCP").

b. The Ledger Article

The article at issue in this litigation reads in its entirety as follows:

> Police allege Belleville man bilked immigrants in Essex
>
> By Paul Brubaker
>
> Star-Ledger Staff
>
> A 39-year-old Belleville man has been arrested on charges of bilking several immigrants by posing as an immigration attorney without authorization to practice law, Essex County Prosecutor Paula Dow announced yesterday.
>
> Max Antoine was apprehended late Wednesday after a three-year investigation by detectives from the Bloomfield Police Department, which was aided by the Essex County Prosecutor's Office economic crimes unit for the past year.
>
> Antoine has been fraudulently practicing immigration law from a Bloomfield office since 2003, said Essex County Assistant Prosecutor Robert Grady. The investigation was prompted by several complaints to Bloomfield **[*5]** police, said Grady.
>
> "It's basically a case of receiving payments and services never being rendered," said Paul M. Loriquet, a spokesman for the prosecutor's office.

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[1] The article is attached as Exhibit 2 to the certification of Keith J. Miller ("Miller Cert.") in support of defendants' Federal Rule of Civil Procedure ("FRCP") 12(b)(6) motion to dismiss. [D.E. 6.] The Court may consider documents attached to or specially referenced in the second amended complaint, and matters of public record, without converting a motion to dismiss into one for summary judgment. *See Mele v. Federal Reserve Bank of N.Y., 359 F.3d 251, 255 n.5 (3d Cir. 2004)*.

> Several documents from Antoine's office were confiscated and more charges are expected, Loriquet said. It remains to be seen if anyone's immigration status has been jeopardized, he said. He said police don't know how much was stolen but the investigation is continuing.
> Loriquet said Antoine made false claims of having other credentials, including a real estate broker's license and a doctorate. "All we know for certain is he is a licensed private detective," he said.
> Antoine faces charges of theft by deception, unauthorized practice of law and conspiracy to traffic false government documents and, if convicted, could be sentenced up to 15 years in prison, said Loriquet.
> Antoine is being held at the Essex County Jail with bail set at $ 75,000 with no 10 percent option, said Loriquet.

(Miller Cert., Exh. 2.)

II. Standard of Review

In deciding a motion to dismiss under *FRCP 12(b)(6)*, the Court is "required to accept as true all of the allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them **[*6]** in the light most favorable to the plaintiff." *Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)*. A complaint should be dismissed if the plaintiff's allegations, taken as true, fail to state a claim. *Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384-85 (3d Cir. 1994)*. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal citations omitted).

III. Discussion

Antoine's claim under *42 U.S.C. § 1983* alleges that the Ledger and Brubaker infringed on his *First*, *Fourth*, *Fifth*, and *Fourteenth Amendment* rights. (Compl. P 7.) For this claim, and throughout the suit, Antoine attempts to link defendants' act of publishing a newspaper article with the past conduct of state actors--specifically, the Bloomfield Police Department, the Irvington Police Department, and the Essex County Prosecutors Office. For example, in paragraph 1(W), where he alleges that **[*7]** "[f]reedom of the Press was vested under the *First Amendment* Right of our Federal Constitution [and] does not in any explicit way immune [sic] reports from CIVIL AND CRIMINAL LIABILITY, especially when attempting to maliciously deprive private citizens of their constitutional rights to privacy, [and] unlawful search and seizures," Antoine seeks to intertwine defendants' article with the allegedly unlawful search and seizures conducted by his arresting officers. In paragraph 5, Antoine characterizes the Ledger as acting under color of state law: "The defendant, Star Ledger, is also a duly licensed [sic] by the state of New Jersey to legally conduct its print business; however, it is not immune to knowingly defame good reputations . . . and venerated names of New Jersey private citizens and businesses alike *under color of [] New Jersey State Law.*" Again in paragraph 12, he links up defendants with law enforcement:

> [D]efendants have also purposefully defamed and boycotted . . . Plaintiff Dr [sic] Max Denis Antoine by publishing fake, false, and premeditated stories . . . , knowing that the Essex County Prosecutors [sic] charges were pre-fabricated, criminally planted defamatory statements, **[*8]** and taken from the unauthorized police officers, and covert detectives of the local Bloomfield Municipal Police Dept, and also from a Perpetuator "AKA" as [sic] Mr. David Sanabria of the Essex County Prosecutors Office.

Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983.

Thus, "[t]he Supreme Court has set forth the two essential elements of a *§ 1983* action: (1) the conduct complained of was committed by a person acting under color of state law; and (2) this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993)*. To act under color of state law, a defendant must have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority **[*9]** of state law." *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*.

Where named defendants are not state or municipal officials but private individuals, like the Ledger and Brubaker, the Third Circuit instructs that "[a] private action is not converted into one under color of state law merely by some tenuous connection to state action. The issue is not whether the state was involved in some way in the relevant events, but whether the action taken can be fairly attributed to the state itself." *Groman v. Township of Manalapan, 47 F.3d 628, 639 (3d Cir. 1995)* (citing *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974))*. The inquiry, stated another way, is "whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." *NCAA v. Tarkanian, 488 U.S. 179, 192, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988)*.

According to the pleadings, defendants' article was defamatory, lacked proper investigation, and was written with full knowledge that his arrest was premised on unconstitutional acts by the Essex County Prosecutors office committed in retaliation for his prior accusations against them. Nowhere in the complaint, however, does he assert that defendants contributed to the underlying acts **[*10]** of his false arrest, illegal search and seizure, or the unspecified abuse he suffered from the Irvington Police Department in 1996. Instead, he alleges that defendants were responsible for the violations of his *First*, *Fourth*, *Fifth*, and *Fourteenth amendment* rights because they reported a false story, despite knowing the true facts behind the matter. These allegations do not state a claim under *§ 1983* because Antoine has not pleaded facts demonstrating that the defendants were clothed with the authority of the state.

The Third Circuit addressed a similar suit in *Lewis v. City of Renton Police Department et al., 175 F. App'x 552, 554 (3d Cir. 2006)*, where it affirmed a district court's dismissal of a *pro se* complaint against newspaper defendants, holding as follows:

> Essential to an action under *§ 1983* are allegations that a person acting under color of state law engaged in conduct depriving a plaintiff of his constitutional rights. *See Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 277 (3d Cir. 1999)*; *Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993)*. Because the newspaper defendants are private parties and there is simply no indication that they acted under color of state law, **[*11]** the District Court did not err in dismissing Lewis' claims against them.

Id.

Notwithstanding Antoine's claims that defendants shared in the state actors' bias against him and ill-intent to harm him, he does not sufficiently aver with facts that in publishing the article, defendants engaged in conduct "fairly attributed to the state itself." *See Groman v. Township of Manalapan, 47 F.3d at 639*.

Antoine also brings federal claims under Title VII, federal ***antitrust law***, and the Federal Video Privacy Protection Act. Antoine alleges that defendants defamed him and his employers in violation of Title VII and the NJLAD laws against employment discrimination. (Compl. P 9.) Title VII and the NJLAD protect *employees* from adverse *employment actions* on the basis of their status as individuals within a recognized protected class. *See 42 U.S.C. § 2000e-2(a)*; *N.J.S.A. 10:5-12*. Antoine, however, does not allege in his complaint that defendants employed him, so Title VII and NJLAD afford him no relief on these facts.

Likewise, Antoine has failed to state a claim for relief under federal ***antitrust law*** or the Video Privacy Protection Act, *18 U.S.C. § 2710*. Antoine appears to be suing under federal ***antitrust*** **[*12]** ***law*** because defendants were allegedly "boycotting" and damaging his business by publishing the article on his arrest. (*See* Compl P 9.) Section 1 of the Sherman Act, *15 U.S.C. § 1*, governs federal antitrust claims of illegal "group boycotts." *See Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984)*. The Third Circuit has held that a claim under § 1 of the Sherman Act "requires proof of a contract, combination or conspiracy, a restraint of trade, and an effect on interstate commerce." *Miller v. Indiana Hosp., 843 F.2d 139, 141 (3d Cir. 1988)*. Here, at a minimum, Antoine's pleadings do not allege any contract or effect on interstate commerce, and the Court finds that they fail to state a claim for an illegal boycott.

The Video Privacy Protection Act can be violated when: (1) a video tape service provider discloses personally identifiable information regarding a customer without the customer's permission; (2) personally identifiable information from video tape rentals is obtained in any manner and is "received in evidence" in an adversarial proceeding; and (3) a person fails to timely destroy a customer's personally identifiable information. *See Dirkes v. Borough of Runnemede, 936 F.Supp. 235, 239 (D.N.J. 1996)* **[*13]** (Brotman, J.). Antoine has not pleaded anything to implicate that videotapes or information stemming from videotape rentals were involved in defendants' alleged misconduct.

To the extent that Antoine brings state law claims for defamation and libel against defendants, section *28 U.S.C. § 1367(a)* of the Judicial Improvements Act of 1990 states that federal courts "shall have supplemental jurisdiction" over claims if they are "part of the same case or controversy" over which the court has original jurisdiction. *Subsection (c)* of the statute provides that a district court may decline to exercise jurisdiction if it "has dismissed all claims over which it has original jurisdiction." *Id. § 1367(c)*. The Court has granted defendants' motion to dismiss all of Antoine's federal law claims, and declines to exercise supplemental jurisdiction over his remaining state law claims. *See Bacon v. Carroll, 232 F. App'x 158, 160 (3d Cir. 2007)*.

IV. Conclusion

For the forgoing reasons, defendants' motion under *FRCP 12(b)(6)* is granted on Antoine's federal claims and his claim under the NJLAD, and the complaint will be dismissed. An appropriate order will be entered.

/s/ Katharine S. Hayden

Katharine S. Hayden, **[*14]** U.S.D.J.

[DCI Solutions, Inc. v. Urban Outfitters, Inc.]

United States District Court for the Southern District of California

May 6, 2010, Decided; May 6, 2010, Filed

CASE NO. 10-CV-369 - IEG (JMA)

Reporter
2010 U.S. Dist. LEXIS 44438 *; 2010 WL 1838303

DCI SOLUTIONS, INC., a California corporation, Plaintiff, vs. URBAN OUTFITTERS, INC., a Pennsylvania corporation; and DOES 1-20, inclusive, Defendants. URBAN OUTFITTERS, INC., a Pennsylvania corporation, Counter-Claimant, vs. DCI SOLUTIONS, INC., a California corporation, Counter-Defendant.

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by *DCI Solutions Inc. v. Urban Outfitters, Inc., 2011 U.S. Dist. LEXIS 36647 (S.D. Cal., Apr. 5, 2011)*

Core Terms

counterclaim, alleges, fraudulent, cause of action, practices, savings, recommendations, motion to strike, anti-SLAPP, non-moving, grant a motion, lawsuit, fraud in the inducement, motion to dismiss, induce, unfair, unfair competition, breach of contract, declaratory relief, present case, good faith, covenant, right of petition, sufficient facts, fair dealing, free speech, misrepresentations, conclusory, relations, reasons

Counsel: **[*1]** For DCI Solutions, Inc., a California corporation, Plaintiff, Counter Defendant: Brett M. Weaver, Frank J Johnson , Jr, LEAD ATTORNEYS, Johnson Bottini, LLP, San Diego, CA.

For Urban Outfitters, Inc., a Pennslyvania Corporation, Defendant, Counter Claimant: Thomas J Stoddard, LEAD ATTORNEY, Gordon and Rees, San Diego, CA.

Judges: IRMA E. GONZALEZ, Chief Judge, United States District Judge.

Opinion by: IRMA E. GONZALEZ

Opinion

ORDER:

(1) DENYING MOTION TO STRIKE [Doc. No. 11]; and

(2) GRANTING MOTION TO DISMISS [Doc. No. 10].

This is a contract dispute case. Currently before the Court are Counter-Defendant DCI Solutions, Inc.'s ("DCI") Motion to Strike and Motion to Dismiss certain causes of action in Counter-Claimant Urban Outfitters, Inc.'s ("Urban") counterclaim. Having considered the parties' arguments, and for the reasons set forth below, the Court DENIES the motion to strike and GRANTS the motion to dismiss WITH LEAVE TO AMEND.

BACKGROUND

I. The Parties

DCI is a company specializing in overhead cost reduction. Working on a contingency fee, DCI helps companies identify ways to save money. DCI alleges that unlike other companies, which focus only on one expense category, it offers an expert analysis of 40 different **[*2]** overhead and tax categories. DCI does not charge any up-front fee and begins billing its clients only after the client has begun saving money.

Urban is an innovative specialty retail company that offers a variety of "lifestyle" merchandise to highly defined customer niches through its "Urban Outfitters," "Anthropologie," and "Free People" retail stores in the United States, Canada, and Europe, as well as through websites, catalogues, and wholesale concepts.

II. The Dispute

In October 2007, DCI and Urban entered into a written agreement ("Agreement"), whereby DCI was to recommend ways Urban could save money. According to Urban, DCI promised it would "dramatically reduce" Urban's overhead costs and that Urban would realize "six figure savings" as a result of "expert" recommendations. Urban allegedly agreed to pay DCI 33% of all savings it received during the thirty-six months following the implementation of DCI's recommendations.

According to DCI, it demonstrated to Urban that Urban was paying far more than it should for its "Less than Truckload" ("LTL") freight costs. DCI estimated that by renegotiating its tariff rates with its current freight carriers, or negotiating rates with new carriers, **[*3]** Urban could save between $ 1 million and $ 1.5 million per year based upon its current annual shipping volume. DCI alleges that it invested valuable time and energy over a period of several months to come up with these recommendations. Urban then told DCI that it decided not to implement DCI's recommendations. DCI has since learned, however, that Urban did in fact secretly implement DCI's recommendations without notifying DCI and is now achieving significant savings on its LTL freight rates. According to DCI, Urban refuses to pay DCI the savings fee that was agreed to in the Agreement.

On the other hand, Urban alleges that DCI's consultant spent less than five hours "analyzing" Urban's extensive freight cost history, and that DCI failed to deliver any useful recommendations. Accordingly, Urban rejected and did not utilize any recommendations or advice provided by DCI. Urban also alleges that it subsequently discovered that DCI's representations were the core of its regular business practice. According to Urban, DCI fraudulently induces company managers to enter into contracts for services with DCI and to forego entering into any other contracts with competing companies. In fact, DCI **[*4]** has no interest in genuinely analyzing a company's business practices, but rather makes generic recommendations as to what the company should do to save money. Urban alleges that DCI's entire business scheme is intended to fraudulently induce companies to pay DCI money which it has not earned. If a company complains, DCI's practice is to file a lawsuit.

III. Procedural Background

In January 2010, DCI filed this lawsuit in the Superior Court for the County of San Diego. Urban subsequently removed it to this Court based on diversity grounds. DCI's complaint alleges four causes of action: (1) fraud in the inducement, (2) breach of contract, (3) breach of the implied covenant of good faith and fair dealing, and (4) quantum meruit.

In response to DCI's complaint, Urban filed a counterclaim. Urban's counterclaim alleges seven causes of action: (1) fraud in the inducement, (2) fraud, (3) breach of contract, (4) violation of *Section 17200 of the California Business and Professions Code*, (5) declaratory relief, (6) breach of covenant of good faith and fair dealing, and (7) rescission based upon fraud.

Currently before the Court are DCI's Motion to Strike pursuant to California's anti-SLAPP statute, **[*5]** *CAL. CIV. PROC. CODE § 425.16*, and Motion to Dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* with respect to certain Urban's counterclaims. Urban filed an opposition to each motion, and DCI replied. The Court heard oral argument on May 3, 2010.

LEGAL STANDARD

I. Motion to Strike

A Strategic Lawsuit Against Public Participation ("SLAPP") is a civil action "in which the [non-moving party's] alleged injury results from petitioning or free speech activities by [the moving party] that are protected by the federal or state constitutions." *Vess v. Ciba-Geigy Corp., 317 F.3d 1097, 1109 (9th Cir. 2003)*. "California's anti-SLAPP statute was 'enacted to allow early dismissal of meritless *first amendment* cases aimed at chilling expression through costly, time-consuming litigation.'" Id. (citations omitted). Specifically, the statute allows a party to move to strike the non-moving party's cause of action if that cause of action "aris[es] from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." [1] See *CAL. CIV. PROC. CODE § 425.16(b)(1)*.

An anti-SLAPP motion to strike requires a two-step inquiry. First, the moving party must make an initial prima facie showing that the other party's suit arises from the moving party's protected activity--i.e, an act in furtherance of that party's rights of petition or free speech. *Vess, 317 F.3d at 1110*. The other party's intentions in bringing the suit "are ultimately beside the point." *Equilon Enterprises v. Consumer Cause, Inc., 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507, 52 P.3d 685 (2002)*. Similarly, the moving party need not demonstrate that any speech was actually chilled. See *City of Cotati v. Cashman, 29 Cal. 4th 69, 75-76, 124 Cal. Rptr. 2d 519, 52 P.3d 695 (2002)*. The filing of a lawsuit is one example of protected activity. See *Jarrow Formulas, 31 Cal. 4th at 734*; *CAL. CIV. PROC. CODE § 425.16(e)* (providing that an "act in furtherance of a person's right of petition or free speech" includes any written or oral statement or writing made "before **[*7]** a . . . judicial proceeding" or "in connection with an issue under consideration by . . . a judicial body").

Nonetheless, "the critical point is whether the [non-moving party's] cause of action itself was *based on* an act in furtherance of the [moving party's] right of petition or free speech." *Cotati, 29 Cal. 4th at 78* (citations omitted). The mere fact that an action was filed after protected activity took place--in this case, DCI's lawsuit against Urban-does not necessarily mean it arose from that activity. See *id. at 76-77*. As the California Supreme Court has cautioned, to construe "arising from" in *Section 425.16(b)(1)* as meaning "in response to" would in effect render all cross-actions potential SLAPPs. *Id. at 77*. Indeed, "to suggest that all cross-actions arise from the causes of action in response to which they are pled would contravene the statutory scheme governing cross-complaints." Id.

If the moving party meets its initial burden, the court proceeds to the second step and asks whether the non-moving party can demonstrate "a probability that he or she will prevail on the claim." *CAL. CIV. PROC. CODE § 425.16(b)*. In order to do so, the non-moving party must "state and substantiate **[*8]** a legally sufficient claim." *Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811, 821, 123 Cal. Rptr. 2d 19, 50 P.3d 733 (2002)* (citation and internal quotation marks omitted). "Put another way, the [non-moving party] 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the [non-moving party] is credited.'" Id. (citation omitted). Although the court does not weigh the credibility or comparative probative strength of competing evidence, it must grant a motion to strike "if, as a matter of law, the [moving party's] evidence supporting the motion defeats the [non-moving party's] attempt to establish evidentiary support for the claim." Id. (citation omitted).

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[1] That **[*6]** the underlying action in this case is a counterclaim rather than an original complaint is not statutorily significant because the anti-SLAPP statute explicitly applies to complaints and counter-complaints. See *Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 735 n.2, 3 Cal. Rptr. 3d 636, 74 P.3d 737 (2003)*; *CAL. CIV. PROC. CODE § 425.16(h)*.

II. Motion to Dismiss

A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the pleadings. A complaint survives a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S.544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The court may dismiss a complaint as a matter of law for: (1) "lack of cognizable legal theory," or (2) "insufficient facts under a cognizable legal claim." **[*9]** *SmileCare Dental Group v. Delta Dental Plan of Cal., 88 F.3d 780, 783 (9th Cir. 1996)* (citation omitted). The court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. al-*Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)* (citation omitted).

Despite the deference, the court need not accept "legal conclusions" as true. *Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*. It is also improper for the court to assume "the [plaintiff] can prove facts that [he or she] has not alleged." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. On the other hand, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 129 S.Ct. at 1950*.

DISCUSSION

I. Motion to Strike

DCI brings the anti-SLAPP motion to strike with respect to the following causes of action in Urban's counterclaim: (1) fraud in the inducement, (2) fraud, and (3) violation of *Section 17200 of the California Business and Professions Code* (hereinafter, "*Section 17200*"). **[*10]** According to DCI, all of these causes of action arise out of DCI's alleged litigation activity. In support of this, DCI relies heavily on paragraph 9 of Urban's counterclaim, which provides in its entirety:

> DCI's entire business scheme is intended to fraudulently induce companies to pay DCI money which DCI has not earned. If a company complains to DCI about its claims for payment, DCI's practice is to file a lawsuit. Indeed, DCI has litigated multiple lawsuits with clients in pursuit of gains from its fraudulent business model and practices.

(Def. Counterclaim P 9 [Doc. No. 4].) However, even if DCI could meet its burden under *Section 425.16(b)(1)*, the motion to strike nonetheless fails because the challenged counterclaims fall squarely within an exception to the anti-SLAPP statute contained in *Section 425.17(c)*.

Due to a "disturbing abuse" of California's anti-SLAPP law, which has undermined the very constitutional rights that *Section 425.16* was designed to protect, the Legislature in 2003 enacted *Section 425.17*, rendering *Section 425.16* inapplicable to certain actions. See *CAL. CIV. PROC. CODE § 425.17(a)*. One of the exceptions provides that:

> *Section 425.16* does not apply to any cause **[*11]** of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:
>
> > (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
> >
> > (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except

> where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought **[*12]** by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

Id. *§ 425.17(c)*. This exception was specifically intended to apply to cases against a business arising out of its "commercial speech" or "conduct," see *Brill Media Co. v. TCW Group, Inc., 132 Cal. App. 4th 324, 342, 33 Cal. Rptr. 3d 371 (2005)*, and the party moving to strike under the anti-SLAPP statute bears the burden of establishing that the exception does not apply. Moreover, the exception applies even if the elements of *Section 425.16* would otherwise be satisfied. See *id. at 330-31* (noting that although *Section 425.17(c)* does not alter the traditional two-prong burden-shifting approach, it does represent a "procedural exception to the special motion to strike remedy" (citations omitted)).

In the present case, DCI has not met its burden of demonstrating that *Section 425.17(c)* does not apply. On the contrary, an examination of Urban's counterclaim reveals that the "commercial speech" exception is directly applicable. First, DCI is "primarily engaged in the business of selling . . . services" within the meaning of the statute in that DCI styles itself as "an expert in overhead cost reduction" that "helps companies **[*13]** identify undetected ways to reduce costs and maximize savings" for a contingency fee. (See Pl. Compl. P 12.) Second, the challenged "statement or conduct consists of representations of fact about [DCI's] . . . services" within the meaning of *Section 425.17(c)(1)* in that DCI's fraudulent misrepresentations about its services form the basis of Urban's counterclaim. (See Def. Counterclaim PP 5-9.) Third, these statements were "made for the purpose of obtaining approval for, promoting, or securing sales . . . of . . . [DCI's] . . . services" within the meaning of the statute in that Urban's counterclaim alleges that those statements were made "to induce company managers to enter into contracts for services with DCI." (See id. P 6.) Finally, because the statements were made "to induce a company to enter into a contract with DCI," (id. P 7), this satisfies *Section 425.17(c)(2)*'s requirement that "[t]he intended audience is an actual or potential buyer or customer."

DCI's arguments to the contrary are unavailing. In attempting to show that the "commercial speech" exception does not apply in this case, DCI shifts the focus from the alleged conduct as a whole to the allegations in paragraph **[*14]** 9 in Urban's counterclaim. [2] However, the Court cannot ignore the fact that at the center of Urban's counterclaim is DCI's allegedly fraudulent misrepresentations about its services, which amount to "commercial speech" that the Legislature expressly decided to exempt from the application of the anti-SLAPP statute. See *132 Cal. App. 4th at 342*. Although it is true that the anti-SLAPP statute provides that it "shall be construed broadly," see *Equilon, 29 Cal. 4th at 60*, there is a limit to how broadly the Court can construe it. In the present case, that limit was expressly provided by the Legislature when it enacted *Section 425.17(c)*, and DCI has failed to meet its burden of demonstrating that the exception set forth there does not apply.

Accordingly, DCI has failed to carry its initial burden of demonstrating that **[*15]** the challenged counterclaims "aris[e] from any act . . . in furtherance of [its] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" as that term is defined in *Section 425.16(b)(1)*. That is because *Section 425.17(c)* explicitly excludes DCI's alleged conduct from the scope of *Section 425.16*. For the foregoing reasons, the Court **DENIES** DCI's motion to strike Urban's first, second, and fourth counterclaims.

The Court also **DENIES** Urban's request for attorney's fees. *Section 425.16(c)(1)* provides that a court shall award costs and reasonable attorney's fees to the non-moving party if the court finds that the motion to strike was "frivolous" or was "solely intended to cause unnecessary delay." *CAL. CIV. PROC. CODE § 425.16(c)(1)*. "Frivolous" means "totally and completely without merit" or "for the sole purpose of harassing an opposing party."

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[2] As previously noted, paragraph 9 alleges that as part of DCI's fraudulent scheme, DCI makes it a practice to file a lawsuit against any company that complains to DCI about its claims for payment. (Def. Counterclaim P 9.) Paragraph 9 also alleges that "DCI has litigated multiple lawsuits with clients in pursuit of gains from its fraudulent business model and practices." (Id.)

Id. *§ 128.5(b)(2)*. In this case, the Court does not believe the motion to strike was frivolous or that it was solely intended to cause unnecessary delay. [3]

II. Motion to Dismiss

In its Motion to Dismiss, DCI seeks to dismiss Urban's first, second, fourth, fifth, sixth, and seventh counterclaims for failure to state a claim pursuant to *Rule 12(b)(6)*.

A. Fraud and fraud in the inducement

Urban's first and second counterclaims allege fraud and fraud in the inducement by DCI. To recover for common law fraud under California law, Urban must demonstrate: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." See *Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)* (citation and internal quotations marks omitted). Fraud in the inducement is a subset of fraud. It occurs when "the promisor knows what he is **[*17]** signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is *voidable.*" *Rosenthal v. Great Western Fin. Sec. Corp., 14 Cal. 4th 394, 415, 58 Cal. Rptr. 2d 875, 926 P.2d 1061 (1996)* (citation and internal quotation marks omitted) (emphasis in original). The remedy for fraud in the inducement is rescission. See id.

Morever, *Rule 9(b) of the Federal Rules of Civil Procedure* requires allegations of fraud or mistake to be stated "with particularity." In the Ninth Circuit, this rule "has been interpreted to mean the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981)* (citations omitted); see also *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." (citation omitted)).

Urban has failed to satisfy the heightened pleading requirement of *Rule 9(b)*. Although Urban arguably alleges sufficient facts to state the who, what, and when of the misconduct charged, **[*18]** it has provided only conclusory allegations as to *why* it believes the statements were false when made. Fraudulent intent cannot be proven by simply pointing to the defendant's subsequent nonperformance. See *Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30-31, 216 Cal. Rptr. 130, 702 P.2d 212 (1985)*. Rather, "the plaintiff must plead facts explaining why the statement was false when it was made." *Smith v. Allstate Ins. Co., 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001)* (citation omitted). In the present case, Urban's counterclaims cannot survive the motion to dismiss because Urban provides only conclusory allegations as to why Urban believes the statements were false when made. For example, Urban alleges in a conclusory matter that: (1) DCI engages in a practice of making such misrepresentations in order to induce companies to enter into a contract with DCI; (2) DCI then makes generic recommendations as to what the company should do to save money; (3) afterwards, DCI sits and waits for a period of time before claiming that any cost savings were the result of DCI's recommendations and ideas; and (4) if the company complains, DCI's practice is to file a lawsuit. (Def. Counterclaim PP 5-9.) Because there is absolutely no factual **[*19]** basis provided for these allegations, they are not sufficient "to raise a right to relief above the speculative level." See *Twombly, 550 U.S. at 555*. Accordingly, the Court **GRANTS** the motion to dismiss as it relates to Urban's counterclaims for fraud and fraud in the inducement.

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[3] To the extent Urban also seeks attorney's fees pursuant to *Rule 11 of the Federal Rules of Civil Procedure*, the **[*16]** Court **DENIES** that request because Urban has not shown that it complied with *Rule 11*'s "safe harbor" provision. See *Winterrowd v. Am. Gen. Annuity Ins. Co., 556 F.3d 815, 826 (9th Cir. 2009)* ("A Rule 11 motion for sanctions must be served on opposing counsel twenty-one days before filing the motion with the court . . . ." (citations omitted)); *FED. R. CIV. P. 11(c)(2)*.

B. Unfair competition claim

Urban's fourth counterclaim alleges DCI violated California's unfair competition law by engaging in a pattern of unlawful, unfair, and fraudulent conduct. *Section 17200* defines unfair competition as "any unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." *CAL. BUS. & PROF. CODE § 17200*. Because the statute is written in the disjunctive, it prohibits three separate types of unfair competition: (1) *unlawful* acts or practices, (2) *unfair* acts or practices, and (3) *fraudulent* acts or practices. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. In the present case, Urban's counterclaim alleges that DCI violated all three sub-parts of the unfair competition law.

With respect to the "unlawful practices" part, Urban has failed to allege sufficient facts to state a claim for relief. By proscribing "any **[*20]** unlawful" business practice, *Section 17200* "borrows" violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. *Cel-Tech., 20 Cal. 4th at 180*. Because Urban fails to specifically allege any other law that DCI violated, the Court finds that Urban failed to state a claim for relief under the "unlawful practices" prong of *Section 17200*. [4]

Likewise, with respect to the "fraudulent practices," Urban has failed to allege sufficient facts to state a claim for relief. "[F]raudulent acts are ones where members of the public are likely to be deceived." *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1152 (9th Cir. 2008)* (citation omitted); accord *South Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 888, 85 Cal. Rptr. 2d 301 (1999)*. Here, the counterclaim provides only conclusory statements as to whether the public was impacted at all by DCI's alleged actions. **[*21]** As already noted, these allegations of a fraudulent scheme are insufficient "to raise a right to relief above the speculative level." See *Twombly, 550 U.S. at 555*. Accordingly, because Urban has failed to demonstrate that members of the public are likely to be deceived, it failed to state a claim for relief under the "fraudulent practices" prong as well.

Finally, Urban has failed to allege sufficient facts to state a claim for relief under the "unfair practices" prong. Where direct competitors are concerned, the California Supreme Court has concluded that the word "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech., 20 Cal. 4th at 187*. On the other hand, when an action is brought by a consumer or a competitor alleging a different kind of violation, as is the case here, it appears a broader definition would apply. In that context, an "unfair" business practice occurs "when it offends an established public policy or when the practice is immoral, unethical, **[*22]** oppressive, unscrupulous or substantially injurious to consumers." See *People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 530, 206 Cal. Rptr. 164 (1984)*, abrogated on other grounds *Cel-Tech., 20 Cal. 4th at 186-87 & n. 12*; accord *McDonald v. Coldwell Banker, 543 F.3d 498, 506 (9th Cir. 2008)*. Nonetheless, because Urban provides only conclusory statements as to DCI's alleged fraudulent scheme, the Court cannot conclude if those actions "offend[] an established public policy" or if they are "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." See *Casa Blanca, 159 Cal. App. 4th at 530*. Accordingly, Urban has also failed to state a claim for relief under the "unfair practices" prong.

For the foregoing reasons, the Court **GRANTS** the motion to dismiss as it relates to Urban's counterclaim for violation of California's unfair competition law.

C. Declaratory relief

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[4] In its opposition to DCI's Motion to Dismiss, Urban alleges for the first time that the challenged conduct is "unlawful" because it violates *Sections 1709 et seq of the California Civil Code*. However, this allegation does not appear anywhere in Urban's counterclaim.

Urban's fifth counterclaim seeks declaratory relief concerning the parties' rights, duties, and obligations under the Agreement. Under *28 U.S.C. § 2201*, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party **[*23]** seeking such declaration, whether or not further relief is or could be sought." Declaratory relief, however, may be unnecessary where an adequate remedy exists under some other cause of action. See *Mangindin v. Wash. Mut. Bank, 637 F. Supp. 2d 700, 707 (N.D. Cal. 2009)*. Likewise, "[d]eclaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. Washington, 759 F.2d 1353, 1356-57 (9th Cir. 1985)* (en banc) (per curiam) (citations omitted).

In the present case, Urban's request for declaratory relief appears to be redundant in the face of the other causes of action, and it does not appear to be useful in clarifying the legal relations between the parties. Specifically, Urban wants the Court to adjudge whether the Agreement is null and void due to fraud or failure of consideration such that Urban owes no compensation thereunder. (Def. Counterclaim P 39.) However, this is identical to the relief sought in Urban's third counterclaim (breach of contract) and DCI's second claim (breach of contract). **[*24]** (See Def. Counterclaim PP 24-28; Pl. Complaint PP 25-29.) In other words, the resolution of the parties' competing breach of contract claims would afford Urban the exact relief sought in its counterclaim for declaratory relief. Accordingly, the Court **GRANTS** the motion to dismiss in this regard.

D. Breach of the covenant of good faith and fair dealing

Urban's sixth counterclaim alleges a breach of the implied covenant of good faith and fair dealing. However, "if the plaintiff's allegations of breach of the covenant of good faith 'do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated.'" *Bionghi v. Metropolitan Water Dist., 70 Cal. App. 4th 1358, 1370, 83 Cal. Rptr. 2d 388 (1999)* (citation omitted). In the present case, it does not appear that Urban's counterclaim for breach of covenant of good faith and fair dealing goes beyond Urban's counterclaim for breach of contract. Moreover, both of the counterclaims seek the same damages. Accordingly, because the sixth counterclaim is "superfluous" **[*25]** to the allegations of breach of contract, see id., the Court **GRANTS** the motion to dismiss in this regard. [5]

E. Rescission based upon fraud

Finally, Urban's seventh counterclaim seeks rescission based upon fraud pursuant to *Sections 1567* and *1689(b)* of the California Civil Code. As relevant here, *Section 1567* provides that "[a]n apparent consent is not real or **[*26]** free when obtained through . . . fraud." *CAL. CIV. CODE § 1567(3)*. Likewise, as relevant here, *Section 1689(b)* provides that a party to a contract may rescind the contract if its consent was obtained through fraud or if there is a failure of consideration. Id. *§ 1689(b)*. However, as previously noted, Urban's allegations of fraudulent misconduct against DCI are not stated with sufficient particularity as required by *Rule 9(b)*. Accordingly, for the same reasons as before, the Court **GRANTS** the motion to dismiss as to this counterclaim.

CONCLUSION

[5] To the extent Urban alleges this is a *tort* claim for breach of covenant of good faith and fair dealing, it nonetheless fails because Urban cannot point to any "independent duty" between the parties. See *Freeman & Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 102, 44 Cal. Rptr. 2d 420, 900 P.2d 669 (1995)* (concluding that, with the exception of insurance contracts, there can be no tort recovery for breach of the implied covenant of good faith and fair dealing, "at least in the absence of violation of 'an independent duty arising from principles of tort law'" (citation omitted)); accord *Bionghi, 70 Cal. App. 4th at 1370* ("[T]ort recovery for breach of the covenant is available only in limited circumstances, generally involving a special relationship between the contracting parties, such as the relationship between an insured and its insurer." (citation omitted)).

For the foregoing reasons, the Court **DENIES** the motion to strike Urban's first, second, and fourth counterclaims pursuant to the anti-SLAPP statute. Nonetheless, because Urban has failed to plead those counterclaims with requisite particularity, and because the other challenged counterclaims fail to allege sufficient facts to state claims for relief, the Court **GRANTS** the motion to dismiss with respect to Urban's first, second, fourth, fifth, sixth, and seventh counterclaims. All of those counterclaims are dismissed **WITH LEAVE TO AMEND.** Urban shall file an amended counterclaim **within 21 days** from the filing of this Order.

IT IS SO ORDERED.

DATED: **[*27]** May 6, 2010

/s/ Irma E. Gonzalez

IRMA E. GONZALEZ, Chief Judge

United States District Court

Shell Co. (P.R.) v. Los Frailes Serv. Station

United States Court of Appeals for the First Circuit

May 6, 2010, Decided

No. 09-1279

Reporter

605 F.3d 10 *; 2010 U.S. App. LEXIS 9311 **; 95 U.S.P.Q.2D (BNA) 1539 ***; 2010-1 Trade Cas. (CCH) P77,056

THE SHELL COMPANY (PUERTO RICO) LIMITED, Plaintiff, Appellee, v. LOS FRAILES SERVICE STATION, INC., Defendant, Appellant.

Subsequent History: As Amended May 28, 2010.

Prior History: [1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Francisco A. Besosa, U.S. District Judge.

Shell Co. (P.R.) v. Los Frailes Serv. Station, 551 F. Supp. 2d 127, 2007 U.S. Dist. LEXIS 96932 (D.P.R., 2007)

Core Terms

termination, district court, station, lease, trademarks, retailer, service station, injunction, franchise, counterclaims, fuel, summary judgment, provisions, rent, post-termination, expiration, permanent injunction, slip opinion, lease agreement, sublease, summary judgment motion, deliveries, antitrust, ordering, franchisors, franchisee, rights, vacate, failure to prosecute, breach of contract

LexisNexis® Headnotes

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

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

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

HN1[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's grant of a permanent injunction for abuse of discretion; the appellate court reviews its underlying conclusions of law de novo and any factual findings for clear error.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN2[] **Injunctions, Grounds for Injunctions**

A plaintiff seeking a permanent injunction before a district court must ordinarily show: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing > Franchise Nonrenewal & Termination

HN3[] **Franchising & Marketing, Franchise Nonrenewal & Termination**

Under provisions of the Petroleum Marketing Practices Act, *15 U.S.C.S. § 2801 et seq.*, franchisors can terminate or fail to renew a franchise only if the franchisor provides written notice and takes the action in question for a reason specifically recognized in the statute.

Energy & Utilities Law > Oil & Petroleum Products > Franchising & Marketing > Franchise Nonrenewal & Termination

HN4[] **Franchising & Marketing, Franchise Nonrenewal & Termination**

Reasons recognized in the Petroleum Marketing Practices Act (PMPA), *15 U.S.C.S. § 2801 et seq.*, for termination include the occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise is reasonable. *15 U.S.C.S. § 2802(b)(2)(C)*. The PMPA explicitly includes failure by the franchisee to pay the franchisor in a timely manner, *§ 2802(c)(8)*, failure by the franchisee to operate the marketing premises for an unreasonable period of time under the circumstances, *§ 2802(c)(9)(B)*, and willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations of the franchisee, *§ 2802(c)(10)*, as examples of such events.

Business & Corporate Compliance > ... > Causes of Action Involving Trademarks > Infringement Actions > Determinations

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 1st Circuit Court

HN5[] **Infringement Actions, Determinations**

Section 43(a) of the Lanham Act creates civil liability for any person who uses in commerce any word, term, name, symbol, or device which is likely to cause confusion as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. *15 U.S.C.S. § 1125(a)(1)(A)*. The United States Court of Appeals for the First Circuit generally looks to a non-exclusive, multi-factor list to determine whether a likelihood of confusion exists. That list is merely illustrative, however; the purpose of the inquiry is simply to determine whether the allegedly infringing conduct carries with it a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care. Specifically, the First Circuit looks to (1) the similarity of the marks; (2) the similarity of the goods (or, in a service mark case, the services); (3) the relationship between the parties' channels of trade; (4) the juxtaposition of their advertising; (5) the classes of prospective purchasers; (6) the evidence of actual confusion; (7) the defendant's intent in adopting its allegedly infringing mark; and (8) the strength of the plaintiff's mark. The application of those factors to the record is a highly fact-intensive inquiry.

Trademark Law > ... > Infringement Actions > Standards of Review > Clearly Erroneous

Trademark Law > Likelihood of Confusion > Consumer Confusion > General Overview

HN6[] Standards of Review, Clearly Erroneous

In the context of *15 U.S.C.S. § 1125(a)*, an appellate court reviews the district court's finding of a likelihood of confusion for clear error.

Civil Procedure > ... > Justiciability > Standing > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN7[] Justiciability, Standing

Anyone who may suffer adverse consequences from a violation of *15 U.S.C.S. § 1125(a)* has standing to sue regardless of whether he is the registrant of the trademark.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

Civil Procedure > Pretrial Matters > Conferences > Case Management

HN8[] Entitlement as Matter of Law, Appropriateness

An appellate court reviews a district court's decision to strike a motion for summary judgment for an abuse of discretion when it is stricken for a failure to comply with the terms of a case-management order. Case management-related decisions are generally reviewed for an abuse of discretion. The appellate court reviews the district court's grant of summary judgment de novo and makes all reasonable factual inferences in the light most favorable to the non-movant. Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. The appellate court may affirm on any basis in the record.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN9[] Regulated Practices, Price Discrimination

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination among different purchasers of like commodities if the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, among other consequences. *15 U.S.C.S. § 13(a)*. The Robinson-Patman Act prohibits, inter alia, actions directed at injuring competition among the discriminating seller's customers, referred to as "secondary line violations."

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN10[] **Price Discrimination, Competitive Injuries**

In the antitrust context, one of the basic requirements of competitive injury is a showing of "actual competition" between the disfavored retailer and those retailers benefitting from the price discrimination.

Civil Procedure > Dismissal > Involuntary Dismissals > Appellate Review

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN11[] **Involuntary Dismissals, Appellate Review**

An appellate court reviews dismissals for failure to prosecute under *Fed. R. Civ. P. 41(b)* for an abuse of discretion.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

HN12[] **Involuntary Dismissals, Failure to Prosecute**

A district court's decision to dismiss a claim for failure to prosecute with or without prejudice is ordinarily within its discretion.

Counsel: Yvonne M. Menendez-Calero for appellant.

Nannette Berrios Haddock with whom Raul M. Arias-Marxuach, Frank LaFontaine, and McConnell Valdes LLC were on brief for appellee.

Judges: Before Lynch, Chief Judge, Selya and Lipez, Circuit Judges.

Opinion by: LYNCH

Opinion

[*1540] [*14] LYNCH, Chief Judge**. This Petroleum Marketing Practices Act suit is between the plaintiff, Shell Company **[***1541]** (Puerto Rico) Limited ("Shell"), and defendant, the Los Frailes Service Station, Inc. ("LFSS"), which owned and operated the Los Frailes gasoline service station in Guaynabo, Puerto Rico as a Shell franchisee from 1997 until 2003. Shell terminated LFSS's franchise, and this appeal by LFSS primarily concerns the permanent injunction awarding Shell relief against LFSS and the dismissal of LFSS's counterclaims. The complications in this case arise from LFSS's dual status as the owner of the service station and surrounding property, in which capacity it leased the property to Shell, and as a retailer-franchisee, in which capacity LFSS subleased the service station from Shell to operate it.

Since December 2003, when Shell first obtained **[**2]** a preliminary injunction, LFSS has been ordered to cease using Shell's trademarks, trade dress, and color patterns; to comply with all post-termination contractual provisions; and to "immediately surrender the station in question, the storage tanks and all pertinent equipment to Shell, in order for Shell to designate a third party to operate the same." The Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc. (Shell I), No. 03-1623, slip op. at 35 (D.P.R. Dec. 2, 2003).

On January 23, 2007, the district court granted Shell summary judgment on **[*15]** LFSS's counterclaims. See *The Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc. (Shell II), 551 F. Supp. 2d 127, 134 (D.P.R. 2007)*. The district court converted the preliminary injunction to a permanent injunction on January 29, 2007, ordering and compelling LFSS to cease any use of Shell trademarks, trade dress, or color patterns, to comply with the post-termination provisions of its franchise agreements with Shell, and, in addition, to allow Shell "to continue in possession of the Los Frailes Service Station, along with the subterraneous storage tanks and all pertinent equipment, until the expiration of [Shell's] rights under the lease **[**3]** agreement between the parties," set to expire in 2014. The Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc. (Shell III), No. 03-1623, slip op. at 2-3 (D.P.R. Jan. 31, 2007). [1] In the same order, the district court denied LFSS's motion to reconsider its grant of summary judgment to Shell on LFSS's counterclaims and dismissed LFSS's breach of contract counterclaim for failure to prosecute. Id. at 1-2. In the meantime, LFSS has gone through bankruptcy, and Shell has changed its name to Sol Puerto Rico Limited following an acquisition and share purchase in 2006. [2] See *Shell IV, 596 F. Supp. 2d at 196 n.1*. Shell has been in control of the property since 2003.

LFSS appeals from various provisions of the permanent injunction, the grant of summary judgment to Shell on LFSS's federal and state law counterclaims against Shell, and the dismissal of LFSS's state law breach of contract counterclaim with prejudice (for failure to prosecute). We hold that the district court did not abuse its discretion by enjoining LFSS from further use of Shell's trademarks, trade dress, and color patterns under Section 43(a) of the Lanham Act. We further hold that the district court did not abuse its discretion by compelling LFSS to comply with the post-termination provisions of its franchise agreements with Shell. The district court did, however, abuse its discretion by extending the injunction to compel LFSS "to allow [Shell] to continue in possession of the Los Frailes Service Station . . . until the expiration of [Shell]'s rights under the lease agreement between the parties" in 2014. Shell III, slip op. at 2. **[**5]** We vacate that provision of the injunction, without prejudice to Shell's seeking further injunctive relief at a future date. We also hold that the district court properly granted Shell summary judgment on LFSS's counterclaims and that there was no abuse of discretion in dismissing LFSS's breach of contract counterclaim for failure to prosecute.

I. Factual Background

The following facts are either uncontested or were stipulated by the parties.

The gasoline service station located at the corner of State Road 177 and Muro Street in the Los Frailes area of Guaynabo has long **[***1542]** been one of the busiest in the region. LFSS has owned this station and **[*16]** the property surrounding it since 1977. For several decades, LFSS sold Shell-brand gasoline as an independent retailer under a lease arrangement with Shell. In 1997, LFSS became a Shell franchisee.

Three contracts, all signed on April 11, 1997, defined the franchise relationship between Shell and LFSS: an amended lease agreement, a retailer/sublease agreement, and a trademark and equipment agreement.

The amended lease agreement extended Shell's 1992 lease of the service station and its surrounding property until February 28, 2014. The "primary and essential **[**6]** purpose" of the lease was to maintain a service station there, and, under the amended lease, Shell did not need LFSS's permission to sublease the station to a third party retailer to operate. In exchange for this leasehold, Shell agreed to pay graduated rent to LFSS based on the number of gallons of gasoline the retailer (whether LFSS or a third party) bought from Shell each month.

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[1] The district court later issued an amended order clarifying that Shell was entitled to injunctive relief only under Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*, to compel LFSS to stop further use of Shell's trademarks, trade dress, and color patterns. See The Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc. (Shell V), No. 03-1623, slip op. at 1-2 (D.P.R. Dec. 30, 2008) (amended judgment); *The Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc. (Shell IV), 596 F. Supp. 2d. 193, 201-03, 205 (D.P.R. 2008)* **[**4]** (opinion and order).

[2] In order to accurately describe the parties' interactions and the events leading up to this suit, all of which occurred before the merger, we refer to the plaintiff as "Shell" throughout and discuss the significance of the merger where relevant.

Under the retailer/sublease agreement, Shell then subleased the station back to LFSS to operate as a Shell franchisee. As a Shell franchisee, LFSS had the right to operate the station under the Shell name, as an exclusive retailer of Shell-brand petroleum products. In exchange, LFSS agreed to certain obligations, including to purchase a minimum average of 300,000 gallons of fuel from Shell each month, to pay for Shell products on time each month on the check or credit terms set by Shell, to keep the station open and running during its hours of operation, and to operate the station for the exclusive purpose of selling only Shell-brand products.

The trademark and equipment agreement governed LFSS's exclusive use of Shell trademarks and of equipment Shell provided to LFSS and also set out LFSS's maintenance, **[**7]** inventory, and delivery obligations. This agreement recognized Shell's ownership of the underground storage tanks and other equipment at the station and gave LFSS the right to use this equipment only to sell and store Shell-brand fuel when operating the station.

These three agreements also included important provisions governing when the agreements could be terminated and the consequences of termination. The parties contest the interpretation of many of these provisions, and we discuss them further below.

From 1997 to 2000, LFSS operated the Los Frailes station as a Shell station under the terms of these agreements. Beginning in 2000, the parties made several amendments to the lease agreement. A February 15, 2001, amendment, at issue in this case, gave LFSS a temporary rent benefit from Shell to encourage a higher volume of gasoline sales. [3] Under the amendment, this rent benefit would automatically continue every month unless Shell notified LFSS otherwise in writing.

On July 2, 2001, Shell informed LFSS and its other Puerto Rican franchisees that it was implementing a Competitive Adjustment Program (CAP), and LFSS agreed to participate. The program established certain price zones for retailers and set maximum retail prices for Shell's retailers in those zones. In exchange, the CAP gave retailers discounts on wholesale fuel prices, again based on those zones. Following an investigation, the Puerto Rico Department of Justice ordered Shell to cease the CAP program on January 30, **[*17]** 2004, on the ground that it violated Puerto Rican ***antitrust law***. Shell complied.

LFSS participated in the CAP for the duration of its franchise with Shell. Though LFSS now contests whether the CAP displaced the temporary rent benefit Shell implemented in February 2001, LFSS does not contest the district court's factual finding that LFSS sent Shell an April 9, 2002 letter proposing "a temporary adjustment in rent for LFSS as we had in the first quarter of last year." We discuss the CAP in further detail below.

By early 2003, LFSS was suffering from cash flow problems and so did not pay for more than $ 80,000 worth of Shell's fuel deliveries. Shell, pursuant to **[**9]** the retailer/sublease agreement, also implemented a hard cash payment policy and required LFSS to pay for Shell products by certified check at delivery.

During the weekend of May 17 and 18, 2003, LFSS instead tried to pay for two deliveries with personal checks. On Monday, May 19, Shell told LFSS that until LFSS paid for the weekend deliveries with certified checks, Shell would not make any further deliveries. **[***1543]** LFSS did not comply; there were no further deliveries, LFSS ran out of fuel to sell, and the station temporarily closed. That same day, May 19, LFSS sent Shell a letter stating that Shell had not paid the February 2001 additional rent benefit since July 2001 (when the CAP went into effect), that Shell had not sent written notice of its cancellation, and that Shell therefore immediately owed the balance of the additional rent from July 2001 until April 2003.

On May 21, 2003, LFSS sent Shell a letter purportedly cancelling their entire commercial relationship, including the lease, citing Shell's alleged failure to pay LFSS the additional rent and its alleged obligation to deliver fuel to LFSS. LFSS then purchased fuel from other refiners and distributors, covered some but not all **[**10]** of the Shell trademarks at the station, and began selling non-Shell-brand fuel. LFSS also put up signs saying "We Do Not Sell Shell Gasoline." The signs were not prominently displayed.

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[3] Specifically, in addition to the rent specified in the lease, Shell agreed to pay LFSS an additional $ 0.02 per gallon for the first 480,000 gallons sold, and an additional $ 0.03 per gallon for every gallon over 490,000 **[**8]** that LFSS sold.

On May 23, 2003, Shell informed LFSS by letter that it was terminating LFSS's franchise, which Shell said terminated the retailer/sublease agreement and trademarks and equipment agreement but not the underlying lease agreement under which Shell leased the property from LFSS. Shell said that LFSS's termination of the lease was invalid because LFSS had not complied with the lease termination provisions. Shell then demanded that LFSS honor its obligations under the lease and under the post-termination provisions of the retailer/sublease and equipment and trademark agreements by immediately vacating the service station premises and turning over Shell's equipment.

LFSS instead continued to operate the service station by selling non-Shellbrand fuel at the service station. Shell then brought assorted federal and state law claims against LFSS in the federal district court of Puerto Rico less than two weeks later, on June 3, 2003, eventually culminating in this appeal.

II. The Parties' Claims

Before delving into **[**11]** the legal analysis, we summarize Shell and LFSS's respective claims and counterclaims.

Shell's claims against LFSS proceed from Shell's contention that it validly terminated LFSS's franchise on May 23, 2003. Shell says it was entitled to do so under the Petroleum Marketing Practices Act ("PMPA"), *15 U.S.C. § 2801 et seq.*, a federal law that regulates franchisors' termination of franchises, because of LFSS's failure to pay for fuel deliveries, its unreasonable **[*18]** closing of the station, and its sale of non-Shell fuel while displaying Shell trademarks.

Shell claims LFSS's post-termination actions violated Shell's rights in two respects. First, Shell says that LFSS created a likelihood that consumers would be confused or deceived when it sold non-Shell products while displaying Shell trademarks, in violation of Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*. On this basis, Shell requested, and the district court granted, injunctive relief to stop LFSS from using Shell trademarks, trade dress, or color patterns. See *Shell IV, 596 F. Supp. 2d at 203-05*; Shell I, slip op. at 29-31.

Second, Shell says its termination of the franchise left its underlying lease of the station from LFSS intact. **[**12]** Shell further claimed that LFSS's refusal to vacate the premises and to allow Shell to exercise its property rights over the station as a lessor violated the terms of the lease, as well as various post-termination provisions in the retailer/sublease and trademark and equipment agreements requiring LFSS to relinquish possession of the station. This was the district court's basis for compelling LFSS to comply with all post-termination contractual provisions and for the separate provision of the injunction allowing Shell to remain in possession of the service station until the expiration of its lease in 2014. See Shell I, slip op. at 27-29, 32-34.

LFSS makes several arguments as to why the district court abused its discretion in granting Shell a permanent injunction. LFSS first claims that it validly terminated all contracts, including the lease, on May 21, 2003, two days before Shell purportedly terminated the franchise. In the alternative, LFSS says, Shell's termination of the franchise was not valid under the PMPA, and the district court erred in finding otherwise.

LFSS further argues that the district court erred in granting injunctive relief. It contests the injunction on Shell's Lanham **[**13]** Act claim, urging that the evidence was contradictory and insufficient to support a likelihood of confusion. In any event, LFSS says, Shell is not entitled to the specific remedy of an injunction to enforce the lease, which gives Shell possession **[***1544]** until 2014, whether under the PMPA or any of Shell's other claims, and the district court erred in finding otherwise. This last issue is potentially the most difficult in the case, raising questions about the scope of injunctive relief available to franchisors under the PMPA.

LFSS also argues that the district court erred in granting Shell summary judgment on LFSS's counterclaim that Shell's CAP program violated federal and Puerto Rican ***antitrust law***. Specifically, LFSS argues that the district court abused its discretion by striking LFSS's cross-motion for summary judgment and denying its motion for reconsideration. Its main substantive challenge, however, is that the district court erroneously made factual inferences in Shell's favor when granting summary judgment to Shell on LFSS's antitrust claims and that there were material issues of fact precluding summary judgment. Finally, LFSS says the district court abused its discretion by dismissing **[**14]** its state law breach of contract counterclaim for failure to prosecute, because, LFSS insists, it diligently asserted this claim.

We analyze LFSS's challenges to the permanent injunction, summary judgment, and dismissal of its breach of contract counterclaim in turn. We vacate only the portion of the district court's injunction allowing Shell to continue in possession of the Los Frailes service station until 2014, when its lease expires, and we affirm the district court's judgment on all other grounds.

[*19] III. Shell's Claims against LFSS

HN1[] We review a district court's grant of a permanent injunction for abuse of discretion; we review its underlying conclusions of law de novo and any factual findings for clear error. [4] *Garcia-Rubiera v. Calderon, 570 F.3d 443, 455-56 (1st Cir. 2009)*.

HN2[] A plaintiff seeking a permanent injunction before a district court must ordinarily show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)*; see also *CoxCom, Inc. v. Chaffee, 536 F.3d 101, 112 (1st Cir. 2008)*. LFSS's claims of error cut across these criteria.

A. LFSS's Purported Termination of the Lease Agreement

LFSS's primary argument on appeal is that LFSS validly terminated its lease of the Los Frailes station to Shell on May 21, 2003, and that the district court therefore erred by granting Shell an injunction **[**16]** that gave Shell possession of the service station.

We reject this argument; LFSS's attempt to terminate the lease on May 21 was plainly invalid. [5] Even assuming dubitante that Shell had defaulted on its lease obligations, article 17 of the lease provided that LFSS could terminate the lease in the event of default only after a sixty-day curative period. LFSS admits that its May 21, 2003, letter of termination cited Shell's purported breaches as the grounds for termination and did not comply with the sixty-day curative requirement.

Instead, LFSS claims that a different part of the lease agreement, article 7, authorized LFSS to terminate the lease with Shell immediately, without any sixty-day curative period, on the sole condition that LFSS pay Shell for the cost of the improvements and alterations Shell had made to the station, less depreciation. Because **[**17]** LFSS only developed this interpretation of article 7 at oral argument and not in its briefs, this argument is waived. See *Mass. **[***1545]** Museum of Contemporary Art Found. v. Buchel, 593 F.3d 38, 65 (1st Cir. 2010)*. Even if the argument were properly before this court, it would fail. Article 7 states in relevant part that "[i]f this lease is terminated before the expiration of its term . . . for causes attributable to [LFSS]," LFSS, "in addition to any other remedy under the contract," must **[*20]** "immediately pay [Shell] an amount equivalent to the amount not depreciated (or amortized) of the improvements and permanent alterations made by [Shell] in the Property, in the

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[4] LFSS's argument that the district court could not convert the preliminary injunction into a permanent injunction without an evidentiary hearing fails. The district court converted the preliminary injunction into a permanent injunction only after issuing a show cause order to LFSS, and only after determining that LFSS had not advanced any new evidence or legal arguments beyond what it had presented at the preliminary **[**15]** injunction hearing. Under those circumstances, an evidentiary hearing would have served little purpose, and the district court's conversion was not error. See *HMG Prop. Investors, Inc. v. Parque Indus. Rio Canas, Inc., 847 F.2d 908, 915 (1st Cir. 1988)*; cf. *United States v. Owens, 54 F.3d 271, 276-77 (6th Cir. 1995)*.

[5] The parties have not briefed the question of whether this court is, in any event, bound by the bankruptcy court's determination that the lease remained in effect and Shell retained all its rights as a lessor under that agreement, though the district court relied on that judgment in rejecting LFSS's claims below. See Shell III, slip op. at 3.

Station or in the surrounding areas." This is plainly a liquidated damages provision addressing the consequences of termination, not the conditions under which the parties could terminate the agreement. It cannot be construed as an open-ended alternative to the limitations on termination set out in article 17.

B. Shell's PMPA Claim

In the alternative, LFSS argues that the district court erred in concluding as a matter of law that Shell's termination of LFSS's franchise complied with the PMPA. Absent a valid termination, LFSS suggests, **[**18]** Shell suffered no irreparable injury, since Shell's asserted harms arose from LFSS's alleged failure to comply with the consequences of franchise termination. Those consequences include the loss of LFSS's right to use Shell's trademarks and equipment and to sublease and operate the service station. This argument also fails; we reject its assumption that Shell's termination was invalid.

The PMPA, enacted in 1978, addressed franchisors' "allegedly unfair franchise terminations and nonrenewals in the petroleum industry" by "establish[ing] minimum federal standards governing the termination and nonrenewal of petroleum franchises." *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co. LLC, 559 U.S. 175, 130 S. Ct. 1251, 1255, 176 L. Ed. 2d 36 (2010)*. ***HN3***[] Under provisions of the PMPA, franchisors can terminate or fail to renew a franchise "only if the franchisor provides written notice and takes the action in question for a reason specifically recognized in the statute." Id. [6]

HN4[] Reasons recognized in the statute for termination include "[t]he occurrence of an event which is . . . relevant to the franchise relationship and as **[**19]** a result of which termination of the franchise . . . is reasonable." *15 U.S.C. § 2802(b)(2)(C)*. The PMPA explicitly includes "failure by the franchisee to pay the franchisor in a timely manner," id. ' *2802(c)(8)*, "failure by the franchisee to operate the marketing premises for . . . an unreasonable period of time" under the circumstances, id. *§ 2802(c)(9)(B)*, and "willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations of the franchisee," id. *§ 2802(c)(10)*, as examples of such events.

LFSS does not contest that it failed to make payments on time, temporarily closed the station, and sold non-Shell-brand fuel. Rather, it argues that the PMPA requires courts to determine whether a termination based on these events was objectively reasonable under the circumstances, not just whether an event listed under *§ 2802(c)* technically occurred. The circumstances here, LFSS says, made Shell's termination unreasonable, because the cash flow problems leading to these three events were caused by Shell's alleged violation of antitrust laws and its purported failure to pay LFSS the temporary rent benefit Shell agreed to in February 2001. Those two allegations are **[**20]** also the basis for LFSS's counterclaims against Shell.

The district court rejected this argument, holding as a matter of law that Shell's termination of the franchise was per se reasonable because the termination **[*21]** was based on those three, explicitly listed statutory grounds for termination. See Shell I, slip op. at 19-21. The district court's reasoning suggested that the termination was valid even under an objective reasonableness standard. It found that LFSS's claim that Shell's nonpayment of the rent benefit caused LFSS's cash flow problems lacked merit because of LFSS's April 2002 admission in its letter to Shell that the February 2001 rent benefit was no longer in effect. Id. at 22. We need not evaluate the wisdom of a per se rule that termination is reasonable if an event listed in *§ 2802(c)* occurs. [7] LFSS could not prevail even if we

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[6] It is clear, and LFSS does not contest, that Shell provided adequate written notice of the termination here.

[7] The district court's interpretation of the PMPA reflects the law of this circuit: if any of the events listed in *§ 2802(c)* occur, "termination is conclusively presumed to be reasonable as a matter of law." *Desfosses v. Wallace Energy, Inc., 836 F.2d 22, 26 (1st Cir. 1987)*. At least one other circuit also adopted this rule. See *Hinkleman v. Shell Oil Co., 962 F.2d 372, 377 (4th Cir. 1992)* (per curiam). But see *Patel v. Sun Co., Inc., 141 F.3d 447, 456-57 (3d Cir. 1998)* ("There is no question that at least some of the *§ 2802(c)* relevant event exceptions mandate some form of judicial scrutiny."); *Marathon Petroleum Co. v. Pendleton, 889 F.2d 1509, 1512 (6th Cir. 1989)* (suggesting that all terminations for events listed in *§ 2802(c)* are subject to judicial scrutiny to determine whether they were objectively reasonable); *Sun Refining & Mktg. Co. v. Rago, 741 F.2d 670, 672-74 (3d Cir. 1984)* (holding that in light of the PMPA's purpose of benefitting franchisees, courts must **[**22]** look to whether franchisor terminations under *§ 2802(c)(8)* and *(9)* are objectively reasonable and not presume reasonableness per se).

reviewed whether **[***1546]** Shell's termination was objectively reasonable. The district court did not clearly err in finding that the February 2001 rent benefit was temporary, long since terminated, and could not have been responsible for LFSS's May 2003 cash flow problems. In any event, uncontested record evidence shows that LFSS's cash flow problems, culminating **[**21]** in its inability to pay Shell for deliveries, had a number of causes unrelated to Shell's actions with respect to the CAP or the temporary rent benefit. [8] Shell's termination of the franchise was valid under the PMPA.

C. Shell's Lanham Act Claim

LFSS also challenges the district court's grant of a permanent injunction preventing LFSS from further using Shell trademarks, trade dress, and color patterns. The district court reasoned that this relief was warranted under Section 43(a) of the Lanham Act, *15 U.S.C. § 1125(a)*, because LFSS's sale of non-Shell products while displaying Shell trademarks was likely to cause confusion as to the origin of LFSS's petroleum products. See Shell I, slip op. at 29-32; *Shell IV, 596 F. Supp. 2d at 202-03* (limiting injunctive relief to *§ 1125(a)*).

HN5[] Section 43(a) of the Lanham Act creates civil liability for "any person who . . . uses in commerce any **[**23]** word, term, name, symbol, or device . . . which . . . is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person." *15 U.S.C. § 1125(a)(1)(A)*. This circuit generally looks to a non-exclusive, multi-factor list to determine whether a likelihood of confusion exists. [9] That list is merely illustrative, **[*22]** however; the purpose of the inquiry is simply to determine whether "the allegedly infringing conduct carries with it a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care." *Int'l Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 201 (1st Cir. 1996)*.

The application of those factors to the record is a highly fact-intensive inquiry. See *Visible Sys. Corp. v. Unisys Corp., 551 F.3d 65, 73-74 (1st Cir. 2008)*. That is especially so given that LFSS is challenging the district court's decision to limit the evidence to Shell's photographs and the persuasiveness of that evidence. ***HN6***[] We accordingly review the district court's finding of a likelihood of confusion for clear error, and hold that the district court did not clearly err in its finding.

There is no need to go through a mechanical application of the multi-factor list to reach this conclusion. The district court properly rejected LFSS's argument that Shell's photographs of still-visible Shell trademarks at the Los Frailes service station are unpersuasive and unreliable evidence. LFSS presented evidence squarely challenging Shell's photographs only in 2007 and had previously made stipulations at odds with the 2007 evidence that it presented. See *Shell IV, 596 F. Supp. 2d at 201-02*.

Moreover, beyond the photographic evidence, it is uncontested that LFSS had operated a Shell station on the premises for more than **[**25]** a decade, and that LFSS covered up some, but not all, of the Shell trademarks displayed at the Los Frailes station while selling non-Shell-brand fuel. It is also uncontested that LFSS failed to alter the overall appearance of the service station, which retained the **[***1547]** trade dress of a Shell station. LFSS

[8] Specifically, in 2000, before the CAP or the February 2001 rent benefit were implemented, LFSS's net operating income was $ 33,440, but it loaned more than $ 150,000 to its stockholders during the fiscal year. LFSS also took out substantial loans totaling about $ 675,000 before implementing the CAP, and LFSS paid out more than $ 200,000 to its president, the station operator, in 2000, 2002, and 2003.

[9] Specifically, this circuit looks to

> (1) the similarity of the marks; (2) the similarity of the goods (or, in a service mark case, the services); (3) the relationship between the parties' channels of trade; (4) the juxtaposition of their advertising; (5) the classes of prospective purchasers; (6) the evidence of actual confusion; (7) the defendant's intent in adopting its allegedly infringing mark; and (8) the strength of the plaintiff's mark.

Int'l Ass'n of Machinists v. Winship Green Nursing Ctr., 103 F.3d 196, 201 (1st Cir. 1996); **[**24]** see also *Visible Sys. Corp. v. Unisys Corp., 551 F.3d 65, 73 (1st Cir. 2008)*.

further conceded before the district court that the fuel it sold after May 21, 2003, was of inferior quality to the fuel it had previously sold under Shell trademarks. *Shell I*, slip op. at 24. LFSS's brief on appeal concedes that the station continued to serve the same potential customers before and after the franchise termination.

These facts amply support the district court's finding that when LFSS began selling non-Shell-brand fuel without completely obscuring the Shell trademarks at the station, LFSS's actions were substantially likely to confuse reasonably prudent consumers. Given that the Los Frailes station had been identified with the Shell brand for over a decade and that Shell trademarks were still visible at the station, LFSS's signs stating "We Do Not Sell Shell Gasoline" were not enough to avoid likely confusion, not least because customers could only see those signs after **[**26]** they were already at the gas pump. [10]

[*23] D. The Provision of the Injunction Ordering LFSS to Allow Shell to Retain Possession of the Service Station until the Expiration of the Lease

We next address LFSS's argument that the district court abused its discretion in granting the portion of the injunction that compelled LFSS "to allow [Shell] to continue in possession of the Los Frailes **[**27]** Service Station . . . until the expiration of [Shell]'s rights under the lease agreement between the parties" in 2014. Shell III, slip op. at 2.

The district court did not provide any specific reasoning in its opinion as to why this particular provision of the injunction, guaranteeing Shell's continued presence for a number of years into the future, was necessary to remedy the irreparable harms associated with Shell's loss of goodwill and market presence. Those harms derived from LFSS's failure to comply with the consequences of its franchise termination, including the termination of LFSS's sublease of the service station from Shell and LFSS's obligation to cease operating the station as Shell's designated retailer/sublessee. Shell I, slip op. at 28-29. But the district court's injunction included a separate provision specifically requiring LFSS to comply with the post-termination provisions of the retailer/sublease agreement and the trademark and equipment agreement. Id. The portion of the injunction requiring LFSS to also allow Shell to remain in possession of the service station until its rights under the lease expired in 2014 was in addition to, and separate from, that provision. **[**28]** Id. The district court appears to have reasoned that the PMPA allows franchisors to obtain injunctions based on an underlying lease agreement, not merely injunctions to enforce post-termination provisions of franchise agreements. Id. at 27-29.

On appeal, LFSS does not challenge the portion of the injunction ordering it to comply with post-termination clauses in the franchise agreements. Nor does LFSS dispute that those contractual clauses provided that "[i]f this Contract is terminated or non-renewed, [LFSS] will deliver the Station and the Equipment to [Shell]" within twenty-four hours of termination. Once LFSS's sublease of the station from Shell ended, LFSS had to vacate the premises. Shell then could presumably enter into another sublease with a new retailer to operate the service station. It is unclear from the record whether that has in fact happened.

Instead, LFSS's argument is that the district court should not have added the additional portion of the injunction compelling LFSS to allow Shell to possess the station until Shell's rights under the lease expire in 2014. LFSS is essentially arguing that franchisors like Shell cannot use the PMPA to obtain this kind of injunctive remedy, **[**29]** as distinct from whatever post-termination obligations LFSS has under the franchise agreements. [11]

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[10] We likewise reject LFSS's argument that Shell lacked standing to assert an injury on its Lanham Act claims because of Shell's 2006 acquisition and share purchase and its rebranding as Sol Puerto Rico, and specifically because Sol is not the registrant of the relevant Shell trademarks. ***HN7***[] Anyone "who may suffer adverse consequences from a violation of *section 1125(a)* has standing to sue regardless of whether he is the registrant of the trademark." *Quabaug Rubber Co. v. Fabiano Shoe Co., Inc., 567 F.2d 154, 160 (1st Cir. 1977)*; see also *Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 784-85 (2d Cir. 1994)*. Sol, as the owner of numerous Shell stations, plainly has an interest in preventing the confusion of the Shell brand with the inferior-quality fuel that LFSS sold while still displaying some Shell trademarks.

[11] Though LFSS broadly asserts that the PMPA does not allow franchisors to obtain injunctive relief against franchisees if the relief would give the franchisors property rights, LFSS does not claim that this prevents the district court from ordering LFSS to

[*1548] [*24]** We agree that the district court abused its discretion in ordering LFSS to allow Shell to continue in possession of the Los Frailes service station until Shell's rights under the lease expired.

Here, Shell made no showing of irreparable harm that **[**30]** might justify an order giving it possession of the property for the full term of the lease, until 2014. The post-termination provisions of the retailer/sublease and trademark and equipment contracts adequately protected Shell's right to resume possession of the station and its equipment. We see no basis for further ordering LFSS to allow Shell to possess the property until 2014 under the lease; the district court's order compelling LFSS to comply with these post termination provisions sufficiently protected Shell's interests. The district court did not hold that any violations of the lease by LFSS may have caused discrete, irreparable harms to Shell or that injunctive relief would be the remedy for such harms.

Moreover, the terms of this portion of the injunction appear to allow Shell to continue possessing the property and service station until the lease expires even if Shell, in the future, breaches its obligations under the lease. Shell plainly cannot be entitled to that remedy, which goes even beyond ordering enforcement of the lease agreement.

We vacate this portion of the injunction alone, without prejudice. Shell is free to try to obtain this remedy at a later date if future events **[**31]** warrant it.

IV. LFSS's Antitrust Counterclaim against Shell

LFSS also appeals the district court's decision to strike LFSS's cross-motion for summary judgment and its grant of summary judgment to Shell on LFSS's federal and state law antitrust counterclaims.

HN8[] We review a district court's decision to strike a motion for summary judgment for an abuse of discretion when it is stricken for a failure to comply with the terms of a case-management order. See *Rosario-Diaz v. Gonzalez, 140 F.3d 312, 315 (1st Cir. 1998)* (holding that case management-related decisions are generally reviewed for an abuse of discretion). We review the district court's grant of summary judgment de novo and make all reasonable factual inferences in the light most favorable to the non-movant, LFSS. *Boston & Me. Corp. v. Mass. Bay Transp. Auth., 587 F.3d 89, 98 (1st Cir. 2009)*. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Id. (internal quotation marks omitted). "We may affirm . . . on any basis in the record." *Chiang v. Verizon New England, Inc., 595 F.3d 26, 34 (1st Cir. 2010)*. We affirm both rulings.

A. The District **[**32]** Court Did Not Abuse Its Discretion in Striking LFSS's Summary Judgment Motion

LFSS's argument that the district court erred in striking its motion for summary judgment ignores the salient fact that LFSS's motion was filed on January 3, 2007, weeks after the conclusion of discovery, and well after the September 1, 2006, deadline the district court imposed for dispositive motions.

LFSS argues on appeal that the district court's extension of discovery until November 30, 2006, effectively extended or **[*25]** vacated the September 1 deadline. That argument, however, does not provide a persuasive ground for questioning the district court's discretionary case management decisions. See *Perez-Cordero v. Wal-Mart P.R., 440 F.3d 531, 533 (1st Cir. 2006)*; *Rosario-Diaz, 140 F.3d at 315*. LFSS had numerous opportunities to request a filing extension for its summary judgment motion at various status conferences after the September deadline; it took none of them. Nor has LFSS presented any convincing reason for the delay in filing this motion. [12] There was no **[***1549]** abuse of discretion in denying LFSS's summary judgment motion.

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comply with its post-termination contractual obligations. In any event, we need not decide whether the PMPA allows franchisors to obtain injunctions to enforce those kinds of obligations. Shell's complaint also included a claim to judicially dispossess LFSS of the service station premises and equipment under Puerto Rican law, and Shell can obtain enforcement of the relevant post-termination contractual provisions on that basis. Shell did not, however, bring any state law claims that would provide an alternate basis for it to obtain an injunctive remedy involving the lease agreement in this suit.

[12] In any event, as the district court noted in its opinion granting summary judgment to Shell, **[**33]** the outcome would have been no different even if it had considered this untimely motion. LFSS's purported evidence that it was in actual competition with

B. The District Court Properly Granted Summary Judgment to Shell on LFSS's Antitrust Counterclaim

LFSS further argues that the district court improperly granted summary judgment against it on its claims under the Robinson-Patman Act and equivalent provisions of Puerto Rican ***antitrust law*** because, it says, there were contested material issues of fact as to various elements of that claim even absent the evidence submitted in its stricken motion for summary judgment. We disagree.

HN9[] *Section 2(a)* of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination among different purchasers of like commodities if "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce," among other consequences. *15 U.S.C. § 13(a)*. The Robinson-Patman Act prohibits, inter alia, actions "directed **[**34]** at injuring competition among the discriminating seller's customers," referred to as "secondary line violations." See *Able Sales Co., Inc. v. Compania de Azucar de P.R., 406 F.3d 56, 60 (1st Cir. 2005)*.

LFSS claims that Shell engaged in secondary-line violations through the CAP program Shell implemented in July 2001. LFSS says that in establishing price zones for retailers, the CAP offered certain Shell retailers (those operating Shell-owned stations) more favorable prices on Shell fuel than LFSS and other retailer-owned stations received.

HN10[] One of the basic requirements of competitive injury, however, is a showing of "actual competition" between the disfavored retailer (LFSS) and those retailers benefitting from the price discrimination. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177, 126 S. Ct. 860, 163 L. Ed. 2d 663 (2006)*.

The central reason LFSS's argument fails is because, as the district court found, LFSS presented no evidence that it was actually in competition with the retailers it said were the beneficiaries of the CAP. LFSS's response to Shell's motion for summary judgment simply asserted that under an August 2005 Puerto Rican law, *P.R. Laws. Ann., tit. 23, § 1104*, the entire island constituted **[**35]** a single price zone and that all retailers were presumptively each other's competitors. But that law was marginally relevant at best. It was a non-retroactive law implemented two years after this suit began, and a year after the CAP was discontinued. See Shell III, slip op. at 8-9.

We likewise reject LFSS's argument that the deposition testimony showing **[*26]** three other Shell stations were within two miles of LFSS meant that those stations were presumptively in competition with the Los Frailes service station. This testimony was exceptionally vague. LFSS neither presented corroboration nor explained why consumers would in practice choose among these stations. On the evidence submitted in this case, even viewing all reasonable inferences in LFSS's favor, proximity does not per se show actual competition.

LFSS's reply to Shell's motion for summary judgment presented no other factual or legal basis for finding LFSS was in competition with favored retailers, and its attempts on appeal to create an issue of material fact on this point all depend on the exhibits in support of its stricken motion for summary judgment. We need go no further. [13] LFSS cannot satisfy the first prerequisite **[**36]** of its antitrust claims, and thus the district court properly granted Shell summary judgment.

V. LFSS's State Law Breach of Contract Counterclaim

Finally, we reject LFSS's argument that the district court erred in dismissing for failure to prosecute LFSS's breach of contract claim for additional rent due under the lease. ***HN11***[] We review dismissals for failure to prosecute under *Fed. R. Civ. P. 41(b)* for an abuse of discretion. See *Malot v. Dorado Beach Cottages Assocs., 478 F.3d 40, 43 (1st Cir. 2007)*. There was no abuse of discretion here.

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other, nearby retailers that it said received better prices from Shell was weak at best, and it failed to show price differentials. See *Shell II, 551 F. Supp. 2d at 134 n.3*.

[13] We note that the district court amply explained why, even assuming arguendo that LFSS presented an issue of material fact on the question of whether it was in competition with favored retailers, there were no material issues of fact on the other required elements of this claim that would preclude Shell from obtaining judgment on the merits. See *Shell II, 551 F. Supp. 2d at 134-35*.

LFSS conceded before the district court in a 2007 show-cause hearing that this claim had been included only in a section of an earlier response to a motion to show cause. The district court could reasonably find there was no real development of this claim since 2003. LFSS's main **[**37]** argument before the district court was that the district court should nonetheless **[***1550]** exercise its discretion not to deem the argument waived. LFSS made all its present arguments as to the lack of hardship to Shell before the district court, which carefully considered them. Nor, despite the extensive filings in this case, has LFSS at any point explained why this claim has merit. LFSS has also not developed the argument as to why this claim should not have been dismissed with prejudice; in any event, *HN12*[] the district court's decision to dismiss a claim for failure to prosecute with or without prejudice is ordinarily within its discretion. The district court did not abuse its discretion in dismissing the claim with prejudice.

We affirm the district court's grant of a permanent injunction ordering LFSS to refrain from further use of any Shell trademarks, trade dress, or color patterns and ordering LFSS to comply with relevant post-termination contractual obligations. We vacate, without prejudice, the portion of the permanent injunction ordering and compelling LFSS to allow Shell to continue in possession of the Los Frailes Service Station until the expiration of the lease in 2014. Shell is free **[**38]** to seek future injunctive relief should it be warranted. The district court's grant of summary judgment and its dismissal of LFSS's breach of contract counterclaim with prejudice are affirmed. No costs are awarded.

So ordered.

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City of New York v. Group Health

United States District Court for the Southern District of New York

May 11, 2010, Decided; May 11, 2010, Filed

No. 06 Civ. 13122 (RJS)

Reporter

2010 U.S. Dist. LEXIS 60196 *; 2010-1 Trade Cas. (CCH) P77,053; 2010 WL 2132246

THE CITY OF NEW YORK, Plaintiff, VERSUS GROUP HEALTH INCORPORATED, HIP FOUNDATION, INC., AND HEALTH INSURANCE PLAN OF GREATER NEW YORK, Defendants.

Subsequent History: Affirmed by *City of New York v. Group Health, 2011 U.S. App. LEXIS 17116 (2d Cir. N.Y., Aug. 18, 2011)*

Prior History: *City of New York v. Group Health, Inc., 2008 U.S. Dist. LEXIS 95055 (S.D.N.Y., Nov. 21, 2008)*

Core Terms

health benefits, summary judgment motion, amend, plans, Defendants', consumer, summary judgment, discovery, purchaser, benefits, relevant market, bargaining, antitrust

Counsel: **[*1]** For The City of New York, Plaintiff: Alan H. Kleinman, LEAD ATTORNEY, John Rudolf Low-Beer, New York City Law Depart. Office of the Corporation Counsel, Bronx, NY; June R. Buch, LEAD ATTORNEY, City of New York Law Department, New York, NY; Anthony James Minko, New York City Law Department, New York, NY; Brandon W. Duke, Richard J. Costa, NYC Law Department, Office of the Corporation, New York, NY.

For Group Health Incorporated, Defendant: Bruce Harvey Schneider, LEAD ATTORNEY, Stroock & Stroock & Lavan LLP, New York, NY; Stephen Mark Axinn, LEAD ATTORNEY, Irina Cristina Rodriguez, Lauren Stacey Albert, Michael L. Keeley, Russell Mark Steinthal, Axinn, Veltrop & Harkrider, LLP, New York, NY.

For HIP Foundation, Inc., Health Insurance Plan of Greater New York, Defendants: Bruce Harvey Schneider, LEAD ATTORNEY, Claude Gabriel Szyfer, Derek Irving Adam Silverman, Stephen Mark Axinn, Stroock & Stroock & Lavan LLP, New York, NY.

Judges: RICHARD J. SULLIVAN, United States District Judge.

Opinion by: RICHARD J. SULLIVAN

Opinion

RICHARD J. SULLIVAN, District Judge:

The City of New York brings this antitrust action, seeking to unwind the merger of Defendants Group Health Incorporated ("GHI") and the HIP Foundation. [1] Now before **[*2]** the Court are Defendants' motion for summary

[1] Also named as a Defendant is the Health Insurance Plan of Greater New York ("HIP"), the subsidiary of the HIP Foundation that actually provides insurance coverage to consumers.

judgment and Plaintiff's cross-motion to amend its Complaint. For the reasons stated below, Defendants' motion is granted, and Plaintiff's motion is denied. Accordingly, the case will be closed.

I. BACKGROUND

A. Facts

1. The Health Benefits Program

Current and former employees of the City of New York, as well as their dependents, receive health benefits through the City's Health Benefits Program. (Defs.' 56.1 P 37.) In addition to approximately one million individuals associated with the City, the Program also covers an additional 200,000 employees of thirty-five City-related agencies and entities, such as the New York City Housing Authority, the New York Public Library, and the Metropolitan Museum of Art. (Pl.'s 56.1 P 1.)

The Health Benefits Program is administered by the City's Office of Labor Relations ("OLR"). (Defs.' 56.1 P 37.) The OLR works in conjunction with the Municipal Labor Committee ("MLC"), a multi-union organization, to select plans for inclusion in the **[*3]** Program. (*Id*. P 38.) To be included in the Program, a plan must successfully respond to a request for proposals ("RFP") issued by the City. (*Id*.)

A number of health plans are currently included in the program, including plans offered by CIGNA, Aetna, Empire, GHI, and HIP. (*Id*. P 27.) The City has agreed to pay for participants' benefits up to the rate charged by HIP for its health maintenance organization ("HMO") product; where an employee chooses a plan with a higher premium, he or she is responsible for the difference in the form of either a payroll or pension deduction. (*Id*. PP 40, 42.) The City, however, has also created a "Stabilization Fund," the goal of which is to cover the difference between the GHI preferred provider organization ("PPO") rate and the HIP HMO rate. (*Id*. P 41.) According to the Complaint, 93% of the participants in the Health Benefits Program select a plan offered by HIP or GHI, as their costs are far lower than their competitors'. (Compl. P 15.)

2. The Challenged Transaction

On September 29, 2005, GHI and HIP announced their intention to affiliate under a common holding company. (Defs.' 56.1 P 6.) After the transaction was approved by the United States Department **[*4]** of Justice, the New York Superintendent of Insurance, the New York Department of Health, and the New York attorney general, the affiliation was consummated on November 15, 2006. (*Id*. PP 9, 11, 12, 14, 17.)

B. Procedural History

Plaintiffs filed this action on November 13, 2006, and it was assigned to the Honorable Kenneth M. Karas, District Judge. On November 14, 2006, the parties appeared before Judge Karas on Plaintiff's motion for a temporary restraining order. Judge Karas denied the motion from the bench.

The case was reassigned to my docket on September 4, 2007, and Defendants moved for summary judgment on December 4, 2009. On January 20, 2010 -- nine days before its opposition papers were due -- Plaintiff submitted a pre-motion letter seeking leave to amend the Complaint. The parties appeared before the Court for a pre-motion conference on January 27, 2010, at which time the Court granted Plaintiff permission to seek leave to amend in its papers opposing Defendants' summary judgment motion. The motions were fully submitted on February 25, 2010. [2]

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

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[2] The motions were technically fully submitted on February 19, 2010, when Defendants submitted their reply memorandum in support of their **[*5]** motion for summary judgment and in opposition to Plaintiff's motion to amend. On February 25, 2010, however, Plaintiff filed a reply in support of its motion to amend, despite the fact that the Court's Order of January 27, 2010, did not authorize the filing of such a memorandum. Notwithstanding Plaintiff's failure to seek permission to submit a reply brief, the Court has considered it in resolving the pending motions.

A court may grant a motion for summary judgment if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party bears the burden of showing that he or she is entitled to summary judgment. *See* *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir. 2004)*. **[*6]** As such, "if 'there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment.'" *Binder & Binder PC v. Barnhart, 481 F.3d 141, 148 (2d Cir. 2007)* (quoting *R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 59 (2d Cir. 1997))* (alteration in original).

B. Analysis

1. The Statutory Claims

The City brings claims, exclusively in its capacity as a purchaser of Defendants' products, under four statutory sections:

(1) *Section 7* of the Clayton Act, which prohibits acquisitions that "substantially . . . lessen competition, or . . . tend to create a monopoly," *15 U.S.C. § 18*;

(2) *Section 1* of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce," *id*. *§ 1*;

(3) *Section 2* of the Sherman Act, which renders it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States," *id*. *§ 2*; and

(4) *Section 340(1)* of the Donnelly Act, which prohibits "[e]very contract, agreement, arrangement **[*7]** or combination whereby [a] monopoly . . . is or may be established or maintained." *N.Y. Gen. Bus. Law. § 340(1)*.

2. The Requirement of a Legally Sufficient Product Market

To state claims under any of the statutes identified above, Plaintiffs must identify the product market in which competition will be impaired. *See* *Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 254 (S.D.N.Y. 1995)* (Sherman Act); *Intellective, Inc. v. Mass. Mut. Life Ins. Co., 190 F. Supp. 2d 600, 609 (S.D.N.Y. 2002)* (Clayton Act); *Astra Media Group, LLC v. Clear Channel Taxi Media, LLC, 679 F. Supp. 2d 413, 2009 WL 5171742, at *10 (S.D.N.Y. 2009)* (Donnelly Act). Failure to plead a legally sufficient product market is grounds for dismissal. *See* *Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001)* ("To survive a Rule 12(b)(6) motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." (citations and internal quotation marks omitted); *accord* *B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 172 (S.D.N.Y. 1995)*.

"The **[*8]** relevant market is defined as all products 'reasonably interchangeable by consumers for the same purposes,' because the ability of consumers to switch to a substitute restrains a firm's ability to raise prices above the competitive level." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 496 (2d Cir. 2004)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. Market definitions recently found to be acceptable by courts in this district have included, for example, "the market for the digital distribution of copyrighted music over the internet," *Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556, 576 (S.D.N.Y. 2007)*, the market for "top commercial films," *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301, 311 (S.D.N.Y. 2003)*, and "the market for the installation of telecommunications wiring and systems in commercial buildings," *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3, No. 00 Civ. 4763 (RMB), 2002 U.S. Dist. LEXIS 1038, 2002 WL 91625, at *6 (S.D.N.Y. Jan. 23, 2002)*.

As then-Judge Sotomayor explained, "[a] consumer might choose to purchase a certain product because the manufacturer has spent time and energy differentiating **[*9]** his or her creation from the panoply of products in the market, but at base, Pepsi is one of many sodas, and NBC is just another television network." *Global Discount Travel Servs., LLC v. Trans World Airlines, Inc., 960 F. Supp. 701, 705 (S.D.N.Y. 1997)* (Sotomayor, J.). In other words, "'the test for a relevant market is *not commodities reasonably interchangeable by a particular plaintiff*, but commodities reasonably interchangeable by consumers for the same purposes.'" *PepsiCo, Inc. v. Coca-Cola Co., No. 98 Civ. 3282 (LAP), 1998 U.S. Dist. LEXIS 13440, 1998 WL 547088, at *10 (S.D.N.Y. Aug. 27, 1998)* (emphasis added and additional internal quotation marks omitted) (quoting *Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430, 438 (3d Cir. 1997)*.

As the Tenth Circuit has explicitly held, "[p]urchasing constraints on a single consumer, such as a required competitive bidding procedure, do not" create a market of which only that consumer is a member. *See Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 368 (10th Cir. 1993)*; *accord Lockheed Martin Corp. v. Boeing Co., 314 F. Supp. 2d 1198, 1228-29 (M.D. Fla. 2004)* ("The argument that, because it cannot turn to many suppliers, the U.S. Government has been or will **[*10]** be harmed by unfair trade practices by one of few suppliers does not alter this analysis. The goal of ***antitrust law*** is to prevent harm to *competition*, not to prevent harm to one of many purchasers of a product.").

3. The City's Market Definition

The Complaint defines the relevant product market as the "the low-cost municipal health benefits market." (Compl. P 3.) According to the Complaint, this entire market consists of two programs: the Health Benefits Program, administered by the City as described above, and the Transit Health Program, administered by the New York City Transit Authority. (*Id*. P 14.) [3]

The Complaint alleges that within the City's Health Benefits Program, HIP and GHI are the only sellers of "low-cost health insurance." (*Id*.) While other companies offer health insurance, the Complaint alleges, their prices are sufficiently higher such that they do not exist **[*11]** in the same market as HIP and GHI. (*Id*. at PP 14-15.)

According to Plaintiff, plans in the relevant market are distinguished from other plans by four characteristics: (1) the absence of pharmacy benefits, (2) the absence of tiered networks, (3) a large number of in-network doctors in the outer boroughs of New York willing to accept relatively low reimbursements, and (4) in the case of the GHI plan, the fact that hospital and medical benefits are separately provided. (Compl. PP 39.) [4]

4. Analysis

a. The City's Market Definition Is Improperly Limited to a Single Purchaser

Notwithstanding the distinguishing features identified by the City, the market definition contained in the Complaint is deficient as a matter of law, as the market is defined predominantly by the City's and the MLC's roles in selecting plans for inclusion in the Health Benefits Program.

The City concedes that the requirements **[*12]** of the collective bargaining process create significant barriers to entering its proposed market. In other words, an insurer cannot simply decide to enter the Health Benefits Program.

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[3] Although the Complaint alleges that the Transit Health Program is a member of the relevant product market, it is not addressed in the parties' briefing on the instant motion or in their Local Rule 56.1 statements. Accordingly, the Court will not consider the Transit Health Program in resolving the pending motions.

[4] As a fifth supposed difference, the City indicates that "the City and the MLC have worked in conjunction with GHI and HIP to craft the benefits included in their plans." (*Id*.) This is hardly a relevant difference, apart from the fact that it produced the four distinguishing factors noted in the text above.

Rather, "[t]o change insurers, the City and its unions have to engage consultants and undertake a 15-step process to issue a Request for Proposals and evaluate responsive proposals." (Pl.'s Opp'n at 20.)

As explained in the Declaration of Dorothy A. Wolfe, the Director of the Employee Benefits Program within the City's Office of Labor Relations, "[h]ealth insurance . . . is a mandatory subject of collective bargaining" and "the City cannot modify the Health Benefits Program unilaterally." (Decl. of Dorothy A. Wolfe P 5.) Accordingly, "any significant restructuring of the City's health program would require a number of lengthy and expensive steps." (*Id*. P 18.) In total, awarding a contract to an insurance company to join the Health Benefits Program typically takes anywhere from twelve to eighteen months. (*Id*. P 22.)

The City further concedes that it exercises its gatekeeping role based on its particular needs and policy preferences. (*See* Pl.'s Opp'n at 17 ("The City's program is designed as a result of mandatory **[*13]** collective bargaining with the City's many unions."); *id*. ("These attributes of the City's health plan express policy preferences of the City and its many unions, and are incorporated in multiple collective bargaining agreements."); *id*. ("The unions' influence on the design of the City's health benefits program is a further factor that influences the City's ability to switch to another carrier.")).

Against the backdrop of these significant barriers to entry erected by the City's collective bargaining process, it is disingenuous for the City to argue that the four minor distinguishing features that it has identified serve to define the product market. [5] Rather, the record is clear that the major distinguishing feature of the plans in the City's purported market is that, unlike other plans, the plans in the market have been approved by the City for inclusion in the Health Benefits Program after a lengthy bidding process. Yet the law is equally clear that the preferences of a single purchaser cannot define a product market, *see, e.g*., *Lockheed Martin Corp., 314 F. Supp. 2d at 1228-29*; *PepsiCo, 1998 U.S. Dist. LEXIS 13440, 1998 WL 547088, at *1*, and that "[p]urchasing constraints on a single consumer, *such as a required* ***[*14]*** *competitive bidding procedure*, do not" create a market of which only that consumer is a member, *see* *Smalley, 13 F.3d at 368* (emphasis added).

The City's argument that it has not defined a "single purchaser" market, as individual enrollees choose the program within the market in which they wish to enroll, may be dismissed out of hand. While the individuals choose the member of the proposed "market" in which to enroll, no plan can become a member of this market without being first selected by the City.

Because the City has defined the relevant market solely with regard to its own preferences as a purchaser of health insurance, its market definition is inadequate as a matter of law. This inadequacy alone is sufficient support for granting summary judgment.

b. The City's Market Definition Is Not Supported by Its Own Expert Report

A further, independent flaw with the City's proposed market definition is that it is not supported by the City's own expert report. Rather than concluding that the two-provider market for "low-cost municipal health benefits" **[*15]** described in the Complaint is a relevant product market for antitrust purposes, the expert report of Professor Frank Lichtenberg concludes that the market for "medical benefits to City employees, retirees, and dependents is a relevant antitrust market." (*See* Decl. of Frank R. Lichtenberg P 20.) His report then analyzes the merger's effects on competition in this market. Notably, Professor Lichtenberg's market definition does not include cost as a bounding factor of the market; unlike the Complaint, it thus does not conclude that GHI and HIP are the only members of the relevant market. (*See id*. Ex. 5.) The City's inability to proffer any evidence in support of reduced competition in the market defined by its own Complaint is fatal to its claims. *See* *Mahmud v. Kaufmann, 607 F. Supp. 2d 541, 555 (S.D.N.Y. 2009)* (noting that, where the market definition stated in the complaint differed from the market definition asserted in opposition to the defendant's summary judgment motion, "courts will not consider, on a

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[5] Indeed, it is undisputed that HIP offers an identical HMO plan to purchasers outside of the Health Benefits Program. (*See* Def.'s 56.1 P 62.)

motion for summary judgment, allegations that were not pled in the complaint and raised for the first time in opposition to a motion for summary judgment"), *aff'd*, *358 Fed. Appx. 229, 2009 WL 4912180 (2d Cir. 2009)*.

III. **[*16]** PLAINTIFF'S MOTION TO AMEND

Where a party is not entitled to amend as a matter of right, the Federal Rules of Civil Procedure still provide that the "Court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. Nevertheless, the Court has broad discretion in deciding whether or not to grant such a request." *Panther Partners, Inc. v. Ikanos Commc'ns, Inc., No. 06 Civ. 12967 (PAC), 2008 U.S. Dist. LEXIS 45907, 2008 WL 2414047, at *2 (S.D.N.Y. June 12, 2008)*; *see also* *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007)*. Factors that are relevant to the exercise of the Court's discretion include (1) the presence of bad faith, dilatory motives, or undue delay on the part of the movant; (2) the potential for prejudice to an opposing party; and (3) whether the sought-after amendment would be futile. *See, e.g.,* *In re PXRE Group, Ltd., Sec. Litig., 600 F. Supp. 2d 510, 523-24 (S.D.N.Y. 2009)*. Ultimately, "*Rule 15(a)* is not a shield against dismissal to be invoked as either a makeweight or a fallback position in response to a dispositive motion." *DeBlasio v. Merrill Lynch & Co., No. 07 Civ. 318 (RJS), 2009 U.S. Dist. LEXIS 64848, 2009 WL 2242605, at *41 (S.D.N.Y. July 27, 2009)*.

Courts are particularly skeptical **[*17]** of motions to amend brought in response to motions for summary judgment. *See* *Ansam Assocs., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 446 (2d Cir. 1985)* ("[P]ermitting the proposed amendment would have been especially prejudicial given the fact that discovery had already been completed and [the defendant] had already filed a motion for summary judgment."); *CL-Alexanders Laing & Cruickshank v. Godlfeld, 739 F. Supp. 158, 167 (S.D.N.Y. 1990)* ("When the motion is made after discovery has been completed and a motion for summary judgment has been filed, leave to amend is particularly disfavored because of the resultant prejudice to defendant.").

Given the flaws in Plaintiff's market definition identified above, and detailed in Defendants' able briefing, Plaintiff's desire to amend its Complaint is unsurprising. In this case, Plaintiff moves to file an amended complaint that would (1) propose an additional market definition of "downstate New York suppliers of commercial medical benefits," (2) revise the complaint's existing market definition to clarify that other companies, in addition to HIP and GHI, participate in that market, and (3) add the "upwards pricing pressure" test as an avenue **[*18]** of proof. [6] The motion is denied, both because (1) Plaintiff has exhibited undue delay, and (2) there would be clear prejudice to the opposing party.

With respect to undue delay, Plaintiff has been on notice of the flaws in its market definition since at least November 14, 2006, when Judge Karas denied its motion for a temporary restraining order. As Judge Karas explained in denying Plaintiff's motion, "there are substantial questions about the market definition analysis that the plaintiff has **[*19]** adopted here. *It appears to be focused on what the City is paying for, and not so much on the market of insurance coverage*." (Tr. Nov. 14, 2006, at 79:6-9 (emphasis added)). He continued that "I think the products . . . are the same, whether they're offered to the City or they're offered to a private large employer, and so I think it raises substantial questions as to whether or not the City's market analysis is really the appropriate starting point." (*Id*. at 79:24 - 80:4.) While Judge Karas indicated that his conclusion was preliminary, and should not be treated as law of the case (*id*. at 80-4:6), Plaintiff was at least on notice as of this date of the potential flaws in its market definition.

In addition to the undue delay noted above, allowing the City's proposed amendment would impose undue prejudice on Defendants. Having required Defendants to spend three and half years defending a lawsuit premised on the City's narrowly defined market, the City would now force Defendants to analyze an entirely different, broader

[6] The "upwards pricing pressure" test "predicts the likely competitive impact of a proposed merger based on how a merger is likely to alter the merged firm's pricing incentives. This analysis can be used in addition to, or instead of, the traditional structural approach of defining relevant markets and calculating market shares to determine the likely effect of a merger." (Decl. of Frank R. Lichtenberg P 107.) The Court notes that its research has not revealed a single decision of a federal court adopting this test. In light of the case law's clear requirement that a Plaintiff allege a particular product market in which competition will be impaired, this absence of authority is hardly surprising.

market. And while the City argues that Defendants would need little additional discovery to defend its revised claims, the Court is persuaded that prudent counsel would **[*20]** insist on additional discovery to defend a lawsuit alleging reduced competition in an entirely different market from the one identified in the Complaint.

Because the City waited unduly long to propose amendments that would require Defendants to conduct substantial additional discovery, leave to amend is denied.

IV. CONCLUSION

For the reasons stated above, Defendants' motion for summary judgment is granted, and Plaintiff's motion to amend is denied. The Clerk of the Court is respectfully directed to terminate the motions located at document numbers 129 and 142 and to close this case.

SO ORDERED.

/s/ Richard J. Sullivan

RICHARD J. SULLIVAN

United States District Judge

Dated: May 11, 2010

New York, New York

End of Document

[E-Z Roll Off, LLC v. County of Oneida]

Court of Appeals of Wisconsin, District Three

January 12, 2010, Submitted on Briefs ; May 11, 2010, Decided; May 11, 2010, Filed

Appeal No. 2009AP775

Reporter

2010 WI App 76 *; 325 Wis. 2d 423 **; 785 N.W.2d 645 ***; 2010 Wisc. App. LEXIS 346 ****; 2010-1 Trade Cas. (CCH) P77,015

E-Z ROLL OFF, LLC, PLAINTIFF-APPELLANT, v. COUNTY OF ONEIDA, DEFENDANT-RESPONDENT.

Subsequent History: Review granted by *E-Z Roll Off, LLC v. Cnty of Oneida, 2010 WI 125, 329 Wis. 2d 371, 791 N.W.2d 380, 2010 Wisc. LEXIS 492 (2010)*

Reversed by *[E-Z Roll Off, LLC v. County of Oneida, 2011 WI 71, 2011 Wisc. LEXIS 356 (2011)]*

Prior History: [**1]** Cir. Ct. No. 2006CV124. APPEAL from a judgment of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge.

Disposition: Reversed and cause remanded.

Core Terms

notice, injunction, antitrust, requirement of notice, notice of claim, provisions, prompt resolution, municipality, exemption, purposes, parties, injunctive relief, circuit court, legislative preference, statutory scheme, violations, argues, give rise, circumstances, discovery, restrain, hinder, prompt

LexisNexis® Headnotes

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

Governments > Local Governments > Claims By & Against

Torts > ... > Liability > Claim Presentation > Actual Notice

Torts > ... > Liability > Claim Presentation > Content & Form

Torts > ... > Liability > Claim Presentation > Time Limitations

HN1[] **Complaints, Prelitigation Notices**

Wis. Stat. § 893.80(1) (2007-08) sets forth two prerequisites to bringing an action against a governmental body such as a county, a notice of injury, *§ 893.80(1)(a)*, and a notice of claim, *§ 893.80(1)(b)*. The notice of injury must be given within 120 days after the happening of the event giving rise to the claim, and supply written notice of the circumstances of the claim. However, failure to give the requisite notice shall not bar action on the claim if the county had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the county. The purpose of the para. (1)(a) notice of injury is to notify the governmental entity of the potential claim so that it might investigate and evaluate.

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

Governments > Local Governments > Claims By & Against

Torts > ... > Liability > Claim Presentation > Actual Notice

Torts > ... > Liability > Claim Presentation > Content & Form

Torts > ... > Liability > Claim Presentation > Time Limitations

HN2[] **Complaints, Prelitigation Notices**

The notice of claim against a governmental body is not subject to any filing deadline. The notice is to contain the claimant's address and an itemized statement of the relief sought, and no action may be brought until the claim has been disallowed. *Wis. Stat. § 893.80(1)(b)* (2007-08). A claim is deemed disallowed if the governmental body fails to respond within 120 days. *Wis. Stat. § 893.80(1g)*. The purpose of the para. (1)(b) notice of claim is to afford the governmental entity an opportunity to effect compromise without suit, and to budget for settlement or litigation.

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

Governments > Local Governments > Claims By & Against

Torts > ... > Liability > Claim Presentation > Actual Notice

Torts > ... > Liability > Claim Presentation > Content & Form

HN3[] **Complaints, Prelitigation Notices**

The notice provisions in *Wis. Stat. § 893.80(1)* (2007-08) apply generally to all actions, not just those in tort or those for money damages. Substantial compliance with the statute is sufficient.

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

Governments > Local Governments > Claims By & Against

Torts > ... > Liability > Claim Presentation > Actual Notice

Torts > ... > Liability > Claim Presentation > Content & Form

HN4[] **Complaints, Prelitigation Notices**

Courts apply the following three-factor test to determine on a case-by-case basis whether a particular statutory claim is excepted from the notice requirements of *Wis. Stat. § 893.80* (2007-08): (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of *§ 893.80(1)* would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

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

Governments > Legislation > Interpretation

Torts > ... > Liability > Claim Presentation > Actual Notice

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

Torts > ... > Liability > Claim Presentation > Content & Form

HN5[] **Standards of Review, De Novo Review**

Whether the notice provisions of *Wis. Stat. § 893.80(1)* (2007-08) apply to specific statutory actions is a question of statutory interpretation and presents a question of law that an appellate court determines independently of a trial court.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

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

HN6[] **Public Enforcement, State Civil Actions**

See *Wis. Stat. § 133.16* (2007-08).

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

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Regulated Practices, Private Actions**

See *Wis. Stat. § 133.18(4)* (2007-08).

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Regulated Practices, Private Actions**

See *Wis. Stat. § 133.18(5)* (2007-08).

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

Governments > Local Governments > Claims By & Against

Torts > ... > Liability > Claim Presentation > Actual Notice

Torts > ... > Liability > Claim Presentation > Content & Form

HN9[] **Complaints, Prelitigation Notices**

"Specific" merely recognizes that the enforcement of a claim must be explicitly provided for by statute to qualify for an exception to *Wis. Stat. § 893.80(1)* (2007-08).

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

Governments > Local Governments > Claims By & Against

Torts > ... > Liability > Claim Presentation > Actual Notice

Torts > ... > Liability > Claim Presentation > Content & Form

HN10[] **Complaints, Prelitigation Notices**

Wis. Stat. § 893.80(5) (2007-08) expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of *§ 893.80*.

Counsel: On behalf of the plaintiff-appellant, the cause was submitted on the briefs of James B. Connell of Crooks, Low & Connell, S.C. of Wausau.

On behalf of the defendant-respondent, the cause was submitted on the brief of John T. Juettner of Crivello Carlson , S.C. of Milwaukee.

Judges: Before Hoover, P.J., Peterson and Brunner, JJ.

Opinion by: HOOVER

Opinion

[*P1] **[**426]** **[***646]** HOOVER, P.J. E-Z Roll Off, LLC, appeals a judgment dismissing its complaint for failure to provide Oneida County a timely notice of injury and claim as required by *WIS. STAT. § 893.80(1)*. [1] E-Z Roll Off primarily argues its WIS. STAT. ch. 133 antitrust claim was exempt from the statutory notice requirements. If not exempt, then E-Z Roll Off contends its notice was timely because **[***647]** there was a continuing violation. As its final alternative, E-Z Roll Off asserts Oneida County had actual notice and was not prejudiced by the failure to give the statutory notice. We agree ch. 133 antitrust claims are exempt from *§ 893.80(1)*'s notice requirements and, therefore, reverse the judgment and remand.

BACKGROUND

[*P2] E-Z Roll Off was in the solid waste hauling business, providing dumpsters to its customers. In June 2003, Oneida County executed an agreement with another waste hauling company, Waste Management, Wisconsin,

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[**2] [**427]** Inc. As part of that agreement, Waste Management was charged a preferential $ 5.25 per ton rate for waste it delivered to the County's transfer station. Other waste haulers, including E-Z Roll Off, were charged $ 44 or $ 54 per ton, depending on whether the hauler delivered enough waste to the County annually to earn a rebate.

[*P3] E-Z Roll Off's owners, Todd and Paula Laddusire, were unaware of the Waste Management contract until February 2004, when one of their employees inadvertently saw a scale ticket showing Waste Management's rate. [2] The Laddusires promptly requested a meeting with the County's solid waste director, Bart Sexton. At a February 17, 2004 meeting, the Laddusires expressed their concerns with the Waste Management contract, opining it created a monopoly and stating they would take their waste elsewhere unless the County reduced E-Z Roll Off's disposal rate. Sexton refused to reduce E-Z Roll Off's rate.

[*P4] The Laddusires then filed complaints with various governmental entities, including the Wisconsin Department of Agriculture, Trade, and Consumer Protection. As a remedy, the complaint requested reimbursement of "the amount … paid over [$]5.25/ton, … which is about [$]98,000," and that "the monopoly … be broken [and] criminal charges filed against all parties involved." The Department forwarded a copy of the complaint to the County landfill, but took no further **[**428]** action. The Department's cover letter indicated the County had the option to provide a response, which the Department would place in its file. Sexton replied to the complaint, which he had received May 8, 2004, in a letter to the Department and the Laddusires. Sexton asserted the Laddusires were always aware of the contract terms, and stressed the contract resulted from an open bidding process. He also denied the Laddusires' claim that payments had been made "under the table."

[*P5] On September 28, 2005, E-Z Roll Off filed with the County a notice of injury alleging violations of WIS. STAT. ch. 133, and a statement of claim indicating a loss of $ 1,199,100.45 in past and future **[****4]** lost earnings. The claim was disallowed and E-Z Roll Off filed the present action on April 20, 2006. Ultimately, the circuit court granted the County's motion for summary judgment, dismissing the case. The court concluded *WIS. STAT. § 893.80(1)*'s notice requirements applied, E-Z Roll Off's notice was not timely, and E-Z Roll Off failed to demonstrate actual notice and lack of prejudice.

DISCUSSION

[*P6] ***HN1***[] *WISCONSIN STAT. § 893.80(1)* sets forth two prerequisites to bringing an action **[***648]** against a governmental body such as Oneida County, a notice of injury, *§ 893.80(1)(a)*, and a notice of claim, *§ 893.80(1)(b)*. [3] The notice of injury must be given "[w]ithin 120 days after the happening of the event giving rise to the claim," and supply "written notice of the circumstances of the claim." *WIS. STAT. § 893.80(1)(a)*. However, "[f]ailure **[**429]** to give the requisite notice shall not bar action on the claim if the [county] had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the [county]." ***Id.*** The purpose of the *para. (1)(a)* notice of injury is to notify the governmental entity of the potential **[****5]** claim so that it might investigate and evaluate. ***Griffin v. Milwaukee Transp. Servs., Inc****., 2001 WI App 125, PP14-15, 246 Wis. 2d 433, 630 N.W.2d 536*.

[*P7] ***HN2***[] The notice of claim, on the other hand, is not subject to any filing deadline. ***Vanstone v. Town of Delafield****, 191 Wis. 2d 586, 593, 530 N.W.2d 16 (Ct. App. 1995)*; *see also* ***Thorp v. Town of Lebanon****, 2000 WI 60, P28, 235 Wis. 2d 610, 612 N.W.2d 59*. That notice is to contain the claimant's address and "an itemized

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[2] The County disputes this fact, asserting the Laddusires were aware of the contract when it was created. However, because summary judgment was granted to the County, the facts must be construed in E-Z Roll Off's favor. *See* ***Kuehl v. Sentry Select Ins. Co****., 2009 WI App 38, P5, 316 Wis. 2d 506, 765 N.W.2d 860*. **[****3]** Regardless, the fact is not critical to our decision.

[3] *WISCONSIN STAT. § 893.80(1)(a)* actually uses the word "claim," not "injury." The case law, however, recognizes this component of the statute as the notice of injury. ***Vanstone v. Town of Delafield****, 191 Wis. 2d 586, 591 n.5, 530 N.W.2d 16 (Ct. App. 1995)*.

statement of the relief sought," and no action may be brought until the claim has been disallowed. *WIS. STAT. § 893.80(1)(b)*. A claim is deemed disallowed if the county fails to respond within 120 days. *WIS. STAT. § 893.80(1g)*. The purpose of the *para. (1)(b)* notice of claim is to afford the governmental entity an opportunity to effect compromise without suit, and to budget for settlement or litigation. ***Griffin**, 2001 WI App 125, 246 Wis. 2d 433, PP14-15, 630 N.W.2d 536*

[*P8] Our supreme court has held *HN3*[] *WIS. STAT. § 893.80(1)*'s **[****6]** notice provisions apply generally to all actions, not just those in tort or those for money damages. *See* ***DNR v. City of Waukesha**, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994)*, *overruled in part by* ***State ex rel. Auchinleck v. Town of LaGrange**, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996)* (holding the "all actions" language was overbroad). However, the court held substantial compliance with the statute was sufficient. ***Id**. at 198*.

[*P9] [430]** Two years later, in ***Auchinleck**, 200 Wis. 2d at 596*, the supreme court nonetheless held *WIS. STAT. § 893.80(1)*'s notice requirements do not apply to open records and open meetings actions because the statutes were conflicting, primarily because the open records and meetings laws specify procedures for immediate relief. The court also rejected the Town's argument that effect must be given to the notice statute's intent to afford a municipality an opportunity to settle the claim without litigation. ***Id**. at 593, 595-96*. It reasoned that "allowing a municipality an additional 120 days to contemplate how to respond to an open records or open meetings enforcement action in large part duplicates the process in which it already engaged prior to its initial response **[****7]** [denying the records request or deciding to hold a closed meeting]." [4] ***Id**. at 596*.

[*P10] [*649]** Subsequently, in ***Gillen v. City of Neenah**, 219 Wis. 2d 806, 821-22, 826-27, 580 N.W.2d 628 (1998)*, the supreme court held *WIS. STAT. § 893.80(1)(b)* does not apply to public trust doctrine cases, primarily because the relevant statute specifically mentions injunctive relief. The statute at issue there states in its entirety: "Every violation of this chapter is declared to be a public nuisance and may be **[**431]** prohibited by injunction and may be abated by legal action brought by any person." *WIS. STAT. § 30.294*. The court explained:

> *Wisconsin Stat. § 30.294* expressly allows **[****8]** a plaintiff to seek immediate injunctive relief to prevent injury. The enforcement procedures provided in *§ 30.294*, are inconsistent with *Wis. Stat. § 893.80(1)(b)*, which requires a plaintiff to provide a governmental body with a notice of claim, and to wait 120 days or until the claim is disallowed before filing an action. Therefore, the general application of *§ 893.80(1)(b)* in this case frustrates the plaintiffs' specific right to injunctive relief under *§ 30.294*.

***Gillen**, 219 Wis. 2d at 822*. The court also relied in part on the nature of public trust doctrine cases, which are enforced on behalf of the state. ***Id**. at 827*.

[*P11] Suffice it to say, since the ***City of Waukesha*** decision, Wisconsin courts "have identified [at least eight] statutes which provide specific procedures for bringing actions in which municipal entities are defendants or respondents, but to which the notice … requirement[s] of *WIS. STAT. § 893.80(1)* do[] *not* apply." ***Oak Creek Citizen's Action Comm. v. City of Oak Creek**, 2007 WI App 196, P6, 304 Wis. 2d 702, 738 N.W.2d 168* (collecting six cases, and recognizing a seventh exception); *see also* ***Kapischke v. Walworth County**, 226 Wis. 2d 320, 326-27, 595 N.W.2d 42 (Ct. App. 1999)* **[****9]** (an eighth statutory exception recognized, not collected in ***Oak Creek***).

[*P12] *HN4*[] We apply the following three-factor "test," first set forth in ***Town of Burke v. City of Madison**, 225 Wis. 2d 615, 625, 593 N.W.2d 822 (Ct. App. 1999)*, to determine on a case-by-case basis whether a particular **[**432]** statutory claim is excepted from *WIS. STAT. § 893.80*'s notice requirements: [5]

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[4] In ***State ex rel. Auchinleck v. Town of LaGrange**, 200 Wis. 2d 585, 596, 547 N.W.2d 587 (1996)*, the court also observed: "Further, *Wis. Stat. § 893.80(5)* expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of *§ 893.80*." This effectively overruled the court's prior holding in ***DNR v. City of Waukesha**, 184 Wis. 2d 178, 191-93, 515 N.W.2d 888 (1994)*, where the court had concluded *subsec. (5)* only applied to *subsec. (3)*'s damage caps, not *subsec. (1)*'s notice provisions. ***Id**. at 192*.

(1) whether there is a specific statutory scheme for which the plaintiff seeks exemption;

(2) whether enforcement of *§ 893.80(1)* would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and

(3) whether the purposes for which *§ 893.80(1)* was enacted would be furthered by requiring that a notice of claim be filed.

***Oak Creek**, 2007 WI App 196, 304 Wis. 2d 702, P7, 738 N.W.2d 168* **HN5**[] Whether the notice provisions of *WIS. STAT. § 893.80(1)* apply to specific statutory actions is a question of statutory interpretation and presents a question of law that we determine independently of the circuit court. ***Nesbitt Farms, LLC v. City of Madison**, 2003 WI App 122, P4, 265 Wis. 2d 422, 665 N.W.2d 379*.

[*P13] [*650]** E-Z Roll Off, relying heavily on ***Gillen***, argues for an exception to *WIS. STAT. § 893.80(1)*'s notice requirements for its WIS. STAT. ch. 133 antitrust claim. The primary focus here is on *WIS. STAT. § 133.16*, injunction; pleading; practice. [6] That section consists of a single, lengthy paragraph. In relevant part, it states:

> ***HN6***[] **[**433]** Any circuit court may prevent or restrain, by *injunction* or otherwise, any violation of this chapter. The department of justice, any district attorney or any person by complaint may institute actions or proceedings to prevent or restrain a violation of this chapter, setting forth the cause and grounds for the intervention of the court and praying that such violation, whether intended or continuing be enjoined or prohibited. When the parties informed against or complained of have been served with **[****11]** a copy of the information or complaint and cited to answer it, the court *shall proceed, as soon as may be in accordance with its rules*, to the hearing and determination of the case; and pending the filing of the answer to such information or complaint may, *at any time, upon proper notice, make such temporary restraining order or prohibition* as is just. Whenever it appears to the court that the ends of justice require that other persons be made parties to the action or proceeding the court may cause them to be made parties in such manner as it directs. The party commencing or maintaining the action or proceeding may demand and recover the cost of suit including reasonable attorney fees. … Copies of all pleadings filed under this section shall be served on the department of justice.

WIS. STAT. § 133.16 (emphasis added). Also relevant to the statutory scheme here are two provisions of *WIS. STAT. § 133.18*:

> (4) ***HN7***[] A cause of action arising under this chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action.
>
> (5) ***HN8***[] Each civil action under this chapter and each motion or other proceeding in such action *shall be expedited in every way and shall **[****12]** be heard at the earliest practicable date*. (Emphasis added.)

[434] I. Whether there is a specific statutory scheme for which the plaintiff seeks exemption.**

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[5] In ***Town of Burke v. City of Madison**, 225 Wis. 2d 615, 625, 593 N.W.2d 822 (Ct. App. 1999)*, we merely observed that prior decisions had focused **[****10]** on three factors. In ***Nesbitt Farms, LLC v. City of Madison**, 2003 WI App 122, P9, 265 Wis. 2d 422, 665 N.W.2d 379*, we noted ***Town of Burke*** had identified three factors "which shed light on the question." Eventually, we referred to the three factors as a "test." *See* ***Oak Creek Citizen's Action Comm. v. City of Oak Creek**, 2007 WI App 196, P7, 304 Wis. 2d 702, 738 N.W.2d 168*.

[6] Although titles are not part of statutes, *WIS. STAT. § 990.001(6)*, they may be helpful in interpretation. ***Aiello v. Village of Pleasant Prairie**, 206 Wis. 2d 68, 73, 556 N.W.2d 697 (1996)*. As the issue here is one of statutory interpretation, we recite the title to provide context.

[*P14] We first address whether there is a specific statutory enforcement scheme. As noted, the statutory scheme addressed in ***Gillen*** consisted of a single sentence recognizing the availability of injunctive relief. Here, the County concedes *WIS. STAT. § 133.16*'s mention of injunctive relief, alone, might thus satisfy the first factor of the test. Nonetheless, it argues the WIS. STAT. ch. 133 scheme is not specific enough to qualify. Specifically, the County contends *§ 133.16* is too vague because it uses terms in addition to injunction, allowing a court to prevent or restrain any violations by "injunction or otherwise," and permitting parties to accomplish this through "actions or proceedings."

[*P15] The County misunderstands the "specific" requirement. ***HN9***[] "Specific" merely **[****13]** recognizes that the *enforcement* of a claim must be explicitly provided for by statute to qualify for an exception to *WIS. STAT. § 893.80(1)*. *See* ***Gillen****, 219 Wis. 2d at 823, 826-27*. When we first recognized the three-factor analysis in ***Burke***, we cited ***City of Racine v. Waste [***651] Facility Siting Board****, 216 Wis. 2d 616, 575 N.W.2d 712 (1998)*, for the "specific statutory scheme" factor. *See* ***Burke****, 225 Wis. 2d 625 n.3*. The supreme court held the factor had not been satisfied in ***City of Racine*** because of "the lack of specific statutory provisions for enforcement of the claim." ***Burke****, 225 Wis. 2d at 625 n.3*. Indeed, the plaintiffs in ***City of Racine****, 216 Wis. 2d at 626-27*, conceded there were no enforcement provisions for violations of the statute at issue there.

[*P16] The County also argues *WIS. STAT. § 133.16*'s references to a "complaint" and to "actions or proceedings" **[**435]** suggest that WIS. STAT. ch. 133 claims are brought as traditional actions pursuant to the rules of civil procedure and, therefore, are subject to *WIS. STAT. § 893.80(1)*'s notice requirements. [7] This argument, however, does not account for the ***Gillen***or ***Nesbitt Farms*** decisions.

[*P17] The statute in ***Gillen***, *WIS. STAT. § 30.294*, similarly provides for enforcement of injunctions generally by "legal action," without providing any specific mechanisms. Thus, WIS. STAT. ch. 30 actions must also be brought by complaint and prosecuted in the usual manner. *See* ***Gillen****, 219 Wis. 2d at 837* (C.J. Abrahamson, concurring). Similarly, *WIS. STAT. § 32.05(11)*, at issue in ***Nesbitt Farms***, provides that appeals brought under it "shall proceed as an action in [circuit] court subject to all the provisions of law relating to actions originally brought therein." That statute does, however, set forth procedural guidance, analogous to that found here in *WIS. STAT. §§ 133.16* and *133.18*. *See* ***Nesbitt Farms****, 2003 WI App 122, PP5, 10, 265 Wis. 2d 422, 665 N.W.2d 379*

[*18] *WISCONSIN STAT. § 30.294* constitutes a specific statutory enforcement scheme even though it consists of a single, vague **[****15]** sentence mentioning "injunction" and "legal action" and providing no further enforcement mechanism, procedural guidance, or deadlines. *See* ***Gillen****, 219 Wis. 2d at 821-22*. If that section constitutes a specific statutory enforcement scheme, then so too must the much more specific provisions of **[**436]** *WIS. STAT. §§ 133.16* and *133.18*, which are comparable to those found sufficient in ***Nesbitt Farms***. [8] Therefore, the first factor is satisfied in this case.

II. Whether enforcement of *WIS. STAT. § 893.80(1)* would hinder a legislative preference for a prompt resolution [**16] of the type of claim under consideration.**

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[7] The County also asserts the "actions and proceedings" **[****14]** language suggests other remedies, in addition to injunctions, are also appropriate in WIS. STAT. ch 133 actions. However, *WIS. STAT. § 133.16* and *133.18* *specifically* provide for the recovery of costs, attorney fees, and treble damages. This serves to strengthen, not weaken, the conclusion that there is a specific statutory enforcement scheme.

[8] In addition to the provisions of *WIS. STAT. §§ 133.16* and *133.18* recited in this decision, those sections also specify a statute of limitations, tolling provisions, an allowance for treble damages, and state enforcement procedures. Additionally, like *WIS. STAT. § 30.294*, the statute at issue in ***Gillen v. City of Neenah****, 219 Wis. 2d 806, 580 N.W.2d 628 (1998)*, both sections apply only to the specific violations provided for by the chapter in which they are set forth. *See* *WIS. STAT. §§ 133.16*, *133.18*; ***Gerol v. Arena****, 127 Wis. 2d 1, 12, 377 N.W.2d 618 (Ct. App. 1985)* (WIS. STAT. ch. 133 remedies are "confined to violations under ch. 133").

[*P19] We next address whether enforcement of *WIS. STAT. § 893.80(1)* would hinder a legislative preference for a prompt resolution of WIS. STAT. ch. 133 claims. In the past, courts have often found this second factor satisfied where a specific statutory enforcement scheme established precise procedural time limits **[***652]** that conflicted with the 120-day timelines of *§§ 893.80(1)* and *(1g)*. *See* ***Oak Creek**, 2007 WI App 196, PP5, 9, 304 Wis. 2d 702, 738 N.W.2d 168*; ***Burke**, 225 Wis. 2d at 620, 625-26*; ***Gamroth v. Village of Jackson**, 215 Wis. 2d 251, 258-59, 571 N.W.2d 917 (Ct. App. 1997)*. However, specific time limits are not the sole indicator of a legislative preference for prompt resolution.

[*P20] Rather, prior decisions have also focused on statutory statements indicating such a preference. *See* **[**437]** ***Auchinleck**, 200 Wis. 2d at 592* (response required "as soon as practicable and without delay"); ***Nesbitt Farms**, 2003 WI App 122, 265 Wis. 2d 422, P11, 665 N.W.2d 379* (condemnation appeals "shall have precedence over all other actions not then on trial"); ***Burke**, 225 Wis. 2d at 620, 625-26* ("An action contesting an annexation shall be given preference in the circuit court."). There are similar statutory statements in this instance. *WISCONSIN STAT. § 133.16* **[****17]** provides that "the [circuit] court shall proceed, as soon as may be in accordance with its rules, to the hearing and determination of the case." Further, *WIS. STAT. § 133.18(5)* requires, "Each civil action under this chapter and each motion or other proceeding in such action shall be expedited in every way and shall be heard at the earliest practicable date." That the legislature used such strong language, i.e., shall, and twice set forth requirements for prompt resolution, supports a conclusion that the second factor is satisfied.

[*P21] Additionally, in ***Gillen***, the supreme court relied solely on the mere suggestion of a preference for prompt resolution, based on the statute's allowance for injunctions, holding:

> *Wisconsin Stat. § 30.294* expressly allows a plaintiff to seek immediate injunctive relief to prevent injury. The enforcement procedures provided in *§ 30.294*, are inconsistent with *Wis. Stat. § 893.80(1)(b)*, which requires a plaintiff to provide a governmental body with a notice of claim, and to wait 120 days or until the claim is disallowed before filing an action.

Gillen**, 219 Wis. 2d at 822*. The concurrence in that case criticized this immediacy rationale, observing that it "obfuscates **[*18]** the differences between a preliminary injunction and a permanent injunction." ***Id**. at 837* (C.J. Abrahamson, concurring). Here, on the other hand, *WIS. STAT. § 133.16* provides not only for injunctive **[**438]** relief generally, but also specifies that a court, "pending the filing of the answer … may, at any time, upon proper notice, make such temporary restraining order or prohibition as is just." This provides further indication that the legislature intended prompt relief for WIS. STAT. ch. 133 plaintiffs.

[*P22] Finally, we have recognized "that hindering a legislative preference for 'promptness' is not the only way in which the requirements of *WIS. STAT. § 893.80(1)* might interfere with legislative purposes." ***Nesbitt Farms**, 2003 WI App 122, 265 Wis. 2d 422, P13, 665 N.W.2d 379*. Rather, other significant conflicts may also support an exception to *§ 893.80(1)* under the second factor of the analysis. *See* ***id**., PP13-17* (applying *§ 893.80(1)* to *WIS. STAT. § 32.05(11)* would limit ability of additional parties to join an appeal, thus conflicting with legislative preference "for efficiency and consistency in resolving compensation disputes").

[*P23] Of importance here, *WIS. STAT. § 133.18(4)* provides, "A cause of action arising under this **[****19]** chapter does not accrue until the discovery, by the aggrieved person, of the facts constituting the cause of action." Yet, a claim might be extinguished before discovery of the facts underlying it by the application of *§ 893.80(1)(a)*, which requires that notice of the injury must be provided "[w]ithin 120 days after the happening of the event giving rise to the claim." Indeed, here the **[***653]** circuit court concluded the "event" was the creation of the contract, rather than the Laddusires' subsequent discovery of its terms.

[*P24] By hindering a party's ability to bring timely actions to enforce violations, applying the 120-day limitations period would be contrary to the legislature's intent that WIS. STAT. ch. 133 "be interpreted in a manner which gives the most liberal construction to **[**439]** achieve the aim of competition." *WIS. STAT. § 133.01*. In light of the legislature's multiple indications of a preference for prompt resolution, and the conflict with *WIS. STAT. § 133.18(4)*, we conclude the second factor is satisfied in this case.

III. Whether the purposes for which *WIS. STAT. § 893.80(1)* was enacted would be furthered by requiring that a notice of claim be filed.

[*P25] Finally, we address whether the **[****20]** purposes for which *WIS. STAT. § 893.80(1)* was enacted would be furthered by requiring that a notice of claim be filed. In other words, should the notice requirements still apply despite the conflicts with *WIS. STAT. § 133.16* and *133.18*? *See* ***Auchinleck**, 200 Wis. 2d at 595-96*; ***Nesbitt Farms**, 2003 WI App 122, 265 Wis. 2d 422, PP21-23, 665 N.W.2d 379*

[*P26] We first observe that the application of this third factor is a nebulous matter. When the first two factors of the analysis have been found to favor exemption from *WIS. STAT. § 893.80(1)*, to our knowledge no court has concluded the third factor did not also favor exemption. Thus, neither has any court addressed how such a conclusion, that the third factor militated against exemption, would affect the outcome of the analysis. [9] In fact, the County concedes "no court has declared whether all of the prongs must be fulfilled for **[**440]** the notice requirements of *§ 893.80* to give way." Further contributing to the **[***654]** nebulosity of the third factor's application, it is unclear whether we should focus only on the statutes or also on the facts. In most cases courts **[**441]** have addressed the third factor only by comparing the statutes at issue, rather than addressing the particular facts of the **[****21]** given case. However, in ***Oak Creek**, 2007 WI App 196, 304 Wis. 2d 702, PP10-12, 738 N.W.2d 168*, for example, we addressed both.

[*P27] Aside from simply restating the purposes underlying the notice of injury and notice of claim provisions, the County provides no argument applying them in the context of WIS. STAT. ch. 133 claims, generally, or as they apply to the specific facts of this case. We may treat this failure to sufficiently address the issue as a concession. *See* ***State v. Flynn**, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994)*. E-Z Roll Off argues there was no need to provide notice for investigation purposes, because the County entered into the contract and therefore already knew its terms. It further argues antitrust actions will frequently involve continuing violations and, therefore, the need for prompt investigation will not exist.

[*P28] By the very nature of WIS. STAT. ch. 133 antitrust claims, aggrieved parties often will not immediately know of the circumstances giving rise to a claim. The prohibited deals and conspiracies will be secret and, thus, the

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[9] In both ***Auchinleck**, 200 Wis. 2d at 595-96* and ***Gillen**, 219 Wis. 2d at 822-24*, the supreme court observed the conflicting, specific statutory schemes had to take precedence over the more general notice statute. Thus, it is unclear whether the third factor could outweigh the first two factors in any given case.

When first setting forth the three-factor analysis in ***Burke**, 225 Wis. 2d at 625* and nn.3-5, we cited a different case for the existence of each factor. For the third factor, we cited ***City of Waukesha**, 184 Wis. 2d 178, 515 N.W.2d 888*Recall, however, that case was where the supreme court first recognized *WIS. STAT. § 893.80(1)* applied in all types of cases. ***Id**. at 202*. The court there did not engage in what is now our three-factor test. To the contrary, it refused to consider a claim that an exception existed for WIS. STAT. ch. 144 (1991-92) enforcement actions even though the chapter's enforcement provisions, WIS. STAT. §§ 144.98 and 144.99 (1991-92), explicitly provided that all violations of the chapter constituted public nuisances enforceable by injunction. Yet, that is precisely what the subsequent **[****22]** ***Gillen*** decision concluded was sufficient to create an exception, there, without consideration of the third ***Burke*** factor. *See* ***Gillen**, 219 Wis. 2d at 821-22, 826-27*.

The court declined in ***City of Waukesha**, 184 Wis. 2d at 193 n.10*, to address whether there should be an exception because, although the DNR had requested an injunction, ***id**. at 186*, it had not requested immediate relief via a *temporary* injunction. In ***Gillen***, the court abrogated ***City of Waukesha***, explicitly rejecting any requirement that injunctive relief, in any form, even be requested to recognize an exception to *WIS. STAT. § 893.80(1)*'s notice requirements, relying instead on the enforcement scheme's provision for injunctive relief. ***Gillen**, 219 Wis. 2d at 826 (per curiam), 834-35* (C.J. Abrahamson, concurring) (criticizing the per curiam for failing to acknowledge it was overruling ***City of Waukesha***). Thus, our reliance on the much maligned ***City of Waukesha*** decision to recognize a third factor for the "exceptions test," may not have been the best choice. Despite our concerns with the third factor, we are obliged to apply it. *See* ***Cook v. Cook**, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997)* (court of appeals may not overrule, **[****23]** modify, or withdraw language from a prior published opinion). Perhaps the issue is ripe for review by our supreme court; it has yet to address our recognition of a three-factor test.

legislature has provided for tolling commencement of the limitations **[****24]** period for bringing claims until discovery of the conduct. *See* *WIS. STAT. § 133.18(4)*. Such conduct will, however, be known to the parties partaking in it. Hence, E-Z Roll Off is correct that there is little need to provide for prompt investigation into the circumstances giving rise to the claim. "In short, a [ch. 133 antitrust action] is not like a suit to recover damages for injuries sustained in a slip-and-fall on municipal property, of which, absent notice under *WIS. STAT. § 893.80(1)*, a municipality may know absolutely nothing prior to suit." ***Nesbitt Farms**, 2003 WI App 122, 265 Wis. 2d 422, P25, 665 N.W.2d 379*

[*P29] **[**442]** We further agree with E-Z Roll Off that in the case of continuing violations, there is also a diminished need to provide an opportunity for prompt investigation. *See* *WIS. STAT. § 133.01* (ch. 133 is intended "to safeguard the public against the creation or *perpetuation* of monopolies") (emphasis added). Additionally, here, E-Z Roll Off did promptly provide actual notice of the circumstances giving rise to its claim when it met with Sexton and expressed dissatisfaction with Waste Management's preferential pricing, and claimed that preference created a monopoly. Thus, in any event, the purposes of notice **[****25]** were honored here.

[*P30] Neither party specifically addresses the *WIS. STAT. § 893.80(1)(b)* purpose of allowing the municipality an opportunity to effect compromise without suit, and to budget for settlement or litigation. However, in this case, E-Z Roll Off did eventually provide that notice and the claim was disallowed prior to filing the action. [10] Thus, again, the purposes of notice were honored here.

[*P31] Regarding the interactions of the statutes generally, a defendant municipality may be unable to simply negotiate a compromise on a WIS. STAT. ch. 133 claim because, even if a private party plaintiff **[***655]** settles its claim, the State might nonetheless prosecute the conduct criminally. In fact, *WIS. STAT. § 133.16* requires that copies of all ch. 133 pleadings be served on the department of justice. Thus, the opportunity-to-compromise purpose is less important in ch. 133 actions. Further, while *WIS. STAT. § 893.80(1)(b)*'s 120-day delay may allow municipalities some opportunity to budget for defending a claim, the legislature has strongly expressed its intent that ch. 133 actions be decided **[****26]** swiftly. **[**443]** The general notice statute cannot override *WIS. STAT. §§ 133.16*'s and *133.18*'s specific provisions requiring prompt resolution. *See* ***Auchinleck**, 200 Wis. 2d at 595-96*; ***Gillen**, 219 Wis. 2d at 822-24*. "Further, ***HN10***[] *Wis. Stat. § 893.80(5)* expressly states that specific rights and remedies provided by other statutes take precedence over the provisions of *§ 893.80*." ***Auchinleck**, 200 Wis. 2d at 596*.

[*P32] Finally, in ***Gillen***, which preceded our recognition of a three-factor test, the supreme court recognized an exception to *WIS. STAT. § 893.80(1)* without any discussion of the third factor. [11] Rather, it relied on a conflicting statutory scheme (factors one and two) and the fact that the statutory claims at issue there could be enforced by private citizens on behalf of the public interest. ***Gillen**, 219 Wis. 2d at 820-21, 826-27*. WISCONSIN STAT. ch. 133 claims are likewise brought in the public interest:

> The Wisconsin legislature determined that private, civil antitrust suits are important methods of enforcing chapter 133. To encourage private enforcement, the legislature built incentives into the statute. These include tolling the statute of limitations under certain circumstances, allowing **[****27]** the cost of the suit, including reasonable attorney fees to prevailing claimants, awarding treble damages, and granting expedited treatment to civil antitrust actions in the courts. Under this legislative scheme, a private party "performs the office of a private attorney general," when bringing a civil antitrust action and significantly supplements the government's limited resources for enforcing ***antitrust law***.

[444]** ***Carlson & Erickson Bldrs., Inc. v. Lampert Yards, Inc**., 190 Wis. 2d 650, 663-64, 529 N.W.2d 905 (1995)* (internal citations omitted). While not comfortably fitting within the third-or any other-factor of the analysis, this "private attorney general" similarity provides further support for recognizing an exception pursuant to ***Gillen***. [12]

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[10] As noted *supra*, the *WIS. STAT. § 893.80(1)(b)* notice of claim is not subject to a filing deadline.

[11] Thus, we reject the County's bald assertion, lacking citation, that the ***Gillen*** court proceeded to examine all three factors.

By the Court. -- Judgment reversed and cause remanded.

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[12] Because we conclude WIS. STAT. ch. 133 claims are exempt from *WIS. STAT. § 893.80(1)*'s notice requirements, we need not resolve E-Z Roll Off's remaining arguments regarding continuing violations and actual notice with lack of prejudice. *See* ***State v. Castillo**, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997)* (cases should be **[****28]** decided on the narrowest possible grounds).

Integrated Sys. & Power, Inc. v. Honeywell Int'l, Inc.

United States District Court for the Southern District of New York

May 13, 2010, Decided; May 13, 2010, Filed

09 CV 5874 (RPP)

Reporter

713 F. Supp. 2d 286 *; 2010 U.S. Dist. LEXIS 47283 **; 2010-2 Trade Cas. (CCH) P77,110

INTEGRATED SYSTEMS AND POWER, INC., Plaintiff - against - HONEYWELL INTERNATIONAL, INC., Defendant.

Prior History: *Integrated Sys. & Power v. Honeywell Int'l, Inc., 2009 U.S. Dist. LEXIS 78476 (S.D.N.Y., Sept. 1, 2009)*

Core Terms

distributors, dealers, horizontal, bids, conspiracy, manufacturer, termination, discounters, vertical, rule of reason, complaints, alleges, per se violation, antitrust, hotel, alarm system, brand, service contract, fire-detection, cases, relevant market, installation, customers, products, Sherman Act, territorial, rig, motion to dismiss, license, factual allegations

LexisNexis® Headnotes

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

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

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Motions to Dismiss, Failure to State Claim**

Generally, a complaint must merely contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. In recent years the United States Supreme Court has clarified and refined the appropriate pleading standard: *Rule 8(a)(2)* still requires a showing, rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests. The Supreme Court recognizes the threshold requirement of *Rule 8(a)(2)* that the plain statement possess enough heft to show that the pleader is entitled to relief. Courts do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. In determining whether a complaint states a claim to relief that is plausible on its face, a court must take all of the factual allegations in the complaint as true, but is not bound to accept as true a legal conclusion couched as a factual allegation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The United States Supreme Court has stated that it is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act, *15 U.S.C.S. § 1*. It has long been recognized that agreements between competitors at the same level of the market structure to allocate territories, fix prices or otherwise minimize competition, referred to as horizontal restraints, are classic examples of per se violations of *§ 1* of the Sherman Act. Conversely, agreements between persons at different levels of a market structure, for example between manufacturer and distributor or between franchisor and franchisee, referred to as vertical restraints, are analyzed under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN3[] **Vertical Restraints, Nonprice Restraints**

The Second Circuit has held that a manufacturer's decision to discontinue the distributorship of one distributor in accordance with the terms of their contract is judged under the rule of reason, even when the manufacturer's decision came at the behest and insistence of another distributor. It has always been the prerogative of a manufacturer to decide with whom it will deal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

Evidence > Inferences & Presumptions > Presumptions > Creation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN4[] **Vertical Restraints, Nonprice Restraints**

A vertical restraint is not illegal per se unless it includes some agreement on price or price levels, even when the vertical restraint came about as a result of price complaints from a competing dealer. There is a presumption in favor of a rule-of-reason standard. While vertical restraints, such as a manufacturer terminating a distributor, have the potential to restrain intrabrand competition, they also have real potential to stimulate interbrand competition, which is the primary concern of ***antitrust law***.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN5[] **Cartels & Horizontal Restraints, Price Fixing**

Evidence of complaints from competing retailers to a manufacturer about price competition is insufficient to show a horizontal conspiracy. Where the evidence does not suggest that the competing retailers conspired to boycott the manufacturer unless it terminated the plaintiff, the terminated plaintiff cannot proceed under a horizontal group boycott analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

HN6[] **Cartels & Horizontal Restraints, Sherman Act**

The United States Supreme Court cases have long been clear that parallel conduct is not sufficient to show agreement and, in order to prove a Sherman Act, *15 U.S.C.S. § 1* antitrust claim, a plaintiff must offer evidence tending to exclude the possibility of independent action. At the pleading stage, when allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. In other words, even at the pleading stage, a plaintiff must state enough facts to plausibly suggest agreement, and factual allegations that possibly suggest agreement or are merely consistent with agreement are insufficient.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN7[] **Cartels & Horizontal Restraints, Sherman Act**

A conspiracy to eliminate competition with respect to one component within a business involving a package of numerous products and services, within one brand, within an industry in which a plaintiff has not alleged a lack of substitutes is not the type of restraint that is so manifestly anticompetitive, or that would always or almost always tend to restrict competition and decrease output, nor is it a restraint with which courts have had considerable experience such that a per se rule would be appropriate. Similarly, the alleged restraint on one component of the larger package of goods and services provided by authorized dealers within a single brand is not the type of naked restraint that would merit a quick-look analysis without an analysis of the industry at issue.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN8[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

A manufacturer's decision to eliminate a dealer is evaluated under the rule of reason, even where that decision was the result of price complaints from competing dealers and based on those competing dealers' impermissible desire to restrain competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

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

HN9[] Per Se Rule & Rule of Reason, Sherman Act

In order to plead an antitrust violation under the rule of reason, a plaintiff must allege a relevant market, including both a product market and a geographic market. While acknowledging that market definition is frequently a fact-intensive inquiry where courts are hesitant to grant a motion to dismiss, the Second Circuit has stated that to survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes, analysis of the interchangeability of use or the cross, elasticity of demand, and it must be plausible. Cases in which dismissal on the pleadings is appropriate frequently involve either failed attempts to limit a product market to a single brand that competes with potential substitutes or failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

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

HN10[] Per Se Rule & Rule of Reason, Sherman Act

Dismissal is appropriate in an antitrust case where the alleged product market is defined without reference to the rule of reasonable interchangeability and cross-elasticity of demand or where it clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in the plaintiff's favor. Courts in the United States District Court for the Southern District of New York have consistently held that single brand name product cannot define a relevant market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Evidence > Burdens of Proof > Allocation

HN11[] Per Se Rule & Rule of Reason, Sherman Act

Under the rule of reason, in order to prove a Sherman Act, *15 U.S.C.S. § 1*, violation, a plaintiff must also show an adverse effect on competition, not merely injury to itself. The plaintiff must show that the defendant's conduct had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice. Like the relevant market definition, the adverse effect on competition is a requirement that must be alleged at the pleading stage and can be the basis for a motion to dismiss.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN12[] Motions to Dismiss, Failure to State Claim

The United States District Court for the Southern District of New York strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under *Fed. R. Civ. P. 12(b)(6)*.

Counsel: **[**1]** For Integrated Systems and Power, Inc., Plaintiff: Arthur S. Linker, LEAD ATTORNEY, Katten Muchin Rosenman,LLP(NYC), New York, NY; Robert William Gottlieb, LEAD ATTORNEY, Katten Muchin rosenman LLP, NY, NY.

For Honeywell International, Inc., Defendant: Stephen Randall Neuwirth, LEAD ATTORNEY, Quinn Emanuel Urquhart Oliver & Hedges LLP (NYC), New York, NY.

Judges: Robert P. Patterson, Jr., U.S.D.J.

Opinion by: Robert P. Patterson

Opinion

[*288] OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

By motion dated August 17, 2009, Defendant Honeywell International, Inc. ("Defendant" or "Honeywell") moves to dismiss Plaintiff Integrated Systems & Power, Inc.'s ("Plaintiff" or "ISPI") complaint pursuant to *Rule 12(b)(6)* for failure to state a claim upon which relief may be granted. On September 21, 2009, Plaintiff filed its opposition to Defendant's motion and on October 13, 2009, Defendant filed its reply in further support of its motion to dismiss. The Court heard oral argument on November 20, 2009. For the reasons discussed herein, Defendant's motion is granted and Plaintiff's complaint is dismissed without prejudice.

I. Facts

Plaintiff ISPI is a corporation engaged in the business of selling, installing and servicing fire-detection **[**2]** and alarm systems, including NOTIFIER systems manufactured by Defendant Honeywell. (Compl. P 6.) [1] Through the NOTIFIER division of its Fire Solutions Group, Honeywell manufactures commercial fire alarm systems, as well as related technology, peripheral devices and accessories. (Id. **[*289]** P 7.) From January 2002 until July 2009, ISPI was a non-exclusive authorized distributor of Honeywell's NOTIFIER fire-detection alarm system. (Id. PP 9, 26.) Pursuant to a NOTIFIER Engineered Systems Distributor Agreement dated November 5, 2001 and later pursuant to a successor agreement dated July 1, 2003 (the "Distributor Agreement"), Honeywell authorized ISPI to market, sell, install and service Honeywell's NOTIFIER fire-detection and alarm system products, with New York City as ISPI's "territory" or "primary trading area." (Id. PP 9-10.) The Distribution Agreement contained no limitation on the entities to which ISPI was authorized to sell products and/or services. (Id. P 14.)

As an authorized NOTIFIER distributor, ISPI sold only NOTIFIER fire-detection **[**3]** and alarm systems. (Id. P 12.) On the other hand, after ISPI became a NOTIFIER distributer, in addition to servicing NOTIFIER systems, ISPI continued to provide service to its pre-existing portfolio of customers with Simplex fire-detection alarm systems -- a brand competing with NOTIFIER. (Id. P 13.)

During its time as an authorized distributor, ISPI submitted bids on a number of NOTIFIER service contracts, where the client's system had been sold, installed and/or previously serviced by a different NOTIFIER authorized distributor. (Id. PP 19-24.) ISPI frequently submitted the lowest bid for such service contracts. In some cases ISPI successfully obtained the contracts in question (id. PP 20(d), 23, 24); in some cases it was unsuccessful and the client remained with the "incumbent" distributor despite ISPI's lower bid. (id. PP 20(a),(b)). Other dealers, against

[1] All facts recited in this opinion are drawn from Plaintiff's complaint, which are assumed to be true for the purposes of a motion to dismiss under *Rule 12(b)(6)*.

whom ISPI was bidding for service contracts, complained to Honeywell about ISPI's bidding practices, and Honeywell in turn warned ISPI on a number of occasions that such low-ball bidding was a problem. (Id. PP 19-23, 25, 28.) Honeywell instructed ISPI not to bid for service contracts against other authorized NOTIFIER distributors **[**4]** and told ISPI that Honeywell "expects [ISPI] to cooperate and not bid." (Id. P 20(d).)

At a meeting among NOTIFIER distributors on April 28, 2009, shortly after ISPI was awarded a contract with the United States Postal Service for fire alarm maintenance at 13 postal service sites, other NOTIFIER distributers besides ISPI again complained to Honeywell about ISPI's practice of bidding against other authorized NOTIFIER distributors. (Id. PP 24, 25.) The distributors pressured Honeywell to terminate ISPI as an authorized distributor and, in response to the distributors' requests, demands and/or threats, Honeywell agreed to terminate its Distributor Agreement with ISPI. (Id. P 25.)

By letter dated June 4, 2009, Honeywell gave notice to ISPI that it would terminate ISPI's distributorship without cause on 30 days notice, effective July 6, 2009 in accordance with the terms of the Distributor Agreement. (Id. PP 11, 26.) In two telephone conversations between representatives of ISPI and Honeywell on June 8 and 16, 2009, Honeywell told ISPI that it terminated ISPI because of ISPI's practice of bidding for service contracts against other distributors and referenced examples of ISPI's bidding, complaints **[**5]** from other distributors and previous warnings given by Honeywell to ISPI. (Id. P 28.)

II. Plaintiff's Antitrust Allegations

Plaintiff alleges that NOTIFIER distributors, other than ISPI, agreed among themselves to engage in the conduct complained of: (i) to allocate customers; (ii) to not compete for service contracts; (iii) to submit non-competitive bids; and (iv) to complain to Honeywell about ISPI's low bids on service contracts. (Compl. PP 1, 15, **[*290]** 25.) Plaintiff also alleges that the purpose and/or effect of the agreement was eliminating or substantially reducing price competition. (Id. PP 1, 17.) Plaintiff further alleges that Honeywell was and is an active participant in the agreement among the distributors, that Honeywell knowingly aided and abetted the distributors' agreement, and that Honeywell terminated ISPI's distributorship as part of the distributors' agreement and in response to complaints by distributors. (Id. PP 16, 25, 27)

In its complaint, Plaintiff lists the relevant product market as "the sale, installation and servicing of NOTIFIER fire-detection and alarm system products" and the relevant geographic market as New York City. (Id. P 8.) Plaintiff asserts that the alleged **[**6]** agreement among the NOTIFIER distributors constitutes a horizontal conspiracy (id. PP 1, 16, 18, 27), and that such conduct constitutes a *per se* violation of *Section 1* of the Sherman Act (id. PP 29-33). In the alternative, if the alleged conspiracy is not deemed to be a *per se* violation, Plaintiff asserts that the complained of conduct is unlawful under the rule of reason because the anticompetitive effects of Honeywell's conduct outweigh the pro-competitive effects, if any. (Id. PP 34-37.)

III. Discussion

Defendant moves to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. ***HN1***[] Generally, a complaint must merely contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. In recent years the Supreme Court has clarified and refined the appropriate pleading standard:

> *Rule 8(a)(2)* still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the **[**7]** claim, but also "grounds" on which the claim rests.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The Supreme Court recognized the "threshold requirement of *Rule 8(a)(2)* that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'" *Id. at 557*. Courts "do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id. at 570*. In determining whether a complaint states a claim to relief that is plausible on its face, a court "must take all of the factual allegations in the complaint as true," but is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 555*).

A. Per Se Analysis

The primary point of dispute between the parties is whether the complaint has alleged conduct that is properly analyzed under the *per se* rule for Sherman Act violations or under the so-called "rule of reason." While Plaintiff repeatedly asserts that Defendant's conduct constitutes a "horizontal conspiracy," and therefore is a *per se* violation, this characterization is a legal conclusion **[**8]** that the Court does not accept as true on a motion to dismiss. Therefore, as a threshold question, the Court must determine whether the complaint adequately alleges a horizontal conspiracy, as Plaintiff claims.

HN2[] The Supreme Court has stated that "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." *United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515* ***[*291]*** *(1972)*. It has long been recognized that agreements between competitors at the same level of the market structure to allocate territories, fix prices or otherwise minimize competition -- referred to as "horizontal restraints" -- are classic examples of *per se* violations of *§ 1* of the Sherman Act. See *id. at 608*. Conversely, agreements between persons at different levels of a market structure, for example between manufacturer and distributor or between franchisor and franchisee -- referred to as "vertical restraints" -- are analyzed under the rule of reason. See *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (holding non-price vertical restrictions are analyzed under the rule of reason); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 907, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* **[**9]** (holding vertical price restraints are judged according to the rule of reason).

Without question, the conduct complained of in this case includes both horizontal and vertical components. Plaintiff alleges that the agreement at issue is one among the NOTIFIER distributors, other than ISPI, and is therefore a horizontal conspiracy. But the specific action ISPI alleges that Honeywell took (which ISPI alleges harmed both ISPI and competition generally) was Honeywell's termination of ISPI as an authorized NOTIFIER distributor. The termination of a distributor by a manufacturer is unquestionably a restriction or restraint between actors at different levels of the supply chain, i.e., a vertical restraint. ISPI argues that the termination of ISPI by Honeywell was in response to and in furtherance of a horizontal conspiracy among NOTIFIER distributors, and therefore urges the Court to treat the conduct complained of collectively as one horizontal conspiracy and apply the *per se* rule. For the reasons discussed below, under controlling Supreme Court and Second Circuit precedent, ISPI's argument is unpersuasive.

1. Vertical Restraints Resulting from Dealer Complaints

In *Oreck Corp. v Whirlpool Corp., 579 F.2d 126 (2d Cir. 1978)* **[**10]** (en banc), cert. denied, *439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)*, ***HN3***[] the Second Circuit, sitting en banc, held that a manufacturer's decision to discontinue the distributorship of one distributor in accordance with the terms of their contract is judged under the rule of reason, even when the manufacturer's decision came at the "behest and insistence" of another distributor. *Id. at 128, 133-34*. The court rejected Oreck's argument that "the elimination of its distributorship amounted to tampering with the price structure" and should therefore be construed as a *per se* violation, *id. at 130-31*, and noted that "[i]t has always been the prerogative of a manufacturer to decide with whom it will deal" *id. at 133* (citing *United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919))*.

Ten years later, in *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*, the United States Supreme Court reached a similar conclusion, holding that ***HN4***[] "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels," *Id. at 735-36*, even when the vertical restraint -- in that case, the termination of a dealership -- came about as a result of price complaints from a competing dealer, *id. at 721*. **[**11]** In Business Electronics, the pressure from the complaining dealer was even greater than the complaints from NOTIFIER distributors alleged here, specifically, the complaining dealer "gave respondent the ultimatum that [he] would terminate his dealership unless respondent **[*292]** ended its relationship with petitioner within 30 days." Id. In Business Electronics the Supreme Court emphasized the principle that "there is a presumption in favor of a rule-of-reason standard." *Id. at 726* (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* and *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. While vertical restraints, such as a manufacturer terminating a distributor, have the potential to restrain intrabrand competition, they also have "real potential to stimulate interbrand competition," which is "the primary concern of ***antitrust law***." *Id. at 724, 726*.

Here, just as in *Business Electronics* and *Oreck*, the restraint that allegedly restricted competition and harmed ISPI (Honeywell's termination of ISPI) was a vertical restraint imposed by a manufacturer against a distributor that allegedly came about as a result of price complaints from competing distributors, and should be **[**12]** evaluated under the rule of reason like those cases. Plaintiff attempts to distinguish Business Electronics and Oreck, arguing that ISPI's termination was not merely the result of dealer complaints, but the result of a horizontal conspiracy among NOTIFIER distributors to eliminate competition and rig bids. For the reasons discussed below, Plaintiff's argument is unpersuasive.

2. Horizontal Conspiracy

ISPI cites *United States v. General Motors Corp., 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*, for the proposition that a manufacturer's participation in a horizontal conspiracy among its dealers is a *per se* violation. In General Motors, the United States brought a civil suit against General Motors for conspiracy to restrain trade in violation of *§ 1* of the Sherman Act. After trial, the district court concluded that the proof failed to establish a violation, and on direct appeal, the United States Supreme Court reversed. The government argued that General Motors and its dealers engaged in a concerted effort to eliminate so-called "discounters" from the market for Chevrolet cars sold in the Los Angeles area. Certain dealers developed relationships with discounters that took various forms, but in substance amounted **[**13]** to providing cars to discounters at a small markup over the factory invoice price, allowing the discounters in turn to sell to customers at "bargain" prices relative to authorized dealers. *Id. at 130-31*. This high-volume, low-margin business was profitable to the dealers who worked with discounters, but damaging to the business of authorized dealers as a whole, and the practice generated concerns and complaints from dealers in the Los Angeles area. *Id. at 133-34*. Dealers who worked with discounters were understandably hesitant to give up the practice for fear that if they did, other dealers would merely pick up where they left off. Id. In response to complaints from dealers, General Motors solicited and obtained agreements from each dealer not to do business with discounters. *Id. at 136*. Together, General Motors, dealers and trade associations (comprised of member dealers) policed the new agreements using professional investigators to pose as customers of the discounters. *Id. at 136-37*. Once the investigators obtained evidence that one dealer was doing business with discounters, in violation of its agreement with General Motors, General Motors confronted the offending dealer and offered **[**14]** that dealer the opportunity to repurchase the car previously sold through a discounter, sometimes at a substantial loss to the dealer. *Id. at 137-38*. In every case the "embarrassed" dealer repurchased the car and "promised to stop such sales." *Id. at 137*. The **[*293]** Supreme Court found that the conduct of General Motors and the defendant dealer associations constituted a *per se* violation of *§ 1* of the Sherman Act. *Id. at 145*.

The conduct at issue in ISPI's complaint, however, lacks two key horizontal characteristics that were involved in *General Motors*. First, in General Motors, not only did the associations of dealers agree to attempt to eliminate discounters, the dealers themselves actively policed the agreements not to deal with discounters. *Id. at 141*. Specifically, the dealer associations created a "joint investigating committee" and jointly financed the investigation and policing of the agreements. *Id. at 137, 141*. Conversely, in this case, the only "enforcement" or "policing" action was Honeywell's termination of ISPI as an authorized dealer in accordance with the terms of ISPI's contract. ISPI's termination was undertaken unilaterally and in the sole discretion of Honeywell. While **[**15]** ISPI goes to great length to argue that its termination was in response to complaints from other NOTIFIER authorized dealers, the fact remains that any complaints were vertical in nature (from dealers to manufacturer) and any resulting action by Honeywell was likewise vertical in nature (termination of dealer by manufacturer).

Second, in General Motors, the discounters who were eliminated from the market through the horizontal conspiracy among authorized Chevrolet dealers relied on the dealers in order to obtain cars to sell at a discount. While General Motors' solicitations of explicit agreements from individual dealers not to do business with discounters helped cement the horizontal conspiracy in place, it was the agreement *among the dealers* to cease doing business with discounters that froze the discounters out of the market. Therefore, the Supreme Court ultimately concluded that the conduct of General Motors and the dealer associations was a *per se* violation as a joint refusal to deal or a group boycott. Citing *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, the Supreme Court reasoned that a "group boycott of even a single trader violated [the Sherman Act] **[**16]** without regard to the reasonableness of the conduct in the circumstances." *General Motors, 384 U.S. at 145-46*.

Here, unlike in *General Motors*, the other authorized NOTIFIER distributors who are alleged to have engaged in a horizontal conspiracy did not refuse to deal with or boycott ISPI. Indeed, the other distributors had no direct ability to influence whether ISPI could participate in the market. Assuming the facts in the light most favorable to ISPI, the actions taken by NOTIFIER distributors that eventually resulted in ISPI's termination were the act of complaining to Honeywell. The mere act of complaining, even if undertaken by more than one distributor, is a far cry from the horizontal conspiracy involving a group boycott and refusal to deal that the Supreme Court recognized as a *per se* violation in General Motors.

Plaintiff's reliance on *United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*, fares no better. Topco was a trade association comprised of various regional grocery chains that acted as a purchasing cooperative for private-label products. Topco allocated geographic territories among its members and controlled whether new members would be admitted into the cooperative. **[**17]** Because an 85% vote was required to admit a new member when the existing member whose operations were closest to those of the proposed new member voted against admission, the procedure for approval provided members with "a veto of sorts over actual or potential competition **[*294]** in the territorial areas in which they are concerned." *Id. at 602*. Most licenses granted to members were exclusive and the Supreme Court noted that "[w]hen combined with each member's veto power over new members, provisions for exclusivity work effectively to insulate members from competition in Topco-brand goods." Id. The Supreme Court held that the restriction on competition in Topco was a horizontal restraint because the exclusive geographic market allocations and the restrictions on entry imposed by Topco were effectively restrictions imposed horizontally by the member grocery chains because Topco was wholly owned and operated by its member licensees. *Id. at 609* (citing *United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967))*.

The instant case is inapposite because unlike in *Topco*, Honeywell is not owned, operated or controlled by its licensee-distributors, the distributors did not have exclusive territories and the **[**18]** alleged conduct that restrained trade (the elimination of ISPI's distributorship) was imposed vertically and unilaterally by Honeywell, not jointly and horizontally by ISPI's co-distributors as was the case in Topco.

In *American Motor Inns, Inc. v. Holiday Inns, Inc. 521 F.2d 1230 (3d Cir. 1975)*, when a franchisee hotel operator applied to franchisor Holiday Inns ("HI"), HI would solicit comments from at least the three existing Holiday Inn hotels nearest the proposed new hotel. *Id. at 1236*. The district court found that in the case of plaintiff American Motor Inns' ("AMI") application for a new hotel in Newark, New Jersey, the objections of existing franchisees "were dispositive" and were "treated as a veto," resulting in the application being denied. *Id. at 1237, 1242*. Each of HI's franchise agreements, also contained a "non-Holiday Inn" clause prohibiting an HI franchisee from owning or operating any hotel or motel that is not a Holiday Inn during the period of the franchise license. *Id. at 1236 n.3*. After AMI's license application for a new Holiday Inn in Newark was denied, AMI asked HI to waive the non-Holiday Inn clause in AMI's license agreements so it could build a non-Holiday **[**19]** Inn hotel on the parcel of land it had already purchased, and HI refused. *Id. at 1237*. The Third Circuit found that HI's and existing franchisees' actions in the alleged Newark conspiracy constituted a horizontal conspiracy. *Id. at 1242*. HI's established practice of providing existing hotel operators with an absolute veto on new applications (as found by the district court) permitted competitors at the same level in the market structure to directly determine with whom they would compete -- a classic example of a horizontal conspiracy. Further, when considered in connection with the non-Holiday Inn clause, the veto granted to existing hotel operators functioned to exclude *any* competition from hotel operators who were parties to license agreements with HI for hotels in different areas, whether it be competition from HI hotels or non-HI hotels. In other words, by virtue of signing any license agreement with HI, the plaintiff in American Motor Inns, was prevented from opening a competing hotel or motel of any type or brand name in the Newark area after its license application was denied by HI.

In the instant case, ISPI was subject to no similar absolute veto or exclusion imposed by other **[**20]** NOTIFIER distributors. Further, there is no allegation that anything in the structure of Honeywell's distribution agreements allowed for territorial or geographic market allocation or prohibited distributors from engaging in other similar businesses as was the case in *American Motor Inns*. Indeed, ISPI continued to service Simplex alarm systems during the term of its distributorship with Honeywell. (Compl. P 13.)

[*295] In *Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F.2d 1080 (7th Cir. 1970)*, the Seventh Circuit reversed the district court's grant of judgment n.o.v. to defendants, an airline manufacturer and one of its distributors. Fontana is inapposite because the Seventh Circuit opinion, as well as the district court's initial grant of judgment n.o.v., turned on the issue of damages. *Id. at 1083, 1085-86*. The court, however, stated that "[t]here was evidence in the case before us on which the jury reasonably could have found that for the purpose of lessening competition a rigid territorial division had been worked out on a horizontal basis between the various distributors." *Id. at 1084*. In Fontana, the participation in the conspiracy by Beech, both through its tacit approval as manufacturer **[**21]** and through its own distributor companies, did not change an otherwise horizontal restraint into a vertical restraint. *Id. at 1084-85*. Here, in contrast, Honeywell is not alleged to have participated in any concerted, horizontal action of its distributors. Rather, Honeywell received complaints that were voiced up the vertical market structure, relayed those complaints back down to ISPI, and ultimately terminated ISPI -- all vertical actions.

The additional out-of-circuit cases relied on by ISPI in arguing that the alleged conduct constitutes a horizontal conspiracy and a *per se* violation are distinguishable and unpersuasive. See *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc., 476 F.3d 442, 449-50 (7th Cir. 2007)* (stating that ***HN5***[] evidence of complaints from competing retailers to manufacturer about price competition is insufficient to show a horizontal conspiracy and holding that where evidence "does not suggest that the competing [retailers] conspired to boycott [manufacturer] unless it terminated [plaintiff]," the terminated plaintiff "cannot proceed under a horizontal group boycott analysis"); *Alvord-Polk, Inc. v. F. Schumacher &Co., 37 F.3d 996, 1006, 1011-12 (3d Cir. 1994)* **[**22]** (characterizing a restraint intended to target discounters implemented by retailers through a trade association as horizontal conspiracy, but characterizing an effort to target the same discounters by manufacturer as a vertical conspiracy and noting that the manufacturer's action, even if taken in response to retailer complaints, could have been "entirely consistent with its previously held view of its own self-interest"); *Big Apple BMW, Inc. v. BMW of North Am., Inc., 974 F.2d 1358, 1376 (3d Cir. 1992)* (noting that competing dealers combined to form a group boycott of manufacturer to pressure manufacturer not to award prospective competitor a dealership and that such a scenario presents a horizontal group boycott as opposed to a vertical restraint); *Coca-Cola Co. v. Omni Pac. Co., No. 3:98-CV-0784, 2000 U.S. Dist. LEXIS 17089, 2000 WL 33194867, at *4 (N.D. Cal. Sept. 27, 2000)* (noting that manufacturer's territorial restraints have taken on a horizontal character as "the enforcement of these restraints is initiated by, and for the benefit of, the independent bottlers").

3. Bid Rigging

ISPI cites bid rigging cases for the proposition that bid rigging is *per se* illegal under *§ 1* of the Sherman Act. (See Pl. Opp'n **[**23]** at 7 (citing *Philip Morris Inc. v. Heinrich, No. 95-CV-0328 (LMM), 1996 U.S. Dist. LEXIS 9156, 1996 WL 363156, at *9 (S.D.N.Y. June 28, 1996)*.) This is an uncontroversial point. [2] **[*296]** Rather, the salient

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[2] ISPI also cites three criminal bid rigging cases in support of the same point; they add nothing to the argument. See *United States v. Koppers Co., 652 F.2d 290 (2d Cir. 1981)* (affirming criminal conviction based on explicit agreement between the only two competitors in the road tar business to allocate territory and pre-determine bid prices, thereby rigging bids for state contracts); *United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982)* (affirming criminal conviction for bid rigging where evidence at trial included testimony that competitors held periodic in-person meetings where they explicitly agreed to

issues are whether the conduct complained of in ISPI's complaint constitute a bid rigging agreement and whether the complaint contains "allegations plausibly suggesting (not merely consistent with) agreement" to rig bids. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

The complaint sufficiently alleges that authorized NOTIFIER distributors did not tend to bid on service contracts for customers that had a pre-existing relationship with another distributor (the "incumbent" distributor). The complaint also contains well-pled allegations that when ISPI submitted low bids against incumbent distributors, those distributors complained to Honeywell and Honeywell complained to and warned ISPI. The allegation that numerous distributors all complained to Honeywell about ISPI's bidding is insufficient to suggest plausibly that the distributors *agreed with each other* not to submit competitive bids. ***HN6***[] Supreme Court cases have long been clear that parallel conduct is not sufficient to show agreement and in order to prove a *§ 1* antitrust claim, a plaintiff must offer evidence tending to exclude the possibility of independent action. *Twombly, 550 U.S. at 554* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* and *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. Twombly **[**25]** also stated that, at the pleading stage, "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id. at 557*; see also *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 323-24 (2d Cir. 2010)* (quoting Twombly and listing facts which, in addition to parallel conduct, provided factual context raising a suggestion of a preceding agreement). In other words, even at the pleading stage, a plaintiff must state enough facts to *plausibly* suggest agreement, and factual allegations that *possibly* suggest agreement or are merely *consistent with* agreement are insufficient. *Twombly, 550 U.S. at 557, 570*.

Here, there could be any number of reasons distributors declined to bid on the service contracts where the NOTIFIER system was installed by another dealer. There may be operational efficiencies to be gained through continuity of service providers. Further, as discussed in more detail *infra*, the package of products and services provided to customers by NOTIFIER distributors includes at least three different components: sale **[**26]** of the equipment, installation and service. (Compl. PP 6, 10.) Distributors may not consider it valuable business to attempt to poach the service contract alone from an established customer instead of focusing on customers of competing alarm system brands or developing completely new customers to whom a distributor could provide all three components of a NOTIFIER package. In short, ISPI's allegations of distributor complaints followed by action on the part of Honeywell are insufficient to constitute a plausible agreement among the distributors to rig bids for service contracts as opposed to mere parallel action. **[*297]** Nor does the complaint provide factual allegations which, "taken together, place the parallel conduct in a context that raises a suggestion of a preceding agreement." *Starr, 592 F.3d at 323*. Repeating the assertion that the distributors "agreed" and characterizing the conduct as a horizontal conspiracy (Compl. PP 1, 15, 16, 18, 27) does not, without more, pass muster under *Twombly*. See *Starr, 592 F.3d at 319 n.2* (stating that the "allegation that defendants agreed" is "obviously conclusory, and is not accepted as true"). [3]

4. **[**28]** Economic Impact of Alleged Horizontal Restraint

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allocate contracts and not to submit competitive bids); *United States v. Flom, 558 F.2d 1179 (5th Cir. 1977)* (finding trial **[**24]** errors and remanding for new trial convictions based on periodic meetings where competitors explicitly divided and allocated upcoming contracts for steel re-bars).

[3] The same analysis under *Twombly* and *Starr* may apply **[**27]** to the allegations of an "agreement" to terminate ISPI between Honeywell and other NOTIFIER distributors, i.e. the vertical restraint discussed in part III.A.1, *supra*. Because, even assuming that ISPI has sufficiently alleged a vertical "agreement," the allegations of a vertical conspiracy are insufficient to state a claim under the rule of reason (*infra*, part III.B), the issue of whether ISPI's allegations of a vertical agreement fulfill Twombly's pleading requirements is not dispositive of the instant motion. The Court merely notes that allegations that Honeywell "'warned' ISPI that it should not compete for the business of clients previously served by other incumbent NOTIFIER distributors" (Compl. P 19), and allegations that Honeywell terminated ISPI's distributorship "[p]ursuant and in response to the other NOTIFIER distributors' requests, demands and/or threats" (Id. P 25) do not necessarily place Honeywell's conduct "in a context that raises a suggestion of a preceding agreement." *Twombly, 550 U.S. at 557*; *Starr, 592 F.3d at 323*. Therefore, ISPI's allegations of a pre-existing "agreement" between Honeywell and other NOTIFIER distributors, as currently pled, may be conclusory.

Finally, while ISPI defines the relevant market as "the sale, installation and servicing of NOTIFIER fire-detection and alarm system products" (Compl. P 8), ISPI only alleges that service and maintenance contracts were the subject of distributors' agreement not to submit competitive bids (id. PP 15, 20-24). The business of authorized NOTIFIER distributors involves not only service and maintenance, but also sale, installation, marketing (id. P 10), inspections, testing, cleaning, calibration (id. P 6), and possibly the provision of peripheral devices (id. P 7). Not only is the alleged horizontal conspiracy limited to a single brand -- NOTIFIER -- for which ISPI has not pled a high market concentration or lack of substitute brand, but the alleged horizontal conspiracy related to only one aspect of the intrabrand market for NOTIFIER products and services. ***HN7***[] A conspiracy to eliminate competition with respect to one component (within a business involving a package of numerous products and services), within one brand, within an industry in which Plaintiff has not alleged a lack of substitutes is not the type of restraint that is so "manifestly **[**29]** anticompetitive," or that "would always or almost always tend to restrict competition and decrease output," nor is it a restraint with which "courts have had considerable experience" such that a *per se* rule would be appropriate. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. Similarly, the alleged restraint on one component of the larger package of goods and services provided by authorized dealers within a single brand is not the type of "naked restraint" that would merit a "quick-look" analysis without an analysis of the industry at issue. See *NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 109-10, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *Nat'l Soc. of Prof. Eng'rs v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*.

Because this case lacks key horizontal characteristics that were present in prior cases where manufacturers have **[*298]** been held to have participated in a horizontal conspiracy among dealers, and because Plaintiff failed to sufficiently allege an agreement among distributors to rig bids under the clear standards of *Twombly*, this case falls squarely under the controlling precedents of *Business Electronics* and *Oreck*, holding that ***HN8***[] a manufacturer's decision to eliminate a dealer is **[**30]** evaluated under the rule of reason, even where that decision was the result of price complaints from competing dealers and based on those competing dealers' impermissible desire to restrain competition.

B. Rule of Reason Analysis

The inapplicability of a *per se* analysis is not dispositive of Defendant's motion. The conduct alleged in the complaint would constitute a violation of *§ 1* if that conduct "imposes an unreasonable restraint on competition," i.e., if Defendant's conduct is shown to be a violation under the rule of reason. See *Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 316 (2d Cir. 2008)* (describing rule of reason and collecting cases). Honeywell argues that the complaint fails adequately to allege a *§ 1* violation under the rule of reason because: (i) it does not allege a relevant product market; (ii) it does not allege a legally cognizable antitrust injury; and (iii) it fails to allege conduct violating the antitrust laws.

1. Relevant Market

HN9[] In order to plead an antitrust violation under the rule of reason, a plaintiff must allege a relevant market, including both a product market and a geographic market. See *Mathias v. Daily News, L.P., 152 F. Supp. 2d 465, 480-81 (S.D.N.Y. 2001)* **[**31]** (citing *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. While acknowledging that market definition is frequently a fact-intensive inquiry where courts are hesitant to grant a motion to dismiss, the Second Circuit stated:

> To survive a *Rule 12(b)(6)* motion to dismiss, an alleged product market must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible. Cases in which dismissal on the pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand . . . that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Todd v. Exxon Corp., 275 F.3d 191, 200 (2d Cir. 2001) (citing Hack v. President & Fellows of Yale Coll., 237 F.3d 81, 86 (2d Cir. 2000) and Gianna Enters. v. Miss World (Jersey) Ltd., 551 F. Supp. 1348, 1354 (S.D.N.Y. 1982), internal quotations and footnotes omitted).

HN10[] Dismissal is appropriate where the alleged product market is defined without **[**32]** "reference to the rule of reasonable interchangeability and cross-elasticity of demand" or where it "clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor." Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 238 (2d Cir. 2008) (quoting Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)).

Courts in this district have consistently held that single brand name product cannot define a relevant market. Mathias, 152 F. Supp. 2d at 482; Re-Alco Indus., Inc. v. Nat'l Ctr. for Health Educ. Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993); see also Todd, 275 F.3d at 200 n.3 (collecting cases where single-brand market definition was deemed inadequate product market).

[*299] Here, ISPI defines the relevant product market as "the sale, installation and servicing of NOTIFIER fire-detection and alarm system products." (Compl. P 8.) ISPI does not allege a relevant product market that includes interchangeable substitute products, nor does ISPI even attempt to plead facts that, if true, would provide a plausible explanation as to why the relevant product market should be limited to a single brand of fire-detection **[**33]** and alarm system products. In response to Honeywell's argument that ISPI failed to define a relevant product market, ISPI merely states that, because it has alleged a *per se* violation, it is not required to define a relevant product market. (Pl. Opp'n at 10.) As discussed *supra*, ISPI's assertion that it has alleged a *per se* violation is a legal conclusion, which the Court does not accept as true on a motion to dismiss, and is a conclusion that this Court has rejected (*supra*, part III.A). In support of its definition of a relevant market based on a single brand, ISPI cites General Motors and Topco, discussed in detail, *supra*, as examples of antitrust violations based on single brands. But those two cases are inapposite to the relevant market requirement under the rule of reason because they involved *per se* violations based on horizontal restraints.

2. Antitrust Injury

HN11[] Under the rule of reason, in order to prove a § 1 violation, a plaintiff must also show an adverse effect on competition, not merely injury to itself. See Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff must show defendant's conduct "had an *actual* adverse effect on competition as a whole **[**34]** in the relevant market; to prove it has been harmed as an individual competitor will not suffice." (emphasis in original)). Like the relevant market definition, the adverse effect on competition is a requirement that must be alleged at the pleading stage and can be the basis for a motion to dismiss. Electronics Communs. Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 244-46 (2d Cir. 1997); Re-Alco, 812 F. Supp. at 392.

First, ISPI's complaint does not contain allegations that a lack of competitive bidding in publicly-solicited service and maintenance contracts for NOTIFIER fire-detection systems would have any effect on the overall market for fire-detection systems. Second, even assuming *arguendo* that the relevant market as defined in the complaint is sufficient, the allegations of adverse effect on competition remain inadequate. There are no factual allegations which, if true, would show: (i) what percent of service and maintenance contracts are subject to public bidding; (ii) what percent of the market for "sale, installation and servicing" is composed of service and maintenance contracts; or (iii) whether the market for NOTIFIER service and maintenance providers includes businesses **[**35]** that are not authorized NOTIFIER distributors. In short, even within the narrowly-defined relevant market put forth by Plaintiff, the complaint does not allege facts showing an injury to competition, as opposed to merely showing an injury to Plaintiff.

3. Conduct Violating the ***Antitrust Law***

Because Plaintiff failed adequately to plead a relevant product market and failed adequately to plead an antitrust injury, and each independently is grounds to dismiss the complaint under the rule of reason, the Court need not reach Defendant's third argument that the conduct alleged is inadequate to state an antitrust violation.

IV. Conclusion

Because Plaintiff failed to allege a *per se* antitrust violation and because Plaintiff failed to allege both a relevant product market and an antitrust injury under the **[*300]** rule of reason, Plaintiff's complaint is dismissed. Because ***HN12***[] "this circuit strongly favors liberal grant of an opportunity to replead after dismissal of a complaint under *Rule 12(b)(6)*," *Porat v. Lincoln Towers Community Ass'n, 464 F.3d 274, 276 (2d Cir. 2006)*, this dismissal is without prejudice. If Plaintiff elects to re-plead, it shall do so within thirty days of this opinion and order.

IT IS **[**36]** SO ORDERED.

Dated: New York, New York

May 13, 2010

/s/ Robert P. Patterson, Jr.

Robert P. Patterson, Jr.

U.S.D.J.

End of Document

ADA v. Cigna Corp.

United States Court of Appeals for the Eleventh Circuit

May 14, 2010, Decided; May 14, 2010, Filed

No. 09-12033

Reporter
605 F.3d 1283 *; 2010 U.S. App. LEXIS 9928 **; 22 Fla. L. Weekly Fed. C 846

AMERICAN DENTAL ASSOCIATION, in an associational capacity on behalf of its members, JOHN MILGRAM, DDS, SCOTT A. TRAPP, DDS, individually and on behalf of all other similarly situated, BYRON C. DESBORDES, Plaintiffs-Appellants, versus CIGNA CORPORATION, CONNECTICUT GENERAL LIFE INSURANCE COMPANY, CIGNA DENTAL HEALTH, INC., METLIFE, INC., METROPOLITAN LIFE INSURANCE COMPANY, MUTUAL OF OMAHA INSURANCE COMPANY, Defendants-Appellees.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Florida. D. C. Docket Nos. 03-21266 CV-FAM, 00-1334-MD-FAM.

Managed Care Litig. v. Cigna Corp., 2009 U.S. Dist. LEXIS 18731 (S.D. Fla., Feb. 10, 2009)

Disposition: AFFIRMED.

Core Terms

allegations, conspiracy, Plaintiffs', bundling, downcoding, mail, motion to dismiss, district court, Defendants', dental, second amended complaint, misrepresentations, infer, factual allegations, amended complaint, wire fraud, predicated, coding, advertisements, conclusory, enterprise, fraudulent, Counts, failure to state a claim, racketeering activity, alleged conspiracy, trade association, conspiracy claim, predicate act, managed care

LexisNexis® Headnotes

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

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

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

The United States Court of Appeals for the Eleventh Circuit reviews de novo the district court's grant of a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff.

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

HN2[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(a)(2) requires that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.

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

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

HN3[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). To survive a motion to dismiss, a complaint must now contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

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

HN4[] Complaints, Requirements for Complaint

The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN5[] Pleadings, Complaints

Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not shown--that the pleader is entitled to relief.

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

HN6[] Motions to Dismiss, Failure to State Claim

The U.S. Supreme Court has suggested that courts considering motions to dismiss adopt a "two-pronged approach" in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Civil Procedure > ... > Pleadings > Complaints > General Overview

Evidence > Inferences & Presumptions > Inferences

HN7[] **Pleadings, Complaints**

Courts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.

Civil Procedure > ... > Pleadings > Complaints > General Overview

HN8[] **Pleadings, Complaints**

The Twombly plausibility standard applies to all civil actions, not merely antitrust actions, because it is an interpretation of *Fed. R. Civ. P. 8*.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Evidence > Burdens of Proof > Allocation

HN9[] **Racketeer Influenced & Corrupt Organizations, Claims**

18 U.S.C.S. § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961 to 1968*, requires that a plaintiff prove that a defendant participated in an illegal enterprise through a pattern of racketeering activity. *18 U.S.C.S. § 1962(c)*. "Racketeering activity" is defined to include such predicate acts as mail and wire fraud. *18 U.S.C.S. § 1961(1)*. Mail or wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme. In order to prove a pattern of racketeering in a civil or criminal RICO case, a plaintiff must show at least two racketeering predicates that are related, and that they amount to or pose a threat of continued criminal activity. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

HN10[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b)'s heightened pleading standard requires that in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Pursuant to *Rule 9(b)*, a plaintiff must allege: (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the plaintiffs; and (4) what the defendants gained by the alleged fraud. The plaintiff must allege facts with respect to each defendant's participation in the fraud.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

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

Evidence > Burdens of Proof > Allocation

HN11[] **Claims, Fraud**

A plaintiff must allege that some kind of deceptive conduct occurred in order to plead a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961 to 1968*, predicated on mail fraud.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN12[] **Heightened Pleading Requirements, Fraud Claims**

If the specific misrepresentations of a fraud do not exist, it follows that the complaint has not alleged a right to relief that is plausible on its face.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

HN13[] **Racketeer Influenced & Corrupt Organizations, Claims**

Simply specifying particular dates and contents of communications cannot automatically constitute a valid claim that a defendant violated *18 U.S.C.S. § 1962(c)* without also plausibly alleging the existence of a long-term criminal enterprise.

Civil Procedure > Appeals > General Overview

HN14[] **Civil Procedure, Appeals**

The United States Court of Appeals for the Eleventh Circuit may affirm a judgment on any ground that finds support in the record.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Evidence > Inferences & Presumptions > Inferences

HN15[] **Racketeer Influenced & Corrupt Organizations, Claims**

Section 1962(d) of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961 to 1968*, makes it illegal for anyone to conspire to violate one of the substantive provisions of RICO, including *§ 1962(c)*. *18 U.S.C.S. § 1962(d)*. A plaintiff can establish a RICO conspiracy claim in one of two ways: (1) by showing that the defendant agreed to the overall objective of the conspiracy; or (2) by showing that the defendant agreed to commit two predicate acts. A plaintiff need not offer direct evidence of a RICO agreement; the existence of conspiracy may be inferred from the conduct of the participants.

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

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN16[] **Complaints, Requirements for Complaint**

In analyzing a conspiracy claim under the plausibility standard, Iqbal instructs the court that its first task is to eliminate any allegations in a plaintiffs' complaint that are merely legal conclusions.

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

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN17[] **Complaints, Requirements for Complaint**

When allegations of parallel conduct are set out they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. Allegations of parallel conduct, accompanied by nothing more than a bare assertion of a conspiracy, do not plausibly suggest a conspiracy, without that further circumstance pointing to a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. These conclusions are especially true where there is an obvious alternative explanation for each of the collective actions alleged that suggests lawful, independent conduct.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN18[] **Concerted Action, Civil Conspiracy**

Participation in trade organizations provides no indication of conspiracy.

Counsel: For American Dental Association, Appellant: Robert J. Axelrod, Pomerantz Haudek Block Grossman & Gross LLP, NEW YORK, NY.

For John Milgram, DDS, Scott A. Trapp, DDS, Byron C. Desbordes, Appellants: G. Robert Blakey, Notre Dame Law School, Notre Dame, IN.

For Cigna Corporation, Connecticut General Life Insurance Company, Cigna Dental Health, Inc., Appellees: Jamie Zysk Isani, Hunton & Williams, MIAMI, FL.

For Metlife, Inc., Metropolitan Life Insurance Company, Appellees: James L. Griffith, Akin Gump Strauss Hauer & Feld LLP, PHILADELPHIA, PA.

For Mutual of Omaha Insurance Company, Appellee: Thomas R. Julin, Hunton & Williams, MIAMI, FL; Joshua Douglas Poyer, Craig P. Kalil, Aballi, Milne, Kalil, & Escagedo, P.A., MIAMI, FL.

Judges: Before DUBINA, Chief Judge, FAY, Circuit Judge, and ALBRITTON, * District Judge.

Opinion by: DUBINA

Opinion

[*1286] DUBINA, Chief Judge:

* Honorable W. Harold Albritton, United States District Judge for the Middle District of Alabama, sitting by designation.

The question presented in this appeal is whether, under *Fed. R. Civ. P. 9(b)* and the pleading standard recently **[**2]** articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* *and* *Ashcroft v. Iqbal, U.S. , 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, Plaintiffs/Appellants ("Plaintiffs") have sufficiently pled factual allegations in their RICO complaint to survive a motion to dismiss. After reviewing the briefs and record and having the benefit of oral argument, we affirm the district court order dismissing the complaint.

I. BACKGROUND

Plaintiffs are three dentists practicing in Illinois, Nebraska, and Maryland. The American Dental Association ("ADA"), a non-profit dental association headquartered in Chicago, also asserts representational standing on behalf of its members. The defendants/appellees are dental insurance companies: Cigna Corporation, Connecticut General Life Insurance Company, Cigna Dental Health, Inc., MetLife Inc., and Metropolitan Life Insurance Company ("Defendants"). Plaintiffs contracted with Defendants to provide dental services to Defendants' members through dental service managed care plans. Plaintiffs now assert violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961-1968 (2006)*, as well as state law claims **[**3]** for breach of contract and tortious interference with contractual relations and existing and prospective business expectations. More specifically, Plaintiffs allege, on behalf of themselves and a putative class of similarly-situated dentists, that Defendants "engaged in a systematic, fraudulent scheme to diminish payments to Class Plaintiffs through automatic downcoding, Current Dental Terminology ('CDT') code manipulation and improper bundling." [1] D.E. 111, at P 3.

Plaintiffs filed this purported class action lawsuit in the Southern District of Florida in May 2003. The case was originally assigned to Judge Adalberto Jordan. **[*1287]** Defendants moved to dismiss the RICO and state law claims in the original complaint. On March 30, 2005, Judge Jordan dismissed all of the RICO allegations without prejudice on the ground that Plaintiffs' RICO enterprise **[**5]** allegations were deficient. Plaintiffs filed their first amended complaint on April 18, 2005. On June 30, 2005, while Defendants' motion to dismiss the first amended complaint was pending, Judge Jordan transferred the case to Judge Frederico Moreno as a case related to the *In re Managed Care Litigation* Multi-District Litigation ("*Managed Care* MDL"), 00-MD-1334, an MDL that has been ongoing in the Southern District of Florida since 2000. [2] On November 28, 2005, Judge Moreno designated the case as a tag-along action within the *Managed Care* MDL and closed it for statistical purposes.

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[1] The Council on Dental Benefit Programs created an educational manual to include the *Code on Dental Procedures and Nomenclature* ("the Code"). *Current Dental Terminology, Fifth Edition* ("CDT") contains recent revisions to the Code. The Code, which is designed as the national standard for reporting dental services by the Federal Government under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), is currently recognized by third-party payers, including Defendants, nationwide. An underlying purpose of the Code is to provide a uniform language that accurately describes the dental, surgical and diagnostic services a dental service provider has rendered, thereby giving Defendants or their designated payers **[**4]** the information they need to process a claim for payment. To claim reimbursement for dental services, dental health care providers complete a standardized form incorporating a CDT coding system through which procedures are identified by standardized designations. Plaintiffs allege that Defendants utilized automated programs to manipulate procedure codes on submitted claim forms and thereby reduce the amount paid for dental services. According to Plaintiffs' complaint, "downcoding" reduces or denies payment of claims submitted by dental providers by changing the CDT code assigned to a particular service to a less expensive CDT code. D.E. 111, at P 40. "Bundling" reduces or denies payment of claims by combining the CDT codes of two or more appropriately performed and billed procedures into one CDT code. *Id*. at P 41.

[2] The *Managed Care* MDL was originally limited to claims brought by medical doctors against Humana, Inc., a nationwide managed care organization, and other "major HMOs," *see* *Klay v. Humana, Inc., 382 F.3d 1241, 1249-50 (11th Cir. 2004)*, but grew to include many disputes between healthcare providers of all kinds (*e.g.*, chiropractors, obstetricians and gynecologists, and dentists) and managed care companies who use computer software programs to process claims. Providers have, among other things, claimed RICO violations, alleging that managed care entities, acting individually and as part of a conspiracy, developed **[**6]** and used certain claims processing, claims payment and/or other practices in order to "deny, delay, and

In February 2008, Judge Moreno denied all pending motions in the case with leave to re-file, and requested status reports. During the roughly two-year lull in activity in this case, the United States Supreme Court decided *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Although the district court had not ruled on the motion to dismiss the first amended complaint, Plaintiffs sought and received Defendants' consent to file a motion seeking leave to file a second amended complaint.

On May 1, 2008, Plaintiffs filed their Second Amended Complaint, which is at issue in this appeal. The complaint contains six counts. Counts I-IV are federal RICO and RICO-related claims: RICO conspiracy under *18 U.S.C. § 1962(d)* (Count I), a claim for aiding and abetting RICO violations under *18 U.S.C. § 2* (Count II), a substantive RICO claim under *18 U.S.C. § 1962(c)* (Count III), and a claim for declaratory relief under *18 U.S.C. § 1964(a)* and *28 U.S.C. § 2201* **[**7]** for RICO violations (Count IV). Counts V and VI are state law claims for breach of contract and tortious interference with contractual relations and with existing and prospective business expectancies, respectively.

On June 6, 2008, Defendants moved to dismiss Counts I-IV and VI of the Second Amended Complaint. They did not move to dismiss the breach of contract claim (Count V). After briefing, on February 11, 2009, the district court issued a written order granting the motion to dismiss without prejudice. The court held that all four RICO claims were deficiently alleged. Citing *Twombly*, the court held that Plaintiffs' substantive RICO allegations "fail to set forth a violation of *§ 1962(c)* that is 'plausible on its face' because they do not raise a right to relief 'above [the] speculative level.'" *In re Managed Care Litig., No. 03-21266-CIV, 2009 U.S. Dist. LEXIS 18731, 2009 WL 347795, at *4 (S.D. Fla. Feb. 11, 2009)* (quoting *Twombly, 550 U.S. at 570, 555, 127 S. Ct. at 1974, 1965)*. The court also found the conspiracy claim lacking because the Second Amended Complaint did "not contain sufficient factual allegations about the Defendants **[*1288]** agreeing with other entities and/or persons to engage in the ongoing criminal **[**8]** conduct of an enterprise." *Id*. The court held that the remaining RICO claims were deficient for similar reasons.

The district court, however, gave Plaintiffs a chance to file another amended complaint by February 26, 2009. It directed Plaintiffs to "conform with the pleading requirements announced in *Twombly* and applied by this Court in *Solomon* and *Genord*," *2009 U.S. Dist. LEXIS 18731, [WL] at *7*, which are two cases also involved in the *Managed Care* MDL. *See* *Solomon v. Blue Cross & Blue Shield Ass'n, 574 F. Supp. 2d 1288 (S.D. Fla. 2008)* (dismissing complaint for failure to state a claim under *Twombly*); *Genord v. Blue Cross & Blue Shield of Mich., No. 07-21688-CIV, 2008 U.S. Dist. LEXIS 99084, 2008 WL 5070149 (S.D. Fla. Nov. 24, 2008)* (same). The court warned that similar failure to comply with the new pleading standard would result in dismissal with prejudice. *In re Managed Care Litig., 2009 U.S. Dist. LEXIS 18731, 2009 WL 347795, at *8*.

On February 23, 2009, Plaintiffs sought an extension of time to file a third amended complaint. On February 24, 2009, the district court denied that motion, stating:

> Given the history of this particular case and the consistent insufficiencies of the Plaintiffs' allegations, the Court would likely have had sufficient justification to dismiss **[**9]** Counts I-IV and VI of the Second Amended Complaint *with* prejudice. Because the plaintiffs are operating under newer, more stringent pleading requirements, the Court decided to afford them one last bite at the proverbial apple. . . . At this point, the factual averments necessary to satisfy *Twombly* are either readily included in yet another amended complaint, or simply do not exist.

D.E. 143, at 2. Plaintiffs never filed a third amended complaint. On March 2, 2009, the district court dismissed Counts I-IV and VI with prejudice. The district court entered a final order on March 23, 2009, declining to exercise supplemental jurisdiction over Count V and dismissing the case in its entirety. Plaintiffs now appeal the dismissal of the RICO and RICO-related claims in their complaint.

II. STANDARD OF REVIEW

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diminish" payments allegedly owed. *See* *id. at 1247 & n.1*. Among the complained-of practices are "downcoding" and "bundling." *See* *id. at 1248*.

HN1[] "We review *de novo* the district court's grant of a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Mills v. Foremost Ins. Co., 511 F.3d 1300, 1303 (11th Cir. 2008)* (quoting *Castro v. Sec'y of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006))*.

III. [10] DISCUSSION**

***A*. Twombly *and* Iqbal**

Because the present case reflects the concerns that motivated the Supreme Court to adopt a new pleading standard in *Twombly* and *Iqbal*, a brief discussion of those decisions is warranted.

HN2[] *Fed. R. Civ. P. 8(a)(2)* requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)*. In *Twombly*, the Supreme Court expressly "retired" the "no set of facts" pleading standard under *Rule 8(a)(2)* that the Court had previously established in *Conley v. Gibson. Twombly, 550 U.S. at 563, 127 S. Ct. at 1969*. Justice Black wrote for the Court in *Conley* of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *355 U.S. at 45-46, 78 S. Ct.* ***[*1289]*** *at 102*. In rejecting that language, the Court in *Twombly* noted that courts had read the rule so narrowly and literally that "a wholly conclusory statement **[**11]** of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *550 U.S. at 561, 127 S. Ct. at 1968* (internal quotation marks and alterations omitted).

In *Twombly*, the plaintiffs alleged an antitrust conspiracy among certain regional telecommunications providers in violation of the Sherman Act, *15 U.S.C. § 1* (2006). *Id. at 550, 127 S. Ct. at 1962*. Their complaint relied on allegations of the defendants' parallel behavior to allege the conspiracy. *Id*. The Supreme Court granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct. *Id. at 553, 127 S. Ct. at 1963*. Justice Souter, writing for a substantial majority, first noted:

> *HN3*[] While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Id. at 555, 127 S. Ct. at 1964-65 (internal quotation marks, citations, and alterations **[**12]** omitted). The Court explained that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id. at 555, 127 S. Ct. at 1965*. The Court ultimately held that to survive a motion to dismiss, a complaint must now contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id. at 570, 127 S. Ct. at 1974*. Cautioning that its new plausibility standard is not akin to a "probability requirement" at the pleading stage, the Court nonetheless held that the standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Id. at 556, 127 S. Ct. at 1965*. The Court was careful to note that "we do not require heightened fact pleading of specifics," but concluded that when plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id. at 570, 127 S. Ct. at 1974*. Finding that the plaintiffs' complaint did not plausibly suggest an illegal conspiracy by merely alleging parallel conduct--because such **[**13]** parallel conduct was more likely explained by lawful, independent market behavior--the Court held that the district court properly dismissed the complaint. *Id. at 567-70, 127 S. Ct. at 1972-74*.

The Supreme Court has since applied the *Twombly* plausibility standard to another civil action, *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. *Iqbal* involved a *Bivens* action brought by a Muslim Pakistani who had been arrested and detained following the September 11, 2001, terrorist attacks. *Id. at 1943*. He sued current and former federal officials, including John Ashcroft, former Attorney General of the United States, and Robert Mueller, the Director of the FBI. *Id. at 1942*. Iqbal alleged that Ashcroft and Mueller adopted and implemented a detention policy for persons of high interest after September 11, and that they designated him a person of high interest on account of his race, religion, or national origin, in violation of the *First* and *Fifth Amendments to the Constitution*. *Id. at 1944*. Iqbal's complaint alleged that Ashcroft was the "principal architect" of the policy and identified Mueller as "instrumental in [its] adoption, promulgation, and implementation," but also stated that both men "knew **[**14]** of, condoned, and willfully **[*1290]** and maliciously agreed to subject" Iqbal to harsh conditions of confinement "as a matter of policy . . . for no legitimate penological interest." *Id. at 1944* (alteration in original).

In evaluating the sufficiency of Iqbal's complaint in light of *Twombly's* construction of *Rule 8*, the Court explained the "working principles" underlying its decision in that case. *Id. at 1949*. First, the Court held that ***HN4***[] "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*. Second, restating the plausibility standard, the Court held that ***HN5***[] "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'--'that the pleader is entitled to relief.'" *Id. at 1950* (quoting *Fed. R. Civ. P. 8(a)(2)*). ***HN6***[] The Court suggested that courts considering motions to dismiss adopt a "two-pronged approach" in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they **[**15]** plausibly give rise to an entitlement to relief." *Id*. Importantly, the Court held in *Iqbal*, as it had in *Twombly*, that ***HN7***[] courts may infer from the factual allegations in the complaint "obvious alternative explanation[s]," which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer. *Id. at 1951-52* (quoting *Twombly, 550 U.S. at 567, 127 S. Ct. at 1972*). Finally, the Court in *Iqbal* explicitly held that ***HN8***[] the *Twombly* plausibility standard applies to all civil actions, not merely antitrust actions, because it is an interpretation of *Rule 8*. *Id. at 1953*.

Applying these principles to Iqbal's complaint, the Court began by disregarding as wholly conclusory Iqbal's allegations that Mueller was "instrumental" in adopting the detention policy and Ashcroft was the "principal architect" of the policy, and that they willfully agreed to subject Iqbal to harsh treatment for a discriminatory purpose. *Id. at 1951*. The Court then determined that the remaining factual allegations--that Mueller and Ashcroft approved the FBI's policy of arresting and detaining thousands of Arab Muslim men as part of its investigation into the events of September 11--did not plausibly **[**16]** establish the purposeful, invidious discrimination that Iqbal asked the Court to infer. *Id. at 1951-52*. The alternative inferences that could be drawn from the facts--namely, that the arrests were likely lawful and justified by a nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts--were at least equally compelling. *Id*. Accordingly, the Court ruled that Iqbal's complaint must be dismissed. *Id. at 1954*.

With this precedent in mind, we now turn to the RICO allegations in Plaintiffs' Second Amended Complaint.

B. Plaintiffs' Allegations of the Predicate Acts of a Pattern of Racketeering Activity under 18 U.S.C. § 1962(c)

HN9[] *Section 1962(c) of the RICO* statutes requires that a plaintiff prove that a defendant participated in an illegal enterprise "through a pattern of racketeering activity." *18 U.S.C. § 1962(c)*. "Racketeering activity" is defined to include such predicate acts as mail and wire fraud. *18 U.S.C. § 1961(1)*. "Mail or wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance **[**17]** of that scheme." *Pelletier v. Zweifel, 921 F.2d 1465, 1498 (11th Cir. 1989)*. In order to prove a pattern **[*1291]** of racketeering in a civil or criminal RICO case, a plaintiff must show at least two racketeering predicates that are related, and that they amount to or pose a threat of continued criminal activity. *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 240, 109 S. Ct. 2893, 2901, 106 L. Ed. 2d 195 (1989)*. "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id. at 242, 109 S. Ct. at 2902*.

Because Plaintiffs' *section 1962(c)* claim is based on an alleged pattern of racketeering consisting entirely of the predicate acts of mail and wire fraud, their substantive RICO allegations must comply not only with the plausibility criteria articulated in *Twombly* and *Iqbal* but also with ***HN10***[] *Fed. R. Civ. P. 9(b)*'s heightened pleading standard, which requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *See also Ambrosia Coal & Constr. Co. v. Pages Morales, 482 F.3d 1309, 1316 (11th Cir. 2007)* (holding that civil RICO claims, which **[**18]** are "essentially a certain breed of fraud claims, must be pled with an increased level of specificity" under *Rule 9(b)*). We have held that pursuant to *Rule 9(b)*, a plaintiff must allege: "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1380-81 (11th Cir. 1997)* (applying the requirements to a RICO fraud complaint). The plaintiff must allege facts with respect to each defendant's participation in the fraud. *Id. at 1381*.

Plaintiffs' complaint alleges that "[d]efendants represented in their on-line advertising, in their provider agreements and in their fee schedules that their in-network providers would be compensated for covered procedures based on commonly accepted dental practice, standard coding practice and Defendants' fee schedules." D.E. 111, at P 28. Plaintiffs argue that these advertisements, agreements, and fee schedules were fraudulent because they indicated benefits payments lower than what Plaintiffs **[**19]** believed were due to them under their fee-for-service agreements with Defendants, which Plaintiffs argue had promised them timely specified payments "in accordance with standard dental coding procedures." D.E. 111, at P 24. In other words, Plaintiffs contend that they performed multiple procedures worthy of multiple or larger benefits payments, but that Defendants bundled and downcoded the procedures into fewer claims worthy of smaller payments. Additionally, Plaintiffs allege that the *only* way the alleged scheme of downcoding and bundling claims could work is if Defendants "agree[d]" to employ the "same" devices and tactics. D.E. 111, at P 9. Thus, Plaintiffs do not allege parallel schemes among competing dental insurers; they allege a single scheme consisting of identical conduct in which all Defendants agreed to participate. Therefore, not only did Plaintiffs need to plausibly and particularly allege facts showing related instances of mail and wire fraud, but also plausibly allege facts showing that a conspiracy created the alleged scheme.

Though the complaint sets out at least six examples of e-mail and letter communications between Defendants and Plaintiffs, including online advertisements, **[**20]** fee schedules, contracts, and Explanations of Benefits ("EOBs") documents, D.E. 111, at PP 28-33, 49-56, Plaintiffs do not point to a single specific misrepresentation by Defendants regarding how Plaintiffs would be compensated in any of these communications, **[*1292]** nor do they allege the manner in which they were misled by the documents, as they are required to do under *Rule 9(b)*. We have held that ***HN11***[] a plaintiff must allege that some kind of deceptive conduct occurred in order to plead a RICO violation predicated on mail fraud. *Am. United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1065 (11th Cir. 2007)* (affirming dismissal of plaintiff's substantive RICO claims where complaint did not allege that defendants made any affirmative misrepresentations in the mailings). Here, Plaintiffs' complaint provides a list of mailings and wires, without ever identifying any actual fraud. ***HN12***[] If the specific misrepresentations do not exist, it follows that the complaint has not alleged a right to relief that is "plausible on its face." *See Twombly, 550 U.S. at 570, 127 S. Ct. at 1974*.

For example, Plaintiffs do not allege any misrepresentations in the EOBs because Plaintiffs allege in their complaint that the EOBs **[**21]** expressly informed Plaintiffs when their claims were going to be bundled or downcoded and gave the reasons for doing so. *See* D.E. 111, at P 56 ("All Defendants have similarly engaged in bundling and downcoding practices by noting on EOBs . . . that 'services are not covered when billed with related primary procedures,' 'benefits are not provided for this service as it is considered to be a part of, and inclusive to, the primary services performed,' or that, 'based on information reported or in file, a different procedure code has been assigned.'"). Plaintiffs have not shown how they were misled by the EOBs if the language in the EOBs notified them about any bundling or downcoding of particular procedures.

Nor does the complaint allege any misrepresentations in the online advertisements. There are no allegations anywhere that the quoted language of the advertisements is false. Read as a whole, they amount at most to puffery, not fraud. *See Byrne v. Nezhat, 261 F.3d 1075, 1111 (11th Cir. 2001)* (noting that claims of surgical success in medical journals "seem more akin to puffing than actionable misrepresentations," in dismissing a civil

RICO complaint alleging violations of *section 1962(c)* **[**22]** predicated on acts of mail fraud). Additionally, Plaintiffs make no allegations as to who, if anyone, read the advertisements and was misled by them.

Further, the complaint does not connect the allegedly fraudulent communications to any particular acts of bundling or downcoding that Plaintiffs find unacceptable. Counsel for Plaintiffs stated at oral argument that this lack of particularity should be excused because they were at an "informational disadvantage" as to exactly how Defendants' software bundled and downcoded submitted procedures. To the contrary, we think it telling that the three named plaintiffs, Drs. Milgram, Trapp, and Desbordes, each received EOBs explaining the reimbursement of specific procedures they had performed, yet the complaint never offers any examples of which claims were bundled and downcoded. Perhaps the closest Plaintiffs come to alleging a specific instance of fraud is in paragraph 49 of the complaint, where they allege that "[d]efendants regularly sent EOBs [to Plaintiffs] that inappropriately and automatically bundled x-ray procedures with other procedures." D.E. 111, at P 49. However, Plaintiffs do not allege other procedures with which the x-ray codes **[**23]** were bundled. This is at most an allegation of possible parallel conduct without any allegation of an agreement as to how Defendants would process x-ray billing codes as part of a greater scheme. In fact, Plaintiffs do not allege how Defendants agreed to employ any of these procedures as part of a long-term criminal enterprise predicated on acts of mail and wire fraud. ***HN13***[] Simply specifying particular dates and contents of communications cannot **[*1293]** automatically constitute a valid claim that a defendant violated *18 U.S.C. § 1962(c)* without also plausibly alleging the existence of a long-term criminal enterprise.

In sum, the Second Amended Complaint does not plausibly, under *Twombly*, or particularly, under *Rule 9(b)*, allege a pattern of racketeering activity predicated on a scheme to commit acts of mail and wire fraud. We find no specific misrepresentations in any of the communications Plaintiffs referenced, no connection between the alleged misrepresentations and any particular acts of downcoding or bundling, and no allegations as to how Defendants agreed to engage in an illegal scheme to defraud dental providers. Plaintiffs may have a difference of opinion from Defendants regarding the coding **[**24]** that was used in processing their claims, but we cannot infer a scheme-driven deception from a complaint that provides no details of fraud or conspiracy. Accordingly, we conclude that the district court did not err in dismissing the substantive RICO claim in the Second Amended Complaint for failure to state a claim. [3]

C. Plaintiffs' Allegations of Conspiracy under 18 U.S.C. § 1962(d)

HN15[] *Section 1962(d) of the RICO* statutes makes it illegal for anyone to conspire to violate one of the substantive provisions of RICO, including *§ 1962(c)*. *18 U.S.C. § 1962(d)*. "A plaintiff can establish a RICO conspiracy claim in one of two ways: (1) by showing that the defendant agreed to the overall objective of the conspiracy; or (2) by showing that the defendant agreed to commit two predicate acts." *Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 950 (11th Cir. 1997)* (quoting *United States v. Church, 955 F.2d 688, 694 (11th Cir. 1992))*. A plaintiff need not offer direct evidence of a RICO agreement; the existence of conspiracy "may be inferred from the conduct of the participants." *Id. at 950* (quoting *Church, 955 F.2d at 695*).

Here, the allegations in Plaintiffs' complaint do not support an inference of an agreement to the overall objective of the conspiracy or an agreement to commit two predicate acts. ***HN16***[] In analyzing the **[**26]** conspiracy claim under the plausibility standard, *Iqbal* instructs us that our first task is to eliminate any allegations in Plaintiffs'

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[3] As somewhat of a last resort, Plaintiffs also argue that the district court did not dismiss their substantive RICO claim on the basis that the allegations were insufficiently particularized under *Rule 9(b)*, but that its dismissal was solely grounded on what it held to be a lack of plausibility under *Twombly*. We disagree because the district court referenced *Rule 9(b)* in the section of its order specifically discussing the *section 1962(c)* claim. *See In re Managed Care Litig., 2009 U.S. Dist. LEXIS 18731, 2009 WL 347795, at *3*. But even if the district court did not apply the proper standard to the substantive RICO claim, we need not resolve that issue if there is another basis for affirming its judgment, because ***HN14***[] "we may affirm its judgment 'on any ground that finds support in the record.'" *Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1256 (11th Cir. 2001)* (quoting *Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 307, 308, 1 L. Ed. 2d 314 (1957))*. **[**25]** The district court's dismissal of the substantive RICO claim is still due to be affirmed because Plaintiffs have not pleaded the claim with sufficient particularity under *Rule 9(b)*.

complaint that are merely legal conclusions. *129 S. Ct. at 1950*. Plaintiffs offer conclusory statements such as "[d]efendants have not undertaken the above practices and activities in isolation, but instead have done so as part of a common scheme and conspiracy," D.E. 111 at P 67, and "[e]ach Defendant and member of the conspiracy, with knowledge and intent, agreed to the overall objective of the conspiracy, agreed to commit acts of fraud to relieve Class Plaintiffs of their rightful compensation, **[*1294]** and actually committed such acts." D.E. 111, at P 68. These are the kinds of "formulaic recitations" of a conspiracy claim that the Court in *Twombly* and *Iqbal* said were insufficient. *See Twombly, 550 U.S. at 557, 127 S. Ct. at 1966* (noting that "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality"); *Iqbal, 129 S. Ct. at 1950-51* (holding that Iqbal's bare allegation that defendants Ashcroft and Mueller agreed to adopt a discriminatory policy was not entitled to the presumption of truth and should be **[**27]** ignored under *Twombly*). Plaintiffs also allege that "[i]n order for the fraudulent schemes described above to be successful, each Defendant and other members of the conspiracy had to agree to enact and utilize the same devices and fraudulent tactics against the Class Plaintiffs." D.E. 111, at P 69. We are "not required to admit as true this unwarranted deduction of fact." *See Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1268 (11th Cir. 2009)* (rejecting plaintiff's allegation that the alleged scheme necessarily required the cooperation of the alleged conspirators); *Twombly, 550 U.S. at 566, 127 S. Ct. at 1971* (rejecting plaintiffs' argument that as soon as one defendant gave in, the conspiracy would not work, because there were logical reasons why defendants would independently engage in similar conduct).

After eliminating the wholly conclusory allegations of conspiracy, we turn to Plaintiffs' remaining factual allegations. Plaintiffs attempt to bolster their conspiracy allegations by describing the following "collective" or parallel actions taken by Defendants, from which they now argue the existence of an agreement may be inferred: the collective development and use of automated processes **[**28]** to manipulate CDT codes, *i.e*. downcoding and bundling; the use of the same claims procedures, including the data that dentists are required to provide in submitting claims, the forms on which dentists must submit their data, and the coding that dentists use to submit their data; and Defendants' participation in trade associations and private, jointly owned partnerships and corporations. D.E. 111, at PP 70-71. Assuming for the sake of argument that parallel conduct has actually been alleged here, [4] and accepting these factual allegations as true, as we are required to do under *Iqbal, see 129 S. Ct. at 1950*, we think that the Supreme Court's holding in *Twombly* forecloses any possibility that Plaintiffs' allegations of parallel conduct plausibly suggest a conspiracy. The Court stated in *Twombly* that "***HN17***[] when allegations of parallel conduct are set out . . . they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *550 U.S. at 557, 127 S. Ct. at 1966*. The Court held that allegations of parallel conduct, accompanied by nothing more than a bare assertion of a conspiracy, do not plausibly suggest **[**29]** a conspiracy, stating that "without that further circumstance **[*1295]** pointing to a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id.* [5]

These conclusions are especially true where, as here, there is an "obvious alternative explanation" for each of the collective actions alleged that suggests lawful, independent conduct. *See Twombly, 550 U.S. at 568, 127 S. Ct. at 1972* (finding that industry developments provided a "natural explanation" for defendants' alleged conduct that

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[4] We are not convinced that Plaintiffs actually allege parallel conduct with regard to their allegation that Defendants used the same downcoding and bundling methods, because there is no indication from the complaint that Defendants used the same software to downcode and bundle procedures in the same way over an extended period of time. *See* D.E. 111, at P 42 ("To accomplish this downcoding and bundling, Defendants used services and software *such as* those sold and licensed by Dentistat Inc. ('Dentistat') and McKesson Corporation ('McKesson'), *such as* ClaimsCheck Dental, CodeReview, and AutoCoder, *or comparable software*, which, among other things, are capable of modifying code protocols.") (emphases added); D.E. 111, at P 46 ("Through the use of Dentacom, Proclaim *and other systems*, Defendant Cigna aggressively reduces the payment of claims by systematically downcoding, bundling and pending provider claims for payment.") (emphasis added).

[5] The Court acknowledged that certain examples of a parallel conduct might **[**30]** be sufficient to imply a conspiracy, such as "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *550 U.S. at 557 n.4, 127 S. Ct. at 1966 n.4* (quoting 6 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 1425, pp. 167-85 (2d ed. 2003)). The conduct alleged here does not fall into any of these categories.

helped to foreclose plaintiffs' suggestion of conspiracy); *Iqbal, 129 S. Ct. at 1951-52* (finding that though some of the plaintiff's allegations were "consistent with" purposeful discrimination, the complaint as a whole supported a plausible and legitimate motive by law enforcement officers to protect the nation from "suspected terrorists"). As for Plaintiffs' allegation that Defendants downcoded and bundled some submitted **[**31]** claims, insurance companies must use computers and software to efficiently process claims, and the use of downcoding and bundling may be proper in order to decrease physicians' costs and potentially increase profits. *See* *In re Managed Care Litig., 430 F. Supp. 2d 1336, 1348 (S.D. Fla. 2006)*, *aff'd sub nom.* *Shane v. Humana, Inc., 228 F. App'x 927 (11th Cir. 2007)* (unpublished). In fact, Plaintiffs' brief only decries the use of "improper" bundling, which implies that some bundling of claims is commonly acceptable. Brief of Appellant at 1. Additionally, the Department of Health and Human Services has taken the position that the inverse processes of "upcoding" and "unbundling" are fraudulent billing practices under Medicare, which supports the use of automated claims processing systems. *See Medicare at Risk: Emerging Fraud in Medicare Programs: Hearing Before the Senate Committee on Governmental Affairs, Permanent Subcommittee on Investigations*, 105th Cong. (1997) (statement of Michael F. Mangano, Principal Deputy Inspector General, U.S. Department of Health and Human Services), *available at* *http://www.hhs.gov/asl/testify/t970626b.html*. The use of automated systems that bundle and downcode **[**32]** may just as easily have developed from independent action in a competitive environment as it would from an illegal conspiracy, because each insurer would have an economic interest in decreasing physicians' costs and increasing profits. *See* *In re Managed Care Litig., 430 F. Supp. 2d at 1348*. The complaint does not plausibly suggest that by using similar methods to downcode and bundle claims, Defendants have acted in any way inconsistent with the independent pursuit of their own economic self-interest. Accordingly, Defendants' parallel conduct is equally indicative of rational independent action as it is concerted, illegitimate conduct and thus "stays in neutral territory." *See* *Twombly, 550 U.S. at 557, 127 S. Ct. at 1966*.

As for Plaintiffs' allegation that a conspiracy may be inferred from Defendants' participation in trade associations and other professional groups, it was well-settled before *Twombly* that ***HN18***[] participation in trade organizations provides no indication of conspiracy. *Twombly, 550 U.S. at 567 n.12, 127 S. Ct. at 1971 n.12*; *see also* *Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988)* ("A trade association by its nature involves **[*1296]** collective action **[**33]** by competitors. Nonetheless, a trade association is not by its nature a 'walking conspiracy' . . . . [T]he establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations.").

Plaintiffs have not plausibly alleged sufficient facts regarding Defendants agreement with other entities or persons to engage in the ongoing criminal conduct of an enterprise. Plaintiffs' allegations of Defendants' parallel conduct, absent a plausibly-alleged "meeting of the minds," fail to "nudge [] their claims across the line from conceivable to plausible." *See* *Twombly, 550 U.S. at 557, 570, 127 S. Ct. at 1966, 1974*. Accordingly, we conclude that the district court did not err in dismissing the RICO conspiracy claim in the Second Amended Complaint. [6]

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[6] We recognize that many of our sister circuits have held that if a plaintiff fails to state a claim of a primary RICO violation, then the plaintiff's civil RICO conspiracy claim necessarily fails. *See* *GE Invest. Private Placement Partners II v. Parker, 247 F.3d 543, 551 n.2 (4th Cir. 2001)*; *Efron v. Embassy Suites, P.R., Inc., 223 F.3d 12, 21 (1st Cir. 2000)*; *Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1064 (2d Cir. 1996)*, **[**34]** vacated on other grounds, *525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; *Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1191 (3rd Cir. 1993)*; *Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.8 (9th Cir. 1992)*; *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc., 941 F.2d 1220, 1232, 291 U.S. App. D.C. 303 (D.C. Cir. 1991)*; *Craighead v. E.F. Hutton & Co., 899 F.2d 485, 495 (6th Cir. 1990)*; *In re Edwards, 872 F.2d 347, 352 (10th Cir. 1989)*. This court has not expressly stated such a rule. In *Jackson v. Bellsouth Telecomms., 372 F.3d 1250 (11th Cir. 2004)*, we affirmed the dismissal of a RICO conspiracy claim because the complaint failed to allege a substantive RICO claim, but we emphasized that "the RICO conspiracy [claim] add[ed] nothing" because it "simply conclude[d] that the defendants 'conspired and confederated' to commit conduct which in itself does not constitute a RICO violation." *Id. at 1269*. In an unpublished opinion, we characterized our holding in *Jackson* as follows: "where a plaintiff fails to state a RICO claim *and the conspiracy count does not contain additional allegations*, the conspiracy claim necessarily fails." *Rogers v. Nacchio, 241 F. App'x 602, 609 (11th Cir. 2007)* (citing *Jackson, 372 F.3d at 1269*) **[**35]** (emphasis added). Unlike in *Jackson*, Plaintiffs' conspiracy count contains additional allegations, separate from the allegations in the substantive RICO count. Accordingly, there appears to be no controlling authority in our circuit or in the Supreme Court instructing us to adopt the reasoning of our sister circuits and dismiss

V. CONCLUSION

The RICO allegations in Plaintiffs' Second Amended Complaint "stop [] short of the line between possibility and plausibility." *See* *Twombly, 550 U.S. at 557, 127 S. Ct. at 1966*. As explained above, Plaintiffs failed to sufficiently plead a pattern of racketeering **[**36]** activity predicated on a scheme to commit acts of mail and wire fraud. Plaintiffs also failed to plausibly allege a conspiracy to commit RICO violations, as they merely offered conclusory allegations of agreement accompanied by statements of parallel behavior, which just as easily suggest independent, lawful action. For the aforementioned reasons, we affirm the district court order dismissing Plaintiffs' RICO and RICO-related claims for failure to state a claim. [7]

AFFIRMED.

End of Document

Plaintiffs' conspiracy claim because the substantive RICO claim was deficiently alleged. *See also* *Beck v. Prupis, 529 U.S. 494, 506 n.10, 120 S. Ct. 1608, 1616 n.10, 146 L. Ed. 2d 561 (2000)* (expressly declining to resolve whether a plaintiff suing under *section 1964(c)* for a RICO conspiracy must allege an actionable violation under *section 1962(a)-(c)*). Because Plaintiffs' conspiracy count fails to state a claim under *Twombly* and *Iqbal's* plausibility standard, we find it unnecessary to decide in this case whether Plaintiffs' conspiracy claim must also fail because of the deficiencies in the substantive RICO count.

[7] The only argument Plaintiffs make with respect to the claim for aiding and abetting RICO violations under *18 U.S.C. § 2* (Count II) is in a footnote, which states that their arguments apply with equal force to that claim. Plaintiffs do not offer any argument with respect to their claim for declaratory relief for RICO violations (Count IV). We conclude that the district court properly dismissed these claims for the same reasons that it dismissed the *section 1962(c)* and *section 1962(d)* claims. Additionally, Plaintiffs raise several other arguments on appeal with respect to the district court's order dismissing their complaint. For example, Plaintiffs assert that the district court erroneously found *Twombly* to have created a **[**37]** heightened pleading standard and wrongly compared their RICO allegations to those in the *Solomon* and *Genord* cases that the court had earlier dismissed for failure to state a claim. Because we hold that the Second Amended Complaint fails to state a claim for relief under the plausibility pleading standard articulated by the Supreme Court in *Twombly* and *Iqbal*, we conclude that these contentions are meritless.

Tese-Milner v. Diamond Trading Co.

United States District Court for the Southern District of New York

May 14, 2010, Decided; May 14, 2010, Filed

04 Civ. 05203 (KMW)

Reporter
2010 U.S. Dist. LEXIS 143934 *

ANGELA TESE-MILNER as CHAPTER 7 TRUSTEE OF THE ESTATE OF W.B. DAVID & CO., INC., Plaintiff, -against- DIAMOND TRADING COMPANY, LTD.; CENTRAL SELLING ORGANIZATION; CSO VALUATIONS A.G.; DE BEERS CONSOLIDATED MINES, LTD.; DE BEERS CENTENARY A.G.; DE BEERS S.A.; and DB INVESTMENTS, INC., Defendants.

Subsequent History: Dismissed by *Tese-Milner v. Diamond Trading Co., Ltd., 2011 U.S. Dist. LEXIS 111514 (S.D.N.Y., Sept. 29, 2011)*

Prior History: *Tese-Milner v. De Beers Centenary A.G., 613 F. Supp. 2d 404, 2009 U.S. Dist. LEXIS 4898 (S.D.N.Y., 2009)*

Core Terms

Diamond, Trading, motion to dismiss, subsidiary, allegations, Consolidated, marketing, rough, Sherman Act, conspiracy, discovery, entities, selling, monopoly, common ownership, relevant market, parent company, redacted, survive, producers, sales, prices, holds, failure to state a claim, factual allegations, formalities, Supplier, policies, courts, amend

Counsel: **[*1]** For W.B. David & Co., Inc., Plaintiff: Jacob W. Heller, LEAD ATTORNEY, Heller, Horowitz & Feit, P.C., New York, NY.

For Angela Tese-Milner, as Chapter 7 Trustee of the Estate of W.B. David & Co., Inc., Plaintiff: John Christopher Crow, LEAD ATTORNEY, Bowles, Cohn & Crow L.L.P., New York, NY; Michael Masefield Milner, LEAD ATTORNEY, Tese & Milner, New York, NY; John Aubrey Wait, Yann Geron, Fox Rothschild, Attorneys at Law (NYC), New York, NY.

For De Beers Centenary AG, De Beers Consolidated Mines Ltd., Defendants: Bradley J. Demuth, Paul Harrison Broer, Sean Michael Tepe, Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY; John Ross Seward, Steven Craig Sunshine, Cadwalader, Wickersham & Taft, LLP (DC), Washington, DC.

For De Beers Societe Anonyme, The Diamond Trading Company, Defendants: Bradley J. Demuth, Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY; Steven Craig Sunshine, Cadwalader, Wickersham & Taft, LLP (DC), Washington, DC.

For Diamond Trading Company, Ltd., CSO Valuations A.G., Diamond Development Company N.V., De Beers S.A., DB Investments, Inc., Defendants: John Ross Seward, Steven Craig Sunshine, Cadwalader, Wickersham & Taft, LLP (DC), Washington, **[*2]** DC; Paul Harrison Broer, Sean Michael Tepe, Skadden, Arps, Slate, Meagher & Flom LLP (NYC), New York, NY.

Judges: KIMBA M. WOOD, United States District Judge.

Opinion by: KIMBA M. WOOD

Opinion

ORDER

WOOD, U.S.D.J.:

On February 24, 2010, the Court issued an opinion resolving several motions in the above-captioned case (the "Opinion"). The Court filed the Opinion under seal because it discussed sealed exhibits that contain confidential and proprietary information relating to Defendants' business operations. The sealed exhibits include confidential business contracts, financial statements, business plans, and minutes from business meetings. The Court ordered the parties to submit a proposed redacted version of the Opinion, which the Court could file publicly.

On March 5, 2010, the parties submitted a proposed redacted version of the Opinion, which the Court has reviewed. The Court finds that only certain of the parties' proposed redactions contain confidential and proprietary business information that should be filed under seal. The Court has redacted those statements from the Opinion, and attached the Court's redacted version of the Opinion (the "Redacted Opinion") to this Order. The Court orders the Clerk of the Court **[*3]** to maintain the redacted portions of the Redacted Opinion under seal, and to file the Redacted Opinion through the ECF public filing system.

SO ORDERED.

DATED: New York, New York

May 14, 2010

/s/ Kimba M. Wood

KIMBA M. WOOD

United States District Judge

OPINION & ORDER

WOOD, U.S.D.J.:

On July 11, 2007, Plaintiff Angela Tese-Milner ("Plaintiff), the Chapter 7 Bankruptcy Trustee of the Estate of W.B. David & Co., Inc. ("W.B. David"), filed an Amended Complaint ("AC") in the above-captioned action, alleging, inter alia, violations of federal and state antitrust laws. Plaintiff now moves for leave to file a Second Amended Complaint ("SAC"), pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure* ("FRCP"). Defendants De Beers Consolidated Mines, Ltd. ("Consolidated"), De Beers Centenary A.G. ("Centenary"), De Beers S.A. ("DBSA"), and DB Investments, Inc. ("DBI") (collectively, "Jurisdictional Defendants"), move to dismiss the AC for lack of personal jurisdiction, pursuant to *Rule 12(b)(2) of the FRCP*. Jurisdictional Defendants, Defendant CSO Valuations A.G. ("CSOV"), and Defendant Diamond Trading Company, Ltd. ("Diamond Trading") (collectively, Defendants), oppose Plaintiffs motion for leave **[*4]** to amend, and move to dismiss the AC, or, in the alternative, the proposed SAC, for failure to state a claim, pursuant to *Rule 12(b)(6) of the FRCP*. CSOV also moves to dismiss the AC for insufficient service of process, pursuant to *Rule 12(b)(5) of the FRCP*. Finally, Jurisdictional Defendants move to dismiss the AC as against Defendant Central Selling Organization ("CSO") on the grounds that CSO does not exist.

For the reasons stated below, the Court: (1) GRANTS Jurisdictional Defendants' motion to dismiss pursuant to *Rule 12(b)(5)*; (2) DENIES Plaintiffs motion to file the proposed SAC; (3) GRANTS Defendants' motion to dismiss the AC, without prejudice; (4) DENIES CSOV's motion to dismiss pursuant to *Rule 12(b)(2)* as moot; and (5) GRANTS Jurisdictional Defendants' motion to dismiss the AC as against CSO.

I. Background

Defendants are business entities affiliated with the De Beers Group ("De Beers"). De Beers is the name of a group of related companies involved in the production, purchase, and sale of diamonds. De Beers has played a leading role in the diamond industry for decades. Plaintiffs claims arise out of W.B. David's longstanding business relationship with De Beers. From 1969 to **[*5]** 2003, W.B. David was a De Beers' Sightholder — a company selected by De Beers to purchase and sell De Beers' rough diamonds.

On July 1, 2004, W.B. David filed the 140-page Original Complaint ("OC") in this action, asserting thirty-six claims against over 100 defendants. The OC alleged that De Beers controlled the world diamond market, and was engaged in anticompetitive conduct affecting the U.S. markets for rough and polished diamonds. The OC's allegations focused on the "Supplier of Choice" program, a program De Beers introduced in 2003 to select Sightholders. De Beers terminated W.B. David as a Sightholder after implementing the Supplier of Choice program. The OC alleged that De Beers used the Supplier of Choice program to reduce the number of Sightholders, thereby restricting the supply of diamonds to the market and raising diamond prices. The OC also alleged that DeBeers had stolen from W.B. David a proprietary diamond marketing plan called "Leading Jewelers of the World." The OC alleged that De Beers' conduct violated: (1) federal and state ***antitrust law***, including *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* & *2*; (2) the Racketeering Influenced and Corrupt Organizations **[*6]** Act; and (3) state common law.

On January 25, 2006, unsecured creditors of W.B. David filed an involuntary Chapter 7 bankruptcy petition against W.B. David in the U.S. Bankruptcy Court for the Southern District of New York. The Bankruptcy Court entered an order of relief on February 8, 2006, and appointed Angela Tese-Milner as Trustee of the W.B. David Estate.

On July 5, 2007, Plaintiff filed the AC, which is 11 pages long and omits many of the defendants, allegations, and claims included in the OC. In the AC, Plaintiff sued Defendants and three additional companies allegedly related to De Beers (the "Diamond Development Companies") (collectively with Defendants, the "AC Defendants"). The AC continues to allege that De Beers controls the diamond market, but it abandons all of the OC's specific allegations regarding the Supplier of Choice program and the Leading Jewelers of the World campaign. Instead, the AC alleges that De Beers maintains its monopoly by various means, many of which are secret, and that it conspires with unidentified entities to control the supply of diamonds and raise and maintain diamond prices. The AC claims that De Beers' monopolistic conduct has anticompetitive **[*7]** effects in the diamond market, and violates *Sections 1* and *2* of the Sherman Act and *Section 340* of the Donnelly Act.

In September 2007, Defendants filed a motion to dismiss the AC for failure to state a claim, pursuant to *Rule 12(b)(6)*. Jurisdictional Defendants filed a motion to dismiss the AC for lack of personal jurisdiction, pursuant to *Rule 12(b)(2)*, and for insufficient service of process, pursuant to *Rule 12(b)(5)*.

On January 23, 2009, the Court issued an order addressing Defendants' motions to dismiss. See *Tese-Milner v. De Beers Centenary A.G., et al., 613 F.Supp.2d 404 (S.D.N.Y. 2009)*. The Court assumes familiarity with its January 2009 Order, and summarizes only those aspects that are relevant to the instant motions. In the Order, the Court stated that it would first address the motion to dismiss for lack of personal jurisdiction, because the jurisdictional issue was antecedent to questions of the propriety of service and the sufficiency of Plaintiff's claims. Plaintiff argued that the Court could assert jurisdiction over the Jurisdictional Defendants based on De Beers' (i.e., all AC Defendants') aggregate contacts with the United States and New York, pursuant to (1) New York's **[*8]** general jurisdiction statute, *N.Y. C.P.L.R. § 301*; (2) New York's long-arm statute, *N.Y. C.P.L.R. § 302*; (3) *Federal Rule of Civil Procedure 4(k)(2)*; and (4) *Section 12* of the Clayton Act. Plaintiff argued that De Beers was an "integrated enterprise," and thus that the New York contacts of Diamond Trading and CSOV, who were not contesting jurisdiction, could be attributed to Jurisdictional Defendants.

The Court held that Plaintiff had not made a prima facie showing of personal jurisdiction over the Jurisdictional Defendants, or even a "sufficient start" towards a prima facie showing so as to justify jurisdictional discovery, pursuant to New York's long-arm statute (*C.P.L.R. § 302*), *Rule 4(k)(2)*, or *Section 12* of the Clayton Act. See

Stratagem Dev. Corp. v. Heron Int'l. N.V., 153 F.R.D. 535, 547 (S.D.N.Y. 1994) (stating that plaintiff was entitled to jurisdictional discovery where he had made a "sufficient start" towards establishing personal jurisdiction).

With respect to *C.P.L.R. § 301*, New York's general jurisdiction statute, Plaintiff argued that Diamond Trading and CSOV were departments or agents of Jurisdictional Defendants, and that, accordingly, their contacts with New York could **[*9]** be attributed to Jurisdictional Defendants for the purpose of establishing jurisdiction. The Court found that Plaintiff had failed to make a prima facie showing of personal jurisdiction pursuant to agency or department theories of jurisdiction, but had made a sufficient start towards such a showing to justify jurisdictional discovery on the issue. The Court denied Jurisdictional Defendants' motion to dismiss for lack of personal jurisdiction, without prejudice to refile upon the completion of jurisdictional discovery.[1] The Court denied Defendants' motions to dismiss for insufficient service of process and for failure to state a claim, without prejudice to refile after the completion of jurisdictional discovery.

In their motion to dismiss for lack of personal jurisdiction, Jurisdictional Defendants also argued that Defendant CSO did not exist. In an order issued on February 24, 2009, the Court ordered the parties to conduct discovery on the issue of whether CSO was a legal entity capable of being sued. The parties completed jurisdictional discovery in May 2009. The instant motions followed.

For the reasons stated below, the Court: (1) GRANTS Jurisdictional Defendants' motion to dismiss pursuant to *Rule 12(b)(2)*; (2) DENIES Plaintiffs motion for leave to amend; (3) GRANTS Defendants' motion to dismiss the AC pursuant to *Rule 12(b)(6)*, without prejudice; (4) GRANTS Jurisdictional Defendants' motion to dismiss the AC as against the CSO; and (5) DENIES CSOV's motion to dismiss pursuant to *Rule 12(b)(5)* as moot.

II. Motion to Dismiss Pursuant to *Rule 12(b)(2)*

The Court holds that Plaintiff has not established that Diamond Trading is a department or agent of Jurisdictional Defendants, and thus has not made out **[*12]** a prima facie case of personal jurisdiction over Jurisdictional Defendants.

A. Personal Jurisdiction Pursuant to *C.P.L.R. § 301*

C.P.L.R. § 301, which is New York's general jurisdiction statute, empowers a court to exercise jurisdiction over a non-domiciliary defendant that is "'engaged in such a continuous and systematic course of 'doing business' [in New York] that a finding of its 'presence' in [the state] is warranted.'" See *Bresciani v. Leela Mumbai-A-Kempinski Hotel, 311 F. Supp. 2d 440, 444 (S.D.N.Y. 2004)* (quoting *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc., 77*

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[1] The Diamond Development Companies — Diamond Development Company N.V. ("Diamdel N.V."), Diamond Development Company S.A. ("Diamdel S.A."), and Diamond Development Company Ltd. ("Diamdel Ltd.") — joined in Jurisdictional Defendants' motion to dismiss pursuant to *Rule 12(b)(2)* and *Rule 12(b)(5)*. In the January 23 Order, the Court granted the motion to dismiss with respect to Diamdel Ltd., holding that the Plaintiffs had not made out a prima facie case of personal jurisdiction over **[*10]** Diamdel Ltd., or even a sufficient start towards a prima facie showing, pursuant to any of the four jurisdictional theories proposed.

Plaintiff alleged that Diamdel N.V. and Diamdel S.A. were alternate names for a company in Antwerp, Belgium that sold diamonds to W.B. David. Defendants claimed that a company named Diamdel S.A. did not exist. Plaintiff stated in a letter to the Court that she did not object to dismissing Diamdel S.A. from the action, based on Defendants' representation that Diamdel N.V. was the correct party. In an order issued on February 24, 2009, the Court dismissed the action against Diamdel S.A. without prejudice.

In the SAC, Plaintiff has dropped Diamdel N.V. as a defendant. In a proposed order attached to the SAC, Plaintiff states that its claims against Diamdel N.V. are moot due to the settlement in Sullivan v. DB Investments. Inc., 04-2819 (SRC) (D.N.J.), a class action filed against various De Beers entities, including some of Defendants. Plaintiff seeks to voluntarily dismiss the action against Diamdel N.V., without prejudice to refile if the Sullivan class action settlement is not finalized. Defendants do not oppose the dismissal. The Court grants Plaintiffs **[*11]** request. The Court notes, however, that Plaintiff can reassert against Diamdel N.V. only claims that accrued on or after the date on which the Amended Complaint was filed, see Part III.D, infra.

N.Y.2d 28, 565 N.E.2d 488, 490, 563 N.Y.S.2d 739 (1990)). Where a court has jurisdiction over a corporate defendant pursuant to C.P.L.R. § 301, the court may also exercise jurisdiction over any company for whom the defendant acts as an agent, or of which the defendant is a mere department.[2] See J.L.B. Equities, Inc. v. Ocwen Fin. Corp., 131 F. Supp. 2d 544, 549-50 (S.D.N.Y. 2001); Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd., 508 F. Supp. 1322, 1333-34 (E.D.N.Y. 1981).

On a motion to dismiss for lack of personal jurisdiction, "the plaintiff bears the burden of showing that the court has jurisdiction over the defendants." Kernan v. Kurz-Hastings, Inc., 175 F.3d 236, 240 (2d Cir. 1999) (citations omitted). After discovery has been conducted, plaintiff must make a "prima facie showing of facts that, if credited by the trier of fact, would suffice to establish jurisdiction over the defendant." Bicicletas Windsor, S.A. v. Bicycle Corp. of America, 783 F. Supp. 781, 783 (S.D.N.Y. 1992); Ball v. Metallurgie Hoboken-Overpelt. S.A., 902 F.2d 194, 197(2d Cir. 1990).

Plaintiff argues that jurisdictional discovery has revealed that Diamond Trading is an agent and/or department of Jurisdictional Defendants,[3] and that the Court can exercise jurisdiction over **[*14]** Jurisdictional Defendants pursuant to Section 301.

B. Results of Jurisdictional Discovery

Diamond Trading and Jurisdictional Defendants — DBI (DB Investments, Inc.), DBSA (De Beers S.A.), Consolidated (De Beers Consolidated Mines, Ltd.), and Centenary (De Beers Centenary A.G.) — are all part of the De Beers group of companies, which consists of directly and indirectly owned subsidiaries of DBI and DBSA.

DBI: DBI is a holding company incorporated in Luxembourg; it is the parent company of DBSA. (SAC, ¶ 16; Seward Decl., Ex. 2). DBI has three shareholders but no executives, and it functions solely through **[*15]** the actions of its board of directors. (Seward Decl., Ex. 3, Ketley Dep. 124:18-25:31; Seward Decl., Ex. 4, Ex. 5.) The responsibilities of DBI's board include approving the annual business plans and budget for each De Beers' company, appointing the Chairman of the DBI and DBSA boards, and approving certain capital expenditures by subsidiaries. (Seward Decl, Ex. 5.)

DBSA: DBSA is a holding company also incorporated in Luxembourg. (SAC, ¶ 17.) DBSA's holdings include Consolidated, Diamond Trading, a retail diamond jewelry chain, and an industrial diamond business. (Seward Decl., Ex. 7.) DBSA is governed by its board of directors, which is responsible for such tasks as reviewing and recommending the annual De Beers' business plan and budget to the DBI board. (Seward Decl., Ex. 5 at DBI 000456-457; Ex. 3, Ketley Dep. 124:6-10.) DBSA has an Executive Committee that recommends and monitors the implementation of DBSA's policies and strategies. (Seward Decl., Ex. 8 at 000556-7.)

Consolidated and Centenary: Consolidated is a South African corporation engaged in diamond exploration and mining. Its owners are DBSA, which owns seventy-four percent of the company, and Ponahalo Holdings (Pty.) Ltd., **[*16]** an investment company established to benefit historically disadvantaged South Africans, which owns twenty-six percent. (Seward Decl., Ex. 7. & 13.) Consolidated's operations are overseen by its board of directors, eight of whom are appointed by DBSA and three by Ponahalo. (Seward Decl., Ex. 15 at 004495; Ex. 14 at 004544.)

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[2] Because Diamond Trading has not contested jurisdiction, the Court has not determined the specific jurisdiction pursuant to which it can exercise jurisdiction over the company. **[*13]** In other words, the Court has not determined that it has jurisdiction over Diamond Trading pursuant to Section 301. The parties contest whether Diamond Trading has sufficient contacts with New York to satisfy Section 301. The Court finds that Diamond Trading is not an agent or department of Jurisdictional Defendants, and thus does not address whether jurisdiction over Diamond Trading arises under Section 301.

[3] The Court also granted jurisdictional discovery to determine whether CSOV was an agent or department of Jurisdictional Defendants. Jurisdictional Defendants argue that discovery did not reveal any evidence showing that CSOV is an agent or department of Jurisdictional Defendants. Plaintiff does not contest this claim. The Court agrees with Jurisdictional Defendants. There is no evidence on the record supporting the theory that CSOV is an agent or department of Jurisdictional Defendants, and thus the Court does not have jurisdiction over Jurisdictional Defendants based on CSOV's activities.

Consolidated's Executive Committee is responsible for the company's day-to-day management. (Seward Decl., Ex. 15 at 004496; Ex. 14 at 004545.) Since at least 2005, Consolidated has sold the diamonds it mines to De Beers Group Services (Pty) Ltd. ("DBGS"), a South African company owned by DBSA. DBGS then sells to Diamond Trading any diamonds intended for export. (Seward Decl., Ex. 17; Ex. 18.)

Prior to 2001, Consolidated and Centenary were both parent companies of De Beers, and were publicly traded. (SAC, ¶¶ 23 & 24.) On June 8, 2001, Consolidated and Centenary were converted into private companies, with DBSA acquiring 100% of each company's stock. Since 2001, Centenary's capital and responsibilities have been reduced significantly, and the company now provides only limited financial services to some De Beers' entities. (Seward Decl., Ex. 23.)

Diamond Trading: Diamond **[*17]** Trading is incorporated under the laws of England and Wales, and has offices in London. (SAC, ¶ 9; Ex. 24.) Currently, Diamond Trading is engaged in purchasing, sorting, marketing, and selling rough diamonds. Prior to 2002, Diamond Trading served only as an invoicing company. (Seward Decl., Ex. 40 at 000713.) At that time, a company known as Diamond Trading Company (Pty) Limited was responsible for selling De Beers' rough diamonds. (Seward Decl., Ex. 12, Page Dep. 4:25-5:19.) Prior to sale, the diamonds were held by a Bermudian company called Corriedale Limited. (Page Dep. 27:23-28:8.) CSOV provided sorting, valuing, sales, and marketing services. (Page Dep. 188:10-189:4.) After Consolidated and Centenary became private companies in 2001, the various companies' functions were consolidated into Diamond Trading. Diamond Trading purchased the stocks of rough diamonds held by Corriedale and its affiliates, and acquired CSOV's assets and liabilities. (Seward Decl., Ex. 40, 41.) By the end of 2005, Diamond Trading had assumed all diamond trading responsibilities and was operating in its current form.

Diamond Trading purchases rough diamonds from mining companies or other suppliers, sorts **[*18]** and values them, and sells them to Sightholders at ten annual sales events, which are known as "Sights." (Seward Decl., Ex. 28-29.) Until it lost its Sightholder position in 2003, W.B. David purchased diamonds from Diamond Trading Sights that took place in London. Diamond Trading purchases of [TEXT REDACTED BY THE COURT] its rough diamonds from Consolidated and the remainder from other companies. (Seward Decl., Ex. 12, Page Dep. 199:16-200:8.) Diamond Trading enters into formal purchase agreements with all of its suppliers, including Consolidated. (Seward Decl., Ex. 18, 25-26.)

Since its 2001 restructuring, Diamond Trading has generated revenues predominately through the sale of rough diamonds. (Seward Decl., Ex. 36.) Revenues are used to cover the company's expenses, such as cost of sales, salaries, interests on loans, and taxes. From 2002 to 2007, Diamond Trading also had access to a revolving credit facility that was provided by a syndicate of banks and open to a number of De Beers companies. (Wait Decl., Ex. 2, Page Dep. 189:5-192:8, 193:21-194:7.) Diamond Trading borrowed money through the facility under its own name, though the liabilities accrued to De Beers generally. (Id. 192.)

Diamond **[*19]** Trading's day-to-day operations are run by its Managing Director, who reports to the company's board and to DBSA's Managing Director. (Seward Decl., Ex. 30 & 31.) The Managing Director is responsible for developing and implementing Diamond Trading's strategy, policies, procedures, and budgets; monitoring its financial performance; assessing and controlling risk; and other management functions. (Seward Decl, Ex. 32 & 35.) Diamond Trading also has an Executive Committee, which assists the Managing Director. (Id.) Diamond Trading's board prepares the annual business plan and budget, which is submitted to DBSA's board for review and recommendation to DBI, which then reviews and approves the plan.

There is some overlapping membership on Defendants' boards of directors. Diamond Trading and DBSA share four directors, and two DBI directors also sit on the Diamond Trading board. (Seward Decl., Ex. 32 & 59.) Four individuals sit on both Consolidated's and Diamond Trading's boards. (Id.) In addition, two of Diamond Trading's executives sit on the boards of DBSA and Centenary.

C. Agency Theory of Personal Jurisdiction

1. Legal Standard

To establish that one company acts as the agent of another company **[*20]** for the purposes of *C.P.L.R. § 301*, the plaintiff must show that the alleged agent "does all the business which [the other company] would do were it [in New York] by its own officials." *Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998)* (internal quotations and citations omitted). "Courts have interpreted this to mean that the agent's activities in New York must be sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." *Stutts v. De Dietrich Group, 465 F. Supp. 2d 156, 162 (E.D.N.Y. 2006)* (internal quotations and citations omitted). In determining whether an agency relationship exists, courts consider only the purported agent's activities in New York. See *Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000)* (stating that a court can exercise jurisdiction over a parent company "predicated upon activities performed in New York [for the parent corporation] by an agent") (emphasis added); *Saraceno v. S. C. Johnson & Son, Inc., 83 F.R.D. 65, 68 (S.D.N.Y. 1979)* (refusing to consider purported agent's non-New York contacts **[*21]** when ruling on personal jurisdiction).

2. Application

Plaintiff has not raised sufficient facts to establish that Diamond Trading is as an agent of Jurisdictional Defendants for the purposes of *C.P.L.R. § 301*.

First, Plaintiff has not shown that Diamond Trading carries out any activities in New York. In Plaintiffs opposition briefs, Plaintiff details certain activities carried out by "De Beers" that involve New York, but she does not explain which — if any — of these activities are carried out by Diamond Trading specifically. (Opp. 12(b)(2), 19-21; Org. Opp. 12(b)(2).) Allegations about the actions of De Beers in general are insufficient to establish that Diamond Trading is an agent of Jurisdictional Defendants. Rather, Plaintiff must allege that Diamond Trading itself is engaged in conduct in New York that can be attributed to Jurisdictional Defendants.

Defendants acknowledge that Diamond Trading was involved in three New York-related activities: (1) sales, which took place in London, to eight New York Sightholders, including W.B. David; (2) formation of the U.S. Carat Club, a marketing mechanism intended to increase De Beers' sales in the U.S.; and (3) organization of a nationwide advertising **[*22]** campaign. (Br. 12(b)(2), 29.) These activities, however, cannot be used to establish agency pursuant to *Section 301*, because they did not take place in New York. Diamond Trading's offices are in London; New York Sightholders travel to London to purchase the company's diamonds. (Org. Opp. Br. 12(b)(2), 5.) There is no evidence that Diamond Trading conducted any Sights or other sales activities in New York. See *Yurman Designs, Inc. v. A.R. Morris Jewelers, L.L.C., 41 F. Supp. 2d 453, 458 (S.D.N.Y. 1999)* ("[Solicitation of business alone will not justify a finding of corporate presence in New York with respect to a foreign [company] . . . .") (internal quotations and citations omitted). The U.S. Carat Club and the advertising campaign were organized by Diamond Trading personnel in London, and targeted to the U.S. in general, not specifically to New York. (Org. Opp. Br. 12(b)(2), 5-8.) Nationwide advertising and marketing does not constitute activity in New York for the purposes of *Section 301*. See *Pellegrino v. Stratton Corp., 679 F. Supp. 1164, 1171-72 (N.D.N.Y. 1988)* (finding that court did not have jurisdiction over defendant pursuant to *C.P.L.R. § 301* based on defendant's advertising **[*23]** in national newspapers because the newspapers were directed at a national audience and not specifically at New York); *Baird v. Day & Zimmerman, Inc., 390 F. Supp. 883, 884 (S.D.N.Y. 1974)* (holding that advertising in New York telephone directory amounted to mere solicitation and did not support a finding that defendant was doing business in New York pursuant to *C.P.L.R. § 301*). Plaintiff, therefore, has raised no evidence showing that Diamond Trading was involved in activity in New York

Second, even if Diamond Trading's sales to New York Sightholders did constitute an activity in New York, Plaintiff has not shown that these sales are sufficiently important to Jurisdictional Defendants that they would conduct the sales themselves if Diamond Trading were unavailable. Jurisdictional discovery revealed that the eight New York Sightholders make up less than ten percent of Diamond Trading's customers. (Steward Decl., Ex. 66.) Plaintiff has pointed to no evidence indicating that these eight Sightholders purchase a significant percentage of Diamond Trading's merchandise. Without such evidence, the Court is not convinced that Jurisdictional Defendants would begin sorting, valuing, and selling **[*24]** rough diamonds simply to maintain eight of Diamond Trading's eighty-three customers, particularly given that Jurisdictional Defendants currently are not equipped to carry out these activities.

Plaintiff attempts to support her agency argument by pointing to statements by De Beers personnel that De Beers is an "integrated enterprise" and that Diamond Trading is the group's "marketing arm." (Opp. Br. 12(b)(2), 15.) The Court has already found that descriptions of De Beers as an "integrated enterprise" are insufficient to establish agency. See *Tese-Milner, 613 F. Supp. 2d at 415-17* (holding that Plaintiff had failed to make a prima facie claim that Diamond Trading was an agent of Defendants, even though Plaintiff alleged that De Beers was an integrated enterprise). This is especially true when, after jurisdictional discovery, Plaintiff has failed to show that Diamond Trading conducts important activities in New York on behalf of Jurisdictional Defendants. Assertions that Diamond Trading is De Beers' "marketing arm" are similarly ineffectual, particularly where Plaintiff has pointed to no facts indicating that Diamond Trading carries out marketing or advertising activities in or specifically **[*25]** targeted to New York. See *H. Heller & Co. v. Novacor Chems. Ltd., 726 F. Supp. 49, 55 (S.D.N.Y. 1988)* (finding that the phrase "marketing arm" can "describe many relationships" and "is not coterminous with the jurisdictional definition of agency'").

Accordingly, the Court finds that Plaintiff has not established that Diamond Trading serves as an agent in New York of Jurisdictional Defendants.

D. Department Theory of Jurisdiction

1. Legal standard

To demonstrate that a subsidiary company is a mere department of its parent, a plaintiff must show that the "parent's control of the subsidiary is pervasive enough that the corporate separation is more formal than real." *H. Heller & Co., 726 F. Supp. at 54*. To determine whether such control exists, courts consider four factors: (1) common ownership; (2) financial dependence of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of control the parent exercises over the marketing and operational policies of the subsidiary.[4] *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120-22 (2d Cir. 1984)*.

2. Application

The Court finds that Plaintiff has not shown that Diamond Trading is a department of any of the Jurisdictional Defendants.

a. Common ownership

Common ownership is "essential to the assertion of jurisdiction over a foreign related corporation." *Id. at 120*. The common ownership prong is most easily satisfied where the alleged department is a wholly-owned subsidiary of the parent corporation. Courts have found common ownership outside of the classic parent-subsidiary relationship, but only where ownership interests in the companies are "nearly identical." Id.; *Palmieri v. Estefan, 793 F. Supp. 1182, 1187-88 (S.D.N.Y. 1992)* (finding that common ownership existed between companies that were all wholly-owned by the same parent **[*27]** company).[5]

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[4] Courts **[*26]** have applied the department test outside of the classic parent-subsidiary relationship. *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984)*. When discussing the test, however, the majority of courts focus on the parent-subsidiary relationship, and, for ease of reference, this Court will do the same. In its analysis, however, the Court applies the test to Centenary and Consolidated, Diamond Trading's sister companies.

[5] In its January 2009 Order addressing personal jurisdiction, the Court found that Plaintiff had not alleged sufficient facts to make jurisdictional discovery appropriate as to former Defendant Diamdel Ltd., in part because Plaintiff had not alleged that Diamdel Ltd. had an ownership interest in CSOV or Diamond Trading. The Court realizes that this statement does not accurately reflect the law: the common ownership prong of the department test can be satisfied in cases involving sister companies or affiliates, if the ownership interests in the companies are nearly identical. The Court also stated, however, that Plaintiffs allegations against Diamdel Ltd. were flawed because Plaintiff had named three Diamdel companies in the AC, and stated that she was not certain which of the three was the appropriate defendant. Plaintiff has since identified Diamdel N.V., and not Diamdel Ltd., as the appropriate defendant.

Consolidated is owned by DBSA (seventy-four percent) and by Ponahalo Investments (twenty-six percent). Thus the ownership of Consolidated is not "nearly identical" to that of Diamond Trading, which is wholly-owned by DBSA. The two thus lack common ownership. See *ESI, Inc. v. Coastal Corp., 61 F. Supp. 2d 35, 52 (S.D.N.Y. 1999)* **[*28]** (finding that common ownership of ninety-percent is a close call but sufficient); *Saraceno, 83 F.R.D. at 69* (one hundred percent ownership satisfies this prong of test); *Vendetti v. Fiat Auto S.p.A., 802 F. Supp. 886, 893 (W.D.N.Y. 1992)* (same). The absence of common ownership weighs heavily against Plaintiffs argument that Diamond Trading is a department of Consolidated.

There is common ownership between Diamond Trading and DBSA, DBI, and Centenary. Diamond Trading is a wholly-owned subsidiary of DBSA, and is an indirect, wholly-owned subsidiary of DBI. Centenary is also wholly-owned by DBSA. The existence of common ownership, however, does not establish that Diamond Trading is a department of DBSA, DBI, or Centenary, if the remaining three factors do not support such a finding. See *Dorfman v. Marriott Int'l Hotels, Inc., No. 99 CIV 10496 (CSH), 2002 U.S. Dist. LEXIS 72, 2002 WL 14363, at *7 (S.D.N.Y. Jan. 3, 2002)*.

b. Financial dependence

To determine whether a subsidiary is financially dependent on its parent company, courts consider whether the parent company, inter alia, (1) provides no- or low-interest loans to the subsidiary or extends credit to the subsidiary on terms not otherwise available; (2) guarantees **[*29]** the subsidiary's obligations; or (3) provides or pays for insurance coverage on behalf of the subsidiary. *ESI, Inc., 61 F. Supp. 2d at 53*. In general, to establish financial dependency, a plaintiff must show that the subsidiary cannot function without the financial backing of the parent company. See *Reers v. Deutsche Bahn AG, 320 F. Supp. 2d 140, 157 (S.D.N.Y. 2004)*; *Meteoro Amusement Corp. v. Six Flags, 267 F. Supp. 2d 263, 271 (N.D.N.Y. 2003)*.

Plaintiff has not established that Diamond Trading is financially dependent on any of Jurisdictional Defendants. Jurisdictional discovery produced evidence that shows that since 2007, Diamond Trading has generated revenues sufficient to cover most of its expenses. It is less clear how Diamond Trading was financed from 2001-2007. Plaintiff, however, has pointed to no evidence that Diamond Trading relied on financing from Jurisdictional Defendants to pay its operating expenses during this period.

Prior to 2007, Diamond Trading did have access to a credit facility that was also open to other De Beers entities. The credit facility was operated by a bank syndicate, however, and there is no indication that Diamond Trading received no- or low-interest **[*30]** loans or any other special terms for borrowing. Diamond Trading's use of the credit facility, therefore, does not establish that it was financially dependent on Jurisdictional Defendants.

Although Diamond Trading purchases [TEXT REDACTED BY THE COURT] from Consolidated, these sales are conducted through arms-length contracts and there is no evidence of any special terms between the parties. Plaintiff has not shown, therefore, that Diamond Trading depends on any of the Jurisdictional Defendants for financial support.

c. Control over personnel selection and respect for corporate formalities

Factors that courts consider when examining the third prong of the department test — interference with personnel selection and failure to observe corporate formalities — include whether (1) the parent shares officers with the subsidiary; (2) the parent pays the executives' salaries; and (3) the subsidiary holds separate meetings of its board of directors. See *ESI, Inc., 61 F. Supp. 2d at 54*. It is normal for a parent company to "control the board of directors of a subsidiary in their capacity as representatives of the controlling stockholder." *Beech Aircraft, 751 F.2d at 121*; see also *Vendetti, 802 F. Supp. at 895* **[*31]** ("[T]he existence of common directors and officers is a normal business practice of a multi-national corporation . . . ."). When, however, "the parent officers extend their control beyond that normally exercised by boards of directors, their behavior supports an inference that the subsidiary is not an independent entity." *Beech Aircraft, 751 F.2d at 121*. The fact that a parent company appoints a few of the subsidiary's officers or directors is insufficient to establish control over personnel selection. *Reers, 320 F. Supp. 2d at 157*.

Here, there is some overlap in the membership of the boards of Diamond Trading and Jurisdictional Defendants. There is no evidence, however, that Jurisdictional Defendants' board members are involved in the day-to-day management of Diamond Trading. The fact that two of Diamond Trading's executives sit on the boards of Centenary and DBSA does not prove that either of these companies controls Diamond Trading. See *Vendetti, 802 F. Supp. at 894-95*.

Plaintiff claims that the restructuring of Diamond Trading from 2001-2004 "speaks volumes as to the meaningless of corporate formalities [within De Beers]." (Br. Opp. 12(b)(5), 18.) While a decision by a parent company **[*32]** to restructure a subsidiary may be a sign that the parent exercises control over the subsidiary, the mere fact that a restructuring occurs does not prove that corporate formality has broken down. See In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000, *342 F. Supp. 2d 207, 215 (S.D.N.Y. 2004)* (finding that restructuring of subsidiary did not show an absence of corporate formality).

Here, the evidence produced during discovery indicates that formalities were adhered to during Diamond Trading's reorganization. Diamond Trading purchased the assets of Corriedale and its affiliates for $1.2 billion, through a sale approved by Diamond Trading's board. The company entered into a formal novation agreement with CSOV and Corriedale to transfer CSOV's operations to Diamond Trading. (Seward Decl., Ex. 42.) There is no evidence indicating that Jurisdictional Defendants controlled or even were involved in these decisions. See *Id. at 215* (finding that restructuring of subsidiary did not disregard corporate formalities where decision to restructure was made by subsidiary's board). The reorganization was designed to benefit Diamond Trading by streamlining diamond trading activities into one entity **[*33]** operating in one location (London). See Seward Decl., Ex. 40; *In re Ski Train Fire, 342 F. Supp. 2d at 215* (restructuring did not disregard corporate formalities where it was designed to benefit subsidiary). The fact that the transaction also benefited Jurisdictional Defendants does not establish that they controlled the process. Plaintiff, therefore, has not established an absence of corporate formality between Diamond Trading and Jurisdictional Defendants.

Accordingly, Plaintiff has not met the third prong of the department test with respect to any of Jurisdictional Defendants.

d. Control over marketing and operational policies

To measure the degree of control a parent company exercises over a subsidiaries marketing and operational policies, courts look to such factors as whether: (1) the parent holds out the subsidiary as a division or department on promotional materials; (2) the parent determines the subsidiary's operational policies and strategy; and (3) the subsidiary runs its own operations and hires, trains, and pays its own employees. *ESI, Inc., 61 F. Supp. 2d at 55*; *Linde v. Arab Bank, PLC, 262 F.R.D. 136, 144 (E.D.N.Y. 2009)*.

Again, Plaintiff has produced no evidence indicating **[*34]** that Jurisdictional Defendants control Diamond Trading's marketing and operational policies. Diamond Trading's Executive Committee and Managing Director set the company's operating policies and oversee its day-to-day operations. Diamond Trading has its own human resources department, and there is no evidence that Jurisdictional Defendants hire, train, or pay the company's employees. Although De Beers refers to itself as an "integrated company" in marketing materials, such descriptions do not show that Jurisdictional Defendants control Diamond Trading's operations. See *Jazini, 148 F.3d at 185* (references to company as a "truly global company" with "global operations . . . contributing to the company as a whole" do not show "pervasive control over the subsidiary that the 'mere department' standard requires.").

Plaintiff argues that Consolidated controls Diamond Trading's operations through contracts it enters into when selling its rough diamonds to Diamond Trading, which [TEXT REDACTED BY THE COURT] (Wait Decl., Ex. 2, Page Dep. 72-80.) These provisions give Consolidated some assurances regarding the price and volume of diamonds it sells to Diamond Trading; they do not give the company **[*35]** control over Diamond Trading's operations. Plaintiff thus has failed to show that any of Jurisdictional Defendants control Diamond Trading's operational or marketing policies.

The Court finds that Plaintiff has not made a prima facie showing of facts that would suffice to establish that Diamond Trading is a mere department of any of Jurisdictional Defendants. Although Plaintiff has shown common ownership between Diamond Trading and DBSA, DBI, and Centenary, she has failed to show that Diamond Trading is financially dependent on any of these companies, or that they control Diamond Trading's selection of personnel or its marketing and operational policies. With respect to Consolidated, Plaintiff has not even established common ownership.

Because Plaintiff has failed to show that Diamond Trading is an agency or a department of Jurisdictional Defendants, the Court cannot exercise jurisdiction over them pursuant to *C.P.L.R. § 301*.[6] Accordingly, the Court GRANTS Jurisdictional Defendants' motion to dismiss for lack of personal jurisdiction pursuant to *Rule 12(b)(2)*.

III. Motion for Leave to Amend Pursuant to *Rule 15(b)*

Plaintiff moves for leave to file the proposed SAC pursuant to *Rule 15(b)*. The remaining Defendants — Diamond Trading and CSOV — oppose Plaintiffs motion, on the ground that amendment would be futile because the SAC would not survive a Rule 12(b)(6) motion to dismiss for failure to state a claim. The Court agrees with Defendants, and DENIES Plaintiffs motion for leave to amend because **[*37]** the SAC fails to state a claim against Diamond Trading or CSOV.

Defendants also move to dismiss the AC for failure to state a claim, pursuant to *Rule 12(b)(6)*. Because the allegations in the AC and SAC are similar, the Court GRANTS Defendants' motion to dismiss the AC for failure to state a claim. See, infra Section IV.

A. Legal Standard for Granting Leave to Amend

Pursuant to *Rule 15(a)(2) of the FRCP*, leave to amend should be freely given when justice so requires. *Fed. R. Civ. P. 15(a)(2)*; *Pangburn v. Culbertson, 200 F.3d 65, 70 (2d Cir. 1999)*. A court may deny a motion for leave to amend, however, when the proposed amendments are futile. See *Acito v. Imcera Group, Inc., 47 F.3d 47, 55 (2d Cir. 1995)*. A proposed amendment is futile when it would not survive a motion to dismiss. See *S.S. Silberblatt, Inc. v. E. Harlem Pilot Block Bldg. 1 Hous. Dev. Fund Co., 608 F.2d 28, 42 (2d Cir. 1979)*. Accordingly, if the SAC would not survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court will deny Plaintiffs motion for leave to amend. *DeBlasio v. Merrill Lynch & Co., No. 07 Civ. 318 (RJS), 2009 U.S. Dist. LEXIS 64848, 2009 WL 2242605*, at Ml (S.D.N.Y. July 27, 2009); *Porter-McWilliams v. Anderson, **[*38]** No. 07-CV-0407 (KMK) (LMS), 2007 U.S. Dist. LEXIS 89326, 2007 WL 4276801 (S.D.N.Y. Dec. 3, 2007)*.

B. Legal Standard for a Rule 12(b)(6) Motion to Dismiss

For a complaint to survive a motion to dismiss pursuant to *Rule 12(b)(6)*, the plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. "Threadbare recitals of the elements of the cause of action . . . do not suffice." Id. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id. at 1950*.

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[6] In its January 2009 Order granting jurisdictional discovery, the Court stated that Plaintiff had made sufficient allegations **[*36]** to justify jurisdictional discovery pursuant only to the agency and department theories of *Section 301*, but that discovery could reveal that jurisdiction is appropriate pursuant to other legal theories as well. *Tese-Milner, 613 F. Supp. 2d at 419 n. 10*. Jurisdictional Defendants argue that discovery has not produced any evidence to support other theories of jurisdiction. Plaintiff does not contest this statement, or argue that the Court has jurisdiction pursuant to another provision. The Court thus holds that Plaintiff has not made a prima facie showing of facts establishing jurisdiction pursuant to *Section 301* or any other jurisdictional provision, including *N.Y. C.P.L.R. § 302*, *Federal Rule of Civil Procedure 4(k)(2)*, and *Section 12* of the Clayton Act.

The Court must accept as true all well-pleaded factual allegations in the complaint, *Twombly, 550 U.S. at 555*, and "draw[] all inferences in the plaintiff's favor," *Allaire Corp. v. Okumus, 433 F.3d 248, 249-50 (2d Cir. 2006)*.

C. Allegations in the SAC

The SAC sues Defendants pursuant to *Sections 1* and *2* of the Sherman Act. The allegations in the SAC are similar to those in the AC, though **[*39]** Plaintiff has added some new factual allegations based on the results of the jurisdictional discovery.

1. Specific allegations regarding Defendants

The SAC alleges that Defendants refer to themselves collectively (and together with other companies) as the "De Beers Group." The SAC makes the following, specific allegations concerning each Defendant:[7]

DBI directly owns DBSA and is the ultimate owner of the De Beers Group.

Around 2001, DBSA became a holding company for its two operating subsidiaries, Consolidated and Centenary. Prior to 2001, DBSA and DBI were the same company.

Centenary is a company that was party to contracts for the acquisition of rough diamonds from producers. Centenary is 100% owned by DBSA.

Consolidated produces the rough diamonds sold to Sightholders, and receives 90% of the final sales price of those diamonds.

Diamond Trading is a "department or agent of each of the other defendants." (SAC ¶ 12). Diamond Trading issued invoices on 95% of the rough diamonds sold to Sightholders by De Beers. Before 2002, **[*40]** Diamond Trading was indirectly owned by Centenary. As of December 2005, Diamond Trading is an indirect subsidiary of DBSA and DBI.

Prior to 2002, CSOV was engaged in sorting and valuing rough diamonds, and determining the prices at which they were sold to Sightholders. Personnel on the CSOV payroll conducted Sights. In 2002, Diamond Trading acquired the assets of CSOV.

2. Allegations regarding DTC/CSO

The SAC introduces an entity called DTC/CSO, which is not named as a Defendant. The SAC alleges that DTC/CSO is "an unincorporated association of affiliates of [DBSA]," engaged in acquiring, stocking, and selling diamonds to "the market." (SAC, ¶ 13.) De Beers allegedly refers to DTC/CSO as a "producers' cooperative" responsible for marketing rough diamonds on behalf of major producers. (Id.)

The SAC alleges that the DTC/CSO is "the mechanism De Beers uses" to regulate the supply of diamonds and ensure stable market conditions. DTC/CSO allegedly sets prices for and sells the rough diamonds produced by Consolidated and purchased by Centenary. The SAC alleges that Diamond Trading is "an entity that is a part of DTC/CSO. (Id. ¶ 12.)

3. Allegations of anticompetitive and monopolistic conduct

The **[*41]** SAC alleges that the De Beers Group controls more than sixty percent of the world's rough diamonds, including the diamonds it produces and diamonds it purchases on the open market or controls through agreements with other produces.

De Beers' monopoly over the diamond business allegedly arose more than a century ago, when it gained control over diamond mines in South Africa. Consolidated later signed a sales contract with the London Diamond Syndicate

[7] The Court includes allegations regarding Jurisdictional Defendants, who are no longer part of the case, because they relate to the claims against Diamond Trading and CSOV

("Syndicate"), a group of previously competing diamond merchants, to sell Consolidated's entire production to the Syndicate, thereby creating a worldwide monopoly. The SAC alleges that the Syndicate "formed the basis" for DTC/CSO. (SAC, ¶ 34.)

The SAC claims that the Syndicate maintained its monopoly by various means, including: (1) purchasing the entire output of a non-De Beers producer; (2) purchasing a non-De Beers producer; (3) entering into an agreement with a non-De Beers producer, in which the producer agreed not to sell at prices lower than those set by De Beers; and (4) imposing production quotas on non-De Beers producers. The SAC alleges that De Beers also engaged in other, secret, monopolistic conduct.

According to the SAC, De Beers **[*42]** regularly acknowledged that it controlled the diamond industry. The SAC cites a speech given in 1999 by De Beers' CEO, in which he claimed that De Beers is the world's best known monopoly and that it intentionally violates the Sherman Act.

DTC/CSO allegedly selects Sightholders and sells ninety to ninety-five percent of the rough diamonds controlled by De Beers. In order to purchase diamonds, Sightholders must supply DTC/CSO with detailed competitive information about their businesses and past sales of diamonds. The SAC claims that De Beers uses that information to regulate the price and supply of rough and polished diamonds worldwide.

The SAC alleges that Defendants are engaged in a "contract, combination and conspiracy," through which Defendants and "co-conspirators": (1) agreed on the prices and terms for selling diamonds; (2) monitored and regulated the production of potential competing producers; and (3) monitored and regulated the availability of diamonds to Sightholders. The alleged purpose of the conspiracy is to: (1) fix, raise, stabilize, and maintain the price of diamonds; (2) regulate the production of diamonds; and (3) "facilitate, effectuate and implement the contract, **[*43]** combination and conspiracy."

According to the SAC, Defendants' conspiracy has had the following anticompetitive effects: (1) purchasers of diamonds are deprived of the benefits of free and open competition; (2) diamond prices are fixed, raised, maintained and stabilized at artificially high and noncompetitive levels; and (3) competition between and among defendants and their co-conspirators is unreasonably restrained.

D. Application of Legal Standards to the SAC

The SAC brings claims under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1-2*. The Court holds that the SAC fails to state a claim against CSOV or Diamond Trading, pursuant to either Section, because: (1) the SAC's allegations of illegal conduct by CSOV fall outside of the statute of limitations for actions brought under the Sherman Act; (2) the SAC fails to sufficiently allege that Diamond Trading entered into an agreement with independent entities to restrain trade, as required to state a claim pursuant to *Section 1* of the Sherman Act; and (3) the SAC fails to sufficiently allege that Diamond Trading holds monopoly power in a relevant market or is involved in a conspiracy to monopolize, as required to state a claim pursuant **[*44]** to *Section 2 of the Sherman Act*. Accordingly, the SAC would not survive a Rule 12(b)(6) motion to dismiss, and Plaintiffs proposed amendments are futile.

1. Statute of limitations

CSOV's alleged involvement in the De Beers monopoly occurred outside of the statute of limitations for actions under the Sherman Act, and therefore cannot be used to support a claim against CSOV pursuant to either *Section 1* or *Section 2* of the Act.

a. Legal Standard

The statute of limitations on Sherman Act claims is four years, accruing when the defendant commits an act that injures the plaintiff. *15 U.S.C. § 15(b)*; N.Y. Gen. Bus. Law § 340.5. In the case of a continuing antitrust conspiracy, the statute of limitations restarts at the time of each overt act that is part of the violation and that injures plaintiff. *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*. When the plaintiff files for bankruptcy, the statute of limitations is tolled for two years from the date that the bankruptcy court files the order for relief. *11 U.S.C. § 108(a)*.

An amended complaint relates back to the filing date of the original complaint for statute of limitation purposes where "the claim or defenses asserted in the amended pleading **[*45]** arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Fed R. Civ. P. 15(c)(2)*. To determine whether relation back is appropriate, courts consider whether the original complaint gave the defendant adequate notice of the matters raised in the amended pleading. See *Schiavone v. Fortune, 477 U.S. 21, 31, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986)*. An amended complaint relates back if it renders previous allegations more definite or precise, but not if it introduces a new set of operative facts. *Slayton v. Am. Express Co., 460 F.3d 215, 228 (2d Cir. 2006)*. Even where an amended complaint tracks the legal theory of the original complaint, claims based on an entirely distinct set of factual allegations do not relate back for the purposes of *Rule 15(c)(2)*. *Bank of Brussels Lambert v. Chase Manhattan Bank. N.A., No. 93 Civ. 5298, 1999 U.S. Dist. LEXIS 13235, 1999 WL 672302 (S.D.N.Y. Aug. 27, 1999)*.

b. Application

The AC and SAC are nearly identical, and it is uncontested that the SAC relates back to the AC for statute of limitation purposes. It is clear, therefore, that Plaintiff can bring claims in the SAC arising on or after February 8, 2002, which is four years prior to the filing of the AC **[*46]** in July 2007, and an additional two years from the order of relief in the bankruptcy proceeding, which was entered on February 8, 2006.

Plaintiff argues that the AC relates back to the OC, which was filed on July 4, 2004. This would mean that Plaintiff could bring claims against Defendants based on conduct reaching back to July 1, 2000. Defendants counter that the SAC introduces a new set of operative facts, and thus does not relate back to the OC. The Court agrees with Defendants, and holds that Plaintiff is limited to claims arising on or after February 8, 2002.

There are some similarities between the OC and AC, including that both raise claims under the Sherman Act and allege that De Beers controls the diamond market. The OC, however, bases its Sherman Act claims on an alleged plot by De Beers to increase its control over the U.S. diamond market through the Suppliers for Choice Program. To support its claim, the OC contains 140-pages of detailed factual allegations about Suppliers for Choice and De Beers' U.S. marketing and advertising strategies and retail operations. The OC also asserts claims based on De Beers' alleged theft of a proprietary marketing scheme from W.B. David.

The **[*47]** AC, which is only eleven pages long, omits almost all of the OC's factual allegations, and instead asserts that De Beers is involved in an amorphous, worldwide conspiracy with unnamed co-conspirators to control the global diamond market, or some unspecified portion thereof. The AC claims that most of the means De Beers uses to maintain its monopoly are secret. Its alleges that De Beers sells rough diamonds to Sightholders and collects information from them that it uses to monitor the diamond market. There is not a single reference in the AC to the Suppliers for Choice Program or De Beers' U.S. marketing, advertising, or retail plans. The AC, therefore, introduces a new set of operative facts. The OC's specific allegations about the Suppliers for Choice Program and De Beers' U.S. marketing and retail plans would not have given Defendants notice that Plaintiff intended to bring broad conspiracy claims based on De Beers' global structure and operations. Accordingly, the AC does not relate back to the OC pursuant to *Rule 15(b)(2)*, and Plaintiff can bring claims based only on conduct taking place on or after February 8, 2002.

The SAC alleges that prior to 2002, CSOV was responsible for sorting **[*48]** and valuing De Beers' diamonds and operating the Sights. In 2002, Diamond Trading acquired CSOV's assets. The SAC does not allege any conduct by CSOV after the acquisition. CSOV's alleged conduct, therefore, falls outside of the limitations period, and cannot be used to state a claim against the company. The SAC's claims against CSOV would not survive a motion to dismiss pursuant to *Rule 12(b)(6)*.

2. *Section 1* of the Sherman Act

a. Legal standard

Section 1 of the Sherman Act makes it illegal to enter into a "contract, combination ... or conspiracy" to restrain trade or commerce. 15 U.S.C. § 1. To properly plead a violation of Section 1, a plaintiff must allege that: (1) defendants were involved in a contract, combination or conspiracy that (2) operated unreasonably to restrain interstate trade. In re Elevator Antitrust Litig., No. 04 CV 1178 (TPG), 2006 U.S. Dist. LEXIS 34517,72006 WL 1470994, at *7 (S.D.N.Y. May 30, 2006).

The bare assertion of a conspiracy is not enough to survive a 12(b)(6) motion to dismiss; the complaint must contain "enough factual matter (taken as true) to suggest that an agreement [to restrain trade] was made." Twombly, 550 U.S. at 545. A well-pleaded complaint should include specific, factual **[*49]** allegations as to "the identities of the co-conspirators, the nature of their conspiracy, how the participants attempted to accomplish their objectives, and what overt acts . . . they performed ...." Mathias v. Daily News. L.P., 152 F. Supp. 2d 465, 484 (S.D.N.Y. 2001); see also Twombly, 550 U.S. at 565 n.10 (allegations should include the time, place, and persons involved in the conspiracy). "[Unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards of pleading a conspiracy in violation of the Sherman Act." Garshman v. Universal Res. Holding Inc., 824 F.2d 223, 230 (3d Cir. 1987).

Section 1 does not cover wholly unilateral action. See Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005) ("Unilateral action simply does not support liability; there must be a "unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.") (internal citations omitted). To state a claim pursuant to the section a plaintiff must allege concerted action by two or more "legally distinct economic entities." Primetime 24 Joint Venture v. Nat'l Broadcasting, Co., Inc., 219 F.3d 92, 103 (2d Cir. 2000). **[*50]** The Supreme Court has held that a parent and its wholly-owned subsidiary are not distinct entities capable of conspiring together in violation of Section 1. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 776-77, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)[8] Courts also apply this rule to sister companies, meaning that Section 1 does not prohibit concerted action on the part of two or more subsidiaries owned by the same parent company. See Cohen v. Primerica Corp., 709 F. Supp. 63, 65 (E.D.N.Y. 1989).

3. Application

Diamond Trading is the only Defendant remaining in the SAC. The SAC's allegations are insufficient to state a claim that (1) Diamond Trading is involved in the alleged conspiracy; or **[*51]** (2) Diamond Trading is acting in concert with independent entities.

a. Diamond Trading's involvement in a conspiracy

The SAC does not sufficiently allege that Diamond Trading is involved in the alleged conspiracy.

The SAC's allegations regarding the nature of the conspiracy focus on the conduct of "De Beers" and the DTC/CSO. De Beers allegedly controls the diamond market and takes actions to maintain its monopoly. DTC/CSO is responsible for setting prices for De Beers' diamonds and regulating the supply of diamonds to the market. Allegations about the conduct of De Beers as a whole and of DTC/CSO do not explain the nature of Diamond Trading's involvement in the alleged conspiracy. See Invamed, Inc. v. Barr Laboratories, Inc., 22 F. Supp. 2d 210, 218-19 (S.D.N.Y. 1998) (dismissing conspiracy claims against parent company where complaint failed to articulate any specific allegations against it).

The SAC alleges that Diamond Trading is a "department and agent" of each Defendant and "part of DTC/CSO, but these bare assertions are insufficient to state a claim against the company. The SAC must plead facts showing how Diamond Trading worked with co-conspirators to restrain the diamond market, **[*52]** such as agreements between

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[8] The Court explained that Section 1 is intended to prevent two independent sources of economic power from joining together to take unified action that has anticompetitive effects. Copperweld Corp., 467 U.S. at 769. A parent and its wholly-owned subsidiary are not separate economic actors pursuing separate interests, but rather a unified entity with a single "corporate consciousness." Id. at 769-70. Accordingly, concerted action by such entities does not give rise to the anticompetitive dangers targeted by Section 1. Id.

Diamond Trading and other entities establishing Diamond Trading's role in the conspiracy, details about the terms of such agreements and when and where they were made, and overt actions taken by Diamond Trading to further the conspiracy. See *Twombly, 550 U.S. at 565 n.10*; *Mathias, 152 F. Supp. 2d at 484*; *Stephens v. CMG Health, No. 96 Civ. 7798 (KMW), 1997 U.S. Dist. Lexis 23797, at * 16-17 (S.D.N.Y. July 21, 1997)* (complaint must allege facts, such as "details of specific meetings, the identities of responsible individuals, [or] the terms of the alleged 'agreements] ....'").

The SAC does allege that Diamond Trading "issues invoices" on ninety-five percent of De Beers' diamond sales. This single allegation, however, does not sufficiently explain the nature of Diamond Trading's involvement in the alleged conspiracy. The SAC does not allege that Diamond Trading agreed to issue invoices in order to support De Beers' monopoly. Moreover, it is not clear how Diamond Trading's invoicing activities are linked to alleged efforts by De Beers and DTC/CSO to set diamond prices, regulate supply, monitor sellers, or otherwise maintain De Beers' monopoly.

b. Acting in concert **[*53]** with independent entities

The SAC does not sufficiently allege that Diamond Trading is conspiring with "legally distinct economic entities." The SAC claims that Defendants — acting in concert as the De Beers Group — mine, sort, and value rough diamonds, which are then sold to Sightholders by the DTC/CSO. The DTC/CSO is described as an "unincorporated association of De Beers' affiliates" and as a "producers' cooperative." None of these allegations make out a claim that Diamond Trading acts in concert with independent entities.

It is clear that Diamond Trading cannot conspire with Jurisdictional Defendants and CSOV within the meaning of *Section 1*: Diamond Trading is a wholly-owned subsidiary of DBSA and DBI, and a sister company of CSOV, Centenary, and Consolidated.

The DTC/CSO is described as an "unincorporated association." It is possible that Diamond Trading could conspire with the DTC/CSO, if it is comprised of independent companies. See *Jund v. Town of Hempstead, 941 F.2d 1271, 1282 (2d Cir. 1991)* (stating that an unincorporated association has no identity outside of the identity of its constituent members). The SAC claims that the DTC/CSO is an association of De Beers' affiliates, **[*54]** but it does not name a single non-De Beers entity involved in the association. Indeed, the only specific companies linked to the DTC/CSO are Consolidated, CSOV, and Diamond Trading itself. The SAC, therefore, fails to allege that the DTC/CSO is an independent entity capable of entering into a *Section 1* conspiracy with Diamond Trading.

The SAC also alleges that De Beers took certain actions with "non-De Beers producers]" in order to maintain its monopoly over the diamond market. However, it again fails to identify even one of these entities. In order to state a claim pursuant to *Section 1*, the SAC must name least one, specific, non-De Beers entity that is allegedly acting in concert with Diamond Trading, through the DTC/CSO or otherwise. The SAC's failure to do so means that it would not survive a Rule 12(b)(6) motion to dismiss.

Accordingly, the SAC does not sufficiently allege that Diamond Trading has entered into an agreement to restrain trade, or acted in concert with independent entities. The SAC's *Section 1* claim, therefore, would not survive a Rule 12(b)(6) motion to dismiss.

4. *Section 2* of the Sherman Act

Plaintiffs *Section 2* claim against Diamond Trading includes claims of monopolization **[*55]** and of conspiracy to monopolize. The Court holds that Plaintiff has failed to state a claim under either theory.

a. Monopolization claim

i. Legal standard

Section 2 of the Sherman Act makes it illegal for an individual to monopolize a market. *15 U.S.C. § 2*. To state a claim of monopolization pursuant to *Section 2*, a plaintiff must allege that the defendant: (1) possesses monopoly power in a relevant market; (2) willfully acquired or maintained that power; and (3) engaged in anti-competitive behavior. See *Invamed, Inc., 22 F. Supp. 2d at 218* (emphasis added).

A relevant market is comprised of the product market and geographic market in which the defendant allegedly exercises monopoly power. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F. 3d 430, 442 (3d Cir. 1997)*. A product market includes all products that are reasonably interchangeable, which requires consideration of the cross-elasticity of demand (that is, the extent to which a change in the price of one product will alter the demand for another product). *Id. at 436*. A geographic market is the geographic area in which competition occurs. *Heerwagen v. Clear Channel Commc'ns. 435 F.3d 219, 227-31 (2d Cir. 2006)*.

The allegation **[*56]** of a relevant market is a "prerequisite" to a *Section 2* claim. *Polargrid LLC v. Videsh Sanchar Nigam, Ltd., No. 04 CV 9578 (TPG), 2006 U.S. Dist. LEXIS 54434, 2006 WL 2266351, at *6 (S.D.N.Y. Aug. 7, 2006)*. Without a market definition, there is no way for a court to measure whether the defendant holds monopoly power and has the ability to act as a monopolist. *United States v. Eastman Kodak Co., 63 F.3d 95, 104 (2d Cir. 1995)*. Determining a relevant market can be a fact-intensive inquiry, and thus courts often hesitate to dismiss a claim for failing to adequately plead a relevant market. *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*. "There is, however, no absolute rule against [ ] dismissal" on such a ground. *Id. at 200*.

ii. Application

The SAC does not state a claim for monopolization because it does not allege a relevant market.

The SAC contains no allegations specifically identifying a relevant market or markets. Indeed, in her brief opposing Defendant's motion to dismiss, Plaintiff explicitly states that she is not attempting to allege a relevant market at this time.[9] Rather, she intends to wait for discovery to reveal the markets in which De Beers exercises monopoly power. She states that discovery **[*57]** could uncover any number of relevant markets, including the U.S. or worldwide markets for rough or polished diamonds, markets defined by other geographic boundaries, or markets based on carat size.

Plaintiff's approach is unacceptable. Plaintiff cannot refuse to plead an essential element of a *Section 2* claim on the ground that she is waiting for discovery to reveal the optimal facts on which to build her case. The SAC does not necessarily need to include detailed factual allegations about all aspects of the alleged relevant markets, such **[*58]** as demand elasticity or substitutability. See *Todd, 275 F.3d at 200-01*. In order to state a claim for monopolization, however, Plaintiff must at least plead the basic contours of the relevant market or markets in which she believes De Beers exercises monopoly power. Without such information, the Court cannot assess whether Plaintiff has alleged that De Beers possesses monopoly power and has engaged in anticompetitive conduct in the identified markets. Plaintiffs refusal to define a relevant market is fatal to her monopolization claim; the claim would not survive a Rule 12(b)(6) motion to dismiss.

b. Conspiracy to monopolize claim

Section 2 also prohibits conspiracies between two or more persons to monopolize. To plead that a defendant was involved in a conspiracy to monopolize, a plaintiff must sufficiently allege (1) that the defendant entered into concerted action with the specific intent of achieving a monopoly, and (2) the commission of overt acts in furtherance of the conspiracy. See *Int'l Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786, 795-96 (2d Cir. 1987)*; *Invamed, Inc., 22 F. Supp. 2d at 220*. To survive a motion to dismiss, an antitrust plaintiff must allege **[*59]** facts "that reasonably tend[ ] to prove that the [defendant]... 'had a conscious commitment to a common

[9] The SAC does include some allegations that reference potential relevant markets, including allegations that De Beers: (1) controls sixty percent of the world's rough diamonds; (2) maintains a "world-wide monopoly;" and (3) exercises control over two-thirds of the world's supply of diamonds and over seventy-five percent of diamonds imported into the United States. The Court could construe these allegations as alleging that the relevant market is the worldwide market for rough diamonds or the market for rough diamonds imported into the U.S. The Court, however, will not interpret the SAC as containing allegations that Plaintiff has explicitly disavowed.

scheme designed to achieve an unlawful objective.'" *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (citations omitted).

c. Application

As discussed above with respect to the *Section 1* claim, the SAC does not plead facts sufficient to explain the nature of Diamond Trading's involvement in the alleged conspiracy. Plaintiffs allegation that Diamond Trading "issued invoices" on De Beers' sales of rough diamonds does not support an inference that Diamond Trading engaged in concerted action with the specific intent of establishing a monopoly. There are no allegations that Diamond Trading was aware that De Beers controlled the diamond market or that the invoiced diamonds were sold at fixed prices. The SAC also does not claim that Diamond Trading itself was involved in determining the prices or quantities of diamonds sold. The SAC, therefore, fails to state a claim for conspiracy to monopolize pursuant to *Section 2*, and the claim would not survive a Rule 12(b)(6) motion to dismiss.

For the reasons stated above, the SAC fails to state claims against Diamond Trading and CSOV **[*60]** pursuant to *Sections 1* and *2* of the Sherman Act, and thus would not survive a Rule 12(b)(6) motion to dismiss. Accordingly, the amendments proposed in the SAC are futile, and the Court DENIES Plaintiffs motion for leave to amend.

IV. Motion to Dismiss the AC Pursuant to *Rule 12(b)(6)*

Defendants move to dismiss the AC for failure to state a claim pursuant to *Rule 12(b)(6)*, with prejudice. The AC contains the same Sherman Act claims as the SAC, as well as a claim under *Section 340* of the Donnelly Act. The AC's allegations are very similar to those in the SAC, except that the SAC includes several additional allegations about De Beers' corporate structure. Therefore, for the reasons set forth above with respect to the SAC, the AC fails to state claims pursuant to *Sections 1* or *2* of the Sherman Act.

Like *Section 1* of the Sherman Act, *Section 340* of the Donnelly Act prohibits individuals from entering into conspiracies to restrain trade. Donnelly Act *§ 340*. To state a claim pursuant to *Section 340*, a plaintiff must satisfy the same pleading requirements as for a claim pursuant to *Section 1* of the Sherman Act. *Granite Partners, L.P. v. Bear, Stearns & Co. Inc., 17 F. Supp. 2d 275, 298 (S.D.N.Y. 1998)*. **[*61]** Accordingly, based on the reasoning set forth above with respect to *Section 1* of the Sherman Act, the Court holds that the AC fails to state a claim pursuant to *Section 340* of the Donnelly Act.

The Court, however, will give Plaintiff the opportunity to file an amended complaint. Defendants argue that the AC should be dismissed with prejudice because Defendant's 2007 *Rule 12(b)(6)* motion to dismiss put Plaintiff on notice of the deficiencies in the AC, and Plaintiff failed to correct those deficiencies in the SAC. The Court did not address Defendants' *Rule 12(b)(6)* arguments before Plaintiff moved for leave to file the SAC. Although Defendants' original motion correctly identified certain of the deficiencies in the AC, the issues do not weigh so clearly in Defendants' favor that the motion should have put Plaintiff on notice that the Court would rule against it. The Court's instant Opinion has clarified that Plaintiff cannot bring an action against Jurisdictional Defendants, because the Court lacks personal jurisdiction over them, or against CSOV, because it did not commit any conduct within the statute of limitations period. If Plaintiff can make out more specific, factual allegations **[*62]** about the role of Diamond Trading in De Beers' alleged monopoly, however, then Plaintiff may be able to state a claim against the company. The Court thus will allow Plaintiff to file an amended pleading, in order to bring claims against Diamond Trading specifically.

Accordingly, the Court GRANTS Defendants' motion to dismiss the AC for failure to state a claim pursuant to *Rule 12(b)(6)*, without prejudice.

Defendants had also moved to dismiss the AC against CSOV for insufficient service of process, pursuant to *Rule 12(b)(5)*. The Court has dismissed the AC as against CSOV, for failure to state a claim. Accordingly, CSOV's *Rule 12(b)(6)* motion is moot. The Court DENIES the motion.

V. The Central Selling Organization

The AC names as a Defendant an entity referred to as the Central Selling Organization ("CSO"). In 2007, when Jurisdictional Defendants moved to dismiss the AC for lack of personal jurisdiction, they also asserted that the CSO did not exist. In an order issued on February 24, 2009, the Court ordered the parties to conduct discovery on whether CSO exists as a separate legal entity capable of being sued.

It is now uncontested the CSO ceased to exist in 2001. It thus cannot have committed **[*63]** any actions that would fall within the limitations period for this action. Accordingly, the Court DISMISSES Plaintiffs claims against the CSO.

VI. Conclusion

For the reasons set forth above, the Court: (1) GRANTS Jurisdictional Defendants' motion to dismiss the AC pursuant to *Rule 12(b)(2)*; (2) DENIES Plaintiffs motion for leave to amend; (3) GRANTS Defendants' motion to dismiss the AC pursuant to *Rule 12(b)(6)*, without prejudice; (4) DENIES CSOV's motion to dismiss pursuant to *Rule 12(b)(5)* as moot; and (5) GRANTS Jurisdictional Defendants' motion to dismiss the AC as against the CSO, with prejudice.

The Court GRANTS Plaintiff leave to file an amended complaint by no later than March 19, 2010.

The Court permitted the parties to file under seal portions of the SAC and of the instant motions and supporting documents because they contain confidential business information. The Court relied on these documents when drafting this Opinion. Accordingly, the Court is filing the Opinion under seal because it may contain confidential information. The Court orders the parties to submit to the Court a proposed redacted version of the Opinion that can be filed publicly, by no later than March 5, 2010.

SO **[*64]** ORDERED.

DATED: New York, New York

February 24, 2010

/s/ Kimba M. Wood

KIMBA M. WOOD

United States District Judge

Rochester Drug Coop. v. Braintree Labs.

United States District Court for the District of Delaware

May 18, 2010, Decided; May 19, 2010, Filed

Civ. No. 07-142-SLR

Reporter

712 F. Supp. 2d 308 *; 2010 U.S. Dist. LEXIS 49634 **; 2010-2 Trade Cas. (CCH) P77,140

ROCHESTER DRUG CO-OPERATIVE, et. al, INC., on behalf of itself and all others similarly situated, Plaintiffs, v. BRAINTREE LABORATORIES, Defendant.

Subsequent History: Motion denied by *Rochester Drug Coop. v. Braintree Labs., 712 F. Supp. 2d 308, 2010 U.S. Dist. LEXIS 122800 (D. Del., May 18, 2010)*

Prior History: *In re K-Dur Antitrust Litig., 2010 U.S. Dist. LEXIS 28918 (D.N.J., Mar. 24, 2010)*

Core Terms

bowel, stool, antitrust, formation, motility, prior art, plaintiffs', generic, infringement, allegations, immunity, patent, fiber, constipation, baseless, anticipation, sham, overall scheme, monopoly power, references, invalid, patent infringement, purchasers, improving, monopoly, prices, ratio, antitrust liability, amount sufficient, anti trust law

LexisNexis® Headnotes

Patent Law > Infringement Actions > Infringing Acts > General Overview

HN1[] **Infringement Actions, Infringing Acts**

35 U.S.C.S. § 271(e)(2)(A) states that: (2) It shall be an act of infringement to submit -- (A) an application under § 505(j) of the Federal Food, Drug, and Cosmetic Act or described in § 505(b)(2) of such Act for a drug claimed in a patent or the use of which is claimed in a patent.

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

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

In reviewing a motion filed under *Fed. R. Civ. P. 12(b)(6)*, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff. A complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Fed. R. Civ. P. 8(a)*. A complaint does not need detailed factual allegations; however, a plaintiff's obligation to provide the "grounds" of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. The factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN3[] Actual Monopolization, Claims

15 U.S.C.S. § 2 of the Sherman Act makes it unlawful to monopolize, attempt to monopolize, or conspire to monopolize, interstate or international commerce. It is the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists. Liability under § 2 requires (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power is the ability to control prices and exclude competition in a given market. If a firm can profitably raise prices without causing competing firms to expand output and drive down prices, that firm has monopoly power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Penalties

HN4[] Actual Monopolization, Claims

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. 15 U.S.C.S. § 2.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN5[] Actual Monopolization, Claims

To support an inference of monopoly power, a plaintiff typically must plead and prove that a firm has a dominant share in a relevant market, and that significant "entry barriers" protect that market. Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, that prevent new competition from entering a market in response to a monopolist's supracompetitive prices. Without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN6[] Actual Monopolization, Claims

Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive. Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive. It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN7[] **Noerr-Pennington Doctrine, Sham Exception**

A patent owner asserting its rights through patent infringement litigation is generally immune from antitrust liability. Commonly referred to as the Noerr-Pennington doctrine, this immunity extends to persons who petition all types of government entities, including legislatures, administrative agencies, and courts. Noerr-Pennington immunity, however, is subject to an exception for "sham" litigation. In this regard, the United States Supreme Court has outlined a two-part test to determine whether the "sham litigation" exception applies. As an objective first part, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit does not qualify as sham litigation and is immunized under the Noerr-Pennington doctrine. The subjective second part of the definition arises only if the challenged litigation is objectively meritless. In such a case, the court must decide whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor. To invoke the "sham" exception, plaintiffs must prove, by clear and convincing evidence, that the defendant's activities were not really efforts to vindicate its rights in court.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN8[] **Noerr-Pennington Doctrine, Sham Exception**

With regard to the "sham" litigation exception to the Noerr-Pennington doctrine, a single lawsuit can violate ***antitrust law*** as long as it is both an objective and subjective sham.

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

HN9[] **Private Actions, Standing**

Antitrust injury, or an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful, is a requisite to antitrust standing.

Antitrust & Trade Law > Sherman Act > Claims

HN10[] **Sherman Act, Claims**

The United States Court of Appeals for the Third Circuit has generally sanctioned claims of antitrust injury including allegations that prescription drug consumers, the "foreseeable and necessary victims" of a pioneer drug company's efforts to exclude a generic from the market, pay overcharges during the exclusion period.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

The existence of antitrust injury is not typically resolved through motions to dismiss.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Actual Monopolization, Claims**

Courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation; if the plaintiffs can allege that a series of actions, when viewed together, were taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability. This rationale applies equally in the patent context as in other antitrust contexts.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Claims

HN13[] **Actual Monopolization, Claims**

If a plaintiff can allege that a series of actions, when viewed together, were taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability.

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

HN14[] **Estoppel, Collateral Estoppel**

Issue preclusion, also called collateral estoppel, applies when "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action. The United States Court of Appeals for the Third Circuit has also considered whether the party being precluded had a full and fair opportunity to litigate the issue in question in the prior litigation and, in addition, whether the issue was determined by final judgment.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN15[] **Noerr-Pennington Doctrine, Sham Exception**

"Objective baselessness," the threshold issue with respect to Noerr-Pennington immunity, is primarily a legal question.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN16[] Noerr-Pennington Doctrine, Sham Exception

Antitrust standing, the second prong of the Noerr-Pennington inquiry are determinations that flow from factual allegations and, as a result, are better addressed at the summary judgment stage upon a developed record.

Counsel: [1]** Jeffrey S, Goddess, Esquire of Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware. Counsel for Plaintiff. Of Counsel: Linda P. Nussbaum, Esquire, and John D. Radice, Esquire of Kaplan, Fox & Kilscheimer, LLP, New York, New York; David F. Sorensen, Esquire and Eric L. Cramer, Esquire of Berger & Montague, P.C., Philadelphia, Pennsylvania; Bruce E. Gerstein, Esquire of Garwin, Gerstein & Fisher, LLP, New York, New York; Joseph M. Vanek, Esquire and David P. Germaine, Esquire of Vakek, Vickers & Masini, Chicago, Illinois; Paul E. Slater, Esquire of Sperling & Slater, P.C., Chicago, Illinois; John Gregory Odom, Esquire and Stuart E. Des Roches, Esquire, Odom & Des Roches, LLP, New Orleans, Louisiana; David P. Smith, Esquire and W. Ross Foote, Esquire of The Smith Foote Law Firm, LLP, Alexandria, Louisiana; Joshua P. Davis, Esquire of the Law Offices of Joshua P. Davis, San Francisco, California; and David Balto, Esquire of the Law Offices of David Balto, Washington, D.C.

Frederick L. Cottrell, III, Esquire, Elizabeth Rui He, Esquire and Steven J. Fineman, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware. Counsel for Plaintiff. Of Counsel: David B. Bassett, Esquire and **[**2]** Alexandra McTague, Esquire of Wilmer Cutler Pickering Hale and Dorr, LLP, New York, New York; Michelle D. Miller, Esquire, Cynthia D. Vreeland, Esquire, Peter A. Spaeth, Esquire and Mark A. Ford, Esquire of Wilmer Cutler Pickering Hale and Dorr, LLP, Boston, Massachusetts.

Judges: Sue L. Robinson, District Judge.

Opinion by: Sue L. Robinson

Opinion

[*311] MEMORANDUM OPINION

Sue L. Robinson, District Judge

I. INTRODUCTION

This is an antitrust action arising out of a patent infringement case filed on May 16, 2003 by Braintree Laboratories, Inc. ("Braintree" or "defendant"), a pharmaceutical company selling the constipation drug polyethylene glycol 3350 ("PEG") in the United States under the brand name MiraLax(R), against a generic drug manufacturer, Schwarz Pharma, Inc. ("Schwarz"), seeking to preclude FDA approval for Schwarz's generic PEG drug GlycoLax(R). (Civ. No. 03-477-SLR (hereinafter, "the Braintree/Schwarz litigation")) The Braintree/Schwarz litigation commenced when Braintree brought suit pursuant to *35 U.S.C. § 271(e)(2)(A)* [1] responsive to Schwarz's filing of an ANDA containing a "Paragraph IV" certification [2] claiming that the patent listed by Braintree in the FDA's Orange Book [3] as covering

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[1] HN1[] "(2) It shall be an act of infringement to submit -- (A) an application under section 505(j) of the Federal Food, Drug, and Cosmetic Act or described in section 505(b)(2) of such Act for a drug **[**4]** claimed in a patent or the use of which is claimed in a patent[.]"

[2] *See 21 U.S.C. § 355(j)(2)(A)(vii)(IV)*.

MiraLax(R), U.S. Patent 5,710,183 **[**3]** ("the '183 patent" or the "Halow patent"), is invalid or not infringed by the manufacture, use, or sale of GlycoLax(R). That suit triggered the 30-month stay on the FDA's approval of Schwarz's ANDA. *See 21 U.S.C. § 355(j)(5)(B)(iii)*. The Braintree/Schwarz litigation was voluntarily dismissed by Braintree on June 3, 2004. Braintree waived any remaining portion of the 30-month stay, and GlycoLax(R) entered the market shortly the FDA issued its approval on July 2, 2004. Plaintiffs filed the instant suit on March 12, 2007 alleging that the Braintree/Schwarz litigation was a sham litigation designed to delay the FDA's approval of GlycoLax(R) and to improperly maintain monopoly power with respect to its pioneer drug. Plaintiffs amended their complaint on October 2, 2009. (D.I. 21) In lieu of an answer, defendant filed a motion to dismiss pursuant **[*312]** to *Federal Rule of Civil Procedure 12(b)(6)*. (D.I. 22) That motion is presently before the court. For the reasons that follow, defendant's motion is denied.

II. BACKGROUND

A. The Parties and their Products

Plaintiffs in this action are direct purchasers of MiraLax(R) who allege that they paid overcharges on their purchases of MiraLax(R) or generic PEG as a result of defendant's monopoly prior to July 2004. (D.I. 21 at P 1) Plaintiffs Meijer, Inc. and Meijer Distribution, Inc. (collectively, "Meijer") are corporations organized under the laws of the State of Michigan, with their principal place of business in Grand Rapids, Michigan. (*Id.* at P 13) Meijer is the assignee of the claims of the Frank W. Kerr Co. which, during the relevant period, purchased MiraLax(R) directly from defendant. (*Id.*) Plaintiff Rochester Drug Cooperation, Inc. ("RDC") is a drug wholesale cooperative located in Rochester, New York. (*Id.* at P 14) Plaintiff Louisiana Wholesale Drug Company, Inc. ("LWD") **[**5]** is a Louisiana corporation located in Sunset, Louisiana. (*Id.* at P 15)

Defendant Braintree is a privately held corporation organized and existing under the laws of the Commonwealth of Massachusetts and shares its name with its principal place of business -- Braintree, Massachusetts. (*Id.* at P 16) Defendant first discovered the '183 patent while its New Drug Application ("NDA") was pending with the FDA. [4] (*Id.* at P 66; D.I. 23 at 5) After defendant's counsel examined the '183 patent, defendant paid the named inventor, George M. Halow ("Halow"), "a nuisance-value payment of approximately $ 15,000 for a non-exclusive license." (D.I. 21 at P 68; D.I. 23 at 5) In 1999, while its NDA remained pending, defendant listed the '183 patent in the FDA's Orange Book as covering MiraLax(R). (D.I. 21 at P 69) Defendant purchased the '183 patent outright in 2001. [5] (*Id.* at P 70)

Schwarz filed its ANDA for GylcoLax(R), a generic PEG, on January 20, 2003, and sent defendant a Paragraph IV certification letter on April 1, 2003. (*Id.* at PP 70-71) Braintree filed its patent infringement suit against Schwarz on May 16, 2003. [6] (*Id.* at P 73) The only asserted claim in the Braintree/Schwarz litigation was claim 33 of the '183 patent, claiming: "A method for improving bowel function in a mammal, comprising orally administering [PEG] to the mammal, in an amount sufficient to improve bowel motility, stool formation, or both."

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[3] The FDA publishes patent information on approved drug products in its publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations," commonly referred to as the "Orange Book," a register that provides notice of patents covering name brand drugs.

[4] The court presumes a familiarity with the statutory framework of the Hatch-Waxman Act. For a detailed description, the court references a recent opinion by Chief Judge Sleet of this court. *See In re Metoprolol Succinate Direct Purchaser Antitrust Litig., Civ. Nos. 06-52 & 06-71, 2010 U.S. Dist. LEXIS 36303, 2010 WL 1485328 (D.Del. April 13, 2010)*.

[5] The purchase **[**6]** price does not appear to be of record.

[6] *See 35 U.S.C. § 271(e)(2)(A)* ("It shall be an act of infringement to submit . . . an application under section 505(j) of the Federal Food, Drug, and Cosmetic Act or described in section 505(b)(2) of such Act for a drug claimed in a patent or the use of which is claimed in a patent[.]").

Schwarz received a tentative approval letter from the FDA for its ANDA for GlycoLax(R) on December 23, 2003. (*Id.* at P 82) This approval would have become final but for the 30-month stay triggered by the Braintree/Schwarz litigation. (*Id.*)

B. The Braintree/Schwarz Litigation

1. Prosecution history relevant to the parties' claim [7] construction arguments**

Claim 33 of the '183 patent was filed as **[*313]** original claim 34. (D.I. 21 at P 57) [7] During prosecution of the '183 patent, on February 25, 1997, the examiner rejected all of the pending claims 1-34. Specifically, claim 34 was rejected as obvious in light of two prior art references teaching compositions containing PEG to improve bowel movement. (*Id.* at P 58) In response, the applicant argued that claims 1-34 "provide a unique composition containing polyethylene glycol and a fiber bulking agent wherein PEG is present in a weight ratio of polyethylene glycol to fiber of from about 1 to 2 to no more than about 7 to 1. These percentages are critical and nowhere are they discussed or taught in the base references or the alleged equivalence teaching set forth by the secondary references." (*Id.* at P 59) The applicant further emphasized that the ratio of PEG to fiber was critical because if "the PEG to fiber ratio is too low, rapid onset of activity of the products of the invention drops off and begins to approach the low onset of a fiber based bulk laxative of the prior art. If the PEG to fiber ratio is too high, the volume of composition which must be ingested to obtain **[**8]** the benefits of the fiber content may be too high and the excess PEG may result in undesirable effects, such as those associated with PEG based bowel lavage compositions, such as those set forth in [the asserted prior art]." (*Id.* at P 60) The examiner issued a notice of allowance based upon this teaching of "the ratio for the two active ingredients." (*Id.* at P 61) While issuing claims 1-32 included the emphasized PEG-fiber ratio, claim 33 (original claim 34) issued unamended, without this restriction. (*Id.* at P 63)

2. The parties' positions and the court's determination

The labeling literature for GlycoLax(R) does not include any reference to the improvement of "bowel motility" or "stool formation" as reflected in claim 33 of the '183 patent. (D.I. 21 at P 6; Civ. No. 03-477, D.I. 262 at 19-20) Braintree argued that the term "amount sufficient" as used in claim 33 should be construed to include the purpose of the stated amount of PEG, that is, "to improve bowel motility, stool formation, or both[,]" as this was the "new use discovered **[**9]** by Dr. Halow and the novel portion of the claim." (Civ. No. 03-477, D.I. 262 at 18) It was Schwarz's position that only an "amount sufficient" to "improv[e] bowel function in a mammal" is required, as there is no discussion of improving bowel motility or stool formation in the '183 patent specification. If "amount sufficient" was not limited to the new use advocated by defendant, then several prior art references disclosing the use of PEG to treat constipation would anticipate the claim. Contrarily, if "amount sufficient" were tied to the result of "improv[ing] bowel motility, stool formation, or both," the prior art, omitting any reference to these particular uses, would not invalidate. (*Id.* at 18-19)

Schwarz's principal argument was twofold: (1) MiraLax(R) does not include in its labeling any reference to bowel motility or stool formation in its packaging, yet Braintree listed the '183 patent in the Orange Book for MiraLax(R); and (2) if GlycoLax(R) can infringe without such references in its packaging, then the asserted prior art references anticipate without specific reference to bowel motility or stool formation. (*Id.* at 19-20) The court agreed that only one construction applies **[**10]** to both infringement and validity analyses. The court noted that Braintree's construction "reflects the plain meaning of the claim," and that neither asserted prior art reference discuss using PEG to improve bowel motility, **[*314]** stool formation, or both. (*Id.* at 20) Schwarz's anticipation argument, therefore, was premised on "inherent anticipation." (*Id.*) Schwarz did not present clear and convincing evidence that an improvement of bowel motility or of stool formation always and necessarily results from the administration of

[7] The court cites the amended complaint in the current action for these facts, which do not differ from those recited in its Braintree/Schwarz litigation opinion.

PEG as disclosed in its asserted prior art references. Both parties' experts agreed that "stool softening," improving "bowel motility" and improving "stool formation" were related benefits to some degree, but the record lacked any clear indication of the nature of this relationship. (*Id.*) Because it was possible that both MiraLax(R) and GlycoLax(R) have a use covered by claim 33, and because clear and convincing evidence of inherent anticipation was not provided, the court "decline[d] to find Braintree's infringement claim frivolous **on th[at] record.**" (*Id.* at 21) (emphasis added) Essentially, although Braintree's position may have been inconsistent with respect to infringement **[**11]** (by GlycoLax(R), as unlabeled for the claimed uses) and anticipation (by prior art not specifically disclosing the claimed uses), the court's decision was premised on Schwarz's failure to meet its high burden of proof.

C. Termination of the Braintree/Schwarz Litigation

The Braintree/Schwarz litigation proceeded until May 21, 2004, at which time Braintree wrote to Schwarz that it had decided to voluntarily dismiss its patent infringement claim with prejudice and without costs. Braintree also offered Schwarz a royalty-free license to claim 33 of the '183 patent. (D.I. 21 at P 83) Braintree states that its dismissal was prompted by "certain unexpected discovery from Mr. Halow." (D.I. 23 at 6) The court effectuated the dismissal on June 3, 2004 (Civ. No. 03-477, D.I. 64), and the FDA issued its final approval to Schwarz for GlycoLax(R) on July 2, 2004. (D.I. 21 at P 86) GlycoLax(R) was first shipped "within days" of the FDA's approval. (*Id.*)

The Braintree/Schwarz litigation was not terminated, however. Schwarz maintained its state law counterclaims of unfair competition and tortious interference with business relations, as well as its claim that defendant violated Section 2 of the Sherman **[**12]** Antitrust Act, *15 U.S.C. § 2*, by engaging in sham patent infringement litigation for the purpose of unlawfully extending defendant's market monopoly on MiraLax(R). Following a bench trial, the court issued its findings of fact and conclusions of law. (Civ. No. 03-477, D.I. 262) [8] On the record before it, the court drew an inference that Braintree "obtained and relied upon an admittedly 'weak' patent for protection from other generic competition." (*Id.* at 14) However, insofar as even a potentially "weak" patent enjoys a presumption of validity, *35 U.S.C. § 282*, the court concluded that Braintree had "advanced at least a colorable argument for validity and for infringement under its reading of claim 33" and, therefore, Braintree was immune from antitrust liability pursuant to the *Noerr-Pennington* doctrine, discussed in detail *infra.* (Civ. No. 03-477, D.I. 262 at 18)

III. LEGAL STANDARDS

A. Motions to Dismiss

HN2[] In reviewing a motion filed under *Federal Rule of Civil Procedure 12(b)(6)*, the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff. *See* ***[**13]*** *Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007)*; **[*315]** *Christopher v. Harbury, 536 U.S. 403, 406, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002)*. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)* (hereinafter, "*Twombly*") (interpreting *Fed. R. Civ. P. 8(a)*) (internal quotations omitted). A complaint does not need detailed factual allegations; however, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id. at 1964-65* (alteration in original) (citation omitted). The "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Id. at 1959*.

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[8] *Braintree Labs., Inc. v. Schwarz Pharma, Inc., 568 F. Supp. 2d 487 (D.Del. 2008)*.

B. Antitrust Liability

HN3[] Section 2 of the Sherman Act makes it unlawful to monopolize, attempt to monopolize, or conspire to monopolize, interstate or international commerce. [9] It is "the provision of **[**14]** the antitrust laws designed to curb the excesses of monopolists and near-monopolists." LePage's Inc. v. 3M, 324 F.3d 141, 169 (3d Cir. 2003) (en banc). Liability under § 2 requires "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); Schuylkill Energy Resources v. Pennsylvania Power & Light Co., 113 F.3d 405, 412-13 (3d Cir. 1997). Monopoly power is the ability" to control prices and exclude competition in a given market. Id. at 571. If a firm can profitably raise prices without causing competing firms to expand output and drive down prices, that firm has monopoly power. Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380 (3d Cir. 2005).

HN5[] To support an inference of monopoly power, a plaintiff typically must plead and prove that a firm has a dominant share in a relevant market, and that significant "entry barriers" protect that market. Harrison Aire, 423 F.3d at 381; United States v. Microsoft, 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001). Barriers to entry are factors, such as regulatory requirements, high capital costs, or technological obstacles, that prevent new competition from entering a market in response to a monopolist's supracompetitive prices. Microsoft, 253 F.3d at 51; Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995); *see also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 591 n.15, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ("[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.").

HN6[] Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition **[**16]** on some basis other than the merits. LePage's, 324 **[*316]** F.3d at 147. Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05, 105 S. Ct. 2847, 86 L. Ed. 2d 467 & n.32 (1985). Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive. *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993) ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.")

C. *Noerr-Pennington* Immunity

HN7[] A patent owner asserting its rights through patent infringement litigation is generally immune from antitrust liability. Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965). **[**17]** Commonly referred to as the *Noerr-Pennington* doctrine, this immunity extends to persons who petition all types of government entities, including legislatures, administrative agencies, and courts. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). *Noerr-Pennington* immunity, however, is subject to an exception for "sham" litigation. In this regard, the Supreme Court has outlined a two-part

[9] HN4[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall **[**15]** be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 2.

test to determine whether the "sham litigation" exception applies. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Ind., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*. As an objective first part, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id. at 60*. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit does not qualify as sham litigation and is immunized under the *Noerr-Pennington* doctrine. *Id.* The subjective second part of the definition arises only if the challenged litigation is objectively meritless. In such a case, the court must decide whether the "baseless lawsuit conceals 'an attempt to interfere directly with the **[**18]** business relationships of a competitor.'" *Id. at 60-61*. To invoke the "sham" exception, plaintiffs must prove, by clear and convincing evidence, that defendant's activities were not really efforts to vindicate its rights in court. *See C.R. Bard, Inc. v. M3 Systems, Inc., 157 F.3d 1340, 1368-69 (Fed. Cir. 1998)* ("sham litigation requires more than a failed legal theory") (quoting *Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288 (9th Cir. 1984))*; *MCI Communications v. Am. Telephone and Telegraph Co., 708 F.2d 1081, 1155 (7th Cir. 1983)*.

IV. DISCUSSION

Plaintiffs frame their Section 2 claim in terms of one improper "course of conduct" by Braintree comprising several distinct acts, specifically, knowingly and intentionally: (1) procuring the '183 patent despite its belief that the '183 patent was invalid; [10] (2) improperly listing the '183 **[*317]** patent in the Orange Book; and (3) improperly filing and prosecuting objectively baseless patent infringement actions against companies seeking to market generic MiraLax(R). [11] (D.I. 21 at P 103) As a result of Braintree's patent monopoly, plaintiffs allege that they paid artificially inflated prices for their PEG purchases ("overcharge" antitrust **[**19]** damages) during the extended monopoly period. (*Id.* at PP 104-05) Braintree disaggregates plaintiffs' theory into its constituent parts, arguing that: (1) plaintiffs' Orange Book allegations fail because they did not result in direct injury; and (2) the court's prior opinion establishes that its suit against Schwarz was not objectively baseless as a matter of law and, therefore, *Noerr-Pennington* immunity applies here to bar plaintiffs' claim.

A. Plaintiffs Have Alleged Antitrust Injury

HN9[] Antitrust injury, or "an injury of the type the antitrust laws were **[**20]** intended to prevent and that flows from that which makes the defendants' acts unlawful," is a requisite to antitrust standing. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. In its reply brief, Braintree argues (for the first time) that plaintiffs' improper Orange Book listing allegation fails because it resulted in no direct injury to plaintiffs. Insofar as the existence of antitrust injury is a threshold issue, the court briefly addresses it here.

Plaintiffs allege that, as a result of Braintree's scheme, the ANDA approval process was delayed by the FDA. (D.I. 21 at P 88) The FDA approved Schwarz's ANDA for PEG less than a month after Braintree dismissed its claim against Schwarz. (*Id.* at P 90) "But for Braintree's misconduct, one or more competitors would have begun marketing A-rated generic versions of MiraLax(R) much sooner than such versions actually were marketed." (*Id.* at P 87) Braintree's "scheme to delay the introduction into the U.S. marketplace of any generic version of MiraLax(R) caused plaintiffs and the class to pay more than they otherwise would have paid for [PEG]" during the exclusionary period. (*Id.* at P 91) More specifically, the emergence **[**21]** of generics typically results in price competition which enables drug purchasers to both purchase generics at a substantially lower price and to purchase the brand name drug at a reduced price. (*Id.* at P 92)

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[10] As Braintree did not prosecute the '183 patent, plaintiffs do not claim that Braintree committed a fraud on the PTO.

[11] Although the allegation is written broadly to encompass other litigation, the complaint identifies only the Braintree/Schwarz litigation as the basis for plaintiffs' claim. ***HN8***[] "A single lawsuit can violate ***antitrust law*** as long as it is both an objective and subjective sham." *See In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 686 (2d Cir. 2009)*. Notwithstanding, as discussed in the following section, plaintiffs have alleged an overall scheme comprising more than the filing of the Braintree/Schwarz litigation.

Braintree's argument that the causal link between its Orange Book listing and delayed generic entry is too attenuated to maintain an antitrust scheme is misplaced. As discussed in detail *infra,* plaintiffs' claim is premised on an overall scheme. It is sufficient, therefore, for plintiffs to allege injuries that occurred as a result of the entire scheme, rather than any particular component therein.

HN10[] The Third Circuit has generally sanctioned claims of antitrust injury including, as in this case, allegations that prescription drug consumers, the "foreseeable and necessary victims" of a pioneer drug company's efforts to exclude a generic from the market, pay overcharges during the **[*318]** exclusion period. *See gen.* *In re Warfarin Sodium Antitrust Litig., 214 F.3d 395, 400-01 (3d Cir. 2000)* (stating that "[i]t is difficult to imagine a more formidable demonstration of antitrust injury") (reversing district court's dismissal of indirect purchasers' claim for injunctive relief under the Clayton **[**22]** Act for lack of standing).

Taking plaintiffs' allegations as true, the court finds that the amended complaint sufficiently conveys a causal nexus between the alleged injury and Braintree's purportedly monopolistic behavior. Plaintiffs' allegations in this regard are of the type that generally pass muster in this context. *See id.; see also* *In re Gabapentin Patent Litig., 649 F. Supp. 2d at 355* (citing *Abbott Labs. v. Mylan Pharms., Inc., Civ. No. 05-6561, 2007 U.S. Dist. LEXIS 12839, 2007 WL 625496 at *4-5 (N.D. Ill. Feb. 23, 2007))*. As "***HN11***[] the existence of antitrust injury is not typically resolved through motions to dismiss," the court declines to analyze any further disputes with respect to causation and injury on this motion. *See* *Schuylkill Energy Res., 113 F.3d at 417*; *see also gen.* *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 989 (9th Cir. 2001)*.

B. Plaintiffs Have Alleged an "Overall Scheme" to Forestall Competition

Plaintiffs may make their antitrust case by establishing an "overall scheme" to forestall generic competition. ***HN12***[] "[C]ourts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation"; "[i]f [plaintiffs] can allege that a series of actions, when viewed **[**23]** together, were taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability." *In re Gabapentin Patent Litig., 649 F. Supp. 2d 340, 358-59 (D.N.J. 2009)* (citing *LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2001))*. This rationale applies equally in the patent context as in other antitrust contexts. *See id.* (citing *In re Remeron Antitrust Litig., 335 F. Supp. 2d 522 (D.N.J. 2004))*; *see also* *In re Neurontin Antitrust Litig., Civ. Nos. 02-1830, 02-2731, & 02-5583, MDL No. 1479, 2009 U.S. Dist. LEXIS 77475, 2009 WL 2751029 at *15-16 (D.N.J. Aug. 28, 2009)* (citations omitted).

Plaintiffs have alleged that during and prior to the proposed class period, Braintree held a 100% share of the PEG market in the United States and, therefore, had monopoly power. (D.I. 21 at P 101) Plaintiffs have alleged in detail how Braintree engaged in a multifaceted scheme to unlawfully maintain its monopoly on the MiraLax(R) (PEG) market. The scheme comprised paying "a nuisance value payment of approximately $ 15,000" for a non-exclusive license to the '183 patent, which Braintree considered to be invalid. (*Id.* at PP 67-68) Braintree nevertheless **[**24]** listed the '183 patent in the Orange Book for MiraLax(R) in 1999 and purchased the patent outright in 2001, "shortly before MiraLax(R) would lose its marketing exclusivity on February 18, 2002." (*Id.* at PP 68-70) The Orange Book listing forced Schwarz to file a Paragraph IV certification. Braintree commenced suit against Schwarz to obtain the benefits of the 30-month stay and extend its market monopoly on MiraLax(R) beyond that allowed by the patent laws. (*Id.* at PP 69-73, 88)

As explained *infra,* plaintiffs describe in detail why they believe that the Braintree/Schwarz litigation was objectively baseless. In view of the foregoing, plaintiffs have sufficiently alleged an overall scheme by Braintree to forestall competition on generic MiraLax(R). *See* *In re Gabapentin Patent Litig., 649 F. Supp. 2d at 359* ("***HN13***[] If a plaintiff can allege that a series of actions, when viewed together, were taken in furtherance and as an integral **[*319]** part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability.") (denying motion to dismiss). The court need not, and declines to, analyze whether each facet of this scheme constitutes a separate antitrust **[**25]** violation. *Id. at 359*.

C. Objective Baselessness

1. Plaintiffs' allegations

The majority of Braintree's papers is devoted to its assertions that *Noerr-Pennington* immunity bars plaintiffs' claim because its positions in the Braintree/Schwarz litigation were objectively reasonable. Plaintiffs' allegations with respect to the baselessness of the Braintree/Schwarz litigation are as follows. First, Braintree knew or should have known that claim 33 was invalid for reading on the prior art. Braintree itself attempted to patent the use of PEG for the treatment of constipation but its applications claiming this use were consistently denied by the PTO. (D.I. 21 at P 64) When Braintree learned of the '183 patent while its NDA for MiraLax(R) was pending, its counsel examined the '183 patent "and concluded, in a December 23, 1998 letter sent to Halow, that claim 33 of the '183 patent was directly anticipated by the prior art, and hence invalid." [12] (*Id. at P 67*)

Aside from anticipation, plaintiffs allege that the '183 patent is invalid on its **[**26]** face because there is no disclosure of PEG (without fiber) in the specification of the '183 patent in accordance with the requirements of *35 U.S.C. § 112*. (*Id.* at P 77) As noted previously, Braintree paid "a nuisance value payment of approximately $ 15,000" for a non-exclusive license prior to purchasing the '183 patent outright prior to the expiration of the MiraLax(R) exclusivity period. (*Id.* at PP 68-70)

Plaintiffs aver that Braintree's lawsuit against Schwarz was "objectively baseless on its face because, to prevail, Braintree was required to advance a claim construction position for purposes of validity that precluded any reasonable argument of inducement by [Schwarz], and vice versa." (*Id.* at P 76) First, reading claim 33 to cover PEG without fiber would be inconsistent with the examiner's basis for allowing the claims in the first instance, and would compel a finding of anticipation (or obviousness) in view of a plethora of prior art teaching the use of PEG (without fiber) to treat constipation. (*Id.* at P 77) Construing the claim consistent with the applicant's arguments results in noninfringement, as GlycoLax(R) does not contain fiber. (*Id.*)

Secondly, to overcome the prior art, **[**27]** Braintree was forced to distinguish improving constipation from both bowel motility and stool formation. Braintree argued: (1) "[m]ost patients with constipation do not have a bowel motility or stool formation problem;" (2) "[p]atients with normal transit constipation may still have dismotility of the bowel, meaning alterations in the neuromuscular contractions of the bowel, but would not necessarily have bowel motility problems;" and (3) "giving PEG to soften stool would not necessarily improve stool formation [-] softening the stool of a person having a stool form of five would make that person's stool formation worse." (*Id.* at P 79) (internal citations omitted). Plaintiffs argue that, if the treatment of constipation does not necessarily require improving bowel motility or stool formation, then Schwarz could not reasonably be viewed as encouraging patients to utilize GlycoLax(R) for these purposes simply **[*320]** by encouraging patients to utilize GlycoLax(R) for constipation. (*Id.*)

Finally, plaintiffs aver that the ruling in *Warner-Lambert Co. v. Apotex Corp., 316 F.3d 1348 (Fed. Cir. 2003)*, preceded Braintree's suit by four months and contravened the grounds for Braintree's infringement **[**28]** claim. (*Id.* at P 75) That is, a method of treatment claim may only be directly infringed by patients who perform the claimed method. (*Id.* at P 76) Schwarz could infringe only if it induced patients to infringe, and GlycoLax(R) labeling is directed to constipation, which was distinguished by Braintree. (*Id.* at PP 76, 78, 79)

2. Effect of the prior opinion

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[12] The contents of the letter to Halow, i.e., Braintree's grounds for its statement that the '183 patent was invalid, are not specified in the amended complaint.

The court addresses at this juncture Braintree's argument that, in view of the court's opinion in the Braintree/Schwarz litigation, the court should decide that the Braintree/Schwarz litigation was not a sham as a matter of law. The court disagrees for several reasons. As discussed above, although the court previously found that the *Noerr-Pennington* doctrine barred Schwarz's antitrust counterclaim, it did so on the record before it at that time, mainly, in view of the fact that "[Schwarz did not] demonstrate[ ], by clear and convincing evidence, the lack of any objectively reasonable argument that the '183 patent is valid." (Civ. No. 03-477, D.I. 262 at 21; *see also id.* ("[T]he court declines to find Braintree's infringement claim frivolous **on this record.**" (emphasis added))

HN14[] Issue preclusion, also called collateral estoppel, applies when **[**29]** "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 249 (3d Cir. 2006)* (citations omitted). The Third Circuit has also considered whether the party being precluded had "a full and fair opportunity to litigate the issue in question in the prior litigation" and, in addition, whether the issue was determined by final judgment. *Id.* (citations omitted).

Plaintiffs, direct purchasers of MiraLax(R), were not represented in the Braintree/Schwarz litigation. [13] Plaintiffs at bar seek to make their own record, and insist that they will overcome the deficiencies in proof suffered by Schwarz. The court will not divest these plaintiffs of their day in court. All that is required to defeat Braintree's motion is that the amended complaint allege facts which, if proven, show that Braintree is not entitled to *Noerr-Pennington* immunity under the sham litigation exception. *See In re Gabapentin Patent Litig., 649 F. Supp. 2d at 363* (citation **[**30]** omitted). The court is satisfied that plaintiffs have alleged facts sufficient to establish that Braintree's suit against Schwarz was both objectively and subjectively baseless.

D. *Noerr-Pennington* Immunity Vis-a-Vis the "Overall Scheme" Claim

As noted previously, having found that plaintiffs have alleged an "overall scheme" on the part of Braintree that resulted in antitrust injury, the court does not parse plaintiffs' theory into its component parts. In analyzing the litigation component of plaintiffs' alleged monopolistic scheme, the court has not lost sight of this determination. For the reasons discussed above, the **[*321]** court does not exclude Braintree's bringing suit against Schwarz from the asserted scheme. [14]

E. Discovery Should be Tailored to the Issues to be Decided on Summary Judgment

HN15[] "Objective baselessness," the threshold issue with respect to *Noerr-Pennington* immunity, is primarily a legal question requiring the court to evaluate the reasonableness of Braintree's litigation positions vis-a-vis the patent laws. To this end, the litigation record of the Braintree/Schwarz litigation has already been forged; only limited additional discovery may be necessary. For example, it would aid the court's review on summary judgment to have scientific evidence shedding light on the credibility of Braintree's positions in that litigation.

HN16[] Antitrust standing, the second prong of the *Noerr-Pennington* inquiry, and the merits of plaintiffs' Section 2 claim, are determinations that flow from factual allegations and, as a result, are better addressed at the summary judgment stage upon a developed record. *See In re Gabapentin Patent Litig., 649 F. Supp. 2d at 360 n.23*; **[**32]** *In re Neurontin Antitrust Litig., 2009 U.S. Dist. LEXIS 77475, 2009 WL 2751029 at *22-23*; *In re Remeron*

[13] This is likely the reason Braintree specifically avoids framing its argument as one of issue preclusion or collateral estoppel, notwithstanding its urging the court to apply preclusively the prior holding in a manner consistent with the doctrine.

[14] Although it need not consider the Orange Book listing component of the asserted scheme independently for purposes of deciding the present motion, the court notes its agreement with the caselaw holding that "improper listing" in the **[**31]** FDA's Orange Book is not an act of petitioning for *Noerr-Pennington* purposes, under the rationale iterated in *In re Buspirone Patent Litigation, 185 F. Supp. 2d 363 (S.D.N.Y. 2002)*. Braintree's motion would be alternatively denied on this ground.

Antitrust Litig., 335 F. Supp. 2d at 528. A scheduling conference will be set in due course. The parties shall be prepared to discuss focusing discovery so as to streamline this litigation.

V. CONCLUSION

For the foregoing reasons, Braintree's motion is denied. An appropriate order shall issue.

AstraZeneca AB v. Mylan Labs., Inc. (In re Omeprazole Patent Litig.)

United States District Court for the Southern District of New York

May 19, 2010, Decided; May 19, 2010, Filed

00 Civ. 6749; 03 Civ. 6057; M-21-81 (BSJ); MDL Docket No. 1291

Reporter

2010 U.S. Dist. LEXIS 50049 *; 2010-1 Trade Cas. (CCH) P77,034

ASTRAZENECA AB, AKTIEBOLAGET HASSLE, KBI-E INC., KBI, INC., and ASTRAZENECA, LP, Plaintiffs, v. MYLAN LABORATORIES INC., et al., Defendants. IN RE OMEPRAZOLE PATENT LITIGATION

Subsequent History: Costs and fees proceeding at, Application granted by, in part *Astra Aktiebolag v. Andrx Pharms., Inc., 2010 U.S. Dist. LEXIS 64346 (S.D.N.Y., June 28, 2010)*

Prior History: *Astrazeneca AB v. Mylan Labs., Inc. (In re Omeprazole Patent Litig.), 281 Fed. Appx. 974, 2008 U.S. App. LEXIS 12390 (Fed. Cir., 2008)*

Core Terms

counterclaims, antitrust, sham, attorney's fees, infringement, generic, patents, immunity, allegations, lawsuit, omeprazole, petitioning, automatic, baseless, predicate act, merits, motion to dismiss, quotation, Sherman Act, marks, patent infringement, relevant market, manufacturers, proceedings, competitor, conspiracy, reasons, cases

LexisNexis® Headnotes

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

HN1[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. p. 12(b)(6) provides for dismissal of a complaint that fails to state a claim upon which relief may be granted. In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, a court is required to accept the material facts alleged in the complaint as true. The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff.

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

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

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

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Instead, a plaintiff must assert enough facts to state a claim to relief that is plausible on its face. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

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

HN3[] Motions to Dismiss, Failure to State Claim

In deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court may refer to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN4[] Exemptions & Immunities, Noerr-Pennington Doctrine

Under the Noerr-Pennington doctrine, citizen petitions are immune from antitrust liability in light of the *First Amendment*. Noerr-Pennington immunity extends to those who petition all types of government entities, including the courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN5[] Noerr-Pennington Doctrine, Sham Exception

There is an exception to Noerr-Pennington immunity if the litigation, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. There are two types of "sham" lawsuits. When it is alleged that a single action amounts to sham petitioning, a plaintiff must show that the litigation in question is (i) objectively baseless, i.e., no reasonable litigant could realistically expect success on the merits; and (ii) an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon. Only if challenged litigation is objectively meritless, may a court examine the litigant's subjective motivation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN6[] Noerr-Pennington Doctrine, Sham Exception

When a defendant is accused of bringing "a whole series of legal proceedings" indiscriminately - known as automatic petitioning - the test is: Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment? In automatic petitioning cases, it is immaterial that some of the claims might, as a matter of chance, have merit. The relevant issue is whether the legal challenges are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN7[] Noerr-Pennington Doctrine, Sham Exception

An unsuccessful lawsuit, without more, is not a sham.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > Remedies > General Overview

HN8[] Basis of Recovery, Statutory Awards

The Patent Statute provides that a court in exceptional cases may award reasonable attorney fees to the prevailing party. *35 U.S.C.S. § 285*. Attorney fees are not to be routinely assessed against a losing party in litigation in order to avoid penalizing a party for merely defending or prosecuting a lawsuit, and are awarded to avoid a gross injustice. A district court must determine whether the case is "exceptional"; if it is, then it is within the court's discretion to award attorneys' fees to the prevailing party. The party seeking attorneys' fees bears the burden to show that a case is exceptional by clear and convincing evidence.

Counsel: **[*1]** For AstraZeneca AB, AstraZenaca, LP, Plaintiffs (1:00-cv-06749-BSJ): Alison Jeanne Taylor, LEAD ATTORNEY; Errol Bancroft Taylor, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; Fredrick M. Zullow, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy, New York, NY; John Michael Griem, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP, Los Angeles, CA; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY; Robert Louis Baechtold, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto, New York, NY.

For Aktiebolaget Hassle, KBI-E Inc., KBI Inc., Plaintiffs (1:00-cv-06749-BSJ): Fredrick M. Zullow, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy, New York, NY; John Michael Griem, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP, Los Angeles, CA; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY; Robert Louis Baechtold, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto, New York, NY; Errol Bancroft Taylor, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY.

For Mylan Laboratories Inc., Mylan Pharmaceuticals Incorporated, Defendants (1:00-cv-06749-BSJ): Alison Jeanne Taylor, LEAD ATTORNEY; Elliot Lauer, LEAD ATTORNEY, Curtis **[*2]** Mallet-Prevost Colt & Mosle, New York, NY; James H. Wallace, Jr., LEAD ATTORNEY, Wilet Rein and Fielding, Washington, DC; Roberta R. Wilson, LEAD ATTORNEY, DKW Law Group, PC, Pittsburgh, PA; Robert Louis Baechtold, Fitzpatrick, Cella, Harper & Scinto(NYC), New York, NY.

For Laboratorios Dr. Esteve, S.A., Esteve Quimica, S.A., Movants (1:00-cv-06749-BSJ): Elliot Lauer, Curtis-Mallet-Prevost et al., New York, NY.

For Mylan Pharmaceuticals Incorporated, Mylan Laboratories Inc., Counter Claimants (1:00-cv-06749-BSJ): Elliot Lauer, Curtis Mallet-Prevost Colt & Mosle, New York, NY.

For AstraZeneca AB, AstraZenaca, LP, Counter Defendants (1:00-cv-06749-BSJ): Errol Bancroft Taylor, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY; Robert Louis Baechtold, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto, New York, NY.

For Aktiebolaget Hassle, KBI-E Inc., KBI Inc., Counter Defendants (1:00-cv-06749-BSJ): Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY; Robert Louis Baechtold, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto, New York, NY.

For Aktiebolaget Hassle, KBI Inc., **[*3]** KBI-E Inc., Counter Defendants (1:00-cv-06749-BSJ): Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY.

For AstraZenaca, LP, AstraZeneca AB, Counter Defendants (1:00-cv-06749-BSJ): Errol Bancroft Taylor, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY.

For Mylan Laboratories Inc., Mylan Pharmaceuticals Incorporated, Counter Claimants (1:00-cv-06749-BSJ): Alison Jeanne Taylor, LEAD ATTORNEY, LEAD ATTORNEY; Elliot Lauer, LEAD ATTORNEY, Curtis Mallet-Prevost Colt & Mosle, New York, NY; James H. Wallace, Jr., LEAD ATTORNEY, Wilet Rein and Fielding, Washington, DC; Roberta R. Wilson, LEAD ATTORNEY, DKW Law Group, PC, Pittsburgh, PA; Robert Louis Baechtold, Fitzpatrick, Cella, Harper & Scinto, New York, NY.

For AstraZenaca, LP, Counter Defendant (1:00-cv-06749-BSJ): Alison Jeanne Taylor, LEAD ATTORNEY, LEAD ATTORNEY; Errol Bancroft Taylor, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; Fredrick M. Zullow, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy, New York, NY; John Michael Griem, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP, Los Angeles, **[*4]** CA; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY; Robert Louis Baechtold, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto, New York, NY.

For Astrazeneca AB, Astrazeneca, LP, Plaintiffs (1:03-cv-06057-BSJ): Errol Bancroft Taylor, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; Fredrick M. Zullow, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy, New York, NY; John Michael Griem, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP, Los Angeles, CA; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY; Robert Louis Baechtold, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto, New York, NY; Eliot Lauer, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY; John D. Carlin, Fitzpatrick, Cella, Harper & Scinto(NYC), New York, NY.

For Aktiebolaget Hassle, KBI-E Inc., KBI, Inc., Plaintiffs (1:03-cv-06057-BSJ): Fredrick M. Zullow, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy, New York, NY; John Michael Griem, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP, Los Angeles, CA; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY; Robert Louis Baechtold, LEAD ATTORNEY, Fitzpatrick, Cella, **[*5]** Harper & Scinto, New York, NY; Eliot Lauer, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY; Errol Bancroft Taylor, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; John D. Carlin, Fitzpatrick, Cella, Harper & Scinto(NYC), New York, NY.

For Laboratorios Dr. Esteve, S.A., Defendant (1:03-cv-06057-BSJ): Eliot Lauer, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY; James H. Wallace, Jr., Wiley, Rein & Fielding, L.L.P., Washington, DC; Mark A. Pacella, Wiley Rein and Fielding, Washington, DC.

For Esteve Quimica, S.A., Defendant (1:03-cv-06057-BSJ): Mark A. Pacella, LEAD ATTORNEY, Wiley Rein and Fielding, Washington, DC; James H. Wallace, Jr., Wiley, Rein & Fielding, L.L.P., Washington, DC; Eliot Lauer, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY; John D. Carlin, Robert Louis Baechtold, Fitzpatrick, Cella, Harper & Scinto(NYC), New York, NY.

For Laboratorios Dr. Esteve, S.A., Defendant (1:03-cv-06057-BSJ): Mark A. Pacella, LEAD ATTORNEY, Wiley Rein and Fielding, Washington, DC; Eliot Lauer, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY.

For Mylan Laboratories Inc., Mylan Pharmaceuticals Inc., Movants (1:03-cv-06057-BSJ): Eliot **[*6]** Lauer, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY; James H. Wallace, Jr., Wiley, Rein & Fielding, L.L.P., Washington, DC; Mark A. Pacella, Wiley Rein and Fielding, Washington, DC.

For Esteve Quimica, S.A., Counter Claimant (1:03-cv-06057-BSJ): Eliot Lauer, LEAD ATTORNEY, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY; John D. Carlin, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto(NYC), New York, NY; Mark A. Pacella, LEAD ATTORNEY, Wiley Rein and Fielding, Washington, DC.

For Laboratorios Dr. Esteve, S.A., Counter Claimant (1:03-cv-06057-BSJ): Eliot Lauer, LEAD ATTORNEY, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY.

For Aktiebolaget Hassle, KBI, Inc., KBI-E Inc., Counter Defendants (1:03-cv-06057-BSJ): John D. Carlin, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto(NYC), New York, NY; Lawrence Tucker Kass, LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY.

For Astrazeneca AB, Astrazeneca, LP, Counter Defendants (1:03-cv-06057-BSJ): Errol Bancroft Taylor, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; John D. Carlin, LEAD ATTORNEY, Fitzpatrick, Cella, Harper & Scinto(NYC), New York, NY; Lawrence Tucker Kass, **[*7]** LEAD ATTORNEY, Jacobowitz and Gubits LLP, Walden, NY.

Judges: Barbara S. Jones, UNITED STATES DISTRICT JUDGE.

Opinion by: Barbara S. Jones

Opinion

Opinion & Order

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

On June 29, 2007, Mylan Inc. and Mylan Pharmaceuticals Inc. ("Mylan") moved under *35 U.S.C. § 285* for an award of attorneys' fees against Plaintiffs AstraZeneca AB, Aktiebolaget Hassle, KBI-E, Inc., KBI, Inc., and AstraZeneca, LP ("Astra"). On December 19, 2008, Astra moved to dismiss with prejudice Mylan's antitrust counterclaims pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons set forth below, Astra's motion to dismiss Mylan's antitrust counterclaims is GRANTED and Mylan's motion for attorneys' fees is DENIED.

BACKGROUND

[1]

On May 31, 2007, the Court ruled in its Second Wave decision that Mylan did not infringe the asserted claims of Astra's omeprazole patents (the formulation described in U.S. Patent Nos. 4,786,505 (the "'505 patent") and 4,853,230 (the "'230 patent")). **[*8]** *See* *AstraZeneca AB, et al. v. Mylan Labs., Inc., 490 F. Supp. 2d 381, 390 (S.D.N.Y. 2007)*. This decision was affirmed on appeal by the United States Court of Appeals for the Federal Circuit. *See* *In re Omeprazole Patent Litig., 281 Fed. Appx. 974, 2008 WL 2369864 (Fed. Cir. 2008)*. After the Court's Second Wave decision, Mylan moved for attorneys' fees pursuant to *35 U.S.C. § 285*, claiming that Astra's patent infringement suit was entirely devoid of merit.

In addition, in its Answer to Astra's Second Amended Complaint, Mylan asserted, *inter alia*, counterclaims for treble damages under the antitrust laws ("antitrust counterclaims"). *AstraZeneca AB, 490 F. Supp. 2d at 397*. The antitrust counterclaims assert that Astra kept generic manufacturers of omeprazole products off the market by bringing sham patent litigation to forestall generic-product launch. These counterclaims were severed and stayed pending resolution of the allegations of the complaint. *Id*. Astra has now moved to dismiss with prejudice the antitrust counterclaims.

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[1] For a more complete recitation of the facts and procedural history of this case, the reader is directed to the Court's decision dated May 31, 2007. *See* *AstraZeneca AB, et al. v. Mylan Labs., Inc., 490 F. Supp. 2d 381 (S.D.N.Y. 2007)*.

LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure ***HN1***[] provides for dismissal of a complaint that fails to state a claim upon **[*9]** which relief may be granted. "In ruling on a motion to dismiss for failure to state a claim upon which relief may be granted, the court is required to accept the material facts alleged in the complaint as true." *Frasier v. Gen. Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991)*. The court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff. *See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*.

HN2[] "While a complaint attacked by a *Rule 12(b) (6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotations marks, alterations and citations omitted). Instead, a plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." *Id. at 570*. "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct **[*10]** alleged." *Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009)*.

HN3[] In deciding a motion to dismiss under *Rule 12(b)(6)*, the court may refer "to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Tech., Inc., 987 F.2d 142, 150 (2nd Cir. 1993)* (citation omitted); *see also Hayes v. Coughlin, No. 87 Civ. 7401, 1991 U.S. Dist. LEXIS 14680, 1991 WL 220963, at *1 (S.D.N.Y. Oct. 16, 1991)* ("Papers outside a complaint may be incorporated by reference into the complaint when such papers are referred to within the body of the complaint.").

DISCUSSION

I. Antitrust Counterclaims

Mylan brings four antitrust counterclaims: monopolization in violation of § 2 of the Sherman Act, *15 U.S.C. § 2*; attempted monopolization in violation of *§ 2*; combination and conspiracy to monopolize in violation of *§ 2*; and combination and conspiracy in restraint of trade in violation of § 1 of the Sherman Act, *15 U.S.C. § 1*. The four predicate acts underlying the counterclaims are the same:

> (1) Astra sued every potential generic **[*11]** competitor (including Mylan) without regard for the merits, (Mylan's Answer and Counterclaims §§ 137, 144-46, 156, 166, 175, 186-88, 200-01);
> (2) Astra improperly listed certain Prilosec(R) patents in the Orange Book, either because the patents were invalid or because they did not meet the statutory requirements, (Mylan's Answer and Counterclaims §§ 141-42);
> (3) Astra attempted to (i) convert sales of Prilosec(R) to Nexium(R) by pressuring physicians and by aggressive direct-to-consumer advertising, thereby replacing revenue that would otherwise have gone to suppliers of generic omeprazole products, and (ii) convert sales of prescription omeprazole to an over-the-counter omeprazole product (Prilosec(R) OTC) before substantial or additional generic competition to Prilosec(R) could occur, (Mylan's Answer and Counterclaims §§ 189-90); and
> (4) Astra's alleged activities abroad were aimed at excluding both generic firms and parallel traders from competing against AstraZeneca's Losec(R) product (Mylan's Answer and Counterclaims §§ 138, 192).

Mylan alleges that Astra committed these acts to unlawfully perpetuate its monopoly power in the U.S. market, which Mylan defines as "omeprazole-based drugs, **[*12]** which consists of Prilosec(R) and generic omeprazole products" or, alternatively, "Nexium(R) (esomeprazole) in addition to Prilosec(R) and generic omeprazole products." (Mylan's Answer and Counterclaims §§ 193, 203.)

In Counts III and IV, Mylan alleges that Astra, Merck & Co., Inc., and Procter & Gamble combined and conspired to delay and prevent generic competition in the relevant market. (Mylan's Answer and Counterclaims §§ 214, 221.) The alleged overt acts in furtherance of the conspiracy are predicate acts (1) and (3), *supra*.

With respect to predicate act (1), Astra responds that under the *Noerr-Pennington* doctrine, Astra's patent infringement action against Mylan cannot give rise to antitrust liability because Astra's suit was not a sham--i.e., Astra's claims were supported by probable cause.

"Generally, ***HN4***[] under the *Noerr-Pennington* doctrine, citizen petitions are immune from antitrust liability in light of the *First Amendment*." *In re DDAVP Direct Purchaser Antitrust Litig., 585 F.3d 677, 685-86 (2d Cir. 2009)* (internal quotation marks and citations omitted). *Noerr-Pennington* immunity extends to those who petition all types of government entities, including the courts. *California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)* **[*13]** .

HN5[] There is an exception to *Noerr-Pennington* immunity if the litigation, ostensibly directed toward influencing governmental action, "is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. There are two types of "sham" lawsuits. When it is alleged that a single action amounts to sham petitioning, a plaintiff must show that the litigation in question is (i) "objectively baseless," i.e., "no reasonable litigant could realistically expect success on the merits"; and (ii) "an attempt to interfere *directly* with the business relationships of a competitor through the use of the governmental *process*--as opposed to the *outcome* of that process--as an anticompetitive weapon." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) ("PRE")* (citations, internal quotation marks, and alterations omitted). "Only if challenged litigation is objectively meritless," i.e., (i), "may a court examine the litigant's subjective motivation," i.e., (ii). *Id*.

By contrast, ***HN6***[] when a defendant is accused of bringing **[*14]** "a whole series of legal proceedings" indiscriminately--known as automatic petitioning--the test is: "Were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?" *Primetime 24 Joint Venture v. Nat'l Broadcasting, Co., Inc., 219 F.3d 92, 101 (2d Cir. 2000)* (internal quotation marks and citations omitted). In automatic petitioning cases, "[i]t is immaterial that some of the claims might, as a matter of chance, have merit. The relevant issue is whether the legal challenges are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id*. (internal quotation marks and citations omitted).

The Court finds that Astra is entitled to *Noerr-Pennington* immunity from antitrust liability arising from its patent infringement action against Mylan because the suit was not a sham. Mylan alleges that when Astra filed its infringement action (and at various points thereafter), Astra knew or should have known that Mylan's product did not infringe the asserted patents, yet Astra pursued the lawsuit **[*15]** to prevent or delay Mylan's entry to the relevant market. However, as explained *infra*, the Court cannot conclude that Astra's infringement action against Mylan was one for which "no reasonable litigant could realistically expect success on the merits." *PRE, 508 U.S. at 60*.

First, ***HN7***[] an unsuccessful lawsuit, without more, is not a sham. *See* *id. at 61 n.5* ("[W]hen the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation."). This Court may not infer automatically that Astra's infringement action against Mylan was objectively baseless just because Astra lost at trial.

Second, this Court *denied* Mylan's motion for summary judgment of non-infringement, ruling that there were genuine issues of fact as to whether Mylan infringed Astra's patents. While surviving summary judgment may not establish conclusively that a suit is not a sham, it provides strong evidence that Astra could have reasonably expected success on the merits. *See, e.g., Sulzer Textil A.G. v. Picanol N.V., 358 F.3d 1356, 1370 (Fed. Cir. 2004)* (agreeing **[*16]** with district court's reasoning that "because Sulzer's claims survived Picanol's motion for summary judgment, Sulzer's claims could not be considered baseless"); *APT Sec. Sys., Inc. v. Guerra*, No. 95-CV-1051, 1997 WL 114784, at *2 (D. Conn. Mar. 4, 1997) ("Here, the court has concluded that ADT's claims are worthy of presentation to the trier of fact and therefore cannot conclude that its lawsuit is a sham.").

Third, at the outset of Astra's case, Mylan gave Astra an objectively reasonable basis to sue: Mylan provided Astra notice of its Paragraph IV certification. This is an act of infringement under *35 U.S.C. § 271(e)(2)(A)*. *See Celgene Corp. v. KV Pharm. Co., No. 07-4819, 2008 U.S. Dist. LEXIS 55700, 2008 WL 2856469, at *2-5 (D.N.J. July 22, 2008)* ("Because the Act has made the act of submitting an ANDA itself an act of infringement," in a Hatch-Waxman ANDA case the attorney need only "conduct a reasonable and competent inquiry into the act of infringement by investigating whether a relevant ANDA has been filed."). The Court agrees with Astra that a reasonable plaintiff in a Hatch-Waxman case would be expected to know few details about the accused product at the outset of litigation and plaintiff's counsel may **[*17]** reasonably rely on discovery to learn the material details.

Finally, Astra's infringement action against Mylan was hard-fought and close. In its lengthy Second Wave decision--issued after a 42-day bench trial--the Court ruled that Astra had proven that two of three contested limitations of its claims (limitations 1(b) and 1(c)) were found in Mylan's product. *See AstraZeneca AB, et al. v. Mylan Labs., Inc., 490 F. Supp. 2d 381, 427-447 (S.D.N.Y. 2007)*. Mylan's invalidity defenses also failed. *Id. at 397, 499*. This outcome hardly bespeaks baseless litigation.

For all these reasons, the Court concludes that Astra's infringement action against Mylan was not objectively baseless and that it was therefore not a sham lawsuit unworthy of *Noerr-Pennington* protection. [2]

Mylan next argues that its antitrust counterclaims should not be dismissed because they fall within the automatic petitioning exception to *Noerr-Pennington* immunity. **[*18]** *See Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 512-16, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)* (holding that plaintiffs' allegations that defendants "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases" "come within the 'sham' exception [to *Noerr-Pennington* immunity]"). In connection with this, Mylan alleges that (1) "Astra and its marketing partners engaged in an extensive multifaceted worldwide campaign designed to maintain their market dominance and monopoly beyond the legitimate scope of its patent protection [by] filing and maintaining lawsuits against each and every potential generic competitor without regard for the merits," (Mylan's Answer and Counterclaims § 137), and (2) "Astra and its U.S. marketing partner Merck & Co. . . . had a policy of starting and maintaining legal proceedings [in the form of patent infringement actions] against all competitors (including Mylan) seeking FDA approval to enter the relevant market without regard to the merits of those actions." (Mylan's Answer and Counterclaims § 187.)

The Court first notes that it appears to be an open question whether *California Motor Transport's* automatic petitioning **[*19]** exception to *Noerr-Penington* immunity remains viable following the Supreme Court's decision in *PRE*. In *PRE*, the Court observed that it had previously "described a sham as evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims." *PRE, 508 U.S. at 58* (emphasis in original, internal quotations omitted). The *PRE* Court ultimately rejected a "purely subjective definition of 'sham,'" reasoning that "[s]ince *California Motor Transport*, we have consistently assumed that the sham exception contains *an indispensable objective component." Id. at 58, 60* (emphasis added). The Supreme Court thus indicated that a sham must be, at minimum, objectively baseless. Yet the automatic petitioning exception to *Noerr-Pennington* immunity would apply even where a defendant's allegedly indiscriminate litigation campaign occasionally is *successful*, i.e., where some portion of the lawsuits are meritorious and thus, objectively justified. *See Primetime 24 Joint Venture, 219 F.3d at 101* (explaining that in automatic petitioning cases "[i]t is immaterial that some of the claims might, as a matter of chance, have merit"). Because *PRE* indicates that a sham must be objectively baseless, and because **[*20]** this

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[2] Because the Court does not find that the infringement action was objectively meritless, the Court need not examine Astra's subjective motivation in bringing the suit. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*.

Court has concluded that Astra's infringement action against Mylan was not objectively baseless (and indeed, many of Astra's suits against other generic manufacturers of omeprazole were not objectively baseless because they succeeded), it may be that the automatic petitioning exception cannot strip Astra of *Noerr-Pennington* immunity for its patent enforcement efforts.

Nevertheless, even if automatic petitioning remains a viable exception to *Noerr-Pennington* immunity where litigation has an objective basis, the Court finds that Mylan's allegations fail to plausibly allege that Astra engaged in automatic petitioning. Astra had considerable success against the generic manufacturers it pursued through litigation. In fact, Astra succeeded against eight of eleven generic manufacturers--a .727 "batting average." *See* *Kaiser Foundation Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1047 (9th Cir. 2009)* (rejecting sham litigation claim against a Hatch-Waxman plaintiff that won seven of its seventeen suits where, in each of the ten losing cases, plaintiff had a "plausible" argument); *see also* *USS-POSCO Indus. v. Contra Costa County Building & Constr. Trades Council, 31 F.3d 800, 811 (9th Cir. 1994)* **[*21]** ("Given that the plaintiff has the burden in litigation, a batting average exceeding .500 cannot support" plaintiff's antitrust theory); *In re Terazosin Hydrochloride Antitrust Litig., 335 F. Supp. 2d 1336, 1367 (S.D. Fla. 2004)* ("Abbott succeeded on seven of the eleven lawsuits it filed: an impressive .636 batting average."). Moreover, although Astra initiated many lawsuits against generic manufacturers of omeprazole, "the volume of [Astra's] suits was dependent on the number of generic companies attempting to enter the [omeprazole] marketplace, a matter over which [Astra] had no control." *Kaiser, 552 F.3d at 1047*. Thus, the Court cannot conclude that Mylan has plausibly alleged that Astra brought its infringement actions pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring market rivals. Therefore, the Court finds no basis for withholding *Noer-Pennington* immunity from Astra for Mylan's antitrust counterclaims.

The Court also finds that none of Astra's other predicate acts alleged in the antitrust counterclaims violates the Sherman Act. In predicate act (2), *supra*, Mylan alleges that Astra improperly listed certain Prilosec(R) **[*22]** patents in the Orange Book, (Mylan's Answer and Counterclaims §§ 141-42), but these allegations do not suggest how these listings were improper or anticompetitive. For example, Mylan does not identify which patents were improperly listed, why those patents were invalid at the time of listing, or how Astra failed to meet other statutory requirements for Orange Book listing. *See generally* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

As for Mylan's allegation in predicate act (3), *supra* (the claim of predatory product replacement practices (Mylan's Answer and Counterclaims §§ 189-90)), the Court finds that Mylan has failed to plausibly allege "predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market," *Morris Communcs. Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1294 (11th Cir. 2004)*, as required to state a claim under *§ 2* of the Sherman Act, because the alleged conduct--introducing new products--is generally considered pro-competitive. *See* *Walgreen Co. v. AstraZeneca Pharm. L.P., 534 F. Supp. 2d 146, 150-52 (D.D.C. 2008)* (rejecting antitrust theory that AstraZeneca engaged in exclusionary conduct by introducing **[*23]** Nexium, a drug alleged to be nearly identical to and no more effective than Prilosec, in order to avoid competition from generic manufacturers because AstraZeneca's actions allegedly increased consumer choice). Similarly, Mylan's allegation that Astra aggressively pressured physicians and persuaded consumers to convert sales of Prilosec(R) to Nexium(R) fails to "identif[y] any ***antitrust law*** that prohibits market switching through sales persuasion short of false representations or fraud, or any court that has identified such conduct as exclusionary for purposes of *§ 2* of the Sherman Act." *Id. at 152*.

In addition, Mylan's allegation that Astra took steps abroad to prevent competition with Prilosec(R) (predicate act 4, *supra*, (Mylan's Answer and Counterclaims §§ 138, 192)) fails to plausibly allege any "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as required by *15 U.S.C. § 6a(1)*. *See* *F. Hoffmann-La Roche Ltd v. Empagran S.A.., 542 U.S. 155, 161, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*; *see generally* *Cantor Fitzgerald Inc. v. Lutnick, 313 F.3d 704, 709 (2d Cir. 2002)* ("[W]e give no credence to plaintiff's conclusory allegations.") (internal quotation marks omitted).

Finally, the Court finds that **[*24]** Mylan's allegations in Counts III and IV of a combination and conspiracy between Astra, Merck and Procter & Gamble to delay and prevent generic competition in the relevant market fail to state claims because they are based on predicate acts (1) and (3), *supra*, which the Court has already determined do not violate the Sherman Act. The Court agrees with Astra that even if the litigation alleged to be a sham was pursued jointly, it is not an antitrust violation as a matter of law if the Court finds the activity immunized by the *Noerr-Pennington* doctrine. *See* *Kahn v. iBiquity Digital, Corp., 309 Fed. Appx. 429, 2009 WL 102810, at *1 (2d Cir. 2009)* (ruling that the alleged conspiracy to engage in activity protected by *Noerr-Pennington* immunity fails to state a claim). [3]

For the foregoing reasons, Astra's motion to dismiss Mylan's antitrust counterclaims is GRANTED.

II. Motion for Attorneys' Fees

In its motion for attorneys' fees, Mylan requests that the Court deem this case "exceptional" **[*26]** and award attorneys' fees and related expenses under *35 U.S.C. § 285* because Astra's patent infringement claims were entirely without merit. Specifically, Mylan asserts that Astra advanced numerous unfounded theories in support of its claim that Mylan's product contains an alkaline reacting compound ("ARC") in the form of alleged impurities. According to Mylan, this case should be deemed "exceptional" and fees should be awarded because "Astra's relentless pursuit of its claims against Mylan and Esteve for more than half a decade, despite [any supporting evidence], forced Mylan/Esteve to incur millions of dollars in attorneys' fees and expenses." (Mylan/Esteve's Motion for Attorneys' Fees 1-2).

HN8[] The Patent Statute provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." *35 U.S.C. § 285*. "Attorney fees are not to be routinely assessed against a losing party in litigation in order to avoid penalizing a party for merely defending or prosecuting a lawsuit, and are awarded to avoid a gross injustice." *Revlon, Inc. v. Carson Products Co., 803 F.2d 676, 679 (Fed. Cir. 1986)* (internal citations omitted). "The district court must determine whether **[*27]** the case is 'exceptional'; if it is, then it is within the court's discretion to award attorneys' fees to the prevailing party." *J.P. Stevens Co., Inc. v. Lex Tex Ltd., Inc., 822 F.2d 1047, 1050 (Fed. Cir. 1987)*. The party seeking attorneys' fees bears the burden to show that a case is exceptional by clear and convincing evidence. *Cambridge Prods., Ltd. v. Penn Nutrients, Inc., 962 F.2d 1048, 1050 (Fed. Cir. 1992)*.

The Court finds that Mylan has failed to establish by clear and convincing evidence that this case is "exceptional" and Mylan is therefore not entitled to attorneys' fees and related expenses. At bottom, Mylan's theory is that Astra should be liable for attorneys' fees because it ultimately lost its infringement claim against Mylan at trial. As discussed *supra*, the Court has found that Astra had an objectively reasonable basis to sue Mylan for infringement and that its lawsuit was not a sham. The same reasoning applies here. For example, as in *Sulzer Textil A.G. v. Picanol N.V., 358 F.3d 1356 (Fed. Cir. 2004)*, because Astra's action survived summary judgment, it is appropriate to conclude that it was not baseless, and thus, not exceptional for purposes of awarding attorneys' **[*28]** fees. *Id. at*

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[3] The Court also rejects Mylan's argument that dismissal of its antitrust counterclaims at this stage is not warranted because the counterclaims raise issues of fact requiring discovery--e.g., evidence of Astra's knowledge and motivations, policies and strategies related to its litigation efforts. Such evidence plainly goes to the subjective intent prong under *PRE* and, as discussed in footnote 2, *supra*, it is irrelevant **[*25]** because the Court concludes that Astra's infringement action against Mylan was not objectively baseless. Moreover, as is clear from the Court's dismissal of Mylan's antitrust counterclaims, Mylan has failed to cross the "threshold of plausibility" on its counterclaims to justify discovery. *See* *Asahi Glass Co. v. Pentech Pharms., Inc., 289 F. Supp. 2d 986, 995 (N.D. I11. 2003)* (Posner, *J.*) ("[T]o avoid turning every patent case into an antitrust case, some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase…. *[A]n infringement suit must be adjudged to be objectively baseless before it can be considered an unlawful method of competition*; that is, the determination of whether such a suit is a sham depends not on what the patentee believes but on the nature of and the underlying merits of the patentee's case.") (emphasis added and internal quotation marks omitted).

1370. And, as discussed, Astra's action against Mylan was hard-fought and close, necessitating a lengthy bench trial and a voluminous opinion. Moreover, there is no basis to find that Astra committed any misconduct in its handling of this litigation. Simply put, there was no bad faith, inequitable conduct, or vexatious activity by Astra. *See* *Cambridge Prods., 962 F.2d at 1050-51* ("In the case of awards to prevailing accused infringers . . . 'exceptional cases' are normally those of bad faith litigation or those involving fraud or inequitable conduct by the patentee in procuring the patent.").

For these reasons, Mylan's motion for attorneys' fees and expenses is DENIED.

CONCLUSION

For the reasons set forth above, Astra's motion to dismiss Mylan's antitrust counterclaims is GRANTED and Mylan's motion for attorneys' fees is DENIED.

SO ORDERED:

/s/ Barbara S. Jones

Barbara S. Jones

UNITED STATES DISTRICT JUDGE

Dated: New York, New York

May 19, 2010

Halton Co. v. Streivor, Inc.

United States District Court for the Northern District of California

May 21, 2010, Decided; May 21, 2010, Filed

No. C 10-00655 WHA

Reporter
2010 U.S. Dist. LEXIS 50649 *; 2010 WL 2077203

HALTON CO., a Kentucky corporation, Plaintiff, v. STREIVOR, INC., a California corporation, Defendant.

Core Terms

infringement, patent, patent infringement, exhaust, induced, hoods, unfair competition, contributory, indirect, prospective economic advantage, intentional interference, allegations, products, patent rights, continues, potential customer, customers, kitchen, prong

Counsel: **[*1]** For Halton Co, a Kentucky corporation, Plaintiff: Julie M. Holloway, Julie M. Holloway, LEAD ATTORNEY, Wilson Sonsini Goodrich & Rosati, San Francisco, CA; Richard Gregory Frenkel, LEAD ATTORNEY, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA; Abby C. Denham, PRO HAC VICE, D. Margeaux Witherspoon, PRO HAC VICE, Kurt C. Rommel, PRO HAC VICE, Miles & Stockbridge PC, McLean, VA; James Douglas Cuthbertson, Miles & Stockbridge P.C., McLean, VA.

For Streivor Inc, a California corporation, Defendant: David Schnapf, LEAD ATTORNEY, Townsend and Townsend and Crew LLP, San Francisco, CA; Richard Gregory Frenkel, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA.

Judges: WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM ALSUP

Opinion

ORDER GRANTING MOTION TO DISMISS AND VACATING HEARING

INTRODUCTION

In this patent infringement action involving commercial kitchen ventilation systems, defendant Streivor, Inc. moves to dismiss plaintiff Halton Co.'s claims for indirect infringement, unfair competition, and intentional interference with prospective economic advantage. Alternatively, defendant moves for a more definite statement on each of these claims. For the reasons stated below, defendant's motion to dismiss is **GRANTED**.

STATEMENT

Three **[*2]** claims are alleged in the complaint: (1) patent infringement, both direct and indirect, (2) unfair competition under California law, and (3) intentional interference with prospective economic advantage (Dkt. No. 1).

Underlying these claims is United States Patent No. 6,851,421, entitled "Exhaust Hood With Air Curtain," of which plaintiff is the assignee. The instant motion targets each of these claims with the exception of plaintiff's claim of direct patent infringement (Dkt. No. 19).

ANALYSIS

1. LEGAL STANDARD

"[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (internal citations omitted); *FRCP 8(a)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ibid*. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. *Id. at 1950*. A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

A. [*3] Indirect Infringement

Defendant argues that plaintiff failed to sufficiently allege indirect infringement of the '421 patent under *FRCP 8(a)* and *Iqbal*. The complaint stated in relevant part (Compl. PP 11-13):

> 11. On information and belief, during the term of the '421 Patent, Streivor has infringed and continues to infringe; has contributorily infringed and continues to contributorily infringe; and/or has induced and continues to induce others to infringe one or more claims of the '421 Patent. Streivor's infringing activities in the United States and in this District include making, using, selling and/or offering to sell commercial kitchen products with exhaust hoods, including, but not limited to, Wall Canopy Box Design Hoods with Smart Aire.
> 12. In April 2009, Halton provided Streivor with actual written notice of the '421 Patent and Streivor's infringing activity, and demanded that Streivor cease and desist from infringing the '421 Patent.
> 13. Streivor has intentionally and willfully infringed the '421 Patent and continues to intentionally and willfully infringe the '421 Patent.

There are two theories under which a party may be held liable for indirect infringement: (1) induced infringement **[*4]** under *35 U.S.C. 271(b)* and (2) contributory infringement under *35 U.S.C. 271(c)*.

As set forth in *35 U.S.C. 271(b)*, "[w]hoever actively induces infringement of a patent shall be liable as an infringer." To establish liability for induced infringement, "a patent holder must prove that once the defendants knew of the patent, they 'actively and knowingly aid[ed] and abett[ed] another's direct infringement.'" *DSU Med. Corp. v. JMS Co., 471 F.3d 1293, 1305 (Fed. Cir. 2006)*. In other words, the accused party must have "knowingly induced infringement and possessed specific intent to encourage another's infringement." *i4i Ltd. Partnership v. Microsoft Corp., 598 F.3d 831, 851 (Fed. Cir. 2010)* (quoting *MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp., 420 F.3d 1369, 1378 (Fed. Cir. 2005))*.

With respect to contributory infringement, "[w]hoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use **[*5]** in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." *35 U.S.C. 271(c)*.

Even assuming the truth of the facts alleged in the complaint, plaintiff has failed to make a plausible claim for induced or contributory infringement. Here's why:

Induced infringement under *35 U.S.C. 271(b)* requires the direct infringement by *another* entity, and that this direct infringement be "actively induce[d]" by the party accused under *Section 271(b)*. *See i4i Ltd. Partnership, 598 F.3d at 851*. As the above excerpts from the complaint illustrate, no entity *other than defendant* as been accused of directly infringing the '421 patent. Moreover, there are insufficient facts supporting a plausible inference of active inducement. The complaint merely alleged that defendant "makes, uses, sells and/or offers to sell" the accused infringing product, and continued to "intentionally" and "wilfully" infringe after receiving notice by plaintiff in April 2009 of possible infringement of the '421 patent (Compl. PP 11-13). No mention of any "specific intent to encourage another's infringement" is made.

Similarly, **[*6]** the complaint is devoid of facts to support a plausible inference of contributory infringement. As the excerpts from the complaint illustrate, there was no allegation by plaintiff that the accused commercial kitchen product was a "component of a patented machine . . . constituting a material part of the [patented] invention" or that the accused product was not capable of "substantial noninfringing use" (*ibid*.). *35 U.S.C. 271(c)*. Nothing alleged in the complaint fits the theory of contributory infringement.

In its opposition, plaintiff hangs its hat on *FRCP 84*, which states that the "forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate" (Opp. 3-4). The gist of plaintiff's argument is that it has sufficiently pled indirect infringement using Form 18, which was created prior to the *Iqbal* decision and is found in the appendix of the current Federal Rules.

On its face, however, Form 18 is silent as to any theory of patent infringement besides *direct* infringement. *See* FRCP Appendix of Forms, Form 18 (recommending in a "Complaint for Patent Infringement" a statement that "defendant has infringed and is still infringing the Letters **[*7]** Patent by making, selling, and using [the accused products] that embody the patented invention"). Nowhere in Form 18 are theories and elements of induced infringement or contributory infringement referenced. Given this silence, this order finds that plaintiff cannot use Form 18 as a shield against the instant motion. Several other courts in this district have reached the same conclusion. *See Bender v. LG Elecs. U.S.A., Inc., 2010 U.S. Dist. LEXIS 33075, 2010 WL 889541 (N.D. Cal. Mar. 11, 2010)* (Form 18 only provides an example of how direct patent infringement may be alleged); *Elan Microelectronics Corp. v. Apple, Inc., 2009 U.S. Dist. LEXIS 83715, 2009 WL 2972374 (N.D. Cal. Sept. 14, 2009)* ("[i]n the absence of any other form that addresses indirect infringement and is made binding on the courts through *Rule 84*, the Court must apply the teachings of *Twombly* and *Iqbal*").

For these reasons, plaintiff's claims of indirect infringement under *35 U.S.C. 271(b)* and *35 U.S.C. 271(c)* are **DISMISSED**.

B. California Unfair Competition Law

Defendant's next attack targets the *Section 17200* claims alleged in the complaint. The complaint set forth in relevant part (Compl. PP 17-20):

> 17. Strevoir [sic] is representing to potential clients that Streivor holds **[*8]** patent rights in its productions, which on information and belief such patent rights do not exist.
> 18. Streivor has represented to potential customers of Halton that it has patent rights that are superior to Halton's patents and by doing so implying [sic] that its patent rights cover Halton's exhaust hoods products.
> 19. On information and belief, during the term of the '421 Patent, Streivor has marketed and continues to market to potential customers that Streivor's exhaust hoods are equal to Halton's exhaust hoods and Streivor's exhaust hoods are half the price of Halton's system.
> 20. Potential customers are likely to be deceived into believing that Strevoir [sic] has the right to market its exhaust hoods, without a license from Halton, when in fact the intellectual property rights to the product covered by the '421 Patent belong to Halton.

Section 17200 states that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." This language was intended to include "anything that can properly be called a business practice." *Prata v. Superior Court, 91 Cal. App. 4th 1128, 1136, 111 Cal. Rptr. 2d 296 (2001)* (internal **[*9]** quotation marks omitted). Defendant argues that the above allegations fail to state a plausible claim under California unfair competition law. *Cal. Bus. & Prof. Code. § 17200 et seq*. This order agrees.

As the relevant excerpts from the complaint show, plaintiff's allegations are difficult to decipher. Giving the complaint as plausible a reading as possible, it appears that defendant misrepresented to its potential clients that it held patent rights in its products superior to those of plaintiff and that customers were likely to be deceived that defendant had the right to market its exhaust hoods without a license from plaintiff. The complaint leaves unaddressed why such misrepresentations would be important to a customer's decision in choosing between commercial kitchen appliances. Additionally, inexplicably thrown into these allegations is the claim that defendant represented to potential customers of plaintiff that its products were of equal quality at half the price.

There are numerous deficiencies with these allegations. *First*, claims that "sound in fraud" or are "grounded in fraud" -- including those alleged under *Section 17200* -- must be pled with particularity under *FRCP 9(b)*. **[*10]** *See Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)* ("[W]e have specifically ruled that *Rule 9(b)*'s heightened pleading standards apply to claims for violations of the . . . UCL."). Since plaintiff's unfair competition allegations appear to be solely based upon defendant's allegedly false "representations" regarding its patent rights that were "likely to deceive []" customers, *FRCP 9(b)* applies to this claim. Applying this heightened pleading standard, the complaint failed to allege sufficient facts as to "the who, what, when, where, and how" relating to the alleged deceitful misconduct. *Id. at 1126*. For example, it is unclear who made these alleged "representations," how they were supposedly made, when they were supposedly made, and where they were supposedly made. This lack of specificity, as well as plaintiff's failure to allege a plausible theory of reliance on these supposed misrepresentations, makes it impossible for defendant to respond to these allegations (which appear to fall under the "fraudulent" prong of *Section 17200*).

Second, with respect to the seemingly unrelated allegation that defendant has marketed (and continues to market) to potential customers that **[*11]** its exhaust hoods are "equal to [plaintiff's] exhaust hoods and . . . are half the price," the complaint failed to allege that these representations were actually false. Moreover, at least with the representation that the competing exhaust hoods were "equal" to each other, such a vague marketing statement would almost certainly be deemed non-actionable puffery under the law.

Third, to the extent that plaintiff has alleged a violation under the "unlawful" prong of *Section 17200*, a violation of federal patent law -- without more -- cannot serve as the basis of this claim. *See Summit Mach. Tool Mfg. Corp. v. Victor CNC Systems, Inc., 7 F.3d 1434, 1439 (9th Cir. 1993)* ("Federal patent and copyright laws limit the states' ability to regulate unfair competition."). A state-law claim must be "qualitatively different from a copyright or patent infringement claim" or else it is preempted. *Id. at 1439-40*. This means that the state-law claim must require proof of an element not shared by the federal law. *Ibid*. In its opposition, plaintiff simply argues that "patent infringement is clearly a violation of federal law" as the basis for its claim under the "unlawful" prong. This argument fails under **[*12]** the rules set forth above.

Fourth, to the extent that a violation of the "unfair" prong has been alleged, there is no allegation that defendant's conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The complaint merely alleged that defendant committed patent infringement and knowingly deceived customers into believing that defendant's products did not require a license. If anything, this alleged misconduct, while potentially in violation of federal patent law, provided customers seeking commercial kitchen exhaust hoods with *additional* choices and the market with *additional* competition. The complaint failed to set forth any legally cognizable theory as to why the alleged misconduct was (and is) "unfair."

For these reasons, plaintiff's unfair competition claim under all three prongs of *Section 17200* has been inadequately pled under *FRCP 8(a)* and *Iqbal*, and is hereby **DISMISSED**.

C. Intentional Interference [*13] With Prospective Economic Advantage

The elements of intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*.

Plaintiff's only factual allegation with respect to the first element is that "Halton had a reasonable probability of profitable economic relationships with others . . ." (Compl. PP 26-33). As the undersigned recently explained in *Swingless Golf Club v. Taylor, 2009 U.S. Dist. LEXIS 57654, *11-12 (N.D. Cal Jul. 7, 2009)*, "it is well settled in California that a plaintiff must establish an existing economic relationship or a protected expectancy with a third person, not merely a hope of future transactions." Such an *existing* relationship must be pleaded to state a claim for intentional interference **[*14]** with prospective economic advantage. Plaintiff acknowledges that its complaint is deficient in this respect (Opp. 10).

As such, plaintiff's claim of intentional interference with prospective economic advantage must be **DISMISSED**.

CONCLUSION

For the reasons stated above, plaintiff's claims for induced patent infringement, contributory patent infringement, unfair competition, and intentional interference with prospective economic advantage are **DISMISSED**. The hearing on this motion is **VACATED**.

Within **FOURTEEN CALENDAR DAYS**, plaintiff may file a motion on the normal 35-day track seeking to cure the foregoing deficiencies. A proposed amended complaint must be appended to such a motion, and the motion should clearly explain why each amended claim overcomes the deficiencies stated herein.

IT IS SO ORDERED.

Dated: May 21, 2010.

/s/ William Alsup

WILLIAM ALSUP

UNITED STATES DISTRICT JUDGE

Am. Needle, Inc. v. NFL

Supreme Court of the United States

January 13, 2010, Argued; May 24, 2010, Decided

No. 08-661

Reporter

560 U.S. 183 *; 130 S. Ct. 2201 **; 176 L. Ed. 2d 947 ***; 2010 U.S. LEXIS 4166 ****; 94 U.S.P.Q.2D (BNA) 1673; 78 U.S.L.W. 4431; 2010-1 Trade Cas. (CCH) P77,019; 79 A.L.R. Fed. 2d 591; 22 Fla. L. Weekly Fed. S 347

AMERICAN NEEDLE, INC., Petitioner v. NATIONAL FOOTBALL LEAGUE et al.

Subsequent History: On remand at, Remanded by *Am. Needle, Inc. v. NFL, 391 Fed. Appx. 564, 2010 U.S. App. LEXIS 18067 (7th Cir. Ill., Aug. 24, 2010)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Am. Needle, Inc. v. NFL, 538 F.3d 736, 2008 U.S. App. LEXIS 17553 (7th Cir. Ill., 2008)

Disposition: Reversed and remanded.

Core Terms

teams, cooperation, conspiracy, licensing, entities, joint venture, decisions, intellectual property, football, concerted action, single entity, Sherman Act, decisionmaking, antitrust, independent action, restraint of trade, competitors, trademarks, parties, league, concerted, profits, concerted activity, common interest, economic power, manufacturers, marketplace, conspiring, deprives, pursuing

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

Every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade is made illegal by *15 U.S.C.S. § 1* of the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN2[] Regulated Practices, Price Fixing & Restraints of Trade

Even though, read literally, *15 U.S.C.S. § 1* would address the entire body of private contract, that is not what the statute means. The United States Supreme Court has not taken a literal approach to that language. Not every instance of cooperation between two people is a potential contract, combination, or conspiracy, in restraint of trade. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN3[] Regulated Practices, Price Fixing & Restraints of Trade

The meaning of the term "contract, combination, or conspiracy" under *15 U.S.C.S. § 1* is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes *§ 1* of the Sherman Act from *15 U.S.C.S. § 2*. *Section 1* applies only to concerted action that restrains trade. *Section 2*, by contrast, covers both concerted and independent action, but only if that action monopolizes, *15 U.S.C.S. § 2*, or threatens actual monopolization, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action. Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

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

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

In *15 U.S.C.S. § 1* Congress treats concerted behavior more strictly than unilateral behavior. This is so because unlike independent action, concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition. Concerted activity is thus judged more sternly than unilateral activity under *15 U.S.C.S. § 2*. For these reasons, *§ 1* prohibits any concerted action in restraint of trade or commerce, even if the action does not threaten monopolization. And therefore, an arrangement must embody concerted action in order to be a "contract, combination, or conspiracy" under *§ 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Concerted action under *15 U.S.C.S. § 1* does not turn simply on whether the parties involved are legally distinct entities. Instead, such formalistic distinctions have been eschewed in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. As a result, instances have repeatedly been found in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. A court seeks the central substance of the situation, and therefore the court is moved by the identity of the persons who act, rather than the label of their hats.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

There is not necessarily concerted action for purposes of *15 U.S.C.S. § 1* simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," cooperation between legally separate entities was once treated as necessarily covered by *§ 1*, a court now embarks on a more functional analysis.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Corporations > General Overview

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

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

As an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that *15 U.S.C.S. § 1* is designed to police, a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. Although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not deprive the marketplace of independent centers of decisionmaking, and as a result, an agreement between them does not constitute a "contract, combination, or conspiracy" for the purposes of *§ 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

Substance, not form, should determine whether an entity is capable of conspiring under *15 U.S.C.S. § 1*. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination, or conspiracy" is concerted action--that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination, or conspiracy" amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition. The central evil addressed by Sherman Act *§ 1* is the elimination of competition that would otherwise exist.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Corporations > General Overview

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

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

While the president and a vice president of a firm can (and regularly do) act in combination, their joint action generally is not the sort of "combination" that *15 U.S.C.S. § 1* is intended to cover. Such agreements might be described as really unilateral behavior flowing from decisions of a single enterprise. Nor, for this reason, does *§ 1* cover internally coordinated conduct of a corporation and one of its unincorporated divisions, because a division within a corporate structure pursues the common interests of the whole, and therefore coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests. Nor, for the same reasons, is the coordinated activity of a parent and its wholly owned subsidiary covered. They have a complete unity of interest and thus, with or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

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

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged *15 U.S.C.S. § 1* violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under *§ 1*, and a court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

An ongoing 15 U.S.C.S. § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN12[] **Regulated Practices, Price Fixing & Restraints of Trade**

A history of concerted activity does not immunize conduct from 15 U.S.C.S. § 1 scrutiny. Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

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

HN13[] **Regulated Practices, Price Fixing & Restraints of Trade**

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. A "contract, combination, or conspiracy," 15 U.S.C.S. § 1, that is necessary or useful to a joint venture is still a "contract, combination, or conspiracy" if it deprives the marketplace of independent centers of decisionmaking. Joint ventures have no immunity from antitrust laws. Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that firms operate jointly in some sense does not mean that they are immune.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

Agreements within a single firm are generally treated as independent action for purposes of 15 U.S.C.S. § 1 on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.

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

HN15[] **Antitrust, Antitrust Statutes**

Competitors cannot simply get around antitrust liability by acting through a third-party intermediary or "joint venture."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

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

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

When restraints on competition are essential if the product is to be available at all, per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible rule of reason. In such instances, the agreement is likely to survive the rule of reason. Joint ventures and other cooperative arrangements are not usually unlawful where the agreement is necessary to market a product at all. And depending upon the concerted activity in question, the rule of reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The true test of legality under *15 U.S.C.S. § 1* is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question a court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Lawyers' Edition Display

Decision

[*947]** Licensing activities of league (unincorporated association of separately owned professional football teams) held to constitute concerted action that was (1) not categorically beyond coverage of § 1 of Sherman Act (*15 U.S.C.S. § 1*), and (2) to be judged under rule of reason.

Summary

Procedural posture: Petitioner former licensee sued respondents, including a professional football league, its teams, and a licensor, alleging antitrust violations under *15 U.S.C.S. §§1* and *2* of the Sherman Act. The district court granted summary judgment for respondents on the § 1 claim, and the United States Court of Appeals for the Seventh Circuit affirmed. The United States Supreme Court granted certiorari.

Overview: The teams formed the licensor to license their intellectual property. The licensee alleged that the agreements among respondents violated *§ 1*. The district court and the Seventh Circuit found that *§ 1* did not apply because the league, the teams, and the licensor acted as a single entity with regard to the licensing of intellectual property. The Supreme Court held that the licensing activities constituted concerted action that was not categorically beyond the coverage of *§ 1*, and the legality of that action had to be judged under the rule of reason. The relevant inquiry was whether there was a “contract, combination, or conspiracy” among separate economic actors pursuing separate economic interests. If an agreement joined together independent centers of decisionmaking, the entities were capable of conspiring under *§ 1*. The teams competed in the market for intellectual property, and decisions to collectively license their separately owned trademarks deprived the market **[***948]** place of independent centers of decisionmaking. The licensor's decisions constituted concerted action, as the licensor acted as an instrumentality of the teams in making licensing decisions.

Outcome: In a unanimous decision, the Court reversed the Seventh Circuit's judgment and remanded the case for further proceedings.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > SHERMAN ACT -- PROHIBITIONS > Headnote:
LEdHN[1][] [1]

Every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade is made illegal by *15 U.S.C.S. § 1* of the Sherman Act.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > SHERMAN ACT -- MEANING OF PROHIBITIONS > Headnote:
LEdHN[2][] [2]

Even though, read literally, *15 U.S.C.S. § 1* would address the entire body of private contract, that is not what the statute means. The United States Supreme Court has not taken a literal approach to that language. Not every instance of cooperation between two people is a potential contract, combination, or conspiracy, in restraint of trade. *15 U.S.C.S. § 1*.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > SHERMAN ACT PROHIBITIONS -- DIFFERENT SECTIONS > Headnote:
LEdHN[3][] [3]

The meaning of the term “contract, combination, or conspiracy” under *15 U.S.C.S. § 1* is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes *§ 1* of the Sherman Act from *15 U.S.C.S. § 2*. *Section 1* applies only to concerted action that restrains trade. *Section 2*, by contrast, covers both concerted and independent action, but only if that action monopolizes, *15 U.S.C.S. § 2*, or threatens actual monopolization, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action. Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

[*949]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > CONCERTED BEHAVIOR -- SHERMAN ACT TREATMENT > Headnote:
LEdHN[4][] [4]

In *15 U.S.C.S. § 1* Congress treats concerted behavior more strictly than unilateral behavior. This is so because unlike independent action, concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition. Concerted activity is thus judged more sternly than unilateral activity under *15 U.S.C.S. § 2*. For these reasons, § 1 prohibits any concerted action in restraint of trade or commerce, even if the action does not threaten monopolization. And therefore, an arrangement must embody concerted action in order to be a “contract, combination, or conspiracy” under *§ 1*.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > CONCERTED ACTION -- FUNCTIONAL CONSIDERATION > Headnote:
LEdHN[5][] [5]

Concerted action under *15 U.S.C.S. § 1* does not turn simply on whether the parties involved are legally distinct entities. Instead, such formalistic distinctions have been eschewed in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. As a result, instances have repeatedly been found in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. A court seeks the central substance of the situation, and therefore the court is moved by the identity of the persons who act, rather than the label of their hats.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > CONCERTED ACTION -- FUNCTIONAL ANALYSIS > Headnote:
LEdHN[6][] [6]

There is not necessarily concerted action for purposes of *15 U.S.C.S. § 1* simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the “intraenterprise conspiracy doctrine,” cooperation between legally separate entities was once treated as necessarily covered by *§ 1*, a court now embarks on a more functional analysis.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > PARENT AND SUBSIDIARY -- AGREEMENT AS NOT COVERED > Headnote:
LEdHN[7][] [7]

As an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that *15 U.S.C.S. § 1* is designed to police, a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. Although a parent corporation and its wholly owned subsidiary are “separate” for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not deprive the marketplace of independent centers of decisionmaking, and as a result, an agreement between them does not constitute a “contract, combination, or conspiracy” for the purposes of *§ 1*.

[*950]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > CONCERTED ACTIVITY -- RELEVANT INQUIRY -- SEPARATE ECONOMIC ACTORS > Headnote:
LEdHN[8][] [8]

Substance, not form, should determine whether an entity is capable of conspiring under *15 U.S.C.S. § 1*. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved “seem” like one firm or multiple firms in any metaphysical sense. The key is whether the alleged “contract, combination, or conspiracy” is concerted action--that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a “contract, combination, or conspiracy” amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition. The central evil addressed by Sherman Act *§ 1* is the elimination of competition that would otherwise exist.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > ACTIONS NOT COVERED -- OFFICERS OF FIRM -- CORPORATION AND DIVISION -- PARENT AND SUBSIDIARY > Headnote:
LEdHN[9][] [9]

While the president and a vice president of a firm can (and regularly do) act in combination, their joint action generally is not the sort of “combination” that *15 U.S.C.S. § 1* is intended to cover. Such agreements might be described as really unilateral behavior flowing from decisions of a single enterprise. Nor, for this reason, does *§ 1* cover internally coordinated conduct of a corporation and one of its unincorporated divisions, because a division within a corporate structure pursues the common interests of the whole, and therefore coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests. Nor, for the same reasons, is the coordinated activity of a parent and its wholly owned subsidiary covered. They have a complete unity of interest and thus, with or without a formal “agreement,” the subsidiary acts for the benefit of the parent, its sole shareholder.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > COVERAGE -- JOINDER OF INDEPENDENT CENTERS > Headnote:
LEdHN[10][] [10]

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged *15 U.S.C.S. § 1* violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under *§ 1*, and a court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > SCRUTINY -- LABEL > Headnote:
LEdHN[11][] [11]

An ongoing *15 U.S.C.S. § 1* violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > HISTORY OF CONCERTED ACTIVITY > Headnote:
LEdHN[12][] [12]

A history of concerted activity does not immunize conduct from *15 U.S.C.S. § 1* scrutiny. Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §12 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > JUSTIFICATION FOR COOPERATION -- JOINT VENTURES > Headnote:
LEdHN[13][] [13]

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. A "contract, combination, or conspiracy," *15 U.S.C.S. § 1*, that is necessary or useful to a joint venture is still a "contract, combination, or conspiracy" if it deprives the marketplace of independent centers of decisionmaking. Joint ventures have no immunity from antitrust laws. Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that firms operate jointly in some sense does not mean that they are immune.

[*951]**

EVIDENCE §343.5 > AGREEMENTS WITHIN SINGLE FIRM -- TRADE RESTRAINT -- PRESUMPTION > Headnote:
LEdHN[14][] [14]

Agreements within a single firm are generally treated as independent action for purposes of *15 U.S.C.S. § 1* on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > LIABILITY -- INTERMEDIARY -- JOINT VENTURE > Headnote:
LEdHN[15][] [15]

Competitors cannot simply get around antitrust liability by acting through a third-party intermediary or "joint venture."

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > RULE OF REASON -- WHEN APPLICABLE -- JOINT VENTURES > Headnote:
LEdHN[16][] [16]

When restraints on competition are essential if the product is to be available at all, per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible rule of reason. In such instances, the agreement is likely to survive the rule of reason. Joint ventures and other cooperative arrangements are not usually unlawful where the agreement is necessary to market a product at all. And depending upon the concerted activity in question, the rule of reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye.

[*952]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > LEGALITY -- TEST -- FACTORS -- INTENT > Headnote:
LEdHN[17][] [17]

The true test of legality under *15 U.S.C.S. § 1* is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question a court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Syllabus

[*183] [1674] Respondent National Football League (NFL) is an unincorporated association of 32 separately owned professional football teams, also respondents here. The teams, each of which owns its own name, colors, logo, trademarks, and related intellectual property, formed respondent National Football League Properties (NFLP) to develop, license, and market that property. At first, NFLP granted nonexclusive licenses to petitioner and other vendors to manufacture and sell team-labeled apparel. In December 2000, however, the teams authorized NFLP to grant exclusive licenses. NFLP granted an exclusive license to respondent Reebok International Ltd. **[***953]** to produce and sell trademarked headwear for all 32 teams. When petitioner's license was not renewed, it filed this action alleging that the agreements between respondents violated the Sherman Act, *§ 1* of which makes "[e]very contract, combination . . . , or conspiracy, in restraint of trade" illegal. Respondents answered that they were incapable of conspiring within *§ 1*'s meaning because the NFL and its teams are, in ***antitrust law*** jargon, **[****2]** a single entity with respect to the conduct challenged. The District Court granted respondents summary judgment, and the Seventh Circuit affirmed.

Held: The alleged conduct related to licensing of intellectual property constitutes concerted action that is not categorically beyond *§ 1*'s coverage. *Pp. 189-204, 176 L. Ed. 2d, at 956-966*.

(a) The meaning of "contract, combination . . . , or conspiracy" in *§ 1* of the Sherman Act is informed by the Act's " 'basic distinction between concerted and independent action.' *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. *Section 1* "treat[s] concerted behavior more strictly than unilateral behavior," *id., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, because, unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands," *id., at 768-769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. That creates less risk of deterring a firm's necessary **[*184]** conduct and leaves courts to examine only discrete agreements. An arrangement must therefore embody concerted action in order **[****3]** to be a "contract, combination . . . , or conspiracy" under *§ 1*. *Pp. 189-191, 176 L. Ed. 2d, at 956-958*.

(b) In determining whether there is concerted action under *§ 1*, the Court has eschewed formalistic distinctions, such as whether the alleged conspirators are legally distinct entities, in favor of a functional consideration of how they actually operate. The Court has repeatedly found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. See, *e.g., United States v. Sealy, Inc., 388 U.S. 350, 352-356, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. Conversely, the Court has found that although the entities may be "separate" for purposes of incorporation or formal title, if they are controlled by a single center of decisionmaking and they control a single aggregation of economic power, an agreement between them does not constitute a "contract, combination . . . , or conspiracy." *Copperweld, 467 U.S., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. *Pp. 191-194, 176 L. Ed. 2d, at 958-960*.

(c) The relevant inquiry is therefore one of substance, not form, which does not turn on whether the alleged parties to contract, combination, or conspiracy are part of a legally single entity or seem like one firm **[****4]** or multiple firms in any metaphysical sense. The inquiry is whether the agreement in question joins together "separate economic actors pursuing separate economic interests," *Copperweld, 467 U.S., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, such that it "deprives the marketplace of independent centers **[***954]** of decisionmaking," *id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, and therefore of diversity of entrepreneurial interests and thus of actual or potential competition. If it does, then there is concerted action covered by *§ 1*, and the court must decide whether the restraint of trade is unreasonable and therefore illegal. *Pp. 195-196, 176 L. Ed. 2d, at 960-961*.

(d) The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of them is a substantial, independently owned, independently managed business, whose "general corporate actions are guided or determined" by "separate corporate consciousnesses," and whose "objectives are" not "common." *Copperweld, 467 U.S., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. They compete with one another, **[1675]** not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel. See, *e.g., Brown v. Pro Football, Inc., 518 U.S. 231, 249, 116 S. Ct. 2116, 135 L. Ed. 2d 521*. Directly **[****5]** relevant here, the teams are potentially competing suppliers in the market for intellectual property. When teams license such property, they are not pursuing the "common interests of the whole" league, but, instead, the interests of each "corporation itself." *Copperweld, 467 U.S., at 770, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. It is not dispositive, as respondents argue, that, by forming NFLP, they have formed a single entity, **[*185]** akin to a merger, and market their NFL brands through a single outlet. Although the NFL respondents may be similar in some sense to a single enterprise, they are not similar in the relevant functional sense. While teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. Nor does it matter that the teams may find the alleged cooperation necessary to compete against other forms of entertainment. Although decisions made by NFLP are not as easily classified as concerted activity, NFLP's decisions about licensing the teams' separately owned intellectual property are concerted activity and thus covered by *§ 1* for the same reason that decisions made directly by the 32 **[****6]** teams are covered by *§ 1*. In making the relevant licensing decisions, NFLP is "an instrumentality" of the teams. *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. *Pp. 196-202, 176 L. Ed. 2d, at 961-965*.

(e) Football teams that need to cooperate are not trapped by ***antitrust law***. The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate to produce games, provides a perfectly sensible justification for making a host of collective decisions. Because some of these restraints on competition are necessary to produce the NFL's product, the Rule of Reason generally should apply, and teams' cooperation is likely to be permissible. And depending upon the activity in question, the Rule of Reason can at times be applied without detailed analysis. But the activity at issue in this case is still concerted activity covered for *§ 1* purposes. *Pp. 202-204, 176 L. Ed. 2d, at 965-966*.

538 F.3d 736, reversed and remanded.

Counsel: Glen D. Nager argued the cause for petitioner.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

Gregg H. Levy argued the cause for respondents.

Judges: Stevens, J., delivered the opinion for a unanimous Court.

Opinion by: Stevens

Opinion

[*186] **[***955]**

[2206]** Justice **Stevens** delivered the opinion of the Court.

HN1[] ***LEdHN[1]***[] [1] "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade" is made illegal by *§ 1* of the Sherman Act, ch. 647, 26 Stat. 209, as amended, **[****7]** *15 U.S.C. § 1*. The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade. This case raises that antecedent question about the business of the 32 teams in the National Football League (NFL) and a corporate entity that they formed to manage their intellectual property. We conclude that the NFL's licensing activities **[**2207]** constitute concerted action that is not categorically beyond the coverage of *§ 1*. The legality of that concerted action must be judged under the Rule of Reason.

[*187] I

Originally organized in 1920, the NFL is an unincorporated association that now includes 32 separately owned professional football teams.[1] Each team has its own name, colors, and logo, and owns related intellectual property. Like each of the other teams in the league, the New Orleans Saints and the Indianapolis Colts, for example, have their own distinctive names, colors, and marks that are well known to millions of sports fans.

Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys. In 1963, the teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Most, but not all, of the substantial revenues generated by NFLP have either been given to charity or shared equally among the teams. However, the teams are able to and have at times sought to withdraw from this arrangement.

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[1] The NFL was founded in Canton, Ohio, as the "American Professional Football Association." *United States Football League v. National Football League, 842 F.2d 1335, 1343 (CA2 1988)*. **[****8]** It took its current name in 1922. *Ibid.* Forty-one franchises failed in the first 41 years of the league's existence. *Ibid.*

Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel **[1676]** bearing team insignias. Petitioner, American Needle, Inc., was one of those licensees. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. It thereafter declined to renew American Needle's nonexclusive license.

American Needle filed this action in the Northern District of **[****9]** Illinois, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated *§§ 1* and *2* of the Sherman Act. In their answer to the complaint, the defendants averred **[*188]** that the teams, NFL, and NFLP were incapable of conspiring within the meaning of *§ 1* "because they are a single economic enterprise, at least with respect to the conduct challenged." App. 99. After limited discovery, the District Court granted summary judgment on the question "whether, with regard to the facet of their operations **[***956]** respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of ***antitrust law***, acting as a single entity." *American Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (2007)*. The court concluded "that in that facet of their operations they have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose." *Ibid.*

The Court of Appeals for the Seventh Circuit affirmed. The panel observed that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between **[****10]** independently owned teams that is subject to review under *§ 1*." *538 F.3d 736, 741 (2008)*. Relying on Circuit precedent, the court limited its inquiry to the particular conduct at issue, licensing of teams' intellectual property. The panel agreed with petitioner that "when making a single-entity determination, courts must examine whether the conduct in question **[**2208]** deprives the marketplace of the independent sources of economic control that competition assumes." *Id., at 742*. The court, however, discounted the significance of potential competition among the teams regarding the use of their intellectual property because the teams "can function only as one source of economic power when collectively producing NFL football." *Id., at 743*. The court noted that football itself can only be carried out jointly. See *ibid.* ("Asserting that a single football team could produce a football game . . . is a Zen riddle: Who wins when a football team plays itself "). Moreover, "NFL teams share a vital economic interest in collectively promoting **[*189]** NFL football . . . [to] compet[e] with other forms of entertainment." *Ibid.* "It thus follows," the court found, "that only one source of economic power controls the **[****11]** promotion of NFL football," and "it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football." *Ibid.* Recognizing that NFL teams have "license[d] their intellectual property collectively" since 1963, the court held that *§ 1* did not apply. *Id., at 744*.

We granted certiorari. *557 U.S. 933, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009)*.

II

As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a "contract, combination . . . , or conspiracy" as defined by *§ 1* of the Sherman Act, *15 U.S.C. § 1*, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents "must be viewed as that of a single enterprise for purposes of *§ 1*." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

Taken literally, the applicability of *§ 1* to "every contract, combination . . . , or conspiracy" could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product. But ***HN2***[] ***LEdHN[2]***[] [2] even though, "read literally," *§ 1* would address "the entire **[****12]** body of private contract," that is not what the statute means. *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S.* ***[***957]*** *Ct. 1355, 55 L. Ed. 2d 637 (1978)*; see also *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* ("This Court has not taken a literal approach to this language"); cf. *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)* (reasoning that the term "restraint of trade" in *§ 1* cannot possibly refer to any restraint on competition because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence"). Not every instance **[*190]** of cooperation between two people is a potential **[1677]** "contract, combination . . . , or conspiracy, in restraint of trade." 15 U.S.C. § 1.

HN3[] LEdHN[3][] [3] The meaning of the term "contract, combination . . . , or conspiracy" is informed by the " 'basic distinction' " in the Sherman Act " 'between concerted and independent action' " that distinguishes § 1 of the Sherman Act from § 2. Copperweld, 467 U.S., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (quoting Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but **[****13]** only if that action "monopolize[s]," 15 U.S.C. § 2, or "threatens actual monopolization," Copperweld, 467 U.S., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628, a category that is narrower than restraint of trade. **[**2209]** Monopoly power may be equally harmful whether it is the product of joint action or individual action.

Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

Thus, HN4[] LEdHN[4][] [4] in § 1 Congress "treated concerted behavior more strictly than unilateral behavior." Id., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628. This is so because unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." Id., at 768-769, 104 S. Ct. 2731, 81 L. Ed. 2d 628. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be **[****14]** remedied simply through prohibition.[2] See Areeda & Hovenkamp **[*191]** P1464c, at 206. Concerted activity is thus "judged more sternly than unilateral activity under **[***958]** § 2," Copperweld, 467 U.S., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628. For these reasons, § 1 prohibits any concerted action "in restraint of trade or commerce," even if the action does not "threate[n] monopolization," *ibid*. And therefore, an arrangement must embody concerted action in order to be a "contract, combination . . . , or conspiracy" under § 1.

III

We have long held that HN5[] LEdHN[5][] [5] concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

As a result, we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. In United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967), for example, a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. Id., at 352-353, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. The Government alleged that the licensees and Sealy were conspiring in violation of § 1, and we **[****16]** agreed. Id., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. We explained that "[w]e seek the central substance of the situation" and **[*192]** therefore "we are moved by the identity of the persons who act, rather than

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[2] If Congress prohibited independent action that merely restrains trade (even if it does not threaten monopolization), that prohibition could deter perfectly competitive conduct by firms that are fearful of litigation costs and judicial error. See Copperweld, 467 U.S., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 ("Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur"); cf. United States v. United States Gypsum Co., 438 U.S. 422, 441, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) ("[S]alutary and procompetitive conduct . . . might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty"). Moreover, if every unilateral action that restrained trade were subject to **[****15]** antitrust scrutiny, then courts would be forced to judge almost every internal business decision. See 7 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P1464c, p. 206 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) (unilateral behavior is "often difficult to evaluate or remedy").

the label **[**2210]** of their hats." *Id., at 353, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. We thus held that Sealy was not a "separate entity, but . . . an instrumentality of the individual manufacturers." *Id., at 356, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. In similar circumstances, we have found other formally distinct business organizations covered by *§ 1*. See, *e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*; *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* *(NCAA);United States v. Topco Associates, Inc., 405 U.S. 596, 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*; *id., **[1678]** at 26, 65 S. Ct. 1416, 89 L. Ed. 2013* (Frankfurter, J., concurring); *United States v. Terminal R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*; see also Rock, Corporate Law Through an Antitrust Lens, *92 Colum. L. Rev. 497, 506-510 (1992)* (discussing cases). We have similarly looked past the form of a legally "single entity" when competitors were part of professional organization[3] or trade groups.[4]

[*959]** Conversely, ***HN6***[] ***LEdHN[6]***[] [6] there is not necessarily concerted action simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by *§ 1*, we now embark on a more functional analysis.

The roots of this functional analysis can be found in the very decision that established the intraenterprise conspiracy doctrine. In *United States v. Yellow Cab Co., 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*, we observed that "corporate interrelationships . . . **[*193]** are not determinative of the applicability of the Sherman Act" because the Act "is aimed at substance rather than form." *Id., at 227, 67 S. Ct. 1560, 91 L. Ed. 2010*. We nonetheless held that cooperation between **[****18]** legally separate entities was necessarily covered by *§ 1* because an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *Ibid.;* see also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*.

The decline of the intraenterprise conspiracy doctrine began in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)*. In that case, several agricultural cooperatives that were owned by the same farmers were sued for violations of *§ 1* of the Sherman Act. *Id., at 24-25, 82 S. Ct. 1130, 8 L. Ed. 2d 305*. Applying a specific immunity provision for agricultural cooperatives, we held that the three cooperatives were "in practical effect" one "organization," even though the controlling farmers "have formally organized themselves into three separate legal entities." *Id., at 29, **[**2211]** 82 S. Ct. 1130, 8 L. Ed. 2d 305*. "To hold otherwise," we explained, "would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect" insofar as "use of separate corporations had [no] economic significance." *Ibid.*

Next, in *United States v. Citizens & Southern Nat. Bank, 422 U.S. 86, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*, **[****19]** a large bank, Citizens and Southern (C&S), formed a holding company that operated *de facto* suburban branch banks in the Atlanta area through ownership of the maximum amount of stock in each local branch that was allowed by law, "ownership of much of the remaining stock by parties friendly to C, use by the suburban banks of the C logogram and all of C's banking services, and close C oversight of the operation and governance of the suburban banks." *Id., at 89, 95 S. Ct. 2099, 45 L. Ed. 2d 41* (footnote omitted). The Government challenged the cooperation between the banks. In our analysis, we observed that " 'corporate interrelationships . . . **[*194]** are not determinative,' *id., at 116, 95 S. Ct. 2099, 45 L. Ed. 2d 41*, "looked to economic substance," and observed that

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[3] See, *e.g.*, *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; **[****17]** *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*.

[4] See, *e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961)* *(per curiam); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*.

"because the sponsored banks were not set up to be competitors, § 1 did not compel them to compete." Areeda & Hovenkamp ¶ 1463g, at 200-201; see also Citizens & Southern, 422 U.S., at 119-120, 95 S. Ct. 2099, 45 L. Ed. 2d 41; Areeda, Intraenterprise Conspiracy in Decline, 97 Harv. L. Rev. 451, 461 (1983).

We finally reexamined the intraenterprise conspiracy doctrine in Copperweld Corp. v. Independence Tube **[***960]** Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984), and concluded that it was inconsistent with the " 'basic distinction between concerted and **[****20]** independent action.' Id., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628. Considering it "perfectly plain that ***HN7***[] ***LEdHN[7]***[] [7] an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police," id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628, we held that a parent corporation and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1 of the Sherman Act," id., at 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628. We explained that although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct **[1679]** by two such entities does not "depriv[e] the marketplace of independent centers of decisionmaking," id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628, and as a result, an agreement between them does not constitute a "contract, combination . . . , or conspiracy" for the purposes of § 1.[5]

[*195] IV

As *Copperweld* exemplifies, ***HN8***[] ***LEdHN[8]***[] [8] "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1." 467 U.S., at 773, n. 21, 104 S. Ct. 2731, 81 L. Ed. 2d 628. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the **[**2212]** parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . , or conspiracy" is concerted action--that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . , or conspiracy" amongst "separate economic actors pursuing separate economic interests," id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628, such that the agreement "deprives the marketplace of independent centers **[****22]** of decisionmaking," *ibid.*, and therefore of "diversity of entrepreneurial interests," Fraser v. Major League Soccer, L. L. C., 284 F.3d 47, 57 (CA1 2002) (Boudin, C. J.), and thus of actual or potential competition, see Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148-1149 (CA9 2003) (Kozinski, J.); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214-215, 253 U.S. App. D.C. 142 (CADC 1986) (Bork, J.); see also Areeda & Hovenkamp P1462b, at 193-194 (noting that the "central evil addressed by Sherman Act § 1 is the "elimin[ation of] competition that would otherwise exist").

Thus, ***HN9***[] ***LEdHN[9]***[] [9] while the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of "combination" that § 1 is intended to **[***961]** cover. Such agreements might be described as "really unilateral behavior flowing from decisions of a single enterprise." Copperweld, 467 U.S., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628. Nor, for this reason, does § 1 cover "internally coordinated conduct of a corporation and one of its unincorporated divisions," id., at 770, 104 S. Ct. 2731, 81 L. Ed. 2d 628, because **[*196]** "[a] division within a corporate structure pursues the common interests of the whole," *ibid.*, and therefore "coordination between **[****23]** a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests," id., at 770-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628. Nor, for the same reasons, is "the coordinated activity of a parent and its wholly owned subsidiary" covered. See id., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628. They "have a complete unity of interest" and

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[5] This focus on "substance, not form," Copperweld, 467 U.S., at 773, n. 21, 104 S. Ct. 2731, 81 L. Ed. 2d 628, can also be seen in our cases about whether a company and its agent are capable of conspiring under § 1. See, *e.g.*, Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 20-21, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964); see also E. Elhauge & D. Geradin, **[****21]** Global ***Antitrust Law*** and Economics 787-788, and n. 7 (2007) (hereinafter Elhauge & Geradin) (explaining the functional difference between Simpson and United States v. General Elec. Co., 272 U.S. 476, 47 S. Ct. 192, 71 L. Ed. 362 (1926), in which we treated a similar agreement as beyond the reach of § 1).

thus "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder." *Ibid.*

HN10[] ***LEdHN[10]***[] [10] Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged *§ 1* violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decisionmaking." *Id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. If it does, the entities are capable of conspiring under *§ 1*, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

V

The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each **[****24]** of the teams is a substantial, independently owned, and independently managed business. "[T]heir general corporate actions are guided or determined" by "separate corporate consciousnesses," and "[t]heir objectives are" not "common." *Copperweld, 467 U.S., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*; see also *North American Soccer League v. NFL, 670 F.2d 1249, 1252 (CA2 1982)* (discussing ways that "the financial performance of each team, while related to that of the others, does not . . . necessarily rise and fall with that of the others"). The teams compete with one another, not only on the playing field, but to attract fans, for gate **[*197]** receipts, and for contracts with managerial **[**2213]** and playing personnel. See *Brown v. Pro Football, Inc., 518 U.S. 231, 249, **[1680]** 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*; *Sullivan v. NFL, 34 F.3d 1091, 1098 (CA1 1994)*; *Mid-South Grizzlies v. NFL, 720 F.2d 772, 787 (CA3 1983)*; cf. *NCAA, 468 U.S., at 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70*.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing **[****25]** interests of each "corporation itself," *Copperweld, 467 U.S., at 770, 104 S. Ct. 2731, 81 L. Ed. 2d 628*; teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking," *id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. Decisions by NFL teams to license **[***962]** their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the marketplace of independent centers of decisionmaking," *ibid.*, and therefore of actual or potential competition. See *NCAA, 468 U.S., at 109, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (observing a possible *§ 1* violation if two separately owned companies sold their separate products through a "single selling agent"); cf. Areeda & Hovenkamp P1478a, at 318 ("Obviously, the most significant competitive threats arise when joint venture participants are actual or potential competitors").

In defense, respondents argue that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. ***HN11***[] ***LEdHN[11]***[] [11] An ongoing *§ 1* violation cannot evade *§ 1* scrutiny simply **[****26]** by giving the ongoing violation a name and label. "Perhaps every agreement and combination in restraint of trade could be so labeled." *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*.

[*198] The NFL respondents may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not similar in the relevant functional sense. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. See generally Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, *1995 Colum. Bus. L. Rev. 1, 52-61 (1995)*; Shishido, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, *39 Hastings L. J. 63, 69-81 (1987)*. Common interests in the NFL brand "*partially* unit[e] the economic interests of the parent firms," Broadley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1526 (1982) (emphasis added), but the teams still have distinct, potentially competing interests.

It may be, as respondents argue, that NFLP "has served as the 'single driver' " **[****27]** of the teams' "promotional vehicle, 'pursu[ing] the common interests of the whole.' " Brief for NFL Respondents 28 (quoting *Copperweld, 467 U.S., at 770-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*; brackets in original). But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties. It is true, as respondents describe, that they have for some time marketed their trademarks jointly. But ***HN12***[] ***LEdHN[12]***[] [12] a history of concerted activity does not immunize conduct from *§ 1* scrutiny. "Absence of actual competition may simply be a manifestation **[**2214]** of the anticompetitive agreement itself." *Freeman, 322 F.3d, at 1149*.

Respondents argue that nonetheless, as the Court of Appeals held, they constitute a single entity because without their cooperation, there would be no NFL football. It is true that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Brown, 518 U.S., at 248, 116 S. Ct. 2116, 135 l. Ed. 2d 521*. But the Court of Appeals' reasoning is unpersuasive.

HN13[] ***LEdHN[13]***[] [13] **[*199]** The justification for cooperation is not relevant to whether that cooperation **[***963]** is concerted or independent action.[6] A "contract, combination **[****28]** . . . , or conspiracy," *§ 1*, that is necessary or useful to a joint venture is still a "contract, combination . . . , or conspiracy" if it "deprives the marketplace of independent centers of decisionmaking," *Copperweld, 467 U.S., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. See *NCAA, 468 U.S., at 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70* ("[J]oint ventures **[1681]** have no immunity from antitrust laws"). Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to *§ 1* analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that the teams operate jointly in some sense does not mean that they are immune.[7]

[*200] The question whether **[****30]** NFLP decisions can constitute concerted activity covered by *§ 1* is closer than whether decisions made directly by the 32 teams are covered by *§ 1*. This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams on an equal basis. Nevertheless we think it clear that for the same reasons the 32 teams' conduct is covered by *§ 1*, NFLP's actions also are subject to *§ 1*, at least with regards to its marketing of property owned by the separate teams. NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Cf. *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. Apart from their agreement to cooperate in exploiting **[**2215]** those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.

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[6] As discussed *infra*, necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason. See *NCAA, 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (holding that NCAA restrictions on televising college football games are subject **[****29]** to Rule of Reason analysis for the "critical" reason that "horizontal restraints on competition are essential if the product is to be available at all").

[7] In any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover, even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.

The Court of Appeals carved out a zone of antitrust immunity for conduct arguably related to league operations by reasoning that coordinated team trademark sales are necessary to produce "NFL football," a single NFL brand that competes against other forms of entertainment. But defining the product as "NFL football" puts the cart before the horse: Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from *§ 1* scrutiny. Members of any cartel could insist that their cooperation is necessary to produce the "cartel product" and compete with other products.

HN14[] **LEdHN[14]**[] [14] We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to **[***964]** maximize **[****31]** the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself,[8] and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action. **[*201]** See, *e.g.*, *Topco Associates, Inc., 405 U.S., at 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515*; *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*.

For that reason, decisions by NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of NFLP are not like the components of a single firm that act to maximize the **[****32]** firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. See generally Hovenkamp, *1995 Colum. Bus. L. Rev., at 52-61*. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. See generally Shusido*, 39 Hastings L. J., at 69-71*. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. “Although the business interests of” the teams “will *often* coincide with those of ” NFLP “as an entity in itself, that commonality of interest exists in every cartel.” *Los Angeles Memorial* ***[1682]*** *Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (CA9 1984)* (emphasis added). In making the relevant licensing decisions, NFLP is therefore “an instrumentality” of the teams. *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*; see also *Topco Associates, Inc., 405 U.S., at 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515*.

If **[****33]** the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from *§ 1*, then any cartel “could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products.” *Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 335 (CA2 2008)* (Sotomayor, J., concurring in judgment). “So long as no agreement,” other than one made by the cartelists sitting **[*202]** on the board of the joint venture, “explicitly listed the prices to be charged, the companies could act as monopolies through the 'joint venture.' ” *Ibid.* (Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risks of a party to an illegal agreement defecting from that agreement). However, **HN15**[] **LEdHN[15]**[] [15] competitors “cannot **[**2216]** simply get around” antitrust liability by acting “through a **[***965]** third-party intermediary or 'joint venture'.” *Id., at 336*.[9]

VI

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[8] See Areeda & Hovenkamp P1471; Elhauge & Geradin 786-787, and n. 6; see also *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 544 (CA2 1993)*; *Bolt v. Halifax Hospital Medical Center, 891 F.2d 810, 819 (CA11 1990)*; *Oksanen v. Page Memorial Hospital, 945 F.2d 696, 706 (CA4 1991)*; *Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380, 387-388 (CA10 1985)*; *Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466, 469 (CA8 1985)*; *Weiss v. York Hospital, 745 F.2d 786, 828 (CA3 1984)*.

[9] For the purposes of resolving this case, there is no need to pass upon the Government's position that entities are incapable of conspiring under *§ 1* if they “have effectively merged the relevant aspect of their operations, **[****34]** thereby eliminating actual and potential competition . . . in that operational sphere” and “the challenged restraint [does] not significantly affect actual or potential competition . . . outside their merged operations.” Brief for United States as *Amicus Curiae* 17. The Government urges that the choices “to offer only a blanket license” and “to have only a single headwear licensee” might not constitute concerted action under its test. *Id., at 32*. However, because the teams still own their own trademarks and are free to market those trademarks as they see fit, even those two choices were agreements amongst potential competitors and would constitute concerted action under the Government's own standard. At any point, the teams could decide to license their own trademarks. It is significant, moreover, that the teams here control NFLP. The two choices that the Government might treat as independent action, although nominally made by NFLP, are for all functional purposes choices made by the 32 entities with potentially competing interests.

Football teams that need to cooperate are not trapped by ***antitrust law***. "[T]he special characteristics of this industry may provide a justification" for **[****35]** many kinds of agreements. *Brown, 518 U.S., at 252, 116 S. Ct. 2116, 135 L. Ed. 2d 521* (Stevens, J., dissenting). The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted **[*203]** activity under the Sherman Act that is subject to *§ 1* analysis.

HN16[] ***LEdHN[16]***[] [16] When "restraints on competition are essential if the product is to be available at all," *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.[10] *NCAA, 468 U.S., at 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70*; see *id., at 117* ("Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved"); see also *Dagher, 547 U.S., at 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1*. In such instances, the agreement is likely to survive the Rule of Reason. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("Joint ventures and other cooperative arrangements **[****36]** are also not usually unlawful. . . where the agreement . . . is necessary to market the product at all"). And depending upon the concerted activity **[***966]** in question, **[**2217]** the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye." *NCAA, 468 U.S., at 110, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70*.

[*204] Other features of the NFL may also save agreements amongst the teams. We have recognized, **[1683]** for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *id. at 117, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for *§ 1* purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.

* * *

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

References

15 U.S.C.S. § 1

3 Antitrust Laws and Trade Regulation §§56.01, 56.02 (Matthew Bender 2d ed.)

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[10] Justice Brandeis provided the classic formulation of the Rule of Reason in *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*:

LEdHN[17][] [17] "***HN17***[] The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent **[****37]** may help the court to interpret facts and to predict consequences." See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885-887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; *National Soc. of Professional Engineers, 435 U.S., at 688-691, 98 S. Ct. 1355, 55 L. Ed. 2d 637*.

10 Federal ***Antitrust Law*** §§74.1, 74.3, 74.8 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices §§9, 14, 16, 33.6

L Ed Index, Football; Sherman Act

Supreme Court's views as to what constitutes per se illegal “price fixing” **[****38]** under the Sherman Act (*15 U.S.C.S. §§1 et seq.*). *64 L. Ed. 2d 997*.

Colonial Med. Group, Inc. v. Catholic Healthcare West

United States District Court for the Northern District of California

May 25, 2010, Decided; May 25, 2010, Filed

No. C-09-2192 MMC

Reporter
2010 U.S. Dist. LEXIS 51350 *; 2010-1 Trade Cas. (CCH) P77,039; 2010 WL 2108123

COLONIAL MEDICAL GROUP, INC., a California corporation, Plaintiff, v. CATHOLIC HEALTHCARE WEST, a California Not-For-Profit Corporation dba MERCY HOSPITAL; GOLDEN EMPIRE MANAGEMENT CARE, A MEDICAL GROUP, INC., a California Corporation; and MANAGED CARE SYSTEMS, LP, Defendants.

Subsequent History: Affirmed by *Colonial Med. Group, Inc. v. Catholic Health Care West, 444 Fed. Appx. 937, 2011 U.S. App. LEXIS 15248 (9th Cir. Cal., July 22, 2011)*

Related proceeding at *Colonial Med. Grp., Inc. v. Dignity Health, 2017 Cal. App. Unpub. LEXIS 3484 (Cal. App. 1st Dist., May 18, 2017)*

Prior History: *Colonial Med. Group, Inc. v. Catholic Healthcare W., 2010 U.S. Dist. LEXIS 5835 (N.D. Cal., Jan. 26, 2010)*

Core Terms

inmates, alleges, relevant market, medical services, monopolize, guarded, Sherman Act, motion to dismiss, subject to dismissal, interchangeable, consumer, hospital facility, prison inmate, facilities, providers, antitrust claim, geographic, Counts

Counsel: **[*1]** For Colonial Medical Group Inc., a California corporation, Plaintiff: Lawrence Silver, LEAD ATTORNEY, Silver & Field, Los Angeles, CA; Maxwell Michael Blecher, LEAD ATTORNEY, Blecher & Collins, P.C., Los Angeles, CA; Courtney Ashe Palko, Blecher & Collins, Los Angeles, CA.

For Catholic Health Care West, a California Not-For-Profit Corporation, doing business as Mercy Hospital, Defendant: Ann M. Heimberger, Manatt, Phelps & Phillips, San Francisco, CA; Barry Scott Landsberg, Erin Witkov, Martin J. Thompson, Manatt Phelps & Phillips LLP, Los Angeles, CA; David Shapiro, PRO HAC VICE, Cambridge, MA; Maxwell Michael Blecher, Blecher & Collins, P.C., Los Angeles, CA.

For Golden Empire Management Care, A Medical Group Inc., a California Corporation, Managed Care Systems, LP, Defendants: Richard Alan Monje, LEAD ATTORNEY, Attorney at Law, Bakersfield, CA; William McDonald Miller, III, LEAD ATTORNEY, Musick Peeler & Garrett LLP, Los Angeles, CA.

Judges: MAXINE M. CHESNEY, United States District Judge.

Opinion by: MAXINE M. CHESNEY

Opinion

ORDER GRANTING IN PART AND DEFERRING IN PART RULING ON DEFENDANTS' MOTIONS TO DISMISS;

DISMISSING FIRST AND SECOND COUNTS WITH LEAVE TO AMEND; CONTINUING CASE MANAGEMENT CONFERENCE

Before **[*2]** the Court are two motions: (1) defendant Catholic Healthcare West dba Mercy Hospital's ("Mercy Hospital") Motion to Dismiss the First Amended Complaint Pursuant to *Fed. R. Civ. P. 12(b)(6)*, filed November 19, 2009; and (2) defendant Golden Empire Management Care, A Medical Group, Inc. and defendant Managed Care Systems, LP's (collectively, "GEMCare") Motion to Dismiss the First Amended Complaint Pursuant to *Fed. R. Civ. P. 12(b)(6)*, filed November 19, 2009 and amended by a Notice of Errata also filed on November 19, 2009. Plaintiff Colonial Medical Group ("Colonial") has filed a single opposition, to which Mercy Hospital and GEMCare have separately replied. Having read and considered the papers filed in support of and in opposition to the motions, the Court hereby rules as follows.

BACKGROUND

In its First Amended Complaint ("FAC"), Colonial alleges that it is "engaged in the business of providing medical services to individuals who are inmates in prisons or correctional institutions located in Central California, consisting of the counties of Fresno, Kern, Kings, Madera, Monterey, and San Luis Obispo." (*See* FAC P 4.) Colonial alleges that in such geographic area, there exists a "product **[*3]** market" it describes as "the provision of medical services to prison inmates at secure or guarded hospital facilities." (*See* FAC P 9.) According to Colonial, "secure" hospital facilities are "those which are locked down so that there is no public ingress or egress," while "guarded" hospital facilities are those with "normally conventional hospital rooms which are, when occupied by an inmate, under armed guard at the door and sometimes in the room as well and protected by barred and/or locked windows." (*See id*.)

Colonial alleges that two of its "competitors" in the above-described product market are GEMCare and Premier Physicians Alliance Group ("PPAG"). (*See* FAC P 10.) Colonial also alleges that both Colonial and GEMCare have a "non-exclusive contract" with the California Department of Corrections and Rehabilitation ("CDCR") to provide medical services to California state inmates. (*See* FAC PP 11, 16.) [1] Colonial further alleges that Colonial, GEMCare, and PPAG have been "unsuccessful in securing authority to care for federal inmates" in federal prisons located in California City and Taft, each of which is operated by a private corporation, and that the "relatively few inmates at those **[*4]** [federal] institutions are cared for by physicians in those communities." (*See* FAC P 12.) [2]

Colonial alleges that Mercy Hospital, located in Bakersfield, California, "has a 29 bed guarded unit and other guarded facilities, which other hospitals in the area do not" (*see* FAC P 11), and that Mercy Hospital has a contract with the CDCR "to provide hospital services to [the] CDCR's inmates" (*see* FAC P 6). According to Colonial, the contract between Mercy Hospital and the CDCR requires that "the guarded facilities of defendant Mercy Hospital be devoted exclusively to state prison inmates under the control of [the] CDCR." (*See* FAC P 11.) Colonial also alleges that at the time Colonial entered into its contract with the CDCR, it was "understood that Mercy Hospital **[*5]** was the only hospital that Colonial would use for CDCR inmates." (*See id*.) [3]

Colonial further alleges that when the CDCR determines an inmate needs medical care at a hospital and further determines that Colonial should provide the medical care, the CDCR "customarily" so advises Colonial and then transports the inmate to a facility which "in most instances" is Mercy Hospital. (*See* FAC P 12.) When the CDCR

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[1] Colonial does not state whether PPAG has such a "non-exclusive contract," or any contract, with the CDCR, but does allege that PPAG "services a small number of inmates at the San Joaquin Community Hospital in Bakersfield." (*See* FAC P 10.)

[2] The FAC includes no allegations setting forth who provides medical care to persons incarcerated in facilities other than those operated by the CDCR or by private corporations operating federal prisons.

[3] Additionally, Colonial alleges that the CDCR, in connection with "the latest proposed contract between the parties," has "requested a term that Colonial admit CDCR patients only to Mercy Hospital." (*See id*.) Colonial does not allege whether it has agreed or disagreed to such additional term, but alleges that it has "not finalized any new contract" with the CDCR "[g]iven the financial crisis which has engulfed the state of California." (*See id*.)

decides to transport an inmate to Mercy Hospital, Colonial alleges, Colonial "contacts the Emergency Room at [ ] Mercy Hospital and advises the Emergency Room personnel of the anticipated arrival of its inmate patient"; if the Emergency Room physician determines the inmate should be admitted, a Colonial physician admits the inmate to Mercy Hospital **[*6]** and thereafter provides care to the inmate. (*See id*.) [4]

Colonial alleges that on or about April 28, 2009, Mercy Hospital entered into an "exclusive contract" with GEMCare, under which agreement GEMCare became "the exclusive provider of medical services to CDCR inmates admitted to Mercy Hospital through the Emergency Room." (*See* FAC P 22.) Colonial alleges that Mercy Hospital, in connection with its having entered into the above-referenced contract with GEMCare, "unilaterally modified the 'On Call' protocol" (*see* FAC P 20), such that "Emergency Room personnel were to call [d]efendant GEMCare to provide care for inmates to the exclusion of Colonial physicians" (*see* FAC P 21). According to Colonial, under such new protocol and beginning May 1, 2009, "inmate patients assigned to Colonial by [the] CDCR have been diverted by **[*7]** Mercy Hospital to physicians associated with GEMCare." (*See* FAC P 29.)

Based on the above allegations, Colonial asserts five causes of action, the first of said causes of action alleging a claim under federal law and the remainder alleging violations of state law.

LEGAL STANDARD

Dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. *Rule 8(a)(2)*, however, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Fed. R. Civ. P. 8(a)(2)*). Consequently, "a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations." *See id*. Nonetheless, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *See id*. (internal quotation, citation, and alteration omitted).

In analyzing a motion **[*8]** to dismiss, a district court must accept as true all material allegations in the complaint, and construe them in the light most favorable to the nonmoving party. *See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*. "To survive a motion to dismiss, a complaint must contain sufficient factual material, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly, 550 U.S. at 555*. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *See Iqbal, 129 S. Ct. at 1950* (internal quotation and citation omitted); *see*, *e.g.*, *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047-48 (9th Cir. 2008)* (holding plaintiff who alleged "only ultimate facts" and "legal conclusions," rather than "evidentiary facts," failed to state claim under Sherman Act).

DISCUSSION

In their respective motions, defendants argue that each of the five counts alleged in the complaint is subject to dismissal for failure to state a claim.

A. Count One ("Antitrust Under the Sherman [*9] Act")

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[4] Colonial does not specify the procedure employed when the CDCR determines that an inmate needs care, determines that Colonial should provide the care, and transports the inmate to a facility other than Mercy Hospital. Nor does Colonial describe the procedure employed when an inmate treated at Mercy Hospital is not admitted to the hospital through the Emergency Room.

In Count One, Colonial alleges violations of §§ 1 and 2 of the Sherman Act. Defendants argue the Sherman Act claims are subject to dismissal.

1. Product Market Allegations

"***Antitrust law*** requires [an] allegation of both a product market and a geographic market." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 n.4 (9th Cir. 2008)*. This requirement applies to both *§ 1* and *§ 2 of the Sherman Act*. *See id. at 1044 n.3*.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. "Interchangeability implies that one product is roughly equivalent to another for the use to which it is put," *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 437 (3rd Cir. 1997)* (internal quotation and citation omitted), while "[c]ross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers," *see id. at 438 n.6* (internal quotation and citation omitted).

Sherman Act claims are subject to dismissal "if the complaint's 'relevant market' definition is facially **[*10]** unsustainable." *See Newcal Indus., 513 F.3d at 1045* (citing *Queen City Pizza, 124 F.3d at 436-37*)). "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza, 124 F.3d at 436*; *see, e.g., Tanaka v. University of Southern California, 252 F.3d 1059, 1063-64 (9th Cir. 2001)* (affirming dismissal of antitrust claims where plaintiff athlete identified product market as "UCLA women's soccer program" but failed to allege any facts to support "conclusory" assertion that such market existed); *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999)* (holding, where complaint alleged existence of "product markets for lodging accommodations and ski packages" in Big Bear Valley, district court properly dismissed antitrust claims because plaintiffs failed to allege "there are no other goods or services **[*11]** that are reasonably interchangeable with lodging accommodations or ski packages within [the] geographic market" of Big Bear Valley).

Here, in its initial complaint, Colonial alleged that the relevant "product market" was "the provision of inpatient medical services and treatment by medical doctors for *inmates of the California prison system." (See* Compl. P 38 (emphasis added).) By order filed September 29, 2009, the Court dismissed the antitrust claims alleged in the initial complaint, for the reason that Colonial had failed to allege a cognizable product market; in particular, Colonial had defined the market by reference to a consumer, specifically, the CDCR. (*See* Order filed September 29, 2009, at 4-5); *see also Newcal Indus., 513 F.3d at 1045* ("The consumers do not define the boundaries of the market; the products or producers do.").

In the FAC, Colonial now allege the relevant product market is "the provision of medical services to *prison inmates* at secure or guarded hospital facilities." (*See* FAC P 4 (emphasis added).) Other than the addition of an allegation that the services are provided in medical facilities from which an inmate may not readily escape, Colonial's amended product **[*12]** market differs from the market alleged in the initial complaint only insofar as it replaces the phrase "inmates of the California prison system" with "prison inmates," and thus now includes federal as well as state prisoners therein. In other words, Colonial is proposing a market in which the only possible consumers of the alleged services, i.e., "products," are the CDCR and the two private corporations that operate federal prisons in the six-county geographic region identified in the FAC. Necessarily excluded from Colonial's alleged product market are medical services provided at "secure or guarded hospital facilities" to inmates incarcerated in city and county jails, to persons detained in county jails pending the outcome of criminal proceedings, to military personnel held in the detention facility at the United States Naval Air Station in Lemoore, and to persons detained or confined by various federal, state, and local government agencies as a result of orders of civil confinement or commitment.

The FAC, however, includes no allegations to support a finding that medical services provided by Colonial and its competitors to persons incarcerated in prisons are not reasonably interchangeable **[*13]** with medical services provided to persons who, for example, are inmates of local jails or other locked facilities by reason of criminal or civil proceedings. Consequently, Colonial's proposed product market is "legally insufficient." *See* Chapman v. New York State Division for Youth, 546 F.3d 230, 238-39 (2nd Cir. 2008) (affirming dismissal of antitrust claims; holding plaintiff's allegation of market for "restraint training services to private child care providers" was legally insufficient, where plaintiff failed to allege facts to "show how the market for restraint training services to child care providers is any different from the larger market for restraint training services to other businesses, agencies, and organizations"); *see also* Queen City Pizza, 124 F.3d at 436, 438 (affirming dismissal of antitrust claims; holding plaintiff's allegation of market for "pizza supplies and ingredients for use in Domino's stores" was legally insufficient, because "dough, tomato sauce, and paper cups that meet Domino's Pizza, Inc. standards and are used by Domino's stores are interchangeable with dough, sauce and cups available from other suppliers and used by other pizza companies").

Accordingly, **[*14]** the First Cause of Action is, in its entirety, subject to dismissal for failure to allege sufficient facts to support a finding that the product market identified in the FAC is legally cognizable.

The Court will afford Colonial one further opportunity to properly allege a product market. For this reason, the Court finds it appropriate to consider at this time defendants' additional argument that, even assuming a properly alleged product market, Colonial nonetheless fails to state a claim under the Sherman Act.

2. Section 1

Section 1 of the Sherman Act provides that any "contract, combination . . ., or conspiracy, in restraint of trade or commerce" is "illegal." *See* 15 U.S.C. § 1.

Colonial alleges that "[t]he modification of the 'On Call' protocol and the Exclusive Coverage Services Agreement between defendants GEMCare and Mercy Hospital each constitutes a contract in an unreasonable restraint of trade" (*see* FAC P 34), in that such agreements constitute "non-price vertical restraint[s]" (*see* FAC P 36). In its opposition, Colonial clarifies that the alleged "restraint[s]" are "exclusive dealing arrangements." (*See* Pl.'s Opp. at 12:18-19.)

An "exclusive-dealing arrangement" does not violate **[*15]** antitrust laws unless "performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *See* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961). [5] "For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent." Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57, 68 (1st Cir. 2004); *see also* United States v. Microsoft Corp., 253 F.3d 34, 70, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (noting "roughly 40% to 50% share [of the relevant market] usually [is] required in order to establish a § 1 violation"); *see, e.g.,* TCA Building Co. v. Northwestern Resources Co., 873 F. Supp. 29, 39 (S.D. Tex. 1995) (holding plaintiff failed to establish exclusive dealing arrangement violated Sherman Act, where buyer's "consumption represent[ed] only 33% of the consumption in the [relevant geographic] area . . ., leaving [the plaintiff] with almost 70% of the [relevant] market open to it").

Defendants argue that the FAC fails to include sufficient facts to support a finding that performance of the contract between Mercy Hospital and GEMCare will foreclose competition in the alleged relevant market. The Court, as discussed below, agrees.

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[5] Although *Tampa Electric* involved a claim under § 3 of the Clayton Act, the Ninth Circuit has held that the analysis set forth therein is applicable to a claim under § 1 of the Sherman Act, with the exception that **[*16]** the plaintiff alleging a § 1 claim must make a "greater showing of anti-competitive effect." *See* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1275 (9th Cir. 1975).

Construed in the light most favorable to Colonial, the FAC alleges that as a result of the challenged contract between Mercy Hospital and GEMCare, when the CDCR brings an inmate in its custody to the Emergency Room of Mercy Hospital, such inmate, if thereafter admitted to Mercy Hospital, can only be treated by a GEMCare physician. Stated otherwise, the FAC alleges that medical providers in the relevant market are unable to compete with GEMCare for services rendered to the CDCR, specifically, medical services rendered to inmates in the custody of the CDCR to the extent such services are rendered after inmates are brought to Mercy Hospital's Emergency Room and thereafter admitted to Mercy Hospital for treatment.

The FAC does not allege, however, that the **[*17]** contract between Mercy Hospital and GEMCare has any effect on services sought by the CDCR to the extent the CDCR seeks treatment for inmates it does not bring to the Emergency Room of Mercy Hospital. More significantly, the FAC does not allege that the contract between Mercy Hospital and GEMCare has any effect on any consumer other than the CDCR. Further, as noted above, the FAC alleges that Mercy Hospital's contract with the CDCR requires Mercy Hospital to "devote[ ] exclusively to state prison inmates under the control of the CDCR" its "guarded facilities" (*see* FAC P 11); [6] by which allegation a reasonable inference can be drawn that all other consumers in the alleged relevant market are using facilities other than Mercy Hospital. [7]

In sum, the FAC alleges that the exclusive dealing arrangement between Mercy Hospital and GEMCare only has an effect on competition among medical providers for the business of the CDCR to the extent the CDCR seeks medical care for inmates who are first brought by the CDCR to the Emergency Room of Mercy Hospital. The FAC includes no facts, however, from which it reasonably could be inferred that the percentage of the product market foreclosed is sufficiently substantial to support a claim under *§ 1 of the Sherman Act*. *See, e.g., Dickson v. Microsoft Corp., 309 F.3d 193, 209 (4th Cir. 2002)* (affirming dismissal of § 1 claim based on "exclusive dealing" contracts; holding that because complaint failed to include "an allegation regarding [defendants'] power or share in the [relevant] market, there [was] no **[*19]** basis for concluding that [the] agreements at issue . . . [were] likely to foreclose a significant share of the relevant [product] markets").

Accordingly, the First Cause of Action is subject to dismissal to the extent it is based on a violation of *§ 1 of the Sherman Act*.

3. Section 2

Section 2 of the Sherman Act provides that it is illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *See* *15 U.S.C. § 2*. Here, Colonial alleges that GEMCare "has monopolized, and engaged in an attempt to monopolize, the provision of medical services at Mercy Hospital for inmates in Central California." (*See* FAC P 34.) [8]

"The offense of monopoly under *§ 2 of the Sherman Act* has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or

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[6] It would appear that "guarded facilities," when read in context, is a reference to Mercy Hospital's "dedicated, secured and guarded floor." (*See* FAC P 24.)

[7] As defendants note, the FAC alleges that the services rendered by medical providers can be rendered in any hospital room with a locking window, if an armed guard can be placed outside the room, (*see* FAC P 9), a description that would appear to describe rooms in every hospital facility. Indeed, the **[*18]** FAC expressly alleges that medical services to incarcerated persons are rendered in facilities other than Mercy Hospital, specifically, in Memorial Hospital and San Joaquin Community Hospital, as well as in facilities, unnamed in the FAC, at which physicians provide medical care to federal prisoners incarcerated at institutions operated by private corporations. (*See* FAC PP 6, 10, 11.)

[8] Colonial does not allege that Mercy Hospital has violated *§ 2*.

development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. "[T]o demonstrate **[*20]** attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*.

At the outset, the Court finds that Colonial fails to state a claim because it does not allege, even as a conclusion, much less with the requisite evidentiary facts, that GEMCare has monopolized or has attempted to monopolize the alleged relevant market. The alleged relevant market is not the "provision of medical services at Mercy Hospital for inmates in Central California" (*see* FAC P 34), but, rather, the "provision of medical services to prison inmates at secure or guarded hospital facilities" in Central California (*see* FAC PP 9, 10). [9]

Nor can the Court reasonably infer, from the facts that are alleged in the FAC, that GEMCare has monopolized or has attempted the monopolize **[*21]** the relevant market. The FAC does not set forth GEMCare's market share, does not allege that GEMCare provides medical services to any consumer in the relevant market other than the CDCR, and includes no facts to support a finding that GEMCare has the ability to control the prices charged by medical providers in the relevant market. *Cf. Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 937, 950-51 (9th Cir. 1996)* (holding allegation defendant had 90% market share in relevant market, coupled with factual allegations to support finding defendant had ability to control prices and to exclude competition, sufficient to allege defendant had monopoly power). Further, as discussed above, Colonial does not allege that the contract between GEMCare and Mercy Hospital has an effect on any consumer in the relevant market other than the CDCR.

Moreover, because the alleged wrongful conduct by GEMCare consists of its having entered into the above-referenced contract with Mercy Hospital (*see* FAC P 34), and the Court has found that Colonial has failed to state a § 1 claim based on such arrangement, Colonial's § 2 claim fails for this additional reason. *See Cascade Cabinet Co. v. Western Cabinet & Millwork Inc., 710 F.2d 1366, 1374 n.3 (9th Cir. 1983)* **[*22]** (holding where plaintiff bases § 1 claim and § 2 claim on same "concerted activity," plaintiff's failure to establish claim under *§ 1* precludes finding in favor of plaintiff on claim under *§ 2*).

Accordingly, the First Cause of Action is subject to dismissal to the extent it is based on a violation of *§ 2 of the Sherman Act*.

B. Count Two ("Violation of the Cartwright Act")

In Count Two, Colonial alleges a violation of California's Cartwright Act. Such claim is based entirely on the conduct on which Colonial bases its Sherman Act claims. (*See* FAC PP 42-44.)

"The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act." *County of Tuolumne v. Sonora Community Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*; *see also Marin County Board of Realtors, Inc. v. Palsson, 16 Cal.3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976)* (holding "federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act").

Accordingly, for the reasons stated above with respect to Count One, Count Two is subject to dismissal.

C. Remaining State Law Claims

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[9] As discussed above, however, Colonial has failed to allege sufficient facts to support a finding there exists a market limited solely to the "provision of medical services to prison inmates at secure or guarded hospital facilities."

In Count Three, Colonial alleges defendants have violated *§§ 650.01* and *650.02* **[*23]** of the California Business & Professions Code by engaging in "prohibited referral[s]" of medical care. (*See* FAC P 47.) In Count Four, Colonial alleges a violation of *§ 17200 of the California Business & Professions Code* and, in Count Five, Colonial alleges a claim for "tortious interference with contract and prospective economic advantage," each such claim based on all of the above-described statutory violations. (*See* FAC PP 49-50, 57-58.)

The Court will defer ruling on the sufficiency of Counts Three, Four, and Five, pending amendment, if any, of Colonial's Sherman Act claims. *See* *28 U.S.C. § 1367(c)(3)* (providing where causes of action over which district court has original jurisdiction have been dismissed, court may decline to exercise supplemental jurisdiction over remaining claims).

CONCLUSION

For the reasons discussed above, defendants' motions to dismiss are hereby GRANTED in part and DEFERRED in part, as follows:

1. Counts One and Two are hereby DISMISSED, with leave to amend to cure the deficiencies identified above.

2. To the extent the motions seek dismissal of Counts Three, Four, and Five, ruling is hereby DEFERRED.

3. If Colonial elects to file a Second Amended Complaint to **[*24]** cure the deficiencies identified above, Colonial shall file its Second Amended Complaint no later than June 18, 2010. If Colonial does not file a Second Amended Complaint on or before June 18, 2010, the instant action will consist of the state law claims alleged in the FAC.

4. The Case Management Conference is hereby CONTINUED from June 25, 2010 to September 3, 2010. A Joint Case Management Statement shall be filed no later than August 27, 2010.

IT IS SO ORDERED.

Dated: May 25, 2010

/s/ Maxine M. Chesney

MAXINE M. CHESNEY

United States District Judge

Varian Semiconductor Equip. Assocs. v. Advanced Ion Beam Tech., Inc.

United States District Court for the District of Massachusetts

May 25, 2010, Decided; May 25, 2010, Filed

CIVIL ACTION NO. 08-10487-NG

Reporter

2010 U.S. Dist. LEXIS 51376 *; 2010 WL 2132267

VARIAN SEMICONDUCTOR EQUIPMENT ASSOCIATES, INC., NORMAN L. TURNER, KENNETH H. PURSER, and ALICE W. ENGE and ELIZABETH DILL, as Co-Executrixes of the Estate of Harald A. Enge, Plaintiffs, v. ADVANCED ION BEAM TECHNOLOGY, INC., Defendant.

Prior History: *Varian Semiconductor Equip. Assocs. v. Advanced Ion Beam Tech., Inc., 2010 U.S. Dist. LEXIS 140015 (D. Mass., Mar. 17, 2010)*

Core Terms

costs, attorney's fees, patent, counterclaims, antitrust, motion to dismiss, recommended, inventors, prevailing party, exceptional case, fraud claim, monopolization, clear and convincing evidence, infringement, discovery, covenant, letters, impose sanctions, inherent power, instant case, allegations, disclose, procured, purposes, argues

Counsel: **[*1]** For Varian Semiconductor Equipment Associates, Inc., Plaintiff: Christopher G. Lim, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA; Richard W. O'Neill, Wayne L. Stoner, LEAD ATTORNEYS, Tristan C. Snell, Wilmer Hale LLP, Boston, MA.

For Norman L. Turner, Kenneth H. Purser, Plaintiffs: Christopher G. Lim, LEAD ATTORNEY, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA; Richard W. O'Neill, Wayne L. Stoner, LEAD ATTORNEYS, Tristan C. Snell, Wilmer Hale LLP, Boston, MA.

For Alice W. Enge, in her capacity as executrix of the Estate of Harald Enge, Elizabeth Dill, in her capacity as executrix of the Estate of Harald Enge, Plaintiffs: Christopher G. Lim, Richard A. Goldenberg, LEAD ATTORNEYS, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA; Richard W. O'Neill, Wayne L. Stoner, LEAD ATTORNEYS, Tristan C. Snell, Wilmer Hale LLP, Boston, MA.

For Advanced Ion Beam Technology, Inc., Defendant, Counter Claimant: Daniel Johnson, Jr., LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius LLP, San Francisco, CA; Dion M. Bregman, LEAD ATTORNEY, PRO HAC VICE, Morgan, Lewis & Bockius (CA), Palo Alto, CA; Michael J. Lyons, LEAD ATTORNEY, PRO HAC VICE, Morgan, **[*2]** Lewis & Bockius LLP, Palo Alto, CA; Todd S. Holbrook, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, Boston, MA.

For Varian Semiconductor Equipment Associates, Inc., Counter Defendant: Christopher G. Lim, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA.

For Norman L. Turner, Counter Defendant: Tristan C. Snell, Wilmer Hale LLP, Boston, MA; Christopher G. Lim, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA.

For Kenneth H. Purser, Harald Enge, Counter Defendants: Tristan C. Snell, Wilmer Hale LLP, Boston, MA; Christopher G. Lim, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA.

For Alice W. Enge, in her capacity as executrix of the Estate of Harald Enge, Elizabeth Dill, in her capacity as executrix of the Estate of Harald Enge, Counter Defendants: Christopher G. Lim, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA.

Judges: Judith Gail Dein, United State Magistrate Judge.

Opinion by: Judith Gail Dein

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

DEIN, U.S.M.J.

I. INTRODUCTION

This matter is before the court on the Defendant's Motion for Attorney's Fees and Costs (Docket No. 74). By its motion, the defendant, Advanced Ion Beam Technology, **[*3]** Inc. ("AIBT"), is seeking an order declaring this an "exceptional case" and awarding it attorney fees pursuant to the Patent Act, *35 U.S.C. § 285*. Additionally, AIBT seeks expert witness fees and prejudgment interest on its costs and attorneys' fees pursuant to the court's inherent power to impose sanctions for abuse of the judicial process, as well as costs pursuant to *Fed. R. Civ. P. 54(d)*. For all the reasons detailed below, AIBT's motion is ALLOWED only as to the defendant's request for costs under *Fed. R. Civ. P. 54(d)*, but is otherwise DENIED. The issue of Varian's conduct vis-a-vis the Patent Office and its motivation in filing this suit will be fully explored in the Antitrust Litigation, in which AIBT may move for fees if appropriate. The instant case, however, should be closed as AIBT has not even sufficiently pleaded inequitable conduct on the part of Varian to withstand a motion to dismiss, much less shown that this is an "exceptional case."

II. BACKGROUND

This court previously described the procedural background of this case in its February 26, 2010 Report and Recommendation on Defendant's Motion for Attorney's Fees and Costs and in its April 27, 2010 Report and Recommendation **[*4]** on Defendant's Motion to Dismiss in Civil Action No. 09-11448-NG. Because that background is directly relevant to the issues raised in the present motion for attorney fees and costs, it is summarized again here as follows.

On March 25, 2008, plaintiffs Varian Semiconductor Equipment Associates, Inc. and the owners of U.S. Patent No. 7,301,156 (the "'156 Patent") (collectively, "Varian") brought this action against AIBT alleging infringement of the '156 Patent entitled "Controlling the Characteristics of Implanter Ion-Beams." (Docket No. 1). AIBT responded by denying liability, asserting various affirmative defenses, and filing three counterclaims consisting of claims for invalidity, non-infringement and unenforceability. (Docket No. 7). On November 25, 2008, after the parties had engaged in initial discovery, Varian, for reasons that are in dispute, unilaterally granted AIBT a covenant not to sue on the '156 Patent, and moved to dismiss both its claims and AIBT's three counterclaims. (See Docket No. 37). Ultimately, the court allowed the parties' Joint Stipulation and Motion for Dismissal by Order of the Court, thereby dismissing Varian's claims with prejudice pursuant to its covenant **[*5]** not to sue, and dismissing AIBT's three counterclaims with prejudice to the extent that those claims were directed to products that were the subject of Varian's covenant not to sue. (See Docket No. 62). AIBT contends that in the eight months the litigation was pending, and before any depositions were taken, it incurred approximately $ 1.4 million in costs, fees and expenses. (Docket No. 76 at 18). In their Joint Stipulation dismissing the claims, the parties agreed that "[w]ith respect to Plaintiffs' claims dismissed in connection with [their] stipulation, AIBT is the prevailing party pursuant to *35 U.S.C. § 285*" of the Patent Act. (Docket No. 62 P 3). However, Varian did not agree that the action constituted an "exceptional case" under *35 U.S.C. § 285*. (Id.).

On December 24, 2008, after Varian had granted the covenant not to sue and while the motion to dismiss Varian's claim and AIBT's three counterclaims remained pending, AIBT filed a First Amended Answer and First Amended Counterclaims. (Docket No. 45). Therein, AIBT reasserted its original counterclaims for invalidity, non-infringement and unenforceability, and added five antitrust counterclaims. The additional claims included *Walker* ***[*6]*** *Process* claims [1] and "sham litigation" claims for monopolization and attempted monopolization, as well as a claim for conspiracy to monopolize. In support of these claims, AIBT alleged among other things that Varian had engaged in monopolization and attempted monopolization by seeking, through this litigation, to enforce a patent that it knew was obtained by fraud on the U.S. Patent and Trademark Office ("PTO"), and that it knew was invalid or otherwise unenforceable. (See id.).

Varian moved to dismiss AIBT's amended counterclaims for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, and on July 20, 2009, this court issued a Report and Recommendation (the "2009 R&R") in which it recommended that Varian's motion be allowed. (Docket No. 72). Therein, this court determined that AIBT had failed to allege **[*7]** sufficient facts to establish an antitrust injury and therefore lacked standing to pursue its antitrust counterclaims. This court also concluded that AIBT had failed to allege fraud with sufficient particularity to support its *Walker Process* and "sham litigation" claims, and that AIBT had failed to allege adequate facts to support its claim for conspiracy to monopolize. Accordingly, this court recommended that all of AIBT's counterclaims be dismissed. [2] However, because this court concluded that the record did not establish that AIBT would not be able to allege a cause of action, it further recommended that the dismissal be without prejudice. The 2009 R&R was adopted by the District Court on August 4, 2009, thereby dismissing AIBT's antitrust counterclaims without prejudice. On August 18, 2009, AIBT filed the instant motion for fees and costs.

Instead of filing a motion for leave to amend its counterclaims in this case, AIBT chose **[*8]** to pursue its antitrust claims by filing a new action against Varian. Thus, on August 31, 2009, AIBT filed a complaint against Varian in Civil Action No. 09-11448-NG (the "Antitrust Litigation"). The complaint expanded upon the factual allegations, but contained the same five antitrust claims that AIBT had asserted against Varian by way of its counterclaims in this action. Accordingly, AIBT continued to contend that Varian engaged in anti-competitive conduct, in violation of federal ***antitrust law***, by "alleging infringement of a patent that they knew was obtained by fraud on the [PTO]." (Docket No. 1 in C.A. No. 09-11448-NG P 1). AIBT is seeking costs and attorneys' fees in connection with the Antitrust Litigation as well.

Varian filed a motion to dismiss all of the claims against it in the Antitrust Litigation, arguing that AIBT had failed to cure the deficiencies identified by this court with respect to AIBT's counterclaims in this action, and that AIBT's Complaint should be dismissed on the same grounds articulated in the 2009 R&R. (Docket No. 8 in C.A. No. 09-11448-NG). On April 27, 2010, this court issued a Report and Recommendation (the "2010 R&R") in which it determined that AIBT's **[*9]** expanded factual allegations cured a few but not most of the deficiencies in AIBT's original counterclaims, and recommended that Varian's motion to dismiss be allowed in part and denied in part. (Docket No. 27 in C.A. No. 09-11448-NG). Specifically, this court recommended that AIBT's principal claim, i.e., that Varian committed fraud by misleading the PTO in connection with its disclosures concerning U.S. Patent No. 3,541,328, its claim of a failure to disclose an article authored by W.K.H. Panofsky, et al. (the "Panofsky Reference"), as well as its claim of conspiracy to monopolize, be dismissed for failure to state a claim. However, this court further recommended that Varian's motion to dismiss be denied with respect to AIBT's claim that Varian

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[1] "A *Walker Process* claim arises when a patentee baselessly institutes litigation to enforce a patent known to be unenforceable because the patent was procured by fraud." *Novo Nordisk of N. Am., Inc. v. Genentech, Inc., 885 F. Supp. 522, 526 (S.D.N.Y. 1995)* (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*.

[2] Because AIBT's counterclaims for invalidity, non-infringement and non-enforceability had been dismissed by the District Court prior to this court's issuance of its 2009 R&R, this court addressed only the remaining five antitrust counterclaims in its decision.

committed fraud on the PTO by failing to disclose a publication by Nicholas White, et al. (the "White Reference"), an invention known as the "Ionex Quad Magnet," an offer by Nicholas White to sell certain technology to Varian, and the identity of Nicholas White as allegedly one of the inventors of the '156 Patent. Both parties have filed objections to the 2010 R&R, which are pending before the District Court for a final decision.

Additional **[*10]** facts will be provided below where appropriate.

III. DISCUSSION

A. AIBT's Request for Attorney Fees

By its present motion, AIBT is seeking attorney fees pursuant to *35 U.S.C. § 285* of the Patent Act. *Section 285* provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." *35 U.S.C. § 285*. Varian argues that AIBT's motion should be denied because it has failed to present clear and convincing evidence showing that this case is "exceptional" within the meaning of the Patent Act. [3] As the Federal Circuit has stated,

> [t]he determination of whether a case is exceptional and, thus, eligible for and warranting an award of attorney fees under *§ 285* is a two-step process in which the district court must (1) determine whether there is clear and convincing evidence that a case is exceptional ... and (2) if so, then determine in its discretion whether an award of attorney fees is justified ....

Digeo, Inc. v. Audible, Inc., 505 F.3d 1362, 1366-67 (Fed. Cir. 2007). [4] For the reasons that follow, this court agrees that AIBT has failed to establish, by clear and convincing evidence, that this is an exceptional case. Accordingly, AIBT has not shown that an award **[*11]** of attorney fees would be appropriate.

"A case may be deemed exceptional when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates *Fed. R. Civ. P. 11*, or like infractions." *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc., 393 F.3d 1378, 1381 (Fed. Cir. 2005)*. In the instant case, AIBT asserts that this case is exceptional because Varian procured the '156 Patent **[*12]** through fraud on the PTO. As AIBT states in its memorandum in support of its motion,

> [t]he evidence of record shows that Plaintiff Varian Semiconductor Equipment Associates, Inc. ("Varian") and the other Plaintiffs brought and knowingly maintained a baseless infringement suit asserting a fraudulently procured patent in an effort to crush AIBT and thereby improperly block competition that offered better technology and that was poised to erode Varian's dominant market position. As such, this is an exceptional case, and the Court should award AIBT its attorneys' fees and costs, including expert fees and interest thereon.

(Def. Mem. (Docket No. 76) at 2). However, AIBT did not present any evidence in the instant case, much less clear and convincing evidence, to substantiate its fraud claims.

Evidence Presented by AIBT

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[3] Varian does not dispute AIBT's contention that this court retains jurisdiction to decide its motion, or that since Varian's claims were dismissed due to the covenant not to sue, AIBT is the "prevailing party" for purposes of its request for attorney fees pursuant to *35 U.S.C. § 285*. Instead, Varian argues that AIBT's request for attorney fees should be denied because the defendant has not established that this is an exceptional case justifying an award of such fees. (See Pls. Opp. (Docket No. 78) at 8-11).

[4] "Federal Circuit case-law [applies] to the *§ 285* analysis, as it is unique to patent law." *Digeo, Inc., 505 F.3d at 1366*.

As AIBT argues, the essence of its fraud claims is the alleged "failure of the inventors to advise the PTO that the inventors were aware that the asserted claims were not patentable due to a much earlier prior art patent, U.S. Patent No. 3,541,328 (the "328 Patent"), that was developed by one of the inventors of the 156 Patent, Enge." (Def. Mem. at 3). While AIBT asserts that **[*13]** there were a number of other instances of failure to disclose information to the PTO which resulted in fraud on the PTO, (see id. at 12-15), it relies on the alleged failure to disclose the '328 Patent and two letters that plaintiff Kenneth H. Purser ("Purser") sent to Harald A. Enge ("Enge") to establish that this case is exceptional. (See Def. Reply Mem. (Docket No. 80) at 4-7). According to AIBT, "[t]hese letters show that the Plaintiffs intentionally deceived the PTO when they signed the declarations attesting that they were the true and only inventors of the inventions claimed in the patent-in-suit with knowledge that one or more of the then pending claims was anticipated by the 328 Patent." (Def. Mem at 4).

This evidence is insufficient to justify an award of attorney fees in this case. In dismissing AIBT's counterclaims, this court considered AIBT's allegations that the inventors misled the PTO about the contents and scope of the '328 Patent and found them insufficient to state a claim for fraud under the applicable pleading standards. (See 2009 R&R at 17-20). Moreover, in connection with Varian's motion to dismiss the Complaint in the Antitrust Litigation, this court considered **[*14]** AIBT's revised allegations regarding the '328 Patent, including the substance of the two letters from Purser to Enge, and found that AIBT still could not state a claim for fraud. (See 2010 R&R at 10-13, 26-31). In particular, as detailed more fully in the 2010 R&R, this court determined that due to the fact that the inventors of the '156 Patent disclosed and accurately described the '328 Patent to the PTO, AIBT could not sustain a claim based on allegations that the inventors misled the PTO about the '328 Patent. (Id. at 26). Because the letters on which AIBT relies to show that this case is exceptional do not even support a claim of fraud on the PTO, they do not establish clear and convincing evidence of inappropriate conduct for purposes of an attorney fee award under *35 U.S.C. § 285*. [5]

AIBT is outraged at the content of these letters and argues that proof that Varian's suit was brought in bad faith is established by Varian's alleged failure to explain the letters, which demonstrate "Plaintiffs' intentional deception of the PTO when they signed the declaration attesting that they were the true and only inventors of the inventions claimed in the patent-in-suit." (Def. Reply Mem. at 6). However, to date, no explanation has been necessary, and AIBT's argument ignores Varian's repeated assertion that these facts likely will be explored in the interference proceeding Varian has requested before the PTO. (See Pls. Opp. (Docket No. 78) at 4). Moreover, AIBT is ignoring the fact that an inventor's opinion about patentability is not controlling on whether an invention is patentable as a matter of law. Finally, as this court has found **[*16]** twice, it is undisputed that the '328 Patent was disclosed and accurately described to the PTO in connection with the procurement of the '156 Patent. The existence of this correspondence does not establish AIBT's claim of fraud and does not render this litigation exceptional under *§ 285*.

To the extent that AIBT relies on other alleged failures to disclose information to the PTO to support its claim for fees, costs and expenses, these claims must also fail. Thus, AIBT argues that Varian's omissions and representations to the PTO with respect to the White Reference, the Panofsky Reference, the Ionex Quad Magnet and Nicholas White's offer to sell technology to Varian also constitute evidence that this case is exceptional. (Def. Mem. at 12-16). However, in the instant case, AIBT was not able to state a claim of fraud based on Varian's alleged failure to disclose these references to the PTO. In light of AIBT having failed to allege sufficient facts to even state a claim in the instant action, and having elected not to amend its pleadings in the instant case, this case should be closed. Any remedy which AIBT may recover should be developed in the Antitrust Litigation where some, but not all **[*17]** of AIBT's claims of failure to disclose this information to the PTO have, thus far, survived a motion to dismiss.

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[5] This court is not ruling that "AIBT must prove its fraud claim to prevail on its motion under *§ 285*[.]" (Def. Reply Mem. at 3) (arguing that proof of fraud is not required). This court agrees that "[i]f there is clear and convincing evidence that a plaintiff has brought a baseless or frivolous suit against an accused infringer, that is a sufficient basis to require a district court to deem the case **[*15]** exceptional under *§ 285*." *Digeo, Inc., 505 F.3d at 1367*. However, since AIBT is basing its claim that this case is exceptional on the existence of these two letters, which AIBT contends establish knowledge of the fraud, the fact that these two letters do not even state a claim for fraud on the PTO defeats AIBT's claim of exceptional circumstances.

AIBT argues further that the timing of Varian's decision not to pursue its claim of infringement, i.e., shortly before a court hearing and depositions, is persuasive evidence that Varian's suit was baseless. (Def. Reply Mem. at 6-7). However, Varian has offered an explanation of its action, which, if supported by a developed record, defeats AIBT's claim. (See Pls. Opp. at 5 n.1). Thus, on its face, the timing of the issuance of the covenant not to sue does not render this case exceptional or warrant the award of attorneys' fees and expenses.

AIBT's Request for Discovery

AIBT has requested an opportunity to pursue discovery to the extent necessary to establish that this is an exceptional case. According to the defendant, "[t]his discovery would include evidence of Plaintiffs' inequitable conduct and evidence that Plaintiffs' knew that this case was frivolous[ ] at the time they filed it." (Def. Mem. at 18). Therefore, AIBT is seeking the same or similar discovery that it will be taking in the Antitrust Litigation in order to prove its claims that Varian violated the antitrust **[*18]** laws by seeking to enforce a patent in this case that it allegedly knew had been obtained by fraud on the PTO.

AIBT's request for discovery in this matter is denied. The defendant has chosen to conclude this litigation by pursuing its antitrust claims in a separate lawsuit. To the extent it is able to develop clear and convincing evidence in the context of the Antitrust Litigation to show that Varian's patent infringement claims were baseless because the '156 Patent was procured by fraud on the PTO, it may file an appropriate motion for attorney fees in that case.

B. AIBT's Request for Expert Witness Fees and Prejudgment Interest

By its motion, AIBT also requests that this court exercise its inherent power to impose sanctions for fraud or abuse of the judicial process, and award the defendant its expert witness fees, as well as pre-judgment interest on its costs and attorneys' fees. A federal court may "invoke its inherent powers if it determines 'that fraud has been practiced upon it, or that the very temple of justice has been defiled.' Similarly, a court may impose sanctions where 'a party shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court **[*19]** order.'" *Amsted Indus. Inc. v. Buckeye Steel Castings Co., 23 F.3d 374, 378 (Fed. Cir. 1994)* (quoting *Chambers v. NASCO, Inc., 501 U.S. 32, 46, 111 S. Ct. 2123, 2133, 115 L. Ed. 2d 27 (1991))* (additional quotations and citations omitted). However, "[w]ithout a finding of fraud or bad faith whereby the 'very temple of justice has been defiled,' a court enjoys no discretion to employ inherent powers to impose sanctions." Id. See also *Chambers, 501 U.S. at 50-51, 111 S. Ct. at 2136* (court must "exercise caution in invoking its inherent power," but may impose sanctions pursuant to such power where there is evidence of bad faith conduct or attempt to perpetrate fraud on the court). The present record does not support the claim for this extraordinary award, and AIBT's request for sanctions in the form of expert witness fees and pre-judgment interest is denied.

C. AIBT's Request for Costs Pursuant to *Fed. R. Civ. P. 54(d)*

Finally, AIBT is seeking costs pursuant to *Fed. R. Civ. P. 54(d)*, which provides in relevant part that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs - other than attorney's fees - should be allowed to the prevailing party." *Fed. R. Civ. P. 54(d)(1)*. **[*20]** Varian urges this court to decline AIBT's request because Varian prevailed on AIBT's antitrust counterclaims, and it contends that under such circumstances, each party should bear its own costs. (Pl. Opp. Mem. at 12). Because this court finds that AIBT is the sole "prevailing party" for purposes of *Rule 54(d)*, AIBT's motion for costs is allowed.

In patent cases, the question "whether a party is 'prevailing' for the purposes of *Rule 54* is a matter of federal circuit law." *Power Mosfet Techs., L.L.C. v. Siemens AG, 378 F.3d 1396, 1416 (Fed. Cir. 2004)*. See also *Manildra Milling Corp. v. Ogilvie Mills, Inc., 76 F.3d 1178, 1181-82 (Fed. Cir. 1996)* (describing basis for applying federal circuit law to define meaning of "prevailing party" in patent litigation). "The dismissal of a claim with prejudice . . . is a judgment on the merits under the law of the Federal Circuit." *Power Mosfet Techs., L.L.C., 378 F.3d at 1416*. Accordingly, "a defendant [is] the prevailing party for purposes of costs under *Rule 54* where the plaintiff voluntarily dismiss[es] its case against [that] defendant with prejudice." *Highway Equip. Co., Inc. v. FECO, Ltd., 469 F.3d 1027, 1035 (Fed.*

Cir. 2006). See also *id. at 1035-36* **[*21]** (basis for defendant's prevailing party status was plaintiff's filing of a covenant not to sue, which ended the litigation and resulted in a dismissal with prejudice). On the other hand, a dismissal without prejudice "does not bestow 'prevailing party' status" upon the opposing party, as it does not amount to a victory on the merits and "does not constitute a change in the legal relationship of the parties because the plaintiff is free to refile its action." *RFR Indus., Inc. v. Century Steps, Inc., 477 F.3d 1348, 1353 (Fed. Cir. 2007)*. See also *Highway Equip. Co., Inc., 469 F.3d at 1034* (dispositive issue is whether the dismissal "had sufficient judicial imprimatur to constitute a 'judicially sanctioned change in the legal relationship of the parties'") (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 605, 121 S. Ct. 1835, 1840, 149 L. Ed. 2d 855 (2001))*; *Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1077 (7th Cir. 1987)* (a dismissal without prejudice "is not the practical equivalent of a victory for defendant on the merits"). Because Varian's claims in this action were dismissed with prejudice, but AIBT's counterclaims were **[*22]** dismissed without prejudice, AIBT is the prevailing party for purposes *Rule 54(d)*. Accordingly, AIBT is entitled to recover costs against Varian pursuant to *28 U.S.C. § 1920*. [6]

IV. CONCLUSION

For all the reasons detailed above, the "Defendant's Motion for Attorneys' Fees and Costs" (Docket No. 74) is ALLOWED IN PART and DENIED IN PART. Specifically, the motion is ALLOWED with respect to the defendant's request for costs under *Fed. R. Civ. P. 54(d)*, but is otherwise DENIED. Within 14 days from the date of this Memorandum of Decision and Order, AIBT shall file a bill of costs with the court. Any objection to the bill of costs shall be filed within 14 days from the date of AIBT's submission.

/s/ Judith Gail Dein

Judith Gail Dein

U.S. Magistrate Judge

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[6] "***Section 1920*** of Title 28 enumerates the expenses that a federal court may award as costs under its *Rule 54(d)(1)* discretionary authority." *Manildra Milling Corp., 76 F.3d at 1184*.

Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health

United States District Court for the Eastern District of Washington

May 25, 2010, Decided; May 25, 2010, Filed

NO. CV-09-3032-EFS

Reporter

717 F. Supp. 2d 1159 *; 2010 U.S. Dist. LEXIS 51897 **; 2010-2 Trade Cas. (CCH) P77,294

YAKIMA VALLEY MEMORIAL HOSPITAL, a Washington Nonprofit Corporation, Plaintiff, v. WASHINGTON STATE DEPARTMENT OF HEALTH; MARY C. SELECKY, in her official capacity as Secretary of the Washington State Department of Health, Defendants.

Subsequent History: Affirmed in part and reversed in part by, Remanded by *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health, 654 F.3d 919, 2011 U.S. App. LEXIS 17222 (9th Cir. Wash., Aug. 19, 2011)*

Core Terms

regulations, license, interstate commerce, dormant, hybrid, anti-trust, monopoly, repeal, elective, challenged regulation, anti-competitive, burdened, effects, out-of-state, pleadings, immune, authorization, interstate, violations, asserting, motion for judgment, unilateral, ordinance, funding, prudential standing, federal health, private party, healthcare, coronary, delegate

LexisNexis® Headnotes

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

HN1[] **Certificates of Need, Hospitals**

Washington law requires Certificates of Need for any tertiary health service, or a specialized service that meets complicated medical needs of people and requires sufficient patient volume to optimize provider effectiveness, quality of service, and improved outcomes of care. *Wash. Rev. Code § 70.38.105(4)(f)*. This includes percutaneous coronary intervention. *Wash. Admin. Code § 246-310-700*.

Healthcare Law > ... > Facility Planning > Certificates of Need > Hospitals

HN2[] **Certificates of Need, Hospitals**

Wash. Admin. Code § 246-310-745 sets the standards for granting elective percutaneous coronary intervention (PCI) Certificate of Need (CON) licenses to hospitals. First, the Washington State Department of Health must estimate the number of elective PCI procedures that will be performed each year in a geographic planning area. To do this, it determines the area's use rate, which is the number of PCI's performed on persons over fifteen years old per 1000 persons. The use rate is then multiplied by an estimate of the area's population in that area for each year five years into the future. The Department grants a new CON license if the estimated future need is substantially greater than licensed providers' capacity to perform elective PCI's (net need). But the Department does not grant a new PCI CON just because there is a net need in the planning area. A new provider must perform a minimum of 300 PCI's per year. *Wash. Admin. Code § 246-310-720*. Therefore, the difference between current capacity and projected demand must exceed 300 for a new provider to receive a CON license. *Wash. Admin. Code § 246-310-745(10)*. If the difference is greater than 300, the Department divides the difference by 300 and rounds down to determine the additional need. *Wash. Admin. Code § 246-310-745(10)*.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN3[] **Pretrial Judgments, Judgment on Pleadings**

A motion for judgment on the pleadings under *Fed. R. Civ. P. 12(c)* is appropriate after the pleadings are closed. In a motion for judgment on the pleadings, a court may consider only legal issues. Material facts must be viewed in the light most favorable to the non-moving party. The court will grant a motion for judgment on the pleadings if the moving party can show a clear right to judgment as a matter of law from the face of the pleadings.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

Generally speaking, restraints of trade imposed directly by states are immune from antitrust liability. This immunity extends to the acts of the state executive branch, including administrative agencies. State restraints of trade are divided into two categories: unilateral and hybrid. Hybrid restraints are not immune from antitrust liability. Restraints are hybrid when the state merely enforces private marketing decisions, thereby granting private actors a degree of private regulatory power. But just because a law has anti-competitive effects that private parties acting in concert could not produce without violating the antitrust laws does not mean it is hybrid. The law must actually sanction an arrangement between private parties that unlawfully restrains competition. In contrast, restraints are unilateral and immune from antitrust challenge when they do not delegate any market authority to private actors. A unilateral restraint's anti-competitive effects are the result of the state's regulation, not of state sanction of private violations.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] **Exemptions & Immunities, Parker State Action Doctrine**

Several Ninth Circuit opinions have rejected antitrust challenges to state-created local monopolies. These opinions did not address whether the regulations were unilateral or hybrid, but they recognized that when the state deliberately creates a monopoly it is immune from ***antitrust law***. The greater power of creating a permanent local monopoly, repeatedly validated by the Ninth Circuit, necessarily encompasses the lesser power of creating a local monopoly that may or may not be permanent.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN6[] **Commerce Clause, Dormant Commerce Clause**

The language of the *Commerce Clause* does not explicitly limit the states' power over interstate commerce. Nevertheless, it is well established that the *Commerce Clause* contains a negative or dormant aspect that limits the states' ability to regulate interstate trade. The U.S. Supreme Court has repeatedly held that states may not enforce laws that either (1) discriminate between in-state and out-of-state entities to protect in-state economic interests or (2) incidentally burden interstate commerce more than they benefit local interests. Like so many rules in constitutional law, the dormant Commerce Clause has a number of exceptions, however.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN7[] Congressional Duties & Powers, Commerce Clause

See U.S. Const. art. I, § 8.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN8[] Standing, Elements

To sue in federal court, a plaintiff must have standing, including both constitutional and prudential components. To have constitutional standing, the plaintiff must have suffered an injury that is redressable by a favorable outcome.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN9[] Commerce Clause, Dormant Commerce Clause

In order to have prudential standing to sue for constitutional violations, the complaint must fall within the zone of interests protected by the constitutional provision at issue. The zone of interests is defined differently if the dormant Commerce Clause challenge is a facial challenge or one based on Pike. The Fifth Circuit articulated this distinction nicely in National Solid Waste Management Association v. Pine Belt Regional Solid Waste Management Association. In that case, a regional waste management authority required the residents of counties in the authority's service area to dispose of their trash at sites owned by the authority. The Fifth Circuit held that the plaintiffs lacked standing to sue for a facial challenge because they did not allege that they intended to ship waste from out of state into the region. However, the court found the plaintiffs had prudential standing to challenge the regulations under Pike because they claimed they operated in interstate commerce and alleged that the challenged ordinance burdened their interstate business. Similarly, the Ninth Circuit held in City of Los Angeles v. County of Kern that it is the interest claimed, not the harm claimed, that matters for purposes of determining prudential standing to sue under the dormant Commerce Clause.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Evidence > Burdens of Proof > Allocation

Governments > Federal Government > US Congress

HN10[] Commerce Clause, Dormant Commerce Clause

An otherwise unconstitutional state burden on interstate commerce is permissible if authorized by Congress. Congressional authorization for state burdens on interstate commerce must be very clear for the burden to survive dormant Commerce Clause scrutiny. The language must indicate a desire to alter the limits of state power imposed by the *Commerce Clause*. The state asserting Congressional authorization bears the burden of showing that Congress authorized the state action.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Governments > Federal Government > US Congress

HN11[] **Commerce Clause, Dormant Commerce Clause**

Congress must authorize only the specific action, not the consequences of that action, in order to exempt it from liability under the dormant *Commerce Clause*. If the explicitly-authorized action has consequences that burden interstate commerce, it is immune from a dormant *Commerce Clause* challenge.

Healthcare Law > ... > Facility Planning > Certificates of Need > General Overview

HN12[] **Facility Planning, Certificates of Need**

Because the natural result of the Certificate of Need laws required by the now-repealed National Health Planning and Resource Development Act, Pub. L. No. 93-641, 88 Stat. 2225 (1975), is to burden interstate commerce, Congress authorized dormant *Commerce Clause* violations.

Healthcare Law > ... > Facility Planning > Certificates of Need > General Overview

HN13[] **Facility Planning, Certificates of Need**

Taking together the evidence of Congressional intent and the states' reliance on the now-repealed National Health Planning and Resource Development Act (NHPRDA), Pub. L. No. 93-641, 88 Stat. 2225 (1975), when they passed their Certificate of Need (CON) laws, the United States District Court for the Eastern District of Washington concludes that the repeal of the NHPRDA removed only the requirement and not the authorization for state CON laws.

Counsel: **[**1]** For Yakima Valley Memorial Hospital, a Washington nonprofit corporation, Plaintiff: James Lincoln Phillips, LEAD ATTORNEY, Miller Nash LLP - SEA, Seattle, WA.

For Washington State Department of Health, Defendant: Michael Steven Tribble, LEAD ATTORNEY, Office of the Attorney General, Olympia, WA; Richard Arthur McCartan, LEAD ATTORNEY, Attorney General of Washington - OLY, Olympia, WA.

For Mary C Selecky, in her official capacity as Secretary of the Washington State Dept of Health, Defendant: Michael Steven Tribble, LEAD ATTORNEY, Office of the Attorney General, Olympia, WA; Richard Arthur McCartan, LEAD ATTORNEY, Attorney General of Washington - OLY, Olympia Division, Olympia, WA.

For Robert M McKenna, in his official capacity as Attorney General of the State of Washington, Defendant: Richard Arthur McCartan, LEAD ATTORNEY, Attorney General of Washington - OLY, Olympia Division, Olympia, WA.

Judges: EDWARD F. SHEA, United States District Judge.

Opinion by: EDWARD F. SHEA

Opinion

[*1161] ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

A hearing occurred in the above-captioned matter on December 16, 2009 in Yakima. James L. Phillips appeared on Plaintiff Yakima Valley Memorial Hospital's ("YVMH") behalf; Michael **[**2]** S. Tribble appeared for Defendants Washington State Department of Health ("Department") and Secretary Mary C. Selecky. Before the Court was Defendants' Motion for Judgment on the Pleadings. (Ct. Rec. 31.) For the reasons given below, the Court grants Defendants' Motion and dismisses YVMH's claims.

I. Background

YVMH sues to enjoin enforcement of the Department's Certificate of Need ("CON") regulations that restrict the number of hospitals that can perform elective percutaneous coronary intervention ("PCI"). The Department first issued the challenged regulations under a Washington statute that was passed in response to the National Health Planning and Resource Development Act ("NHPRDA").

A. NHPRDA

In 1974, Congress passed the NHPRDA, which required states to enact CON laws in order to receive federal health care funding. *Pub. L. No. 93-641, 88 Stat. 2225 § 1523 (1975)*. CON laws empower State health agencies to determine the need for certain health services in each geographic area and license only needed services. Specifically, CON laws "provide for the review of and determination of need for . . . offerings of new institutional health services." *North Carolina v. P.I.A. Asheville, Inc., 722 F.2d 59, 62 (4th Cir. 1983)*. **[**3]** Congress's aim in passing the NHPRDA was to limit costs by preventing needless duplication of services and remedy uneven health care distribution. *Id. at 61*. [1]

This aim was not achieved. Congress repealed the NHPRDA in 1986. *Pub. L. No. 99-660; 100 Stat. 3743, 3799 § 701 (1986)*. Repeal meant that states were no longer required to have CON laws in order to receive federal health care funding.

B. Washington State CON Laws and Regulations

The Washington legislature passed a CON law in 1979, when the NHPRDA was still in effect. RCW 70.38. ***HN1***[] Washington's law required CON's for any "tertiary health service," or a "specialized service that meets complicated medical needs of people and requires sufficient patient volume to optimize provider effectiveness, quality of service, and improved outcomes of care." *RCW 70.38.105(4)(f)*. This includes PCI. WAC *246-310-700*. In response, the Department adopted PCI CON regulations, *WAC 246-310-700* -- *246-310-755*, **[*1162]** among which are the regulations that YVMH challenges.

PCI, commonly known as coronary angioplasty or more simply angioplasty, is a non-surgical treatment **[**4]** for coronary heart disease. PCI involves removing arterial plaque, thereby clearing out obstructed coronary arteries and ameliorating the effects of heart disease. The category includes several different procedures, but PCI always involves inserting some device into the coronary artery to remove plaque. Elective PCI's are performed when the patient is stable and no medical emergency requires immediate action.

HN2[] *Section 246-310-745* sets the standards for granting elective PCI CON licenses to hospitals. First, the Department must estimate the number of elective PCI procedures that will be performed each year in a geographic

[1] Congress passed the NHPRDA out of concern that the market had failed to accomplish this on its own. *Id.*

planning area. To do this, it determines the area's use rate, which is the number of PCI's performed on persons over fifteen years old per 1000 persons. The use rate is then multiplied by an estimate of the area's population in that area for each year five years into the future.

The Department grants a new CON license if the estimated future need is substantially greater than licensed providers' capacity to perform elective PCI's ("net need"). But the Department does not grant a new PCI CON just because there is a net need in the planning area. A new provider must perform **[**5]** a minimum of 300 PCI's per year. *WAC 246-310-720*. Therefore, the difference between current capacity and projected demand must exceed 300 for a new provider to receive a CON license. *WAC 246-310-745(10)* Step 4. If the difference is greater than 300, the Department divides the difference by 300 and rounds down to determine the additional need. *WAC 246-310-745(10)* Step 5. To illustrate, even if the difference is 575, or almost enough for two additional PCI programs, only one additional program will be licensed because 575 divided by 300 is not quite two.

C. YVMH's Claims

YVMH challenges three aspects of the PCI CON regulations. First, it takes issue with the definition of current capacity as the sum of all PCI's performed by providers that have CON approval. Defining current capacity in this way gives licensed hospitals a permanent franchise to perform elective PCI's. These hospitals can continue expanding their PCI capacity to ensure net need never arises in the planning area. Second, it challenges the calculation method for granting additional PCI's, which requires a full 300 additional net needed procedures before another CON will be granted in a planning area. Rounding down underestimates **[**6]** the need for PCI programs. Third, it asserts that the 300 annual PCI minimum volume requirement is arbitrary because cardiologists agree that the appropriate annual minimum is 200.

YVMH brings two claims against Defendants. First, YVMH claims that the regulations violate the Sherman Anti-trust Act because they restrain competition by limiting the number of PCI providers. This injures consumers and hinders commerce. YVMH alleges that the state does not monitor or actively supervise the operation of these regulations so they are not protected by the state immunity doctrine. (Ct. Rec. 1 at 7.) Second, according to YVMH, the CON regulations violate the dormant *Commerce Clause* under the test articulated in *Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)*, because the regulations' burdens on interstate commerce outweigh their putative local benefits. (Ct. Rec. 1 at 6.)

[*1163] II. Discussion

A. Standard

HN3[] A motion for judgment on the pleadings under *Federal Rule of Civil Procedure 12(c)* is appropriate after the pleadings are closed. Although Defendants style their motion under *Rules 12(b)(6)* and *12(c)*, Defendants already filed an answer without asserting the defenses in this motion. Therefore, a *Rule 12(b)(6)* **[**7]** motion is barred in this case, and this is a motion for judgment on the pleadings under *Rule 12(c)*. *See* *Fed. R. Civ. P. 12(b)*.

In a motion for judgment on the pleadings, a court may consider only legal issues. *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd., 132 F.3d 526, 528 (9th Cir. 1997)*. Material facts must be viewed in the light most favorable to the non-moving party, in this case, YVMH. *McGann v. Ernst & Young, 102 F.3d 390, 392 (9th Cir. 1996)*. The court will grant a motion for judgment on the pleadings if the moving party can show a clear right to judgment as a matter of law from the face of the pleadings. *George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1229 (9th Cir. 1996)*.

B. Motion to Supplement

After this motion was argued and submitted, YVMH moved to supplement its response with two expert reports. The Court declines to consider those reports at this time for two reasons. First, it would prejudice Defendants to consider them without converting this motion into a motion for summary judgment. *Fed. R. Civ. P. 12(d)*. Second, the Court does not find the expert reports helpful in clarifying the legal issues in the case. Although YVMH claims they explain the anti-trust **[**8]** and dormant *commerce clause* violations, they appear to assert policy arguments against PCI CON laws. YVMH's motion is denied.

C. Analysis

1. Anti-trust

YVMH asserts that the challenged regulations violate the Sherman Anti-trust Act by enabling hospitals that already have PCI CON licenses to perpetuate their elective PCI monopoly. Additionally, rounding down the estimated need serves no purpose other than to underestimate the number of required procedures, which artificially inflates prices. Finally, the regulation setting the minimum volume requirement at 300 is irrational and experts agree that the appropriate minimum volume requirement is 200 annual PCI's.

Defendants argue that the challenged regulations are actions of the State as sovereign, and as such are immune from anti-trust liability. Although the regulations have anti-competitive effects, Defendants say those effects are part of the State-designed system and the regulations delegate no market power to private parties.

HN4[] Generally speaking, restraints of trade imposed directly by States are immune from anti-trust liability. *See Parker v. Brown, 317 U.S. 341, 350-52, 63 S. Ct. 307, 87 L. Ed. 315 (1943)* ("an unexpressed purpose to nullify a state's control over **[**9]** its officers and agents is not lightly to be attributed to Congress"). This immunity extends to the acts of the State executive branch, including administrative agencies such as the Department. *Deak-Perera Hawaii, Inc. v. Dep't of Transp., 745 F.2d 1281, 1283 (9th Cir. 1984)*.

State restraints of trade are divided into two categories: unilateral and hybrid. *See Fisher v. City of Berkeley, 475 U.S. 260, 267-68, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)*. Hybrid restraints are not immune from anti-trust liability. Restraints are hybrid when the State "merely enforces private marketing decisions," **[*1164]** thereby granting private actors "a degree of private regulatory power." *324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.8, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)* (citations omitted); *Fisher, 475 U.S. at 268* (citing *Rice v. Norman Williams Co., 458 U.S. 654, 665, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982))*. But just because a law has anti-competitive effects that private parties acting in concert could not produce without violating the anti-trust laws does not mean it is hybrid. *See Fisher, 475 U.S. at 266*; *Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 889 (9th Cir. 2008)*; *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n, 197 F.3d 560, 565 (1st Cir. 1999)*. The law must actually sanction **[**10]** an arrangement between private parties that unlawfully restrains competition. *Sanders v. Brown, 504 F.3d 903, 915 (9th Cir. 2007)*.

In contrast, restraints are unilateral and immune from anti-trust challenge when they do not delegate any market authority to private actors. A unilateral restraint's anti-competitive effects are the result of the State's regulation, not of State sanction of private violations. *See Fisher, 475 U.S. at 266-67*; *Costco, 522 F.3d at 887*.

YVMH's assertion that the restraint is hybrid need not be accepted as true at this stage. Because this is a legal conclusion, not a factual assertion, the Court does not automatically take it to be accurate. *See Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949-52, 173 L. Ed. 2d 868 (2009)*; *Point Ruston, LLC v. Pac. Nw. Reg'l Council of the United Bhd. Of Carpenters & Joiners of Am., 658 F. Supp. 2d 1266, 1273 (W.D. Wash. 2009)*.

YVMH makes three arguments that the challenged CON regulations are hybrid. First, YVMH claims that the licensing scheme gives licensed hospitals a local monopoly. This permits them to set prices without any supervision or control by the State. Second, based on *Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993)*, YVMH argues

[11]** that the regulation's anti-competitive effects render it hybrid. Third, YMVH asserts that the State delegated market authority to hospitals with CON licenses because they have the ability to perpetuate their local monopolies.

These arguments are unpersuasive. First, a regulation that enables private actors to enjoy a monopoly is not necessarily a hybrid restraint. Although allowing only certain hospitals to perform elective PCI's might drive up cost by limiting supply and inhibiting competition, a regulation's anti-competitive effects are insufficient to render it hybrid. Those anti-competitive effects are not the result of private action or collaboration given the State seal of approval, but are contemplated by the State's licensing scheme. *Cf. Costco, 522 F.3d at 890* (holding that a scheme that enabled price collusion among private actors was hybrid).

The cases YVMH cites for contrary authority are inapplicable. In *Miller,* the Ninth Circuit considered a statute whereby the State allowed liquor companies to set their own prices and then required them to keep those prices. *813 F.2d 1344*. The court found the regulations compelled private parties to exchange price information and to fix **[**12]** prices without State review. *Id. at 1349-51*. Such private collaboration is not protected by the state immunity doctrine. In contrast, the regulations in this case have incidental anti-competitive effects that are not caused by private action. Rather, the State limits the number of hospitals that may perform the procedures, which makes the procedures pricier. There is no private collusion at all, only a State-granted monopoly.

Second, to the extent *Hertz* is persuasive authority in this Circuit, its logic is questionable because it is irreconcilable **[*1165]** with Supreme Court decisions. In *Hertz,* the Second Circuit held that a New York City ordinance that prohibited rental car companies from charging renters more based on the city of their residence was a hybrid restraint. *1 F.3d at 127*. The *Hertz* court reasoned that the ordinance was unlike rent control because it was not a regulatory scheme, there was no independent regulatory board to adjust rates, and it addressed an issue less central to municipal authority than housing. [2] *Id.* The Second Circuit also noted several "anticompetitive risks" identified in Supreme Court cases, including the city's ability to impose extra-territorial costs on **[**13]** the industry and obstruction of regional efficiency by distorting local markets. *1 F.3d at 127*.

The Court respectfully disagrees with the Second Circuit's decision in *Hertz.* In light of *Fisher,* the Second Circuit's logic in *Hertz* is unpersuasive because it focused on a law's anti-competitive risks rather than delegation of market authority to private actors. The ordinance in *Hertz* was unilaterally imposed by the local government. Although any regulation might distort the market, such distortions are insufficient to make a restraint hybrid. *See Fisher, 475 U.S. at 266*. To be hybrid, a restraint must give direct market authority to private parties. Therefore, *Hertz* does not help YVMH's cause.

YVMH's third argument is more nuanced. YVMH argues that the Department does not grant a CON approval unless there is a net need for elective PCI procedures in a geographic area. In order for there to be a net need, the projected demand for these procedures must exceed the existing providers' capacity to perform them. But by performing procedures **[**14]** on individuals from outside the area, a hospital with a PCI CON license can increase its capacity to ensure local net need never arises. Therefore, although the local monopoly theoretically could end when local need outstrips licensed hospitals' ability to satisfy local PCI needs, in practice it never will because the monopolistic hospital can keep expanding its capacity.

To put it differently, YVMH argues that the regulations permit private actors to control markets. Hospitals with a PCI CON licenses can manipulate their PCI capacity to prevent others from intruding on their monopoly.

This argument ultimately does not persuade the Court. ***HN5***[] Several Ninth Circuit opinions have rejected anti-trust challenges to State-created local monopolies. *See, e.g., A-1 Ambulance Serv., Inc. v. County of Monterey, 90 F.3d 333 (9th Cir. 1996)*; *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869 (9th Cir. 1987)*; *Deak-Perera, 745 F.3d 1281*. These opinions did not address whether the regulations were unilateral or hybrid, but they recognized that when the State deliberately creates a monopoly it is immune from anti-trust law. Defendants

[2] Notably, the Supreme Court in *Fisher* did not rely on any of those factors when it concluded that rent control is a unilateral restraint. *475 U.S. at 266-70*.

point out that Washington's PCI CON laws permit **[**15]** temporary monopolies that might open if there is enough net need. The greater power of creating a permanent local monopoly, repeatedly validated by the Ninth Circuit, necessarily encompasses the lesser power of creating a local monopoly that may or may not be permanent.

None of the challenged regulations delegates any market power to private actors. The definition of current capacity comes directly from the State's regulation. It guarantees that hospitals with a PCI CON license may perform all the PCI's they can, but that is part of the regulatory **[*1166]** design. YVMH takes issue with the possibility that licensed hospitals will keep expanding their capacity and crowd out intruders, but the State granted them an initial license and expected they could perpetuate their monopoly in that way. *Costco, 522 F.3d at 890*. The minimum volume requirement and rounding down are internal calculation methods the Department uses. Although they may restrict competition, and may even be unwise policy, that does not make them unlawful. They are directives from the State. Whatever anti-competitive effects the regulations may have were part of the State's design. Therefore, the regulations are unilateral and immune **[**16]** from anti-trust law, and YVMH's anti-trust claim is dismissed. [3]

2. Dormant *Commerce Clause*

HN6[] The language of the *Commerce Clause* does not explicitly limit the States' power over interstate commerce. [4] Nevertheless, it is well established that the *Commerce Clause* contains a negative or dormant aspect that limits the States' ability to regulate interstate trade. *See, e.g., Dennis v. Higgins, 498 U.S. 439, 446, 111 S. Ct. 865, 112 L. Ed. 2d 969 (1991)*. The Supreme Court repeatedly held that States may not enforce laws that either 1) discriminate between in-state and out-of-state entities to protect in-state economic interests or 2) incidentally burden interstate commerce more than they benefit local **[**17]** interests. *City of Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978)*; *Pike, 397 U.S. at 142*. Like so many rules in constitutional law, the dormant *Commerce Clause* has a number of exceptions, however. Defendants argue that YVMH lacks standing to sue for dormant *Commerce Clause* violations and that the challenged regulations are immune from *Commerce Clause* scrutiny because they were authorized by Congress.

a. Standing

Defendants argue that YVMH lacks standing to bring a dormant *Commerce Clause* claim for four reasons. First, YVMH has not pled its participation in interstate commerce. Second, YVMH cannot assert third-party standing in this case. Third, YVMH has not been harmed by a law that treats out-of-state companies differently from in-state companies. Finally, YVMH's operations in other states have not been harmed by these regulations because YVMH has no operations in other states.

HN8[] To sue in federal court, a plaintiff must have standing, including both constitutional and prudential components. *See On the Green Apartments L.L.C. v. City of Tacoma, 241 F.3d 1235, 1239 (9th Cir. 2000)*. **[**18]** To have constitutional standing, the plaintiff must have suffered an injury that is redressable by a favorable outcome. *Id.* Defendants do not argue that YVMH lacks constitutional standing. Indeed, YVMH has suffered financial injury because the challenged regulations prevent YVMH from performing elective PCI.

Defendants contest YVMH's prudential standing. ***HN9***[] In order to have prudential **[*1167]** standing to sue for constitutional violations, the complaint must fall within the "zone of interests" protected by the constitutional

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[3] *See Gen. Hosps. Of Humana, Inc. v. Baptist Med. Sys., Inc.,* No. LR-C-84-455, 1986 WL 935 (E.D. Ark. Feb. 12, 1986) (holding that private health care providers proceeding under CON licenses are immune from anti-trust liability under the state action doctrine); *Trident Neuro-Imaging Lab. v. Blue Cross & Blue Shield of S.C., Inc.,* No. 81-1639-1, 1982 WL 1955, at *6 (D.S.C. Nov. 2, 1982) (concluding that a State health agency charged with health planning activities under a State statute benefits from state action anti-trust immunity).

[4] ***HN7***[] "The Congress shall have Power. . . To regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes." *U.S. Const. art. I, § 8*.

provision at issue, in this case the Commerce Clause. *Id.* (citing Individuals for Responsible Gov't, Inc. v. Washoe County, 110 F.3d 699 (9th Cir. 1997)). The zone of interests is defined differently if the dormant Commerce Clause challenge is a facial challenge or one based on *Pike.*

The Fifth Circuit articulated this distinction nicely in National Solid Waste Management Association v. Pine Belt Regional Solid Waste Management Association, 389 F.3d 491 (5th Cir. 2004). In that case, a regional waste management authority required the residents of counties in the authority's service area to dispose of their trash at sites owned by the authority. Id. at 493. The Fifth Circuit held **[**19]** that the plaintiffs lacked standing to sue for a facial challenge because they did not allege that they intended to ship waste from out of state into the region. Id. at 499-500. However, the court found the plaintiffs had prudential standing to challenge the regulations under *Pike* because they claimed they operated in interstate commerce and alleged that the challenged ordinance burdened their interstate business. Id. at 500-01.

Similarly, the Ninth Circuit held that it is the interested claimed, not the harm claimed, that matters for purposes of determining prudential standing to sue under the dormant Commerce Clause. City of Los Angeles v. County of Kern, 581 F.3d 841, 847-48 (9th Cir. 2009). In *County of Kern,* a waste-disposal company wanted to ship waste inside its home State but was discouraged from doing so by a statute that made it more expensive. The court held that the company did not have standing even though the increased cost would force it to ship waste out of state. *Id.* Only the harm (having to ship to out-of-state waste disposal sites), and not the interest (maintaining its in-state shipment), was out of state. In order for the company to have had standing, it would have **[**20]** had to claim that the regulations thwarted some actual or potential interstate operation.

The Court concludes that YVMH has prudential standing to sue for the alleged violations. The Complaint adequately alleges that the challenged regulations burden YVMH's interstate business. Specifically, YVMH alleges that if it were allowed to perform elective PCI's, it would 1) provide elective PCI to out-of-state residents; 2) buy necessary PCI equipment from out-of-state vendors; and 3) recruit physicians and staff from outside Washington to perform PCI. (Ct. Rec. 1 at 6.) If these facts are true, the Department burdened YVMH's interest in participating in interstate commerce. *Cf.* Oregon v. Heavy Vehicle Elec. License Plate, Inc., 157 F. Supp. 2d 1158, 1169-70 (D. Or. 2001) (holding that State restrictions on electronic license plates might constitute an undue burden on interstate commerce so the claim fell within the zone of interests protected by the dormant Commerce Clause). YVMH need only plead that it has interstate commercial interests that are burdened by the challenged regulations. County of Kern, 581 F.3d at 847-48; Pine Belt, 389 F.3d at 501; *see also* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 321 n.3, 97 S. Ct. 599, 50 L. Ed. 2d 514 (1977) **[**21]** (holding that stock exchanges asserting their rights to engage in interstate commerce free of discriminatory taxes are within the zone of interests protected by the Commerce clause). This it has done. It pled that it operates in interstate commerce and those operations would include PCI if not for the CON regulations.

Defendants' argument under *On the Green* is misguided. In that case, the **[*1168]** plaintiff, an apartment-complex operator, challenged a local ordinance that required a city utility to collect waste from all businesses and residents in the city and dispose of it in a city-owned landfill. 241 F.3d at 1237. The Ninth Circuit held that the plaintiff lacked standing. Id. at 1239-40. Its only grievance was that it was forced to pay for services that it wished to perform itself. It had no plans to ship waste across state lines, and did not allege that its interstate commercial activities were burdened in any way. *Id.* As a result, the injury it claimed was only "marginally related to the purposes implicit in the dormant Commerce Clause." Id. at 1240 (citing Individuals for Responsible Gov't, Inc., 110 F.3d 699). By negative inference, had the plaintiff pled the ordinance burdened specific **[**22]** interstate contracts, it would have had standing. The apartment operator in *On the Green* was indistinguishable in relevant respects from the trash hauler in *County of Kern.* Neither had any plans to engage in interstate commerce that were burdened by the challenged regulation. 581 F.3d at 847; 241 F.3d at 1239-40. In contrast, YVMH pled that it has an actual interest in contracts with out-of-state medical suppliers, physicians, and potential PCI patients. The challenged regulations make it impossible for those contracts to come to fruition. Further, YVMH is not asserting a third party's rights, but its own frustrated rights to participate in interstate commerce. Accordingly, YVMH has standing under the dormant Commerce Clause.

b. Congressional Authorization

Defendants argue that the 1974 NHPRDA authorized Washington's CON statute, under which the Department issued the challenged regulations. According to Defendants, because Congress authorized the regulations, they are not subject to attack under the dormant *Commerce Clause*. Furthermore, Defendants say, the subsequent repeal of the NHPRDA did not repeal the authorization for CON statutes, but only removed the requirement that States have **[**23]** CON statutes if they wished to receive federal health care funding.

HN10[] An otherwise unconstitutional State burden on interstate commerce is permissible if authorized by Congress. *C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 408, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994)*; *Shamrock Farms Co. v. Veneman, 146 F.3d 1177, 1179 (9th Cir. 1998)*. Congressional authorization for State burdens on interstate commerce must be very clear for the burden to survive dormant *Commerce Clause* scrutiny. *Wyoming v. Oklahoma, 502 U.S. 437, 458, 112 S. Ct. 789, 117 L. Ed. 2d 1 (1992)*. [5] The language must indicate a desire **[*1169]** to alter the limits of state power imposed by the *Commerce Clause*. *United States v. Pub. Util. Comm'n of Cal., 345 U.S. 295, 304, 73 S. Ct. 706, 97 L. Ed. 1020 (1953)*. The State asserting Congressional authorization bears the burden of showing that Congress authorized the State action. *Id.*

Research revealed only one case addressing a dormant *Commerce Clause* challenge to a health care CON law. *See* *Walgreen Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005)*. That case did not discuss whether Congress authorized the CON statute through the NHPRDA, and the defendant-appellee Puerto Rico Health Department did not raise the defense in its brief. *See* 2004 WL 5661258.

The Court holds that **[**25]** the NHPRDA clearly authorized PCI CON regulations such as the one at issue. Although the NHPRDA did not explicitly say that it allowed the States to burden interstate commerce, it required states receiving federal funding to devise programs to ensure that "only those [health care] services, facilities, and organizations found to be needed shall be offered or developed in the State." *Pub. L. No. 93-541, 88 Stat. 2225 § 1523(a)*. Through this mandate, Congress necessarily permitted and indeed encouraged some restrictions of interstate commerce. As YVMH complains, limiting the number of CON licenses burdens hospitals' interstate contracts. Hospitals that lack licenses would service out-of-state patients, purchase supplies from out-of-state companies, and recruit out-of-state physicians if they were allowed to perform those services. ***HN12***[] Because the natural result of the CON laws required by the NHPRDA is to burden interstate commerce, Congress authorized dormant *Commerce Clause* violations. *See* *Ne. Bancorp., 472 U.S. at 174-75*; *White v. Mass. Council of Constr. Employers, 460 U.S. 204, 213, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983)* (concluding that a federal program intended to encourage economic revitalization "affirmatively **[**26]** permit[ted] the type of parochial favoritism" promoted by a municipal order that required city-funded construction projects to be performed by a local work force).

Moreover, the Court is not convinced that repeal of the NHPRDA extinguished that authorization. YVMH has the burden of showing that Congress intended to revoke permission to burden interstate commerce when it repealed the NHPRDA. *See* *Cent. Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160, 1185 (E.D. Cal. 2006)*. It did not meet that burden. Relying on Congress's CON law requirements, all states but one enacted CON laws after the

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[5] The Supreme Court frequently has held that Congress did not state its intent to relieve a state action from the limits of the *Commerce Clause* sufficiently explicitly. *See, e.g.,* *South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984)* (holding that a Congressional policy allowing vertical integration of logging on federal lands does not indicate that a similar **[**24]** policy is permissible on State lands); *New England Power Co. v. New Hampshire, 455 U.S. 331, 102 S. Ct. 1096, 71 L. Ed. 2d 188 (1982)* (holding that the Federal Power Act did not evince an intent to permit States to prohibit export of hydroelectric power out of state); *Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 959-60, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982)* (reasoning that Congressional deference to States on water law does not indicate that Congress did not intend for the *Commerce Clause* to apply to State water regulations).

HN11[] But Congress must authorize only the specific action, not the consequences of that action, in order to exempt it from liability under the dormant *Commerce Clause*. If the explicitly-authorized action has consequences that burden interstate commerce, it is immune from a dormant *Commerce Clause* challenge. *See* *Ne. Bancorp., 472 U.S. at 174-75*.

NHPRDA. Lowell M. Zeta, *Fundamental First Steps Along the Road to Health Care Reform: Eliminating the Bureaucratic Burdens of Certificate of Need Programs and Embracing Market Competition to Improve State Health Care Systems,* *41 Creighton L. Rev. 727, 731 (2008)*. When Congress repealed the NHPRDA, it did not comment on all the CON regulations then existing in a supermajority of States. Nor did Congress revoke federal health care funding for States that had CON laws passed in response to its mandate. Even after the repeal, thirty-six states and the District of Columbia retained their CON laws **[**27]** and their federal funding. *Id. at 732*. The Court infers from this that Congress continued to approve of CON laws.

The scant legislative history of the repeal supports this inference. President Reagan issued a statement when he signed the bill that repealed the NHPRDA. He indicated that the federal government was withdrawing from regulating an area in which it had caused considerable inefficiencies:

> **[*1170]** It is also with great pleasure that I can finally lay to rest the Federal health planning authorities. I have sought their repeal since I assumed office. These authorities, while perhaps well-intentioned when they were enacted in the 1970s, have only served to insert the Federal government into a process that is best reserved to the marketplace.

Statement by President Ronald Reagan on Signing S. 1744, 22 Weekly Comp. Pres. Doc. 1565 (Nov. 17, 1986). Notably, President Reagan did not say that the States no longer had the power to regulate health care planning when it impacted interstate commerce. Rather, the NHPRDA was repealed because the *federal* government was ill equipped to impose such requirements. The States still could individually decide whether to require CON licenses or leave health **[**28]** care planning to the market. ***HN13***[] Taking together the evidence of Congressional intent and the States' reliance on the NHPRDA when they passed their CON laws, the Court concludes that the repeal of the NHPRDA removed only the requirement and not the authorization for State CON laws.

Defendants met their burden of showing that Congress authorized Washington's PCI CON regulations. Those regulations are immune from dormant *Commerce Clause* scrutiny. [6]

III. Conclusion

For the reasons given above, **IT IS HEREBY ORDERED:**

1. Defendants' Motion for Judgment on the Pleadings **(Ct. Rec. 31)** is **GRANTED.**

2. YVMH's Motion to Supplement **(Ct. Rec. 50)** is **DENIED.** The related Motion to Expedite **(Ct. Rec. 49)** is **GRANTED.**

3. The Clerk of the Court is **DIRECTED** to **[**29]** enter judgment in Defendants' favor on all claims.

4. This file shall be closed.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to counsel.

DATED this 25th day of May 2010.

/S/ Edward F. Shea

EDWARD F. SHEA

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[6] Defendants also move to dismiss YVMH's "privileges and immunities" claim. However, as YVMH makes clear in its response, that is not a separate claim, but simply a rephrasing of its claim for attorney's fees and costs under the dormant *Commerce Clause* through *42 U.S.C. § 1983*. As discussed above, the Court dismisses that claim, so further treatment of the so-called privileges and immunities claim is unnecessary.

United States District Judge

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in Defendants' favor on all claims per Order filed 5/25/2010.

May 25, 2010

Date

Ice Cream Distribs. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc.

United States District Court for the Northern District of California

May 28, 2010, Decided; May 28, 2010, Filed

No. 09-5815 CW

Reporter

2010 U.S. Dist. LEXIS 52985 *; 2010-2 Trade Cas. (CCH) P77,100; 2010 WL 2198200

ICE CREAM DISTRIBUTORS OF EVANSVILLE, LLC, Plaintiff, v. DREYER'S GRAND ICE CREAM, INC.; DREYER'S GRAND ICE CREAM HOLDINGS, INC.; EDY'S GRAND ICE CREAM, INC.; and RANDY STATHERS, Defendants.

Subsequent History: Claim dismissed by, Dismissed by *Ice Cream Distribs. of Evansville v. Dreyer's Grand Ice Cream, 2010 U.S. Dist. LEXIS 99930 (N.D. Cal., Sept. 10, 2010)*

Prior History: *Dreyer's Grand Ice Cream, Inc. v. Ice Cream Distribs. of Evansville, LLC, 2010 U.S. Dist. LEXIS 47738 (N.D. Cal., May 14, 2010)*

Core Terms

ice cream, enterprise, allegations, leave to amend, products, conspiracy, fails, antitrust, tying arrangement, entities, pattern of racketeering activity, Sherman Act, convenience store, communicated, competitors, continuity, subsidiary, employees, predicate, commerce, mail, business practice, grocery store, restitution, violations, Channel, novelty, wire, false statement, market power

Counsel: **[*1]** For Ice Cream Distributors of Evansville, LLC, Plaintiff: Michael Robert Bracamontes, LEAD ATTORNEY, Kristen Michele Ross, Ryan Joshua Vlasak, Bracamontes & Vlasak, P.C., San Francisco, CA.

For Dreyer's Grand Ice Cream, Inc., Dreyer's Grand Ice Cream Holdings, Inc., Edy's Grand Ice Cream, Inc., Defendants: Iris Sockel Mitrakos, James G. Gilliland, LEAD ATTORNEYS, Townsend and Townsend and Crew LLP, San Diego, CA; Robert D Tadlock, Townsend and Townsend and Crew, Palo Alto, CA.

For Randy Stathers, Defendant: Iris Sockel Mitrakos, Townsend and Townsend and Crew LLP, San Diego, CA.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

ORDER GRANTING DREYER'S ENTITIES' MOTION TO DISMISS (Docket No. 29)

Plaintiff Ice Cream Distributors of Evansville, LLC (ICD) alleges that Defendants Dreyer's Grand Ice Cream, Inc.; Dreyer's Grand Ice Cream Holdings, Inc.; Edy's Grand Ice Cream, Inc. (collectively, Dreyer's); and Defendant Randy Stathers violated the Racketeer Influenced and Corrupt Organizations (RICO) Act, *18 U.S.C. §§ 1961-68*; federal and state antitrust laws; and California's Unfair Competition Law (UCL), *Cal. Bus & Prof. Code §§ 17200, et seq*. Dreyer's moves to dismiss ICD's complaint **[*2]** for failure to state a claim. Mr. Stathers has not answered

ICD's complaint and does not join in the motion. [1] ICD opposes the motion in part. The motion was heard on April 29, 2010. Having considered oral argument and the papers submitted by the parties, the Court GRANTS Dreyer's motion.

BACKGROUND

Unless otherwise indicated, the following allegations are contained in ICD's complaint.

ICD is a limited liability corporation registered in Kentucky. Dreyer's Grand Ice Cream, Inc. and Dreyer's Grand Ice Cream Holdings, Inc. are Delaware corporations with a principal place of business in California. At all times relevant to this action, Edy's Grand Ice Cream, Inc., a California corporation, was a wholly-owned subsidiary of Dreyer's Grand Ice Cream, Inc., which itself was a wholly-owned subsidiary of Dreyer's Grand Ice Cream Holdings, Inc. Dreyer's Entities' Request for Judicial Notice (RJN), Exs. 2-3. [2]

ICD sold and distributed ice cream products to grocery and convenience stores in Illinois, Indiana and Kentucky.

In or around July, 2004, Dreyer's employees conspired "to wrongfully acquire ICD's accounts through the use of false statements, unfair business practices, and hiring away key employees from ICD to steal ICD's account information." First Am. Compl. (1AC) PP 22 and 25. To further this scheme, these employees communicated by telephone and email.

In or around December, 2004, Dreyer's contacted ICD about entering into a "Standard Distributorship Agreement - Grocery Channel" (Grocery Agreement), which would govern distribution of Dreyer's products to grocery stores, and a "Standard Distributorship Agreement - New Channel" (New Channel Agreement), which would provide terms for distribution to convenience stores. 1AC PP 15 and 16. Dreyer's conditioned the execution of a Grocery Agreement on ICD agreeing to a New Channel Agreement that would prohibit ICD from selling or distributing ice cream products of Dreyer's **[*4]** competitors, including Unilever, to convenience stores. ICD was hesitant to enter into such an exclusive distribution agreement without compensation for "the risk of narrowing its product selection . . . ." Compl. P 18.

On or around December 12, 2005, Dreyer's notified ICD that it would no longer sell its products to ICD for distribution in grocery stores because ICD refused to enter into an exclusive distribution agreement. As a result, ICD could no longer serve its grocery store accounts, causing a loss of "over half of its business." 1AC P 34.

Also, beginning in December, 2005, Dreyer's made "false and slanderous statements" about ICD. 1AC P 52. These statements caused many convenience stores and regional ice cream distributors to terminate their relationships with ICD. Most of these statements were made between December, 2005 and March, 2006; three were communicated in early 2007. ICD was informed by "Walgreens-Louisville" that, during the same period, "Dreyer's was taking similar actions against various other local distributors around the country." 1AC P 71.

At around the same time, Dreyer's recruited and hired Defendant Stathers, who was an ICD branch manager, and Buddy Stone, a **[*5]** driver for ICD. Stathers and Stone had substantial knowledge of ICD's business practices. Both agreed to misappropriate, on behalf of Dreyer's, ICD's confidential information.

ICD contends that Defendants engaged in racketeering activity and imposed unreasonable restraints of trade. ICD brings four claims under the RICO Act, asserting that Defendants violated and conspired to violate *18 U.S.C. §§ 1962(a)* and *1962(c)*. It also asserts claims for violations of *§ 1 of the Sherman Act* and California's Cartwright Act

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[1] Pursuant to stipulation, the Court extended the time for Mr. Stathers to answer ICD's complaint. (Docket No. 33.)

[2] Dreyer's requests judicial notice of filings with the Securities and Exchange Commission and with the Delaware Secretary of State. Because the facts contained in these filings **[*3]** are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," the Court grants Dreyer's request. *Fed. R. Evid. 201*.

and UCL. ICD maintains that Defendants caused the "total collapse" of its business, leading it to cease operations in or around September, 2007. 1AC P 73.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. Dismissal under *Rule 12(b)(6)* for failure to state a claim is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true **[*6]** and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*. However, this principle is inapplicable to legal conclusions; "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. *Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 555*).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990)*. In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." *Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990)*. Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. *Id. at 296-97*.

DISCUSSION

I. RICO Claims

To state a claim for relief in a private **[*7]** RICO action, ICD must allege four essential elements: (1) a pattern of racketeering activity, (2) the existence of an enterprise engaged in or affecting interstate or foreign commerce, (3) a nexus between the pattern of racketeering activity and the enterprise and (4) an injury to its business or property by reason of the above. *Sedima S.P.R.L. v. Imrex Company, Inc. et al., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*. The racketeering activities upon which ICD relies are the federal offenses of mail fraud and wire fraud. "A wire fraud violation consists of (1) the formation of a scheme or artifice to defraud; (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Odom v. Microsoft Corp., 486 F.3d 541, 554 (9th Cir. 2008)* (internal quotation marks omitted); *18 U.S.C. § 1343*. The elements of mail fraud differ only in that they involve the use of the United States mails rather than wires. *See* *18 U.S.C. § 1341*. All such allegations must be plead with particularity. *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)*.

Dreyer's argues that ICD's four RICO claims fail because ICD does not allege **[*8]** a pattern of racketeering activity and proximate causation. Even if these threshold elements were plead, Dreyer's contends that ICD's claim under *18 U.S.C. § 1962(c)* fails for the independent reason that ICD did not plead RICO persons distinct from the RICO enterprise.

ICD does not oppose dismissal of its claim under *18 U.S.C. § 1962(a)*, acknowledging that it has not sufficiently plead injury resulting from Dreyer's investment of racketeering funds. Opp'n at 8. Accordingly, for this reason and those discussed below, this claim is dismissed with leave to amend. Because ICD's *§ 1962(a)* claim serves as a predicate for one of its claims under *18 U.S.C. § 1962(d)*, which proscribes conspiracies to commit RICO violations, the Court likewise dismisses that claim with leave to amend.

A. Pattern of Racketeering Activity

"A 'pattern' of racketeering activity . . . requires proof that the racketeering predicates are related and 'that they amount to or pose a threat of continued criminal activity.'" *Turner v. Cook, 362 F.3d 1219, 1229 (9th Cir. 2004)* (quoting *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989))*. A pattern can be shown through either closed- or open-ended continuity. *Turner, 362 F.3d at 1229*. **[*9]** To allege closed-ended continuity, a plaintiff must aver a "series of related predicates" that extends "over a substantial period of time" and threatens future criminal conduct. *Id*. (citing *Howard v. Am. Online, Inc., 208 F.3d 741, 750 (9th Cir. 2000))* (editing marks omitted). To plead open-ended continuity, a plaintiff "must charge a form of predicate misconduct that 'by its nature projects into the future with a threat of repetition.'" *Turner, 362 F.3d at 1229* (quoting *Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366 (9th Cir. 1992))*.

ICD contends that it pleads a pattern through closed-ended continuity, referring to its allegations of misconduct spanning from July, 2004 through 2007. In particular, ICD identifies eleven statements between December, 2005 and March, 2006. However, with regard to nine of them, ICD fails to plead the mode through which Dreyer's communicated. [3] *See* 1AC PP 53, 56-61, 66-67. Therefore, as plead, these nine communications do not constitute mail or wire fraud. ICD does allege that Dreyer's communicated two allegedly false statements by wire, 1AC PP 55 and 65; however, two instances of alleged wire fraud do not establish closed-ended continuity.

Assuming ICD plead all eleven communications with sufficient specificity, mail and wire fraud over a four-month period would not constitute "a 'series of related predicates extending over a substantial period of time.'" *Turner, 362 F.3d at 1231*. To expand the timeframe, ICD refers to conduct that occurred in July, 2004. Then, Dreyer's employees allegedly conspired "to wrongfully acquire ICD's accounts through the use of false statements, unfair business practices, and hiring away key employees from ICD to steal ICD's account information." 1AC P 22. ICD does not cite authority providing that the goal of this conduct -- acquiring ICD's accounts -- constitutes racketeering activity under *18 U.S.C. § 1961(1)*. And although ICD alleges that Dreyer's used "false statements" to achieve this end, it fails to plead these statements with specificity. ICD has not identified the "who, what, where, or why" of these alleged false statements or "set **[*11]** forth what is false or misleading about" them and why they are false. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* (citation and quotation marks omitted). Thus, as plead, the July, 2004 conduct of which ICD complains cannot serve as a predicate for its RICO claim. [4]

ICD also cites three statements allegedly made in 2007. However, these three statements, along with the eleven others made between December, 2005 and March, 2006 do not constitute conduct over a substantial period of time, which is necessary to support a RICO claim. *See* *Turner, 362 F.3d at 1231* (concluding that ninety-four communications over a two-month period, along with three from the prior year, did not suffice as a pattern of racketeering activity). Furthermore, ICD fails to plead that at least two of these statements were false. 1AC PP 62 and 64. [5] Accordingly, ICD has not alleged a pattern through closed-ended continuity.

ICD likewise fails to plead a pattern through open-ended continuity. ICD contends that the statements between December, 2005 and March, 2006 demonstrated a threat of future misconduct. However, ICD has not plead these acts with the specificity required to suggest the communications constituted wire and mail fraud. And even if it had, ICD has not alleged facts to suggest a threat of future misconduct. ICD avers that Dreyer's identified Unilever as its "number one nemesis" and that it learned through Walgreens that Dreyer's engaged "in similar actions against various other local distributors." 1AC P 71. Citing *Ticor Title Insurance v. Florida*, ICD maintains that these allegations suggest a "regular way of conducting business" sufficient to show a threat of future misconduct. *937 F.2d 447, 450 (9th Cir. 1991)*. However, Dreyer's statement about its competitor, on its own, does not suggest that it will engage in future racketeering activity. And ICD fails to allege facts to support its claim that Dreyer's harmed other regional distributors through wire and mail fraud. **[*13]** If it intends to allege such fraudulent conduct, ICD

[3] ICD **[*10]** makes a broad allegation that Dreyer's communicated by telephone, U.S. mail and the Internet to further its alleged fraudulent scheme. 1AC P 76. However, this does not satisfy the specificity required for RICO claims.

[4] Furthermore, the alleged enterprise did not exist at that time. Although ICD avers that Mr. Stathers was part of the enterprise, it alleges that he became associated with Dreyer's in January, 2006.

[5] ICD does not appear to consider these statements false and misleading. As discussed **[*12]** in greater detail below, ICD argues that only one of the statements made in 2007 was false and misleading. *See* Opp'n at 13.

must allege facts with specificity. In its current complaint, ICD does not do so. Accordingly, it does not allege a pattern through open-ended continuity.

Because ICD fails to plead a pattern of racketeering conduct, the Court dismisses all of its RICO claims with leave to amend.

B. Proximate Causation

To show an injury under RICO, a plaintiff must show a concrete financial loss, not mere injury to a valuable intangible property interest. *Oscar v. Univ. Students Coop. Ass'n, 965 F.2d 783, 785 (9th Cir. 1992)*; *Fireman's Fund Ins. Co. v. Stites, 258 F.3d 1016, 1021 (9th Cir. 2001)*. The Supreme Court has stated that there must be "some direct relation between the injury asserted and the injurious conduct alleged. Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 268-69, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to plaintiff's injuries." **[*14]** *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 460-61, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*.

ICD adequately alleges that Defendants' acts proximately caused its injury. Although ICD may be seeking damages in excess of the harm Defendants actually caused, this would not defeat causation.

C. Claim under *18 U.S.C. § 1962(c)*

Under *18 U.S.C. § 1962(c)*,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

To establish liability under this section, a plaintiff must allege "(1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005)* (quoting *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001))*. In other words, a RICO "enterprise" [6] must constitute an entity distinct from the RICO "person." *Living Designs, 431 F.3d at 361*; *River City Markets, Inc. v. Fleming Foods W., Inc., 960 F.2d 1458, 1461 (9th Cir. 1992)* **[*15]** (stating that "a single individual or entity cannot be both the RICO enterprise and an individual RICO defendant"); *see also* *Walter v. Drayson, 538 F.3d 1244, 1247 (9th Cir. 2008)*.

ICD pleads that the three Dreyer's entities and Mr. Stathers are RICO "persons" that also comprise the RICO "enterprise." This does not satisfy the distinctiveness requirement. At the time the alleged activity took place, Mr. Stathers was a Dreyer's employee, and Edy's was a wholly-owned subsidiary of Dreyer's Grand Ice Cream, Inc. [7] An "enterprise" comprised of a corporation, a wholly-owned subsidiary and an employee of that corporate family is not a being sufficiently distinct from these entities as "persons." *See* *Living Designs, 431 F.3d at 361-62*; *Fogie v. THORN Americas, Inc., 190 F.3d 889, 896 (8th Cir. 1999)* (concluding that a parent and subsidiary are not sufficiently distinct for the purposes of *§ 1962(c)*); *Greenstein v. Peters, 2009 U.S. Dist. LEXIS 124196, 2009 WL 722067, at *2 (C.D. Cal.)*. As plead, the RICO "enterprise" **[*16]** is indistinguishable from the RICO "persons."

ICD cites *River City Markets, Inc. v. Fleming Foods West, Inc.*, in which the Ninth Circuit stated that "a plaintiff is free to name all members of an association-in-fact enterprise as individual defendants." *960 F.2d 1458, 1462 (9th Cir. 1992)* (citations omitted). However, *River City* is inapposite because it involved an enterprise comprised of two

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[6] An enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*.

[7] Notably, ICD does not plead how Dreyer's Grand Ice Cream Holdings, Inc. participated in the enterprise.

separate corporate families that "associated together in a business relationship akin to a joint venture . . . ." *Id. at 1461*. Thus, the combination of the individual defendants in the enterprise created a new entity because they had not been previously related. As the court explained, "Logically, one can associate with a group of which he is a member, with the member and the group remaining distinct entities." *Id*. The same does not apply here. Unlike in *River City*, the three Dreyer's Defendants are all part of the same corporate family, of which Mr. Strathers is an employee. The combination of Defendants as an enterprise does not create a sufficiently distinct being. Thus, ICD's reliance on *River* ***[*17]*** *City* is misplaced.

Accordingly, even if ICD adequately plead a pattern of racketeering activity, its *§ 1962(c)* claim would nevertheless fail because it does not plead RICO persons that are sufficiently distinct from the alleged RICO enterprise. For this additional reason, the Court dismisses this claim with leave to amend. Because ICD's *§ 1962(c)* claim serves as a predicate for one of its claims under *18 U.S.C. § 1962(d)*, that claim is likewise dismissed with leave to amend.

II. Federal and State Antitrust Claims

A. Sherman Act Claim

To state a claim under *§ 1 of the Sherman Act*, a plaintiff "must demonstrate: '(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.'" *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001)* (quoting *Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996))*.

Dreyer's argues that ICD's antitrust claims must be dismissed because ICD fails to allege an antitrust conspiracy and an injury to competition. Dreyer's also contends that ICD does not plead an unlawful **[*18]** tying arrangement.

1. Existence of a Contract, Combination or Conspiracy ICD alleges that Defendants entered into an agreement to demand "that ICD cease distribution and sale of all of Dreyer's competitors' products, namely Unilever products, and . . . enter into an agreement whereby ICD would distribute Dreyer's products exclusively." 1AC P 122. However, as plead, only Edy's and Dreyer's Grand Ice Cream, Inc. and its employees were responsible for this alleged anti-competitive conduct. Coordinated acts among a corporation, its wholly-owned subsidiary and its employees do not establish the type of conspiracy to which *§ 1* is directed. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (concluding that a corporation "and its wholly owned subsidiary . . . are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act"); *see also Jack Russell Terrier Network for N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1034 (9th Cir. 2005)* ("The crucial question is whether the entities alleged to have conspired maintain an 'economic unity,' and whether the entities were either actual or potential competitors."). These actors are not "pursuing separate economic **[*19]** interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals." *Copperweld, 467 U.S. at 769*. *Section 1* applies only to "restraints effected by a contract, combination, or conspiracy" and therefore "leaves untouched a single firm's anticompetitive conduct . . . ." *Id. at 775*.

To save its claim, ICD argues that, when "Dreyer's was attempting to force ICD into unlawful exclusivity and tying arrangements," Mr. Stathers was an ICD employee. Opp'n at 10. Although this may be true, it is irrelevant. To allege a conspiracy involving Mr. Stathers, ICD must plead that, while working for ICD, he agreed with Dreyer's to impose an unreasonable restraint of trade. [8] Furthermore, ICD does not allege that Mr. Stathers was an actual or potential competitor of ICD. Thus, Mr. Stathers does not appear legally capable of participating in an antitrust conspiracy.

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[8] In its complaint, ICD identifies Mr. Stathers as part of a group of persons that "also conspired to force ICD into improper tying arrangements and exclusivity arrangements." 1AC P 23. However, ICD does not plead facts to suggest that Mr. Stathers associated with Dreyer's prior to his **[*20]** employment in January, 2006. Thus, as alleged, Mr. Stathers did not "conspire" with Dreyer's until he was a Dreyer's employee.

ICD does not allege a contract, combination or conspiracy to support its § 1 claim. Accordingly, the Court dismisses ICD's Sherman Act claim with leave to amend.

2. Injury to Competition

"Indispensable to any section 1 claim is an allegation that *competition* has been injured rather than merely competitors." *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 734 (9th Cir. 1987)* (emphasis in original); *see also In re Webkinz Antitrust Litig., 695 F. Supp. 2d 987, 2010 U.S. Dist. LEXIS 20724, 2010 WL 597990, at *5 (N.D. Cal.)*. "'The intent proscribed by the antitrust laws lies in the purpose to harm competition in the relevant market, not to harm a particular competitor.'" *Rutman Wine, 829 F.2d at 735* (quoting *A.H. Cox & Co. v. Star Machinery, 653 F.2d 1302, 1307 (9th Cir. 1981))*. "In order successfully to allege injury to competition, a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably. Rather, a claimant must, at a minimum, sketch the outline of the antitrust violation with allegations of supporting factual detail." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507-08 (9th Cir. 1989)* **[*21]** (citing *Rutman Wine, 829 F.2d at 736*).

ICD pleads that the alleged demands by Dreyer's that it enter into exclusivity agreements had "the probable effect of foreclosing competition in a substantial share of the line of commerce." 1AC P 122. Although not clearly stated, it appears that ICD complains that Dreyer's harmed competition in the market for novelty ice cream products sold in convenience stores. *See* 1AC P 123 (pleading that Dreyer's "imposed an illegal tying arrangement on ICD by using its market power in grocery store accounts to demand that ICD purchase Defendants' novelty ice cream products, a distinct market in which Defendants Dreyer's and Edy's did not have market power"); Opp'n at 11 ("In the case at hand, the purpose of Dreyer's exclusivity requests were centered on its desire to damage Unilever's business and pick up market share."). However, ICD fails to plead any facts to suggest that Dreyer's reduced competition in this market or negatively impacted its competitors, such as Unilever. *See Rebel Oil Co., Inc. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995)*. And even if ICD made such allegations, it must also plead facts concerning how the conduct harmed consumers. **[*22]** *Id*. ("Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare.").

Instead of pleading facts addressing injury to the market, ICD alleges harm to its business. [9] This injury is not sufficient to sustain a claim under the Sherman Act. Accordingly, even if ICD plead an antitrust conspiracy, its Sherman Act claim would nevertheless fail because it failed to allege an injury to competition.

3. Illegal Tying Arrangement

"A tying arrangement is a device used by a seller with market power in one product market to extend its market power to a distinct product market." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 912 (9th Cir. 2008)* **[*23]** (citation omitted). "To accomplish this objective, the seller conditions the sale of one product (the tying product) on the buyer's purchase of a second product (the tied product)." *Id*. "For a tying claim to suffer per se condemnation, a plaintiff must prove: (1) that the defendant tied together the sale of two distinct products or services; (2) that the defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and (3) that the tying arrangement affects a 'not insubstantial volume of commerce' in the tied product market." *Id. at 913* (citation omitted).

ICD seems to plead that Dreyer's tied the sale of its multiple-serving ice cream product packages, generally marketed in grocery stores, to the purchase of its individual "novelty ice cream products," which are typically carried by convenience stories. 1AC P 123; Opp'n at 12. ICD suggests that Dreyer's did so because, although it had a presence in the grocery store distribution channel, it lacked a similar foothold in the convenience store channel.

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[9] ICD cites *Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, which does not support its position. *Klor's* involved allegations of a group boycott, whereby various manufacturers, distributors and a retailer conspired "either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms." *359 U.S. at 209*. Here, ICD does not plead that Dreyer's and the regional ice cream distributors conspired to engage in a group boycott against ICD.

ICD tying theory fails because, at the least, it has failed to allege that this purported tying arrangement impacted a "not **[*24]** insubstantial volume of commerce" in the novelty ice cream product market. ICD argues that its allegations that "it lost over six hundred convenience stores" supports its claim. ICD misapprehends the nature of this element. Tying arrangements are prohibited on the theory that they cause "reduced competition in the market for the tied product." *Rick-Mik Enters., Inc. v. Equilon Enters. LLC, 532 F.3d 963, 971 (9th Cir. 2008)* (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984))*. Thus, as above, ICD's allegation that it was harmed by the alleged tying conduct does not speak to whether competition in the convenience store product market was reduced.

Accordingly, like its allegations of an antitrust conspiracy, ICD's theory of liability based on tying fails. In any amended complaint, ICD must make factual allegations, if it can truthfully do so, that Dreyer's conditioned its sale of multiple-serving ice cream product packages on ICD's purchase of its novelty ice cream products, that Dreyer's had sufficient market power in the multiple-serving ice cream product market to coerce its customers and that this tying arrangement affected a "not **[*25]** insubstantial amount of commerce," through a reduction in competition, in the novelty ice cream market.

B. Cartwright Act Claim

The pleading requirements under the Sherman and Cartwright Acts are the same. *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*. Because ICD does not state a Sherman Act claim, its Cartwright Act claim likewise fails and is dismissed with leave to amend.

III. UCL Claim

California's Unfair Competition Law (UCL) prohibits any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. *Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*. Violation of almost any federal, state or local law may serve as the basis for a UCL claim. *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*. In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." *Olszewski v. Scripps Health, 30 Cal. 4th 798, 827, 135 Cal. Rptr. 2d 1, 69 P.3d 927 (2003)*.

ICD pleads under the unlawful prong of the UCL, [10] alleging that Dreyer's **[*26]** violated the RICO Act, the Sherman Act, the California Uniform Trade Secrets Act (CUTSA), the Cartwright Act and *California Business & Professions Code section 17500*, and interfered with its economic relations.

Because it fails to state claims for violations of the RICO Act and state and federal antitrust laws, ICD's UCL claim must be dismissed insofar as it is based on those claims. And although ICD also premises **[*27]** its UCL claim on violations of the CUTSA and intentional interference with economic relations, [11] the claim is nevertheless dismissed in its entirety for the reasons stated below.

A. Statute of Limitations

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[10] In its complaint, ICD states that the alleged violations of these statutes constituted "unfair" business practices. 1AC P 112. However, because ICD states in its opposition that its UCL claim is based on "violations of . . . 'borrowed' laws," the Court understands ICD to plead the unlawful prong of the UCL. Opp'n at 15. Pleading the "unfair" prong of the UCL requires a plaintiff to plead "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commun's v. L.A. Cellular Telephone Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. As noted above, ICD fails to allege harm to competition.

[11] Dreyer's maintains that ICD fails to allege facts supporting such unlawful conduct by each Dreyer's entity. However, ICD pleads that the Dreyer's entities committed these unlawful acts through their employees. Assuming they are agents of Dreyer's, the employees' actions can be imputed on to their employer.

"The UCL has a four-year statute of limitations, which applies even if the borrowed statute has a shorter limitations statute." *Blanks v. Shaw, 171 Cal. App. 4th 336, 364, 89 Cal. Rptr. 3d 710 (2009)* (citing *Cal. Bus. & Prof. Code § 17208*); *see also* *Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 179, 96 Cal. Rptr. 2d 518, 999 P.2d 706 (2000)* ("*Any* action on *any* UCL cause of action is subject to the four-year limitations period created by that section.") (emphasis in original). The "general rule is that a UCL cause of action borrows the substantive portion of the borrowed statute to prove the 'unlawful' prong of that statute, but not the limitations procedural part of the borrowed statute." *Blanks, 171 Cal. App. 4th at 364*.

Because **[*28]** ICD initiated this action on December 11, 2009, it may maintain its UCL claim based on conduct that occurred on or after December 11, 2005. [12]

B. Application of UCL to Conduct Outside of California

California's Unfair Competition Law "does not apply to actions occurring outside of California that injure non-residents." *Standfacts Credit Servs., Inc. v. Experian Information Solutions, Inc., 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005)* (citing *Norwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 226, 85 Cal. Rptr. 2d 18 (1999))*. Nonetheless, a claim under *section 17200* may be asserted by a non-resident plaintiff if the challenged conduct occurred in or emanated from California. *Wershba v. Apple Computer, Inc., 91 Cal. App 4th 224, 241-42, 110 Cal. Rptr. 2d 145 (2001)*; *Norwest Mortgage, 72 Cal. App. 4th at 222*.

The conduct of which ICD complains largely took place outside of California and, as a result, cannot provide a basis for its UCL claim. Accordingly, the claim is dismissed with leave to amend to allege **[*29]** conduct that occurred in or emanated from California.

C. Restitution

Under the UCL, private plaintiffs may only seek injunctive or restitutionary relief. *See* *Cal. Bus. & Prof. Code § 17203*; *see also* *Madrid v. Perot Sys. Corp., 130 Cal. App. 4th 440, 452-53, 30 Cal. Rptr. 3d 210 (2005)*. In "the context of the UCL, 'restitution' is limited to the return of property or funds in which the plaintiff has an ownership interest (or is claiming through someone with an ownership interest)." *Madrid, 130 Cal. App. 4th at 453* (citation omitted). Dreyer's maintains that ICD's UCL claim must be dismissed because ICD seeks damages, not restitution.

In its opposition, ICD argues that it is "entitled to restitution of money it paid to Defendants for ice cream products, money spent for equipment to distribute said products, and money spent for the purchase of ICD." Opp'n at 15. However, ICD did not plead this in its complaint. Nor did ICD plead how restitution of these monies is connected to the alleged unlawful business practices of Dreyer's. [13] Because ICD failed to plead the basis of its request for restitution, its UCL claim is dismissed with leave to amend.

CONCLUSION

For the foregoing reasons, the Court GRANTS Dreyer's motion to dismiss. (Docket No. 29.) The Court's holdings are summarized as follows:

1. ICD's claims under the RICO Act are dismissed with leave to amend. With respect to all of its RICO claims, ICD has failed to allege a pattern of racketeering activity. Concerning its claim under *18 U.S.C. § 1962(a)*, ICD has failed to allege injury resulting from Dreyer's investment of funds obtained through racketeering. As for its claim under *18 U.S.C. § 1962(c)*, ICD has failed to allege a RICO enterprise distinct from the purported RICO

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[12] The Court understands ICD to bring its false advertising claim under the UCL. Thus, it need not address Dreyer's arguments concerning the application of *California Code of Civil Procedure section 338* to this case.

[13] In its complaint, ICD provides conclusory statements that its "remedy **[*30]** at law is inadequate" and that it requires "restitution and disgorgement of all unjust profits." 1AC P 117; 1AC at 22.

persons. Because its claims under *§§ 1962(a)* and *1962(c)* fail, its claims under *§ 1962(d)* for conspiracy to commit violations under these sections likewise fail.

2. ICD's claim under the Sherman Act is dismissed with leave to amend. ICD fails to allege a cognizable contract, combination or conspiracy and an antitrust injury. ICD also does not plead a cognizable antitrust theory based on an unlawful tying arrangement. Because ICD fails to state a Sherman Act claim, its Cartwright Act claim **[*31]** is likewise dismissed.

3. ICD's claim under the UCL is dismissed with leave to amend. The relevant statute of limitations bars the action only to the extent that it rests on actions that accrued before December 11, 2005. However, ICD must allege conduct that occurred in or emanated from California and a basis for a restitutionary remedy.

ICD may file an amended complaint addressing the deficiencies detailed above within fourteen days of the date of this Order. If ICD does so, Defendants may file a motion to dismiss three weeks thereafter, with ICD's opposition due two weeks following and Defendants' reply due one week after that. The motion will be decided on the papers.

IT IS SO ORDERED.

Dated: May 28, 2010

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

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LexisNexis

Watkinson v. MortgageIT, Inc.

United States District Court for the Southern District of California

June 1, 2010, Decided; June 1, 2010, Filed

CASE NO. 10-CV-327 - IEG (BLM)

Reporter
2010 U.S. Dist. LEXIS 53540 *; 2010 WL 2196083

DON TOBIN WATKINSON, Plaintiff, vs. MORTGAGEIT, INC., Defendant.

Prior History: Watkinson v. Mortgageit, Inc., 2010 U.S. Dist. LEXIS 11815 (E.D. Cal., Feb. 9, 2010)

Core Terms

allegations, cause of action, motion to dismiss, rescission, grant a motion, borrower, unfair competition, unjust enrichment, practices, damages, lender, motion to strike, fraudulent, unfair, claim for damages, duty of care, constructive trust, present case, restitution, mortgage, fails, punitive damages, disclosures, conclusory, equitable, consumer, lending, violations, copy of the notice, loan application

Counsel: **[*1]** For Don Tobin Watkinson, Plaintiff: Mitchell L. Abdallah, LEAD ATTORNEY, Abdallah Law Group, Sacramento, CA.

For MortgageIT, Inc., Defendant: Kristine H Chen, LEAD ATTORNEY, Reed Smith LLP, San Francisco, CA.

Judges: IRMA E. GONZALEZ, United States District Chief Judge.

Opinion by: IRMA E. GONZALEZ

Opinion

ORDER:

(1) GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS [Doc. No. 31]; and

(2) GRANTING IN PART AND DENYING IN PART MOTION TO STRIKE [Doc. No. 32].

Currently before the Court are Defendant's Motion to Dismiss and Motion to Strike. Having considered the parties' arguments, the Court GRANTS IN PART and DENIES IN PART the Motion to Dismiss and GRANTS IN PART and DENIES IN PART the Motion to Strike.

BACKGROUND

I. Factual background

Plaintiff Don Tobin Watkinson resides at real property located at 8151 Caminito Santaluz Sur, San Diego, CA 92127 ("Property"). On November 11, 2006, Plaintiff obtained a loan from Defendant MortgageIT, Inc. Plaintiff alleges that he was offered an adjustable rate loan, even though he applied for a 30-year fixed rate loan. Shortly after closing the loan, however, Plaintiff encountered unexpected medical bills associated with a serious illness suffered by his wife, and therefore could **[*2]** no longer produce the necessary income to support his new mortgage. On April 3, 2009, Plaintiff alleges he contacted Defendant for a loan modification, but no modification proposal was ever given to him.

II. Procedural background

Plaintiff originally filed the suit in the District Court for the Eastern District of California. Plaintiff's Complaint alleges nine cause of action: (1) violation of the Truth in Lending Act ("TILA"), *15 U.S.C. §§ 1601 et seq.*; (2) violation of the Real Estate Settlement Procedures Act ("RESPA"), *12 U.S.C. §§ 2601 et seq.*; (3) rescission; (4) unfair competition in violation of *Section 17200 of the California Business and Professions Code*; (5) unjust enrichment; (6) predatory lending; (7) negligence; (8) resulting trust; and (9) constructive trust.

On February 9, 2010, the case was transferred to this Court. Subsequently, Defendant filed the present Motion to Dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* and Motion to Strike pursuant to *Fed. R. Civ. P. 12(f)*. Plaintiff filed late oppositions to both motions, and Defendant replied. The Court took the motions under submission pursuant to *Civil Local Rule 7.1(d)(1)*.

LEGAL STANDARD

I. Motion to dismiss

A motion to dismiss **[*3]** under *Rule 12(b)(6)* tests the legal sufficiency of the pleadings. A complaint survives a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S.544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The court may dismiss a complaint as a matter of law for: (1) "lack of cognizable legal theory," or (2) "insufficient facts under a cognizable legal claim." *SmileCare Dental Group v. Delta Dental Plan of Cal., 88 F.3d 780, 783 (9th Cir. 1996)* (citation omitted). The court only reviews the contents of the complaint, accepting all factual allegations as true, and drawing all reasonable inferences in favor of the nonmoving party. al-*Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009)* (citation omitted).

Despite the deference, the court need not accept "legal conclusions" as true. *Ashcroft v. Iqbal, __ U.S. __, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)*. It is also improper for the court to assume "the [plaintiff] can prove facts that [he or she] has not alleged." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. On the other hand, "[w]hen there are well-pleaded factual allegations, a court should assume **[*4]** their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 129 S. Ct. at 1950*.

II. Motion to strike

Under *Rule 12(f)*, the court may "strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." *FED. R. CIV. P. 12(f)*. "Immaterial" matter is that which has "'no essential or important relationship to the claim for relief or the defenses being pleaded.'" *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)* (citation omitted), rev'd on other grounds, *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*. "Impertinent" matter consists of statements that "'do not pertain, and are not necessary, to the issues in question.'" Id. (citation omitted). In ruling upon a motion to strike, just as with a motion to dismiss, the court must view the pleadings in a light most favorable to the nonmoving party. *In re 2TheMart.com, Inc. Sec. Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)*.

The purpose of a *Rule 12(f)* motion is "to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983)* (citation omitted). However, **[*5]** courts often view motions to strike with disfavor, and therefore will not grant a motion to strike "unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation." *Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)* (citations omitted); see also *Bureerong v. Uvawas, 922 F. Supp. 1450, 1478 (C.D. Cal. 1996)*. The court should deny the motion to strike if "there is *any doubt* as to whether the allegations might be an issue in the action." *In re 2TheMart.com, 114 F. Supp. 2d at 965* (citing *Fantasy, 984 F.2d at 1527*) (emphasis in original).

DISCUSSION

I. Motion to dismiss

A. TILA violations

Plaintiff's first cause of action alleges Defendant violated TILA by "failing to provide Plaintiff with accurate and clear and conspicuous material disclosures required under TILA" and by not fully informing him "of the pros and cons of adjustable rate mortgages in a language (both written and spoken) that [he] can understand and comprehend." (Compl. P 57.) Defendant moves to dismiss this cause of action, arguing that the TILA claim for damages is time-barred and that the TILA claim for rescission fails because Plaintiff has not properly **[*6]** complied with the notice requirements and has not alleged that he is able to tender the loan proceeds.

1. TILA claim for rescission

Section 1635 governs the borrower's right under TILA to rescind a "consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended." *15 U.S.C. § 1635(a)*. While the borrower's right of rescission must normally be exercised within a three-day period, TILA extends that period to three years where the lender fails to provide the borrower with certain "material disclosures" [1] or with the notice of the right to cancel. See id. *§ 1635(f)*; *12 C.F.R. § 226.23(a)(3)*.

In the present case, however, the allegations in the Complaint are insufficient to extend the limitations period to three years. The only alleged TILA violation that is **[*7]** ascertainable from Plaintiff's Complaint is that Defendant allegedly violated TILA by providing Plaintiff with only three, instead of four, copies of the Notice of Right to Cancel. (See Compl. P 47.) However, under TILA, the creditor is only required to deliver "*two copies* of the notice of the right to rescind to each consumer entitled to rescind." *12 C.F.R. § 226.23(b)(1)* (emphasis added). Accordingly, Defendant's failure to deliver four copies of the notice of the right to cancel does not constitute an actionable TILA violation.

Finally, apart from the alleged failure to provide a proper number of copies of the notice of the right to cancel, the Complaint fails to allege what specific material disclosures were not provided to Plaintiff or what specific provisions of TILA were violated. Rather, Plaintiff merely alleges in a conclusory fashion that:

> Defendants violated **TILA** by failing to provide Plaintiff with accurate and conspicuous material disclosures required under **TILA** and not taking into account the intent of the Legislature in approving this statute which was to fully inform borrowers of the pros and cons of adjustable rate mortgages in a language (both written and

[1] The term "material disclosures" means "the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in *§§ 226.32(c)* and *(d)* and *226.35(b)(2)*." *12 C.F.R. § 226.23(a)(3)* n.48.

> spoken) that **[*8]** they can understand and comprehend; and to advise them to compare similar loan products that might be more advantageous for the borrower under the same qualifying matrix.

(Compl. P 57.) Such conclusory allegations, however, are insufficient "to raise a right to relief above the speculative level." See *Twombly, 550 U.S. at 555*. Accordingly, because Plaintiff has not demonstrated that he is entitled to the longer limitations period of three years, the Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the TILA claim for rescission.

2. TILA claim for damages

As to Plaintiff's TILA claim for damages, that claim is clearly barred on the face of the complaint. As Defendant points out, claims for damages under TILA must be commenced within one year following the date of the alleged violation. See *15 U.S.C. § 1640(e)*; see also *Lynch v. RKS Mortgage Inc., 588 F. Supp. 2d 1254, 1259 (E.D. Cal. 2008)*. The date of violation refers to the date of the consummation of the transaction, unless the doctrine of equitable tolling applies. *King v. State of Cal., 784 F.2d 910, 915 (9th Cir. 1986)*. In the present case, because the loan transaction took place on November 11, 2006, but the complaint **[*9]** was not filed until November 7, 2009, the running of the statute of limitations on Plaintiff's TILA claim for damages is clear on the face of the complaint.

Moreover, Plaintiff is not entitled to equitable tolling because he has not carried his burden of showing that it applies in this context. Plaintiff had all of the information he needed to discover and bring an action regarding the alleged wrongs when the loan transaction closed, and he has not alleged that he was prevented in any way from doing so. See *Hubbard v. Fidelity Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996)* (concluding that plaintiff was not entitled to tolling where "nothing prevented [her] from comparing the loan contract, [defendant's] initial disclosures, and TILA's statutory and regulatory requirements" (citing *King, 784 F.2d at 915*)). Accordingly, because Plaintiff's TILA claim for damages is time-barred on the face of the complaint, it fails to allege sufficient facts to state a claim for relief that is plausible on its face. See *Twombly, 550 U.S. at 570*.

For the foregoing reasons, the Court **GRANTS** the motion to dismiss in this regard and **DISMISSES WITH PREJUDICE** Plaintiff's TILA claim for damages.

B. RESPA claim

Plaintiff's **[*10]** second cause of action alleges Defendant violated RESPA "because the payments to the mortgage broker and to the lender in regard to the principal balance and the interest adjustment were misleading and designed to create a windfall," whereby Defendant was paid a "yield spread premium" of approximately $ 9,000. (Compl. P 66.) According to Plaintiff, this premium was Defendant's "incentive for placing Plaintiff in a less attractive loan." (Id.)

Plaintiff's allegations of an improper "yield spread premium" and adjustments that were "designed to create a windfall" appear to fall under *Section 2607*, which prohibits kickbacks and unearned fees. See *12 U.S.C. § 2607*. However, because recovery under *Section 2607* is governed by a one-year statute of limitations, Plaintiff's claims in this regard are untimely on the face of the complaint. See id. *§ 2614*. Accordingly, because Plaintiff's second cause of action fails, the Court **DISMISSES** it **WITH PREJUDICE.**

C. Rescission

In his third cause of action, Plaintiff alleges that he is entitled to rescind the loan for all of the foregoing reasons: (1) TILA violations; (2) failure to provide a Mortgage Loan Origination Agreement; (3) failure to adequately **[*11]** provide loan documents and options in plain English, in which the agreement was negotiated; (4) Plaintiff was given three copies of the Notice of Right to Cancel, which is in contradiction to the lender's instructions; (5) failure to properly provide Truth in Lending disclosures; and (6) Defendants refused to accept Plaintiff's properly executed and delivered rescission. (Compl. P 70.) Plaintiff also alleges that he was "mistaken, misled and deceived about the material terms of the alleged loan." (Id. P 71.) Finally, Plaintiff indicates that upon rescission, he "will provide restitution to Defendant or the amount Plaintiff has been enriched." (Id. P 72.)

The Court has already dealt with rescission based on TILA. To the extent Plaintiff's third cause of action alleges additional grounds for rescission, the Court notes that "[r]escission is not a cause of action; it is a remedy." *Nakash v. Super. Ct., 196 Cal. App. 3d 59, 70, 241 Cal. Rptr. 578 (1987)* (citations omitted); accord *Gayduchik v. Countrywide Home Loans, Inc., No. 2:09-cv-03524 JAM-GGH, 2010 U.S. Dist. LEXIS 50561, 2010 WL 1737109, at *4 (E.D. Cal. Apr. 22, 2010)*; *Tiqui v. First Nat'l Bank of Az., No. 09cv1750 BTM (BLM), 2010 U.S. Dist. LEXIS 33326, 2010 WL 1345381, at *7 (S.D. Cal. Apr. 5, 2010)*. Accordingly, **[*12]** to the extent Plaintiff attempts to assert a *cause of action* for rescission on grounds other than TILA, the Court **DISMISSES WITH PREJUDICE** that cause of action. Plaintiff's request for rescission as a *remedy,* however, remains viable--provided Plaintiff is successful on the merits of one of his other causes of action.

D. Unfair competition claim

Plaintiff's fourth cause of action alleges Defendant violated California's unfair competition law ("UCL") "by consummating an unlawful, unfair, and fraudulent practice." (Compl. P 78.) *Section 17200* defines unfair competition as "any unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." *CAL. BUS. & PROF. CODE § 17200*. Because the statute is written in the disjunctive, it prohibits three separate types of unfair competition: (1) *unlawful* acts or practices, (2) *unfair* acts or practices, and (3) *fraudulent* acts or practices. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. In the present case, Plaintiff's fourth cause of action alleges that Defendant violated all three sub-parts of the unfair competition law.

1. Standing

Defendant first argues that Plaintiff **[*13]** lacks standing, which is a prerequisite for a private plaintiff to bring suit under *Section 17200*. See *Californians For Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 232-33, 46 Cal. Rptr. 3d 57, 138 P.3d 207 (2006)*. A private person has standing to assert a UCL claim only if he or she (1) "has suffered injury in fact" and (2) "has lost money or property as a result of the unfair competition." *CAL. BUS. & PROF. CODE § 17204*. In this case, accepting Plaintiff's allegations as true, he has adequately pled that he suffered an injury and lost money as a direct result of Defendant's actions.

2. Unlawful practices

By proscribing "any unlawful" business practice, *Section 17200* "borrows" violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. Id. "Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair competition] claim." *Plascencia v. Lending 1st Mortg., 583 F. Supp. 2d 1090, 1098 (N.D. Cal. 2008)* (citing *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994))*.

In this case, Plaintiff alleges that Defendant's actions were unlawful because they violated TILA as well as *Sections 1632*, *1916.7(c)*, and *2923.6* of **[*14]** the California Civil Code. (See Compl. PP 79, 84.) However, because the Court has already determined that the Complaint fails to state a cause of action under TILA, that statute cannot form the basis of Plaintiff's UCL claim. As for the other statutes alleged in Plaintiff's fourth cause of action, none of those are applicable in this case. First, there are no allegations in the Complaint that the loan transaction at issue here was negotiated in a language other than English, as required by *Section 1632*. See *CAL. CIV. CODE § 1632*. Second, Plaintiff has not alleged any facts to show that *Section 1916.7*, which governs adjustable rate mortgages, applies to her loan. See id. *§ 1916.7(c)*. Rather, as Defendant points out, the majority of adjustable rate mortgage loans in California originate under the federal Alternative Mortgage Transaction Parity Act, *12 U.S.C. § 3803(b)*, which preempts state laws. See, e.g., *Pagtalunan v. Reunion Mortg., Inc., No. C-09-00162 EDL, 2009 U.S. Dist. LEXIS 34811, 2009 WL 961995, at * 4 (N.D. Cal. Apr. 8, 2009)* (citing *Nat'l Home Equity Mortg. Ass'n v. Face, 239 F.3d 633, 637 (4th Cir. 2001))*. Finally, as other courts have noted with respect to *Section 2923.6*, "nothing in *Cal.*

Civ. Code § 2923.6 **[*15]** imposes a duty on servicers of loans to modify the terms of loans or creates a private right of action for borrowers." *Farner v. Countrywide Home Loans, No. 08cv2193 BTM (AJB), 2009 U.S. Dist. LEXIS 5303 , 2009 WL 189025, at *2 (S.D. Cal. Jan. 26, 2009)*; accord *Pantoja v. Countrywide Home Loans, 640 F. Supp. 2d 1177, 1188 (N.D. Cal. 2009)*. Accordingly, because there is no predicate violation that can form the basis of Plaintiff's UCL claim, Plaintiff has failed to state a claim for relief under the "unlawful practices" prong.

3. Fraudulent practices

Likewise, with respect to the "fraudulent practices" prong, Plaintiff has failed to allege sufficient facts to state a claim for relief. To prove fraud under California law, the plaintiff must demonstrate: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Engalla v. Permanente Med. Group, Inc., 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (1997)* (citation and internal quotations marks omitted). Moreover, to establish "fraudulent acts" under the UCL, the plaintiff must show that "members of the public are likely to be deceived." **[*16]** *Sybersound Records, Inc. v. UAV Corp., 517 F.3d 1137, 1152 (9th Cir. 2008)* (citation omitted); accord *South Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 888, 85 Cal. Rptr. 2d 301 (1999)*.

In addition, *Rule 9(b) of the Federal Rules of Civil Procedure* requires allegations of fraud or mistake to be stated "with particularity." In the Ninth Circuit, this rule "has been interpreted to mean the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Misc. Serv. Workers, Drivers & Helpers v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981)* (citations omitted); see also *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)* ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." (citation omitted)).

In the present case, Plaintiff has failed to satisfy the heightened pleading requirement of *Rule 9(b)*. The fourth cause of action alleges in a conclusory fashion that Defendants' conduct was fraudulent because "Defendants gave information to Plaintiff, that was factually incorrect" and because "Defendants omitted to provide information, **[*17]** which he [sic] was bound by law to provide." (Compl. PP 80-81.) However, it is unclear from these allegations what was the *specific content* of the fraudulent misrepresentations or *who* on behalf of Defendant made those representations. Likewise, apart from conclusory allegations, the Complaint fails to allege *why* Plaintiff believes the statements were false when made. Fraudulent intent cannot be proven by simply pointing to the defendant's subsequent nonperformance. See *Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30-31, 216 Cal. Rptr. 130, 702 P.2d 212 (1985)*. Rather, "the plaintiff must plead facts explaining why the statement was false when it was made." *Smith v. Allstate Ins. Co., 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001)* (citation omitted). In the present case, Plaintiff's unfair competition claim cannot survive the motion to dismiss because Plaintiff fails to plead this cause of action with the specificity required by *Rule 9(b)*. [2]

4. Unfair practices

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[2] The remainder of the Complaint is not helpful in discerning the precise scope of Plaintiff's UCL claim. For example, the Complaint alleges in conclusory manner that: (1) Defendants claimed to maintain underwriting guidelines that assessed the ability of the borrower to repay the debt; **[*18]** (2) they purposefully relaxed those guidelines and sold risky loan products to other borrowers like Plaintiff; (3) Defendants failed to clearly and conspicuously disclose the key provisions of the loans, even though they were very complicated; (4) Defendants provided undisclosed incentives to their agents and officers for marketing and selling these risky loans; and (5) Defendants misrepresented the true terms of the loans. (See generally Compl. PP 14-42.) However, none of these allegations provide any specific allegations as to *who* on behalf of Defendants made these representations, *how* Defendants misrepresented the terms of the loans, or *why* the statements were false or misleading. See *Vess, 317 F.3d at 1106* ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." (citation omitted)); *Misc. Serv. Workers, 661 F.2d at 782* (noting that "the pleader must state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation" (citations omitted)).

Finally, Plaintiff has failed to allege sufficient facts to state a claim for relief under the "unfair **[*19]** practices" prong. Where direct competitors are concerned, the California Supreme Court has concluded that the word "unfair" means "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel. Tech., 20 Cal. 4th at 187*. On the other hand, when an action is brought by a consumer or a competitor alleging a different kind of violation, as is the case here, it appears a broader definition would apply. In that context, an "unfair" business practice occurs "when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." See *People v. Casa Blanca Convalescent Homes, Inc., 159 Cal. App. 3d 509, 530, 206 Cal. Rptr. 164 (1984)*, abrogated on other grounds in *Cel. Tech., 20 Cal. 4th at 186-87* & n.12; accord *McDonald v. Coldwell Banker, 543 F.3d 498, 506 (9th Cir. 2008)*.

In this case, Plaintiff alleges Defendants' conduct was unfair because "Defendants failed to provide disclosures that could be understood by Plaintiff, thus making **[*20]** it likely that Plaintiff would be deceived." (Compl. P 82.) However, the Court cannot conclude from these conclusory allegations whether Defendants' actions "offend[] an established public policy" or if they are "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." See *Casa Blanca, 159 Cal. App. 3d at 530*. Accordingly, Plaintiff's claim for relief under the "unfair practices" prong also fails.

For the foregoing reasons, the Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the entire UCL claim.

E. Unjust enrichment

Plaintiff's fifth cause of action alleges unjust enrichment by Defendants. Under California law, "[t]he theory of unjust enrichment requires one who acquires a benefit which may not justly be retained, to return either the thing or its equivalent to the aggrieved party so as not to be unjustly enriched." *Otworth v. Southern Pac. Transp. Co., 166 Cal. App. 3d 452, 460, 212 Cal. Rptr. 743 (1985)* (citations omitted). However, unjust enrichment is inapplicable where the defendant has merely obtained that to which it was entitled pursuant to a contract between the parties. See *Jones v. Wells Fargo Bank, 112 Cal. App. 4th 1527, 1541, 5 Cal. Rptr. 3d 835 (2003)*.

In the **[*21]** present case, there are no allegations that Defendant has received any benefit at Plaintiff's expense such that it was unjustly enriched. Rather, it appears the only allegation of unjust enrichment is that Defendant *might* receive a windfall in case there is a forced sale of Plaintiff's home. (Compl. P 91.) Such allegations, however, are insufficient to "to raise a right to relief above the speculative level." See *Twombly, 550 U.S. at 555*. Moreover, unjust enrichment is inapplicable to the extent that any benefit derived by Defendant would be pursuant to the loan contract between the parties. See *Jones, 112 Cal. App. 4th at 1541*. Accordingly, the Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the unjust enrichment claim.

F. Predatory lending

Plaintiff's sixth cause of action alleges Defendant committed predatory lending by marketing the subject loan in whole or in part on the basis of fraud, exaggeration, misrepresentation, and concealment of material facts. (Compl. P 96.) According to Plaintiff, the loan contains terms whereby the borrower can never realistically repay the loan, which is representative of "Bait & Switch" tactics. Plaintiff, however, fails to indicate **[*22]** any legal basis for his "predatory lending" cause of action. As a result, both the Court and Defendant are left to guess whether this claim is based on an alleged violation of federal law, state law, common law, or some combination of the above. Accordingly, the Court **GRANTS** the motion to dismiss in this regard and **DISMISSES WITH LEAVE TO AMEND** the predatory lending claim. See *Twombly, 550 U.S. at 555* (noting that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions"). [3]

G. Negligence

Plaintiff's seventh cause of action alleges negligence against Defendant. To state a claim for negligence, a plaintiff must allege: (1) the defendant's legal duty of care to the plaintiff; (2) breach of that duty; (3) causation; and (4) resulting injury to the plaintiff. *Merrill v. Navegar, Inc., 26 Cal. 4th 465, 500, 110 Cal. Rptr. 2d 370, 28 P.3d 116 (2001)*. In the present case, Defendant argues the negligence cause of action fails because Plaintiff cannot demonstrate that Defendant owed him a duty **[*23]** of care.

As a general rule, "a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Nymark v. Heart Fed. Sav. & Loan Ass'n, 231 Cal. App. 3d 1089, 1095-96, 283 Cal. Rptr. 53 (1991)* (citations omitted). However, there are instances where the law imposes a duty on the lender. In California, the test for determining whether a duty exists between a lender and a borrower-client "'involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.'" *Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 865, 73 Cal. Rptr. 369, 447 P.2d 609 (1968)* (quoting *Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16 (1958))*; accord *Nymark, 231 Cal. App. 3d at 1098*.

In the present case, Plaintiff alleges that Defendant overstated Plaintiff's income and the value **[*24]** of the Property on the loan application, knowing that both of those were false. (Compl. PP 20, 27.) Taking these allegations as true, Defendant arguably owed Plaintiff a duty of care in processing Plaintiff's loan application. The transaction at issue was undoubtedly "intended to affect the plaintiff" in that the outcome of the loan application determined what type of loan Plaintiff would qualify for. Likewise, it was readily foreseeable that misstating the amounts on the application and providing Plaintiff with a loan for which he was not qualified would potentially harm Plaintiff in that it increased the likelihood that he would default on the loan. The injury to Plaintiff is also certain because Plaintiff lost an opportunity to obtain a loan that he could afford and there are now foreclosure proceedings instituted against him. All of these factors weigh in favor of finding a duty of care in this case.

On the other hand, because Plaintiff's inability to pay the mortgage was caused by his wife's sudden illness, there might not be a close connection between Defendant's conduct and the injury suffered. Similarly, at this stage of the proceedings, it is unclear whether moral blame should **[*25]** attach to Defendant's conduct and whether public policy will be better served in prohibiting lenders from extending loans to individuals who might not be qualified for them. On balance, however, these factors do not necessarily weigh against the finding of duty of care in this case.

Finally, even the court in Nymark, on which Defendant relies, noted that the "general rule" that a lender does not owe a duty of care to a borrower is not absolute. On the contrary, in holding there was no duty of care in that case, the court noted that "[t]he complaint does not allege, nor does anything in the summary judgment papers indicate, that the appraisal was intended to induce plaintiff to enter into the loan transaction or to assure him that his collateral was sound." *Nymark, 231 Cal. App. 3d at 1096-97*. In this case, however, Plaintiff does allege Defendant misstated the value of the Property in order to induce him into acquiring the more riskier loan. (Compl. PP 20, 23, 27, 29-30.)

Accordingly, based on the consideration of the above factors and the fact that Defendant intended to induce Plaintiff to enter into the loan transaction, the Complaint contains sufficient facts to allege that Defendant **[*26]** owed

[3] To the extent Plaintiff cites Cal. Civ. Code § 17200 in his predatory lending claim, that allegation is duplicative of the fourth cause of action for violation of the UCL.

Plaintiff a duty of care when it allegedly misstated Plaintiff's income and the value of the Property on Plaintiff's loan application. See *Garcia v. Ocwen Loan Serv., LLC, No. C 10-0290 PVT, 2010 U.S. Dist. LEXIS 45375, 2010 WL 1881098, at *3 (N.D. Cal. May 10, 2010)* (finding that a lender owed a duty of care to a borrower-client in processing the borrower's loan modification application). Therefore, the Court **DENIES IN PART** the motion to dismiss in this regard.

On the other hand, the Court **GRANTS IN PART** the motion to dismiss to the extent Plaintiff's seventh cause of action alleges that there was an explicit or implicit duty of care to Plaintiff pursuant to the Note or the Deed of Trust because the Complaint fails to demonstrate how Defendant's obligations in this regard exceeded the scope of Defendant's "conventional role as a mere lender of money." See *Nymark, 231 Cal. App. 3d at 1095-96*. Similarly, there is no duty of care pursuant to the TILA because the Court has already rejected Plaintiff's contention that he was entitled to four, instead of three, copies of the notice of the right to cancel. For the foregoing reasons, the Court **DISMISSES WITH PREJUDICE** **[*27]** these allegations in the seventh cause of action.

H. Resulting and constructive trust

Finally, Plaintiff's eighth and ninth causes of action are titled "resulting trust" and "constructive trust," respectively. In his eighth cause of action, Plaintiff appears to argue that if the foreclosure sale is allowed to go through, there should be a resulting trust created. (Compl. P 106.) In his ninth cause of action, Plaintiff alleges that any foreclosure sale of the Property would be "improper and contrary to law," and therefore Defendant should be required to hold the Property as a constructive trustee for the benefit of Plaintiff. (Id. PP 108-110.) However, as Defendant correctly points out, neither a "constructive trust" nor a "resulting trust" is an independent *cause of action;* rather, each of these is merely a type of a *remedy.* See *Batt v. City & County of S.F., 155 Cal. App. 4th 65, 82, 65 Cal. Rptr. 3d 716 (2007)* ("A constructive trust is 'not an independent cause of action but merely a type of remedy,' and an equitable remedy at that." (internal citations omitted)); *Stansfield v. Starkey, 220 Cal. App. 3d 59, 76, 269 Cal. Rptr. 337 (1990)* ("In their third amended complaint appellants alleged, as causes of action, a resulting **[*28]** trust and a constructive trust. But neither is a cause of action[,] only a remedy." (internal citations omitted)). Accordingly, the Court **GRANTS** the motion to dismiss in this regard and **DISMISSES WITH PREJUDICE** Plaintiff's causes of action for resulting and constructive trust. Plaintiff's request for a resulting or a constructive trust as a *remedy,* however, remains viable--provided Plaintiff is successful on the merits of one of his other causes of action.

II. Motion to strike

A. Request for punitive damages

Defendant moves to strike Plaintiff's request for punitive damages, arguing that it is not adequately supported by factual allegations in the Complaint. In doing so, Defendant relies on mostly California cases that set forth a heightened pleading standard for plaintiffs seeking punitive damages under *Section 3294(a) of the California Civil Code*.

The Court declines to grant the motion to strike on these grounds. *Section 3294* provides for recovery of punitive damages where a plaintiff establishes by clear and convincing evidence that a defendant acted with "oppression, fraud, or malice." *CAL. CIV. CODE § 3294(a)*. However, while *Section 3294* governs Plaintiff's *substantive* claim for punitive **[*29]** damages, the Federal Rules of Civil Procedure govern the punitive damages claim *procedurally* with respect to the adequacy of pleadings. See *Clark v. State Farm Mut. Auto. Ins. Co., 231 F.R.D. 405, 406-07 (C.D. Cal.2005)*; *Jackson v. East Bay Hosp., 980 F. Supp. 1341, 1353 (N.D. Cal. 1997)*; *Bureerong, 922 F. Supp. at 1480*. Pursuant to these rules, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought." *FED. R. CIV. P. 8(a)(2)*, *(3)*. Moreover, with respect to "[m]alice, intent, knowledge, and other conditions of a person's mind," the Federal Rules provide that these allegations "may be alleged generally." *FED. R. CIV. P. 9(b)*.

In the present case, the Complaint contains sufficient allegations to support the request for punitive damages. See, e.g., Compl. P 27 ("Defendants even went so far as to blatantly misrepresent and overstate Plaintiff's income on his loan application . . . ."); id. ("Defendants intentionally misled Plaintiff . . . ."); id. P 30 ("Defendants knew and should have known that Plaintiff's loans would likely result in default and foreclosure . . . ."); id. P 38 ("Defendants **[*30]** did whatever it took to sell more loans, faster . . . ."). The fact that these allegations might be conclusory is not relevant at this stage because under the federal pleading standards, the plaintiff may rely on conclusory averments of malice or fraudulent intent to plead the mental state required by *Section 3294*. See *Clark v. Allstate Ins. Co., 106 F. Supp. 2d 1016, 1019 (S.D. Cal. 2000)* ("In federal court, a plaintiff may include a "short and plain" prayer for punitive damages that relies entirely on unsupported and conclusory averments of malice or fraudulent intent."); accord *Align Tech., Inc. v. Fed. Ins. Co., 673 F. Supp. 2d 957, 965 (N.D. Cal. 2009)*; *Clark v. State Farm Mut. Auto Ins. Co., 231 F.R.D. at 406-07*.

Accordingly, because Defendant failed to demonstrate that these allegations otherwise constitute "redundant, immaterial, impertinent, or scandalous matter," the Court **DENIES** the motion to strike in this regard. The Court, however, does not express any opinion as to whether these allegations satisfy the substantive requirements of *Section 3294(a)*. To the extent Defendant challenges the sufficiency of the factual allegations underlying the claim for punitive damages, the **[*31]** proper medium is a motion to dismiss under *Rule 12(b)(6)*, not *Rule 12(f)*.

B. Reference to conduct that is not actionable under TILA

Defendant next asks the Court to strike the following allegation in paragraph 57 of the Complaint with respect to the TILA requirements: "It also requires the lender to offer other loan products that might be more advantageous for the borrower under the same qualifying matrix." According to Defendant, this allegation impermissibly expands the scope of TILA because TILA does not dictate the terms and conditions under which credit can be extended.

However, in enacting TILA, the Congress expressly found that "[t]he informed use of credit results from an awareness of the cost thereof by consumers." *15 U.S.C. § 1601(a)*. Thus, TILA's purpose was "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." Id. Arguably, there is a relation between this congressional intent and Plaintiff's allegations that the lender should be required **[*32]** to "offer other loan products that might be more advantageous for the borrower." Accordingly, because it is not entirely clear to the Court that the challenged allegation in paragraph 57 of the Complaint "could have no possible bearing on the subject of the litigation," the Court **DENIES** the motion to strike in this regard. See *Platte Anchor Bolt, 352 F. Supp. 2d at 1057* ("A motion to strike should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation." (citations omitted)).

C. Prayer for relief under TILA

Defendant next asks the Court to strike Plaintiff's request for actual and statutory damages as well as for "equitable restitution and disgorgement of profits obtained by Defendants" in connection with Plaintiff's TILA claim. The Court has already determined that Plaintiff's TILA claim for damages is barred by the applicable one-year statute of limitations. See *15 U.S.C. § 1640(e)*. This includes both actual and statutory damages. See id. *§ 1640(a)*. As for Plaintiff's request for equitable restitution and disgorgement, the Court agrees with Defendant that these are not remedies that are available under TILA. See, e.g., **[*33]** *Christ v. Beneficial Corp., 547 F.3d 1292, 1298 (11th Cir. 2008)* ("Because we do not expect Congress to 'expressly preclude' remedies, we do not read TILA to confer upon private litigants an implied right to an injunction or other equitable relief such as restitution or disgorgement." (citation omitted)); *Perrone v. Gen. Motors Acceptance Corp., 232 F.3d 433, 439 (5th Cir. 2000)* ("If Congress had meant for restitution to be the measure of actual damages [under TILA], it could have easily said so in the statute. It did not. The fact that restitution is an available remedy for some purposes does not mean that Congress intended for this to be the measure of all other damages."). Accordingly, the Court **GRANTS** the motion to strike and **STRIKES WITH PREJUDICE** the following paragraphs of the Complaint as they relate to the TILA claim:

> 59. An actual controversy now exists between Plaintiff, who contends that he has the right to damages for Defendants' violations related to the loan on the Subject Property alleged in this complaint, and Defendants.
>
> 60. As a direct and proximate result of Defendants' violations, Plaintiff has incurred and continues to incur damages in an amount according to proof **[*34]** but not yet ascertained including without limitation, statutory damages and all amounts paid or to be paid in connection with the transaction.
>
> 61. Defendants were unjustly enriched at the expense of Plaintiff who is therefore entitled to equitable restitution and disgorgement of profits obtained by Defendants.

D. Prayer for relief under the unfair competition law

Finally, Defendant asks the Court to strike Plaintiff's request for damages as it relates to Plaintiff's UCL claim. As Defendant correctly argues, and Plaintiff concedes, *Section 17200 of the California Business and Professions Code* limits the plaintiff's remedies to restitution and injunctive relief. See *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)* ("While the scope of conduct covered by the UCL is broad, its remedies are limited. A UCL action is equitable in nature; damages cannot be recovered." (internal citations omitted)); *Cel-Tech, 20 Cal. 4th at 179* ("Prevailing plaintiffs [under the UCL] are generally limited to injunctive relief and restitution. Plaintiffs may not receive damages, much less treble damages, or attorney fees." (internal citations omitted)). Accordingly, the Court **GRANTS** the **[*35]** motion to strike in this regard and **STRIKES WITH PREJUDICE** the following paragraph of the Complaint as it relates to the UCL claim:

> 85. By reasons of the foregoing, Plaintiff has suffered and continues to suffer damages in a sum not yet ascertained, to be proven at trial.

CONCLUSION

I. Motion to dismiss

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART the motion to dismiss. Specifically, the Court ORDERS as follows:

- The Court **GRANTS** the motion to dismiss and **DISMISSES WITH PREJUDICE** the following causes of action: (1) the first cause of action to the extent it alleges a TILA claim for damages; (2) the second cause of action for RESPA violations, (3) the third cause of action for rescission; (4) the seventh cause of action to the extent it alleges a duty of care for a violation other than Defendant's alleged misstatement of Plaintiff's income and the value of the Property on the loan application; and (5) the eighth and ninth causes of action for resulting and constructive trusts.

- The Court **GRANTS** the motion to dismiss and **DISMISSES WITH LEAVE TO AMEND** the following causes of action: (1) the first cause of action to the extent it alleges a TILA claim for rescission; **[*36]** (2) the fourth cause of action for violation of the unfair competition law; (3) the fifth cause of action for unjust enrichment; and (4) the sixth cause of action for predatory lending. Plaintiff shall have **thirty (30) days** from the filing of this Order to file a First Amended Complaint.

- The Court **DENIES** the motion to dismiss in all other regards.

II. Motion to strike

The Court also GRANTS IN PART and DENIES IN PART the motion to strike. Specifically, the Court **GRANTS** the motion and **STRIKES WITH PREJUDICE** paragraphs 59, 60, and 61 of the Complaint as they relate to Plaintiff's

TILA claim, and paragraph 85 of the Complaint as it relates to Plaintiff's UCL claim. The Court **DENIES** the motion to strike in all other respects.

IT IS SO ORDERED.

DATED: June 1, 2010

/s/ Irma E. Gonzalez

IRMA E. GONZALEZ, Chief Judge

United States District Court

Downs v. Insight Communs. Co., L.P.

United States District Court for the Western District of Kentucky

June 3, 2010, Filed

CIVIL ACTION NO. 3:09-CV-93-S

Reporter

2010 U.S. Dist. LEXIS 54577 *; 2010-1 Trade Cas. (CCH) P77,059; 2010 WL 2228295

MICHELLE DOWNS and LAURIE JARRETT, PLAINTIFFS v. INSIGHT COMMUNICATIONS COMPANY, L.P., d/b/a INSIGHT, DEFENDANT

Subsequent History: Motion denied by *Downs v. Insight Communs. Co., L.P., 2011 U.S. Dist. LEXIS 29616 (W.D. Ky., Mar. 22, 2011)*

Summary judgment granted by *Jarrett v. Insight Communs. Co., L.P., 2014 U.S. Dist. LEXIS 103079 (W.D. Ky., July 29, 2014)*

Core Terms

cable, boxes, tying product, customers, products, tied product, Premium, cable service, consumers, rent, amended complaint, coercion, cable television, allegations, plaintiffs', technology, television, coerce, buy

Counsel: **[*1]** For Michelle Downs, Laurie Jarrett, Plaintiffs: Adrienne W. Kim, Doris A. Kim, Mark K. Gray, Matthew L. White, Franklin Gray & White, Louisville, KY; Joe R. Whatley, Jr., Whatley Drake & Kallas, LLC, Birmingham, AL; Max R. Schwartz, Whatley Drake & Kallas, LLC, New York, NY.

For Insight Communications Company, L.P., doing business as Insight, Defendant: Laurence John Zielke, LEAD ATTORNEY, Janice M. Theriot, The Zielke Law Firm, Louisville, KY; Bruce D. Sokler, Robert G. Kidwell, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Washington, DC.

Judges: Charles R. Simpson, III, United States District Judge.

Opinion by: Charles R. Simpson, III

Opinion

MEMORANDUM OPINION

In this putative class action, two Louisville residents have sued Insight Communications Company (the dominant local cable television provider) for alleged violations of the Sherman Antitrust Act, *15 U.S.C. § 1*. (We thus have jurisdiction pursuant to *28 U.S.C. § 1331*.) Plaintiffs claim that Insight illegally requires its customers who desire to purchase certain of its cable services to rent from it a set-top cable box in order to receive the content. Insight has moved to dismiss the complaint for failure to state a cognizable Sherman Act claim. That motion **[*2]** will be granted and the complaint dismissed, but the court will grant the plaintiffs' request to file an amended complaint curing the flaws we locate herein.

I

The following facts are drawn from the face of the amended complaint. Insight sells its cable television services in a number of tiers. At the lowest ("basic cable") level, a subscriber can simply plug a cable into his modern "cable ready" television and begin receiving the content he has purchased. (A customer with an older television may have to acquire a cable box, but such users are not included in the plaintiffs' proposed class definition.) Higher levels of service--designated "Premium Cable Services"--require additional equipment even for owners of new TVs. These premium services include specialty channels such as HBO and Showtime as well as "pay-per-view" and "on demand" programming.

Cable boxes serve two basic functions. First, they allow the customer to receive video signals and to navigate among the various channels provided by the cable company. Second, they provide security, allowing the customer access only to those channels for which he has paid. Two companies, Motorola and Scientific Atlanta, dominate the cable box **[*3]** manufacturing market, with Motorola working under contract with Insight. According to the complaint, neither manufacturer will sell its cable boxes to the general public. Instead, Motorola sells them to Insight, which then leases them to its subscribers. The problem arises, the plaintiffs allege, because Insight requires its customers to rent the cable boxes it provides in order to receive Premium Cable Services. Cable customers cannot buy the boxes on the open market, or acquire them from some other source. The plaintiffs admit that, pursuant to a regulation that went into effect on July 1, 2007, an alternative technology ("CableCARD") has been available to fulfill the security function of the cable box, but argue that Insight has inhibited the practical availability and effectiveness of this option in order to coerce its customers into renting Insight cable boxes. Plaintiffs also allege that Insight has "limited the effectiveness of CableCARDs," such that the alternative technology is so undesirable as to give consumers no real choice but to rent an Insight cable box. As a result, no rental or purchase markets have developed for cable boxes, and the plaintiffs allege that they are **[*4]** coerced to spend more money renting the necessary equipment from Insight than it would be worth if purchased outright.

Insight has no real competition among cable television providers in many of the areas in which it operates. Barriers to entry are high, as significant infrastructure is required for the delivery of cable television throughout a community. The main competitors are satellite television providers, but their services are unavailable to many households, by dint of their location in areas without a clear view of the sky or in apartments where satellite dishes are specifically forbidden by the terms of the lease. Insight is also able to "bundle" its television services with broadband internet access and phone service, a tactic satellite providers cannot employ. Plaintiffs therefore maintain that satellite services do not serve as adequate substitutes for Insight's land-based cable television.

II

A complaint "only survives a motion to dismiss if it 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Courie v. Alcoa Wheel & Forged Prods., 577 F.3d 625, 629 (6th Cir. 2009)* (*quoting* *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009))*. **[*5]** This raises the bar from where *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* had left it: Whereas under *Conley* a court was to dismiss a facially well-pleaded complaint only if its contents were so outlandish as to be utterly incapable of proof, *Iqbal* (along with its predecessor, *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))* advises us to toss out a case unless the allegations meet some minimum standard of plausibility. *Courie, 577 F.3d at 629-30*. Specifically, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1949* (*citing* *Twombly, 550 U.S. at 556*). While we must take the complaint's factual allegations as true in making this assessment, we need not accept the truth of legal conclusions or draw unwarranted factual inferences. *Directv, Inc. v. Treesh, 487 F.3d 471, 476 (6th Cir. 2007)*; *Gregory v. Shelby County, 220 F.3d 433, 446 (6th Cir. 2000)*.

III

Plaintiffs allege that Insight's policy of requiring premium cable subscribers to rent Insight cable boxes constitutes an illegal "tying" of one product (the cable box) to another (the cable **[*6]** service). To make out such a claim at this stage, the complaint must successfully allege five elements: (1) the existence of two separate products (i.e. a tying product and a tied product); (2) that the seller has appreciable economic power in the tying product market, such that it is able to coerce consumers into buying the tied product; (3) that the tying arrangement affects a substantial volume of commerce in the market for the tied product; (4) that the seller of the tying product has a direct economic interest in the sale of the tied product; and (5) that the plaintiff has suffered an antitrust injury as a result of the tying arrangement. *CTUnify, Inc. v. Nortel Networks, Inc., 115 Fed. Appx. 831, 834 (6th Cir. 2004)* (unpublished) (citations omitted). *Cf.* ABA Section of ***Antitrust Law***, 1 ***Antitrust Law*** Developments 177 (6th Ed. 2007) (hereinafter ***Antitrust Law*** *Developments*).

A. Two Separate Products

According to the Supreme Court, "the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, *abrogated* ***[*7]*** *on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. The question is whether the products in question are "distinguishable in the eyes of buyers." *Id.* In *Jefferson Parish,* the Court held that anesthesiological services were sufficiently distinct from the balance of the defendant hospital's package of offerings to give rise to a finding that two separate products existed. *Id. at 23*. The critical question was whether "there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services," and the court found that the answer was "[u]nquestionably" affirmative. *Id. at 21-22*. The Court reiterated this definition in *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, holding that repair services and replacement parts were separate products subject to the prohibition on tying. This was the case even despite the defendant's claim that the two products were inextricably linked, in that either one was more or less useless without the other. *Id. at 463* (*citing* *Jefferson Parish, 466 U.S. at 19 n.30*).

Plaintiffs **[*8]** here have adequately alleged the existence of two separate products. Absent Insight's allegedly illegal tying behavior, a market for cable boxes might well develop in the same way that there exist markets for modems and telephones, without which Internet and phone services are useless. Insight already offers multiple cable box products (such as, for instance, boxes offering Digital Video Recording capability (*see* Am. Compl. P 22)), and bills its customers separately for the box rental and for the service itself (*id.* at P 21). We reject the defense's suggestion that a finding of separate products requires "that an independent market *now* exists--from the comsumer's point of view--for the "tied" product." (Def.'s Br. 14 (emphasis added).) By that logic a firm could safely engage in anticompetitive activity provided he maintained such a complete monopoly as to prevent anyone else from selling the product in question--but that result is precisely the sort of thing that the antitrust laws are meant to avoid. The question is not whether a market exists in the sense of several firms already competing in the marketplace, but rather in the sense that there exists "sufficient demand" for the **[*9]** purchase of the tied product separately from the tying product "to identify a distinct product market" from the point of view of the consumer. *Jefferson Parish, 466 U.S. at 21-22*. Here the plaintiffs have alleged that such demand exists: they and others in the putative class would like to buy cable boxes on the open market, but are foreclosed from doing so by the defendant's behavior and the consequent dearth of other options for obtaining the equipment. This claim is certainly "plausible" in this court's view, *Iqbal, 129 S.Ct. at 1949*, and there appears to be unanimous agreement on this point among the other courts who have addressed this question in recent months. *See* *In re Time Warner Inc. Set-Top Cable TV Box Antitrust Litig., 2010 U.S. Dist. LEXIS 22369 at *17-18 (S.D.N.Y. Mar. 5, 2010)*; *Parsons v. Bright House Networks, LLC, No. 2:09-cv-0267-AKK, 2010 U.S. Dist. LEXIS 55277, *10-12 (N.D. Ala. Feb. 23, 2010)*; *In re Cox Enterprises, Inc. Cable Television Box Antitrust Litig., No. 09-ML-2048-C, 2010 U.S. Dist. LEXIS 58417, *11-12 (W.D. Okla. Jan. 19, 2010)*. We accordingly conclude that the plaintiffs have met the *Rule 12(b)(6)* **[*10]** standard with respect to their obligation to identify two separate products.

B. Economic Power and Coercion

Although this element is listed singly in the relevant Sixth Circuit precedent, *see* CTUnify, 115 Fed. Appx. at 834, it apparently encompasses a number of prongs. The question is whether the defendant wields sufficient economic power in the market for the tying product such that it is able to force buyers to accept the tied product. *See id.* In order to show this to be the case, the plaintiffs must allege the existence of a relevant market in terms of both the tying product, *see* Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc., 588 F.3d 908, 917 (6th Cir. 2009), and a geographic area, *see* Mich. Div.--Monument Builders of N. Am. v. Mich. Cemetery Ass'n, 524 F.3d 726, 733 (6th Cir. 2008). They then must allege that the defendant has the power to coerce customer to buy the tied product, *see* Ill. Tool Works, 547 U.S. at 46, and of course that the defendant actually exercised that power, *see* Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). We conclude that, as drafted, the Amended Complaint insufficiently alleges actual coercion, and that it must therefore **[*11]** be dismissed. Because any newly filed complaint will have to change the allegations regarding the product market definition and Insight's power within that market, we will skip over those elements at present.

Without actual coercion, there is no restraint of trade and no Sherman Act claim. In a tying case the coercion takes the form of conditioning the availability of the tying product on the purchase of the tied product. *See id.* There is no dispute that the defendant's Premium Cable Services are available only with the aid of either a cable box or a television with CableCARD technology. Nor is there any allegation that Insight prevented its customers from using CableCARDs. The question is whether the existence of CableCARDs in the marketplace is sufficient to vitiate the plaintiffs' conditioning claim.

Plaintiffs allege that Insight has used its market power "to inhibit and thwart the effectiveness of CableCARD technology" (Am. Comp. P 32), and that consumer electronics manufacturers have "repeatedly complained that Insight and other cable companies have engaged in practices to prevent the CableCARD from becoming an effective option for consumers who no longer wish to pay rental fees **[*12]** for cable boxes" (*id.* P 33). Further, they allege that Insight has "limited the effectiveness of CableCARDs," such that consumers are unlikely to prefer that technology to Insight's cable boxes. (*Id.* at P 35.) The main limit on CableCARDs' actual effectiveness appears to be that the device is (at present) not capable of two-way communication. (*See* Pl.'s Br. 10 (*citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, MB Docket No. 06-189, FCC 07-207, at P 263 (Rel. Jan. 16, 2009) (hereinafter "Thirteenth Annual Report")); Reply 9.) The definition of the tying product, Premium Cable Services, spec-ifically includes "pay per view" and "on demand" video programming (Am. Compl. P 18), at least some of which is not available without the two-way connection that CableCARDs do not offer (*see* Pl.'s Br. 10 (*citing* Thirteenth Annual Report P 263)).

The Southern District of New York recently addressed precisely the same question, and concluded that dismissal was warranted. *In re Time Warner, 2010 U.S. Dist. LEXIS 22369, at *26*. The court ruled that because CableCARDs are a suitable replacement for those **[*13]** Premium Cable Services requiring only one-way communications, the plaintiffs' definition of the tying product (identical to the one now before this court) as including such services was fatal to its claim of coercion. *Id.* A customer desiring only one-way premium services (such as access to HBO and Showtime) had no need to rent a cable box. *Id.* This court finds itself in agreement with Judge Castel's analysis. The facts alleged might support a claim that those consumers wishing to buy two-way services are coerced into leasing a cable box, but the Amended Complaint does not so limit either the putative class or the product market. There is therefore in the court's view no plausible allegation of coercion as to the whole of the designated tying product; according to the amended complaint, only a part of that product is conditioned on rental of the tied product. [1]

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[1] We note that what matters here is actual coercion in the form of conditioning. Insight's promotion of its own products, even if vigorous and at the expense of promotion of CableCARD technology, does not give rise to a finding of the sort of coercion alleged here. *See* *In re Time Warner, 2010 U.S. Dist. LEXIS 22369, at *21-22* **[*14]** (*citing* Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982)).

While we will grant the motion to dismiss (via separate **[*15]** order), we are also in agreement with Judge Castel that a re-drafted complaint could make out a plausible claim for relief. *See* *id. at *28*. The Federal Rules direct the court to "freely give leave [to amend a pleading] when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. Accordingly we will follow his lead, and (at plaintiffs' request) grant leave to file a second amended complaint to cure the defect. We admonish the plaintiffs to take care to ensure that any future pleading contains sufficient factual allegations to fulfill each of the elements of their claim, with specific reference to any newly asserted definition of the relevant tying product.

/s/ Charles R. Simpson III

Charles R. Simpson III, Judge

United States District Court

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Plaintiffs also reprise an argument, based on *Eastman Kodak,* that Judge Castel rejected in *In re Time Warner.* Their assertion is that "[a] coercive scheme may be found even if the tying arrangement leaves the consumer with some choice, or even if the coercion is not 100% effective in meeting the defendants' anticompetitive goal." (Resp. 21.) We again join Judge Castel in finding this argument mistaken. In *Eastman Kodak,* the defendant required buyers of its replacement parts either to purchase repair services from Kodak or to promise to service their own machines; this prevented Kodak's clients from hiring third-party repairmen. *504 U.S. at 458*. The result was to condition the availability of one product on an agreement not to buy a second product from a third-party. Actual coercion was therefore present. Here, however, there is no adequate allegation of conditioning, because CableCARDs provide an alternative to Insight customers who have no use for two-way communications. *See* *In re Time Warner, 2010 U.S. Dist. LEXIS 22369, at *23-24*.

Emulex Corp. v. Broadcom Corp.

United States District Court for the Central District of California

June 7, 2010, Decided; June 7, 2010, Filed

SACV 09-01310 JVS(RNBx)

Reporter
2010 U.S. Dist. LEXIS 153231 *

Emulex Corp., et al. v. Broadcom Corp.

Prior History: Emulex Corp. v. Broadcom Corp., 2009 U.S. Dist. LEXIS 59487 (C.D. Cal., June 29, 2009)

Core Terms

allegations, customers, anti-SLAPP, infringement, commercial speech, argues, patent infringement, products, puffery, competitor's, disparagement, ethernet, network, storage, compete, product line, analysts, contends, website, patent, buyer, prolonged period, technology, campaign, statement of facts, Sherman Act, neutralization, non-actionable, converged, channel

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

Attorneys for Defendants: Not Present.

Judges: James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order Denying Defendant's Motion to Dismiss Emulex's First Amended Complaint (Fld 2-4-10) AND Defendant's Motion to Strike Plaintiff's Defamation Claim Pursuant to CCP Section 425.16 (fld 2-4-10)

Defendant Broadcom Corporation ("Broadcom") moves to dismiss the First Amended Complaint ("FAC") of Plaintiffs Emulex Corporation (a Delaware corporation) and Emulex Corporation (a California subsidiary) (collectively, "Emulex") under Federal Rule of Civil Procedure 12(b)(6). Broadcom also moves to strike Emulex's third claim for relief pursuant to California Code of Civil Procedure section 425.16 ("the anti-SLAPP statute").[1] Emulex opposes.

I. BACKGROUND

[1] "SLAPP is an acronym for "Strategic Lawsuit Against Public Participation."

This action involves a dispute between two competitors in the market for ten gigabit per second ethernet controllers ("10GbE controllers"), which are chipsets typically placed on the motherboards of server computers to allow the server to transmit and receive information over an ethernet network. (FAC ¶ 4.) The 10GbE controllers are sold by Broadcom and Emulex to original equipment manufacturers ("OEMs") that produce server motherboards. (Id. ¶¶ 3-4.) Broadcom has historically enjoyed a dominant share of the 10GbE controller market, currently **[*2]** holding 70 to 75 percent of the market.[2] (Id. ¶ 4.)

Emulex is a new entrant to the 10GbE controller market, having recently introduced a new set of controllers that allows fibre channel networking capability on a ten gigabit ethernet network, a technology referred to as Fibre Channel Over Ethernet ("FCoE"). (Id. ¶¶ 25-27.) Ethernet protocols have a tendency to suffer from certain latency issues—e.g., dropped or out-of-order packets—that slow the transmission of data. (Id. ¶ 21.) Thus, for some critical applications, businesses are forced to maintain a separate network, known as a storage area network, which typically uses fibre channel protocol, which is less prone to latency issues. (Id.) Emulex's FCoE-capable controllers, or Converged Network Adapters ("CNAs"), potentially allow businesses to converge their storage area networks with their ethernet networks. (Id. ¶ 27.)

Emulex alleges that Broadcom is behind the curve in FCoE technology and has resorted to exclusionary and anticompetitive conduct intended to drive Emulex from the market. It contends that Broadcom engaged in a two-pronged assault on Emulex. First, Broadcom attempted to buy Emulex in April throught July 2009. (Id. ¶¶ **[*3]** 30-31.) Second, Emulex alleges that Broadcom engaged in "a campaign of false, misleading and deceptive commercial statements" designed to dissuade OEMs from purchasing Emulex's controllers or CNAs. (Id. ¶¶ 32-33.) Although Emulex alleges that the campaign was extensive, it admits to knowing only of six statements, as follows:

(1) Emulex has a "track record of underperformance," and its management has an "inability to deliver satisfactory results." (Id. ¶¶ 33, 77.)

(2) Emulex needs Broadcom because it is merely a storage connectivity company. (Id.)

(3) Customers should not buy FCoE products from Emulex because Broadcom's acquisition of Emulex was a foregone conclusion. (Id.)

(4) Emulex's alleged infringement of Broadcom's patents "cuts across [Emulex's] entire product line" and threatens its entire business. (Id. ¶ 35.)

(5) Emulex's alleged patent infringement was "significant and pervasive," "cuts across [Emulex's] entire product line," and "covers a broad part of their business today in fibre channel and fibre channel over ethernet." (Id. ¶ 36.)

(6) Emulex's suit against Broadcom was "a diversionary tactic to take the focus off of Emulex's alleged infringement. Contrary to Emulex's misleading **[*4]** statements, we believe their infringement is likely to extend far beyond the examples cited in Broadcom's complaint." (Id. ¶ 37, 86.)

In its first two claims for relief, Emulex alleges that Broadcom's statements constitute monopolization or attempted monopolization in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. (Id. ¶¶ 50-73.) Emulex's third cause of action is for libel and slander. (Id. ¶¶ 74-94.) Broadcom now moves to dismiss the FAC in its entirety and to strike the libel and slander claim.

II. MOTION TO DISMISS

A. Legal Standard

Under *Rule 12(b)(6)*, a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A plaintiff must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v.*

[2] Here, and elsewhere, the Court simply recites the allegations of the FAC and makes no factual findings regarding the correct definition of the relevant market or market share.

Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). In resolving a 12(b)(6) motion under Twombly, the Court follows a two-pronged approach. First, the Court must accept all well-plead factual allegations as true, but "[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 1949. Nor **[*5]** must the Court "accept as true a legal conclusion couched as a factual allegation." Id. (quoting Twombly, 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." Id. This determination is context-specific, requiring the Court to draw on its experience and common sense, but there is no plausibility "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." Id.

B. Discussion

1. Antitrust Claims

Broadcom argues that Emulex's allegations, even if taken as true, cannot amount to a violation of the Sherman Act because they do not overcome the presumption that speech in the marketplace has a de minimis effect on competition. See Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997). In Harcourt Brace, the Ninth Circuit found that false or misleading advertising could constitute exclusionary conduct for a Sherman Act Section 2 claim.[3] However, recognizing the difficulty in distinguishing actionable false statements from puffing, the speculative effect of speech in the marketplace, and buyer distrust of a seller's statements about rivals, the court set a high bar for antitrust claims premised on disparaging statements. **[*6]** Id. The court "suggest[ed] that such claims should presumptively be ignored." Id. (citing 3 Phillip Areeda & Donald F. Turner, ***Antitrust Law*** ¶ 737b (1978)) (emphasis in original).

Thus, in the Ninth Circuit, a competitor's statements about rivals are presumed to have a de minimis effect on competition. To overcome this presumption, a plaintiff must demonstrate that the statements were "(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals." Id. (quoting Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988)). The plaintiff "must satisfy all six elements to overcome de minimis presumption."[4] Id. (emphasis in original).

Though Harcourt Brace itself was decided on a motion for judgment as a matter of law, courts have routinely applied the de minimis presumption at the pleading stage. See, e.g., TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120, 1133 (C.D. Cal. 2009); Tate v. Pacific Gas & Elec. Co., 230 F. Supp. 2d 1072, 1079-80 (N.D. Cal. 2002); Ayerst, 850 F.2d at 916-17. However, the Court is mindful that at the pleading stage, all well-pleaded allegations are taken as true and all reasonable inferences drawn in the plaintiff's favor. See Iqbal, 129 S. Ct. at 1949.

Broadcom contends that Emulex's antitrust claims fail to **[*7]** satisfy the six factor Harcourt Brace test. The Court considers each factor in turn.

a. Clearly False

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[3] The Seventh Circuit, by contrast, does not recognize an actionable antitrust theory of false advertising or disparagement. Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005); Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989).

[4] Some circuits do not require plaintiffs to satisfy every element. See, e.g., Ayerst, 850 F.2d at 916-17; Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 & n.6 (6th Cir. 2003).

Broadcom contends that Emulex's monopolization claims are not actionable because the statements upon which they are based constitute puffery. Puffery is "exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely." *Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997)* (citing 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27.04[4][d] at 27-52 (3d ed. 1994)). Whether a statement is non-actionable puffery or an actionable statement of fact depends on the degree of generality or specificity of the statement. *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1053 (9th Cir. 2008)*. "The 'puffing' rule amounts to a seller's privilege to lie his head off, so long as he says nothing specific." *Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 945 (3d Cir. 1993)* (quoting W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 109, at 756-57 (5th ed. 1984)).

The Court finds that the first statement—that Emulex has a "track record of underperformance" and an "inability to deliver satisfactory results"—is classic puffery. These are general assertions of "underperformance" and "[un]satisfactory results" upon which no buyer would reasonably rely. Though Emulex frames the statement as "misrepresenting statistics" about Emulex, it offers no specific **[*8]** reference to statistics that would push the statement over the line from general to specific. See *TYR, 679 F. Supp. 2d at 1137-38* (finding statement that competitor's product was "inferior" was puffery, but statement touting "a 2% advantage" was not).

On the other hand, the Court cannot say at the pleading stage that the second statement—that Emulex was merely a storage connectivity company—is puffery. The Court sees two possible interpretations of this statement: (1) Emulex specialized in storage connectivity and lacked the expertise to compete in the ethernet controller market, or (2) Emulex only manufactured storage connectivity products. The first interpretation would constitute puffery as a general statement of opinion. See *Coastal Abstract Serv., Inc.v. First Am. Title Ins. Co., 173 F.3d 725, 731 (9th Cir. 1999)* (finding statement that rival was "too small" to handle business was puffery). The second interpretation, however, is specific enough to be proven false. Because all inferences are drawn in Emulex's favor at this stage, the Court finds the statement actionable.

As for the third statement—that customers should not buy from Emulex because its acquisition by Broadcom was a "foregone conclusion"—the Court finds this to be non-actionable opinion rather than an actionable statement of fact. In **[*9]** determining whether a statement is one of fact or opinion, courts must look at the full context of the statements. *Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783-84 (9th Cir. 1980)*. The third statement was made in the context of Broadcom's hostile takeover attempt. (See FAC ¶¶ 30-31.) Thus, the only reasonable interpretation is that the statement is a prediction about the success of the tender offer rather than a representation that an actual deal is in place. Therefore, the statement is non-actionable puffing. See *Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001)* ("Whether a statement is an actionable statement of 'fact' or mere 'puffing' depends upon a number of factors, including . . . whether the statement relates to the present or the future."); see also *Global Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1268-69 (C.D. Cal. 2001)* (finding statement that company was a "sinking ship" to be opinion). The statement that customers should not buy from Emulex is clearly non-actionable opinion.

The Court finds that the fourth comment, made to a stock analyst—that Emulex's alleged patent infringement "cuts across [its] entire product line" and threatened the entire business—does not constitute puffery. It is specific enough to be proven false and, as alleged, is a statement of fact rather than opinion. See *Ideal Instruments, Inc. v. Rivard Instruments, Inc., 434 F. Supp. 2d 598, 624 (N.D. Iowa 2006)* (finding that accusations of patent infringement were statements of **[*10]** fact rather than opinion).

Similarly, the fifth statement,—a second set of comments about Emulex's alleged patent infringement—though couched as opinion, could plausibly be interpreted as a statement of fact. The full statement is as follows:[5]

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[5] Though on a motion to dismiss the Court is ordinarily limited to considering the pleadings, the Court may also consider evidence "on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*. Broadcom has submitted a transcript of the technology conference referred to in the FAC. (See FAC ¶ 36; Req. for Judicial Notice ("RJN"), Ex. 5.) Emulex argues that the transcript cannot be considered on this motion

> Q. [Y]esterday or the day before Broadcom filed a suit against Emulex. Could you talk a little bit about what's underlying that and the patents that you are claiming they infringe, what do they apply to?
> A. Yes. So, as you know, we are a pretty vigorous competitor and compete in some fairly tough markets. And certainly as we looked at the Emulex acquisition, we looked at their business and saw a fair bit of complementarity in terms of the networking side of things.
>
> > They made some fairly strong statements about being competitors of Broadcom, and, as you know, we compete aggressively. And so, we took a hard look at their IP and our IP and what they were selling, and were surprised to discover that there was significant and pervasive infringement, we believed, of our IP, which really cuts across their entire product line. And so, as you know, we are vigorous defenders of our IP and we filed suit.
> >
> > I think when you look at it, the core of what they do and **[*11]** we do in our enterprise space is - enterprise networking technology and data networking technology and whether it relates to TCP/IP offload or CERTES or other things - and we can have a conversation and there's 10 different patents, and Peter has a list of what each one of them covers - we feel that the infringement is pervasive. We feel that it covers a broad part of their business today in fibre channel and fibre channel over ethernet.

(RJN, Ex. 5.)

The Court notes that Broadcom's statements bear similarities to the non-actionable statements of opinion in Information Control—the statements (1) are littered with phrases indicating opinion, (2) were made within days of filing of the patent complaint, and (3) were made at a trade conference to industry professionals and stock analysts who would be expected to know about the litigation. See *id. at 784*. However, the statement at issue in Information Control was about the opposition's motive for filing a lawsuit; that is distinguishable from the statements here, which assert widespread infringement based on due diligence done on Emulex's intellectual property. (RJN, Ex. 5.) Even though the assertions are couched as opinions, they imply knowledge **[*12]** of certain facts supporting that opinion. See *Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990)*.

Finally, the statement that Emulex's suit against Broadcom was "a diversionary tactic to take the focus off of Emulex's alleged infringement" is clearly a statement of opinion. *Information Control, 611 F.2d at 784* (finding statement that lawsuit was "a device by which [the opposing party] was attempting to avoid payment of its obligations" was opinion). Additionally, the statement that "we believe [Emulex's] infringement is likely to extend far beyond the examples cited in Broadcom's complaint" is a future prediction that is too vague to be proven false. Unlike the prior statements that Emulex's infringement affected an entire product line or the entire business, this statement merely asserts a likelihood that infringement would extend "far beyond" the infringement contentions in the litigation. This is too vague to be actionable.

b. Clearly Material

Broadcom does not argue that the alleged misrepresentations are not material, though it does not concede that they are. (Mot. Br. 17 n.8.) Accordingly, the Court will not address this element.

c. Clearly Likely to Induce Reasonable Reliance

Broadcom argues that Emulex fails to adequately allege reasonable reliance, noting that the **[*13]** FAC contains no allegation of actual reliance. Broadcom has cited no authority requiring an allegation of actual reliance and the Ninth Circuit's phrasing of the test—"likely to induce reasonable reliance"—suggests otherwise. Indeed, in other related contexts, a plaintiff need not even prove actual reliance to prevail on a false advertising claim. *Southland Sod, 108*

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because it questions the reliability of the transcription. (Pl.'s Objections to Def.'s RJN at 3.) However, Emulex's claim rests not just on the oral statements made, but on the transcript hosted on Broadcom's website. (See FAC ¶ 36.) Emulex does not contest that this is the actual internet transcript referred to in the complaint. Therefore, the Court may consider the transcript under the incorporation by reference doctrine.

F.3d at 1146 ("Publication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance.") (quoting U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040-41 (9th Cir. 1986))).

Broadcom also argues that because the audience for the false statements—stock analysts, journalists, and industry professionals—are generally knowledgeable and skeptical about charges made by Broadcom against Emulex in the context of a public dispute, they are unlikely to rely on the alleged misrepresentations. However, the FAC alleges that the 10GbE controller market is at a turning point because OEMs are attempting to quickly design next-generation servers, need to "lock in" a specific controller for the next several years, and are risk-averse and want a supplier that will be around long-term. (FAC ¶¶ 41-42.) Taking these allegations as true, it is certainly plausible that an OEM could be swayed by statements **[*14]** that Emulex's widespread patent infringement threatened its entire business.

d. Made to Buyers Without Knowledge of the Subject Matter

Broadcom contends that the FAC fails to adequately allege that the alleged misrepresentations were made to buyers without knowledge of the subject matter. Broadcom notes that the audience for the statements are likely to be sophisticated parties, less likely to be induced by Broadcom's representations. However, the FAC alleges that OEMs are "highly risk-averse" and, because of market conditions requiring quick action, less likely to be able to adequately investigate suppliers' claims. (Id.) Moreover, with respect to the statements regarding Emulex's alleged patent infringement, it is plausible that this highly-technical legal and fact-specific information is outside the general knowledge of OEMs, industry professionals, and analysts. The Court cannot say at the pleading stage that the potential customers had adequate information as to the patent infringement statements.

However, with respect to the claim that Emulex is merely a storage connectivity company, the Court finds that this statement is well within the knowledge of the OEMs and industry professionals. **[*15]** As discussed above, to the extent that the statement can be interpreted as a criticism of Emulex's ability to compete in the ethernet controller or converged controller market, the statement is puffery. See, supra, Part II.B.1.a. On the other hand, if the statement is interpreted as a factual assertion that Emulex produces only storage connectivity products, the Court finds it implausible that OEMs and industry professionals would not know or have the capability of easily determining that Emulex produces other products as well. See Walgreen Co. v. AstraZeneca Pharm. L.P., 534 F. Supp. 2d 146, 152 (D.D.C. 2008) (dismissing antitrust disparagement claim where statements regarding pharmaceuticals were made to medical professionals knowledgeable of the subject matter). As Emulex has alleged, it launched its CNAs in April 2008, a year prior to the first of the alleged misrepresentations. (Id. ¶ 27.) It is implausible that these sophisticated customers were not aware. The Court finds that this statement does not satisfy this element.

e. Continued for Prolonged Periods

Broadcom argues that Emulex fails to adequately allege that the statements continued for a prolonged period. The only remaining actionable statements are the two statements regarding Emulex's alleged patent **[*16]** infringement. One was made on September 14, 2009 and the other on September 16, 2009. (Id. ¶¶ 84-85.) The Court finds as a matter of law that three days is an insufficient period to satisfy this element of the Harcourt Brace test.

Even considering all six of the alleged statements, the Court finds that the statements were not continued, i.e., sustained, for a prolonged period sufficient to satisfy this element. Harcourt Brace suggests that only "systematic" campaigns of disparagement are likely to have any more than a speculative effect on rivals: "buyer distrust . . . should caution us against attaching much weight to isolated examples of disparagement." 108 F.3d at 1152 (quoting Areeda & Turner, supra, ¶ 737b). Although the FAC does not give dates for the first three statements, it is apparent that they took place during the course of Broadcom's failed takeover attempt from April 21, 2009 to July 9, 2009. (See FAC ¶¶ 76-77.) As noted above, the two patent infringement statements were made over a three day period in September 2009. (Id. ¶¶ 84-85.) The final statement, asserting that Emulex's lawsuit was a "diversionary tactic," was made on November 9, 2009. (Id. ¶ 86.) Though the statements began in April 2009 and ended **[*17]** in

November 2009, they were sporadic and isolated and not "continued" for the entire seven months. This is not the sort of sustained or systematic campaign capable of significantly affecting competition.

Emulex invites the Court to dispense with the "prolonged period" requirement, arguing that the realities of the 10GbE controller market, as alleged, dictate that a short period of statements can have a lasting effect, given OEMs' risk-aversion and reluctance to change controller suppliers. (See id. at 42, 44.) In the Second Circuit, Emulex's argument may be tenable, as the "prolonged period" element is not required. See *Ayerst, 850 F.2d at 916-17*. However, the Ninth Circuit requires that every element of the Harcourt Brace test be met. *108 F.3d at 1152*. Emulex cannot get around that requirement by alleging certain market conditions.

The Court does not credit the FAC's conclusory allegations of a secret campaign of disparagement. (See FAC ¶¶ 8, 33, 43, 46-47, 83.) The validity of Emulex's antitrust claims must stand on the statements actually alleged, and cannot be propped up by allegations of secret statements of which Emulex admits no knowledge. See *Twombly, 550 U.S. at 557*.

In the defamation context, the defamatory statements must be plead with specificity. *Kahn v. Bower, 232 Cal. App. 3d 1599, 1612 n.5, 284 Cal. Rptr. 244 (Ct. App. 1991)* ("The **[*18]** general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint."); *Chaconas v. JP Morgan Chase Bank, 713 F. Supp. 2d 1180, 2010 WL 1910748, at *8 (S.D. Cal. May 10, 2010)*; *Jacobson v. Schwarzenegger, 357 F. Supp. 2d 1198, 1216 (C.D. Cal. 2004)*. Emulex's bare allegations of "materially false representations" would certainly not be sufficient to state a defamation claim because they do not identify the substance of what was said. E.g., *Jacobson, 357 F. Supp. 2d at 1216*. By the same logic, Emulex cannot cobble together an antitrust claim—which, under Harcourt Brace, is necessarily grounded on a systematic campaign of defamatory statements—by alleging that Broadcom made a series of "materially false representations" without identifying the substance of those statements.

In Twombly, the Supreme Court found that the plaintiffs could not state a claim for conspiracy in restraint of trade under the Sherman Act purely on the basis of allegations of parallel conduct and conclusory allegations of an illicit agreement or conspiracy. *Id. at 564-66*. The bare allegations of agreement were simply legal conclusions, see *id. at 564* & n.9, and the allegation of parallel conduct did not indicate anything more than legitimate, unilateral actions of each defendant, *id. at 566*. Similarly, Emulex's allegations of "materially false representations," see FAC ¶ 8, are essentially **[*19]** legal conclusions rather than factual allegations, and Emulex pleads no other facts making plausible a secret campaign of disparagement. Just as a bare allegation of conspiracy does not suffice to plead a Sherman Act *§ 1* claim, a bare allegation of a secret campaign of materially false statements does not suffice for a Sherman Act *§ 2* claim.

Emulex notes that, in other contexts, pleading on information and belief is sufficient to state a claim where certain information is particularly in the defendant's knowledge and control. *Boykin v. Keycorp, 521 F.3d 202, 215 (2d Cir. 2008)*. In Boykin, for example, the plaintiff was permitted to allege internal company policies of the defendant on information and belief. See id. However, a disparagement claim is a different animal; the disparaging statements are necessarily outside the defendant's control, as there would be no disparagement if the defendant kept things to itself. This is not the sort of information that can be pled on information and belief.

However, the FAC also alleges that the transcripts and audio of one of the disparaging statements were "made accessible to the public, including Broadcom's and Emulex's customers and potential customers, on Broadcom's website," (FAC ¶ 36), and that **[*20]** other statements were "dispersed widely, repeatedly and continuously in part because they have been distributed by and hosted on Broadcom's website," (id. ¶ 43). Emulex argues that, because the statements were available on the website for an extended period of time, they "continued for a prolonged period" under the Harcourt Brace test. At the hearing, Emulex analogized Broadcom's website to a billboard, where the alleged misrepresentation would be continually viewed by passersby. Emulex notes that anyone seeking information about Broadcom by visiting its site would view the misrepresentations. Broadcom resisted the analogy, arguing that the statements were archived on subdirectories of the main page, so that a visitor would have to click on several links to reach the statements.

The Court recognizes that there may be some difference, in terms of the scope of public dissemination, between a statement on the main page of a website, which may be fairly analogized to a billboard, and a statement archived on a subdirectory of the website, which is closer in analogy to a newspaper advertisement accessible in archives. This, however, is a particularly factual question inappropriate for dismissal **[*21]** on the pleadings. Taking the allegations of statements on the website in the light most favorable to Emulex, the Court finds that Emulex has plausibly pled that those statements continued for prolonged periods.[6]

f. Not Readily Susceptible of Neutralization or Other Offset

Finally, Broadcom contends that Emulex has not sufficiently alleged that the statements were not susceptible of neutralization. Broadcom argues that Emulex has not adequately explained why it could not rebut the alleged misrepresentations with its own speech.

However, Emulex points out that it has alleged that it is a new entrant into the relevant market and thus does not have relationships with the OEMs allowing it to sufficiently rebut Broadcom's statements. (Id. ¶ 46.) A nascent firm is often less able to neutralize misrepresentations by a dominant firm:

> [M]isrepresentations and organized deception by a dominant firm may have [Sherman Act] § 2 implications when used against a nascent firm just as it is entering the market. Such a firm has no established customer base and typically lacks the resources to answer the dominant firm's deception effectively.

3A Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 782b (2007). **[*22]** Based on Emulex's allegations, the Court finds that it has plausibily pled that it is unable to neutralize the patent infringement statements. See *Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513, 532 (E.D. Tex. 2004)*.

However, with respect to the statement that Emulex is only a storage connectivity company, the Court fails to see how Emulex could not easily rebut the statement by simply demonstrating to the OEMs that it was producing and selling CNAs and ethernet controllers. Indeed, Emulex alleges that it launched the CNAs a year before the misrepresentations began. (FAC ¶ 27.) The Court finds it implausible that Emulex could not effectively neutralize the statement that it was limited to storage connectivity products.[7]

To summarize, the *Section 2* monopolization and attempted monopolization claims survive the Harcourt Brace de minimis presumption based on the fourth and fifth statements as posted on Broadcom's website, which regard Emulex's alleged patent infringement. The claim is dismissed with regard to the first, third, and sixth statements, which constitute puffery, and the second statement, which was made to an audience knowledgeable of the subject matter and was readily susceptible to neutralization.[8]

Broadcom makes several additional attacks on **[*23]** the antitrust claims. First, Broadcom argues that Emulex has failed to allege antitrust injury. Antitrust injury is injury that "reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Broadcom asserts that Emulex pleads only injury to itself, not to competition. The Court disagrees. Favorably construed, the FAC alleges that Broadcom's disparagement has the effect of forestalling or preventing the entry of an innovative new firm into the market, which harms consumers

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[6] The Court only considers the two specifically-alleged statements regarding patent infringement as posted on the website. The remaining statements are either puffery, made to audiences with knowledge of the subject matter, or readily susceptible of neutralization.

[7] Again, if the statement is interpreted as asserting Emulex's inability to compete in the 10GbE controller market, the statement is puffery. See, supra, Part II.B.1.a.

[8] The Court therefore declines to consider whether an antitrust claim based on the first three statements—relating to the takeover attempt—is preempted by securities laws.

"because the quantity, quality and variety of products in the marketplace are being reduced . . . and Broadcom will be able to charge supracompetitive prices." (FAC ¶ 58.) Emulex alleges that Broadcom's conduct "is causing delay in the marketplace of the adoption of new, superior technology . . . that will benefit consumers." (Id.) As a result, Emulex alleges, "customers will be deprived of choice in products, will pay higher prices, will receive inferior quality product, and will have no choice but to continue to employ older and less efficient technologies." (Id. ¶ 61.) These allegations, coupled with the allegations detailing the market conditions and **[*24]** barriers facing a new entrant, plausibly plead antitrust injury under Twombly.

Second, Broadcom contends that Emulex has failed to allege that Broadcom has market power in the relevant market because Emulex does not actually compete in the alleged market. "Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market." *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*. Here, Emulex has alleged a market for 10GbE controllers suitable for server motherboards in the United States. (FAC ¶¶ 4, 22.) Emulex alleges that Broadcom enjoys a 70 to 75 percent share of this market. (Id.) This is sufficient to plead market power. See *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924-25 (9th Cir. 1980)*. Emulex alleges that its 10GbE controllers with FCoE functionality competes in the 10GbE controller market. (FAC ¶ 27.)

However, Broadcom argues that Emulex does not actually compete in the 10GbE controller market, noting allegations made by Emulex in a separate securities action against Broadcom that the parties competed in a "converged connectivity" market. (See RJN, Ex. 3 ¶¶ 152-55.)[9] In that complaint, Emulex alleged that it is a "market leader" and "Broadcom has struggled to compete in this new converged market." (Id. ¶¶ **[*25]** 154-55.)

In essence, Broadcom asks the Court to dismiss Emulex's current complaint because it potentially conflicts with allegations it made in a complaint in another action. In other words, Broadcom seeks the application of judicial estoppel, which "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Whaley v. Belleque, 520 F.3d 997, 1002 (9th Cir. 2008)* (citation omitted). In determining whether to apply the doctrine, courts consider "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has successfully persuaded the court of the earlier position[;] and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim, 522 F.3d 1003, 1009 (9th Cir. 2008)* (quoting *New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001))*. The Court finds that Broadcom fails on all three counts. First, the prior allegation of a "converged" market is not inconsistent with Emulex's current allegation that its converged product competes in the 10GbE controller market. Second, Broadcom has not shown that any court was persuaded by Emulex's prior position. And finally, Broadcom has not shown that permitting Emulex's **[*26]** current allegations of market definition and market power would unfairly prejudice Broadcom.

Accordingly, Emulex has adequately pled market power in the relevant market.

2. Libel and Slander Claim

Broadcom seeks dismissal of Emulex's libel and slander claim on a number of grounds. First, Broadcom argues that the statements are non-actionable puffery. As discussed above in Part II.B.1.a, the Court finds that three of the statements are puffery: (1) that Emulex has a "track record of underperformance" and an "inability to deliver satisfactory results"; (2) that Broadcom's acquisition of Emulex was a "foregone conclusion"; and (3) that Emulex's suit was a "diversionary tactic" and that "their infringement is likely to extend far beyond the examples cited in Broadcom's complaint." The Court finds that the remaining three statements are actionable statements of fact as alleged.

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[9] On a motion to dismiss, the Court may consider matters that are the proper subject of judicial notice, such as a publicly-filed complaint. See *Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 991 (9th Cir. 2009)*.

Second, Broadcom argues that the two statements related to Broadcom's patent suit against Emulex are privileged, and therefore non-actionable, under *California Civil Code section 47(d)*. That statute provides that "a fair and true report in, or a communication to, a public journal" about a judicial proceeding is privileged. *Cal. Civ. Code § 47(d)*. The requirement that the report **[*27]** be "fair and true" is not strictly applied; it need only capture the "the substance, the gist, [or] the sting" of the actual statements or events. *Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 244, 83 Cal. Rptr. 2d 677 (Ct. App. 1999)* (quoting *Kurata v. L.A. News Publ'g Co., 4 Cal. App. 2d 224, 227, 40 P.2d 520(1935))*. However, a misrepresentation of "substantial character" is not privileged. *Crane v. Ariz. Republic, 972 F.2d 1511, 1519 (9th Cir. 1992)*.

As Emulex alleges, Broadcom stated that Emulex's patent infringement "cuts across [their] entire product line," threatens their entire business, and "covers a broad part of their business." (FAC ¶¶ 84-85.) Emulex alleges that the patent infringement allegations cover only a small part of their product line and affects a small fraction of their total business. (Id. ¶ 88.)

In each of Broadcom's infringement allegations in the patent complaint, Broadcom contends that Emulex's infringing products "includ[e] but [are] not limited to [certain specified products] and [] other electronic devices that incorporate similar circuitry and/or have similar features and/or functionality." (RJN, Ex. 4 ¶¶ 34, 40, 46, 52, 58, 64, 70, 76, 82, 88.) Thus, the infringement allegations are not limited to those products specifically enumerated—Broadcom's statements extend to all products with similar circuitry, features, or functionality. Although the statement that the infringement **[*28]** "cuts across [Emulex's] entire product line," is not specifically alleged in the complaint, it is a fair characterization of the "gist and sting" of the allegations.

In Sipple, the court applied the litigation reporting privilege to an article about a custody dispute involving testimony of spousal abuse by the plaintiff. *71 Cal. App. 4th at 245*. The Court found that "although [the article] expands on specific incidents of abuse, [it] does not change the gist or sting of the courtroom statements or the complexion of the affair." Id. Similarly, Broadcom's statements here certainly expand on the allegations in the complaint, but they do not substantially change the gist of those allegations—that some indeterminate number of Emulex's products infringe their patents.

Thus, under the broad application of *Section 47(d)*, see *id. at 240*, Broadcom's statements asserting infringement that "cuts across [Emulex's] entire product line" and "covers a broad part of their business," is a "fair and true report" of their patent complaint. Accordingly, the statements are privileged and not actionable.

The litigation privilege does not, however, apply to Broadcom's statement that Emulex is just a storage connectivity company. Accordingly, Emulex's libel **[*29]** and slander claim survives only as to that statement.

III. ANTI-SLAPP MOTION

A. Legal Standard

California's anti-SLAPP statute allows for pre-trial dismissal of strategic lawsuits against public participation ("SLAPPs"). *Cal. Civ. Proc. Code § 425.16*. The statute aims to identify, early in the litigation process, "meritless *first amendment* cases aimed at chilling expression through costly, time-consuming litigation." *Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 839 (9th Cir. 2001)*; see also *Wilcox v. Superior Court, 27 Cal. App. 4th 809, 816, 33 Cal. Rptr. 2d 446 (Ct. App. 1994)*.

To succeed under an anti-SLAPP motion, a defendant must "make a prima facie showing that the plaintiff's suit arises from an act by the defendant made in connection with a public issue in furtherance of the defendant's right to free speech under the United States or California Constitution." *Batzel v. Smith, 333 F.3d 1018, 1024 (9th Cir. 2003)*.

"The burden then shifts to the plaintiff to establish a reasonable probability that the plaintiff will prevail on his or her defamation claim." Id. In other words, "the plaintiff must demonstrate that 'the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited.'" *Metabolife, 264 F.3d at 840* (quoting *Wilcox, 27 Cal. App. 4th at 823*).

Where an anti-SLAPP motion is brought on the grounds that the plaintiff's claim is legally deficient, the Court should adjudicate the motion **[*30]** under the standards for a *Rule 12(b)(6)* motion to dismiss. See *Lauter v. Anoufrieva, 642 F. Supp. 2d 1060, 1109 (C.D. Cal. 2009)*; *In re Bah, 321 B.R. 41, 45 n.6 (BAP 9th Cir. 2005)*. "In other words, the court must read the complaint broadly, take all well-pleaded allegations as true, and dismiss with leave to amend." *In re Bah, 321 B.R. at 45 n.6*.

B. Discussion

Broadcom must first make a showing that the anti-SLAPP statute applies to Emulex's third claim for relief for libel and slander. Broadcom must show (1) that the claim arises from a protected activity, and (2) that no exceptions under the anti-SLAPP statute apply. See *Brill Media Co., LLC v. TCW Group, Inc., 132 Cal. App. 4th 324, 330-31, 33 Cal. Rptr. 3d 371 (Ct. App. 2005)*. While Broadcom bears the burden of proving that Emulex's claim arises from a protected activity, Emulex had the burden of demonstrating that an anti-SLAPP exemption applies. *Simpson Strong-Tie Co. v. Gore, 49 Cal. 4th 12, 109 Cal. Rptr. 3d 329, 230 P.3d 1117, 2010 WL 1948283, at *8 (Cal. May 17, 2010)*. As discussed in the Court's prior order regarding discovery, this motion is to be construed under the *Rule 12(b)(6)* standard. (See Docket No. 35 at 4.)

Emulex begins by arguing that its claim arises from commercial speech and is therefore exempted from the anti-SLAPP statute under California Code of Civil Procedure *section 425.17(c)*. In relevant part, this provision reads:

> [The anti-SLAPP statute] does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services **[*31]** . . . arising from any statement or conduct by that person if both of the following conditions exist:
> (1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.
> (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer . . . .

Cal. Civ. Proc. Code § 425.17(c).

Without "adopt[ing] a per se rule excluding all competitor's statements from anti-SLAPP protection," California courts hold that "in most cases a competitor's statements regarding its competition would not fall within *section 425.16, subdivision (e)(4)*." See, e.g., *Integrated Healthcare Holdings, Inc. v. Fitzgibbons, 140 Cal. App. 4th 515, 526, 44 Cal. Rptr. 3d 517 (2006)*; see also *Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999)* (holding that the statements of one company regarding a competitor company do not satisfy the "issue of public interest" requirement of the anti-SLAPP statute).

Broadcom argues that the commercial speech exception does not apply because Emulex has not alleged **[*32]** that the purpose of the charged speech was to obtain approval for, promote, or secure sales of Broadcom's goods or services. See *Cal. Civ. Proc. Code § 425.17(c)(1)*. Broadcom contends that the first three statements relating to Broadcom's takeover attempt were made for the purpose of closing on the tender offer, rather than the purpose of selling goods. (See FAC ¶¶ 77-79, 93.) Broadcom also argues that the remaining statements were made for various purposes, including hostility and revenge for prior slights. (Id. ¶¶ 80, 93.)

However, as even Broadcom admits, Emulex has alleged that the statements were made for the purpose of selling Broadcom's goods. (Mot. Br. 15.) The FAC alleges that the takeover statements "were made with malice to further Broadcom's commercial interests and promote its own technologically deficient, but market share dominating, 10GbE Controllers," and the remaining statements were made "in an effort to promote Broadcom's own products." (FAC ¶¶ 82, 87; see also id. ¶¶ 28, 33, 34, 77, 89, 93.) Because this motion is governed by the *Rule 12(b)(6)* standards, the Court must take these allegations as true. See *Fed. R. Civ. P. 9(b)* ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."). It is certainly **[*33]** plausible that Broadcom's derogatory statements questioning Emulex's viability and urging customers not to buy from Emulex were made for the purpose of boosting or maintaining Broadcom's own sales.

Broadcom argues that Emulex's allegations of a commercial purpose do not suffice because it also alleges that the statements were motived by other purposes, such as hostility or an effort to close the tender offer. Broadcom contends that the commercial speech exception applies only where the speech is "entirely" or "purely" commercial speech, such that the sole purpose of the speech is for promoting sales of goods or services. The Court declines to adopt such a rigid rule. Nothing in the language of the anti-SLAPP statute suggests that a statement motivated by multiple purposes would be necessarily outside the scope of *Section 425.17(c)(1)*.

Broadcom's cited authorities do not support its contention. *Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001)*, did not involve the anti-SLAPP statute at all; it dealt with the application of the "commercial speech" doctrine in the realm of *First Amendment* law. See *id. at 1184-85*. Similarly, *Hilton v. Hallmark Cards, 599 F.3d 894 (9th Cir. 2010)*, though citing *Section 425.17(c)*, involved commercial speech in the *First Amendment* context. *Id. at 905 n.7*. Broadcom presents no authority applying *First Amendment* "commercial speech" jurisprudence to *Section 425.17(c)*, notwithstanding **[*34]** Hilton's puzzling citation. Though courts often refer to *Section 425.17(c)* by shorthand as "the commercial speech" exception, the actual language of the statute does not contain the words "commercial speech" nor give any indication of a relation to *First Amendment* commercial speech doctrine. See *Cal. Civ. Proc. Code § 425.17(c)*.

In *Contemporary Services Corp. v. Staff Pro Inc., 152 Cal. App. 4th 1043, 61 Cal. Rptr. 3d 434 (Ct. App. 2007)*, the court found that a statement giving an update on a lawsuit and criticizing a competitor's litigation tactics was not within the commercial speech exception because the statements were not about the competitor's operations, goods, or services. *Id. at 1054*. The court did not address the "purpose" element, much less find that a statement motivated by multiple ends could not be commercial speech.

In *Girafa.com, Inc. v. Alexa Internet, Inc., No. C-08-02745 RMW, 2008 U.S. Dist. LEXIS 78260, 2008 WL 4500858 (N.D. Cal. Oct. 6, 2008)*, the court found that allegations of patent infringement within a complaint were not made for the purpose of promoting or selling goods or services. *Id. at *5*. It found that the purpose of the statements was to plead a legal claim of infringement; that the claim might drive the competitor out of business and thereby increase the defendant's sales was "too attenuated" to be an intended purpose. Id. Emulex's complaint is distinguishable. First, all of the statements were made outside judicial **[*35]** proceedings.[10] Second, Emulex alleges that the statements were made to directly influence OEMs into shunning Emulex's goods. (FAC ¶¶ 44-46.) This is not the sort of attenuated causal chain that Girafa.com found to be insufficient to demonstate a commercial purpose.

Finally, in *Taheri Law Group v. Evans, 160 Cal. App. 4th 482, 72 Cal. Rptr. 3d 847 (Ct. App. 2008)*, the court found that advice given by a lawyer to a client regarding a pending legal matter was not within the commercial speech exception. *Id. at 491*. That is clearly distinguishable from the charged speech here, made to customers, industry professionals, and stock analysts. The statement in Taheri that the legislature intended to exempt "disputes that are purely commercial," does not imply that mixed-motive statements are necessarily outside the scope of the commercial speech exception. See id. (emphasis added).

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[10] The Court acknowledges that the Girafa.com court stated that "it is not relevant to *[Section] 425.17(c)(1)* whether [defendant] claimed that [plaintiff's] service infringes in a lawsuit or on a weblog." Id. However, the Court respectfully disagrees. The medium in which a statement is made can give great insight into the speaker's motivation. When an accusation of infringement is made solely to customers without the filing of any lawsuit, one can presume that the intent was to influence customers rather than seek legal redress. The medium may, in some cases, be the message.

In its reply brief, Broadcom argues for the first time that the charged statements were not made to an audience of customers or those likely to influence customers.[11] The Court disagrees. Emulex clearly alleges that the first three statements were made to Emulex's customers. (FAC ¶ 77.) The fourth statement was made to a stock analyst for the alleged purpose "to harm Emulex through communications to these analysts, **[*36]** customers, and potential customers." (Id. ¶ 84.) The Court finds that it is plausible that customers might be influenced by a stock analyst, especially in an industry where customers are concerned about a supplier's viability. (See id. ¶ 42.) The fifth statement was made at a technology convention to "industry professionals, stock analysts, and journalists," and the final statement was made to "the press." (Id. ¶ 85, 86.) This plausibly pleads audiences that are "likely to repeat the statement to, or otherwise influence" customers. See *Cal. Civ. Proc. Code § 425.17(c)*.

Accordingly, the Court finds that Broadcom has failed to carry its burden of demonstrating that the alleged statements do not fall within the *Section 425.17(c)* commercial speech exception to the anti-SLAPP statute. Thus, the anti-SLAPP statute is not applicable.

IV. CONCLUSION

For the foregoing reasons, the motion to dismiss is DENIED. The first and second claims survive as to the fourth and fifth statements posted on Broadcom's website. The third claim survives **[*37]** as to the second statement.

The special motion to strike under the anti-SLAPP statute is DENIED.

IT IS SO ORDERED.

End of Document

[11] Generally, the Court does not consider arguments raised for the first time in a reply brief. See *Officers for Justice v. Civil Serv. Comm'n of S.F., 979 F.2d 721, 726 (9th Cir. 1992)*. However, because Emulex addressed the issue of its own accord in its opposition, the Court considers the issue.

Warren Gen. Hosp. v. Amgen Inc.

United States District Court for the District of New Jersey

June 7, 2010, Decided; June 7, 2010, Filed

Civil Action No. 09-4935 (SRC)

Reporter

2010 U.S. Dist. LEXIS 56220 *; 2010-1 Trade Cas. (CCH) P77,043

WARREN GENERAL HOSPITAL, on behalf of itself and all others similarly situated, Plaintiff, v. AMGEN INC., Defendant.

Notice: NOT FOR PUBLICATION

Subsequent History: Affirmed by *Warren Gen. Hosp. v. Amgen Inc., 2011 U.S. App. LEXIS 11982 (3d Cir. N.J., June 14, 2011)*

Core Terms

purchaser, rebates, allegations, antitrust, drugs, indirect, manufacturer, products, overcharge, wholesaler, buyer, pricing, end user, damages, antitrust violation, conditioned, discounts, middleman, monopoly, volume, buy

Counsel: **[*1]** For WARREN GENERAL HOSPITAL, on behalf of itself and all others similarly situated, Plaintiff: JEFFREY J. CORRIGAN, LEAD ATTORNEY, SPECTOR, ROSEMAN & KODROFF, ESQS., PHILADELPHIA, PA; MARC H. EDELSON, COUNSEL NOT ADMITTED TO USDC-NJ BAR, DOYLESTOWN, PA.

For AMGEN, INC., Defendant: MICHAEL R. GRIFFINGER, LEAD ATTORNEY, CHRISTOPHER T. WALSH, MICHAEL F. QUINN, GIBBONS, PC, NEWARK, NJ.

Judges: STANLEY R. CHESLER, United States District Judge.

Opinion by: STANLEY R. CHESLER

Opinion

CHESLER, District Judge

This matter comes before the Court upon the motion to dismiss the Complaint and to strike certain allegations in the Complaint, filed by Defendant Amgen Inc. ("Amgen") [docket entry 10]. Plaintiff Warren General Hospital ("Plaintiff" or "Warren General") opposes the motion. The Court has considered the papers submitted by the parties, and pursuant to *Federal Rule of Civil Procedure 78*, rules on the motion without oral argument. For the reasons discussed below, the Court grants Amgen's motion and dismisses the Complaint in its entirety. [1]

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[1] In light of the dismissal of the entire Complaint, the Court does not address the portion of the motion seeking an order striking certain allegations of the Complaint.

I. BACKGROUND

Warren **[*2]** General initiated this antitrust action seeking relief for Amgen's allegedly unlawful scheme of tying discounts and rebates on Amgen's White Blood Cell Growth Factor (WBCGF) products, branded as Neupogen and Neulasta, to purchases of its Red Blood Cell Growth Factor (RBCGF) product, branded as Aranesp. It filed the Complaint as a putative class action on behalf of all

> direct purchasers who purchased Aranesp, Neupogen and Neulasta through an Amgen contract, such as an APC or Momentum Rebate, Momentum II or Enhanced Momentum II contract, which tied the rebates and/or discounts received on purchases of Neupogen and Neulasta to purchases of Aranesp during the period January 1, 2003 to the present.

(Compl., P 70.) The Complaint seeks damages for Amgen's alleged violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*, and Section 3 of the Clayton Act, *15 U.S.C. § 14*, based on Plaintiff's view that Amgen implemented an allegedly anti-competitive pricing and sales scheme to leverage its monopoly over the WBCGF market to gain control over the RBCGF market. The relevant facts, which the Court summarizes based on the allegations of the Complaint, are as follows:

Amgen manufactures and sells two **[*3]** different kinds of drugs involved in treating conditions associated with chemotherapy. One of these is WBCGF. Amgen's two WBCGF products command a 98% market share of WBCGF drug sales. The other is Amgen's RBCGF drug known as Aranesp. Aranesp competes with only one other RBCGF drug. The competitor RBCGF drug is manufactured by Ortho Biotech Products, L.P. and sold under the brand name Procrit. Both WBCGF and RBCGF drugs are needed to treat cancer patients.

Warren General purchased both Amgen's WBCGF products and the RBCGF drug, Aranesp, during the class period. Warren General and other end users of the drugs transacted their purchases from Amgen pursuant to contracts identified in the Complaint as the Amgen Portfolio Contract ("APC"), Momentum Rebate, Momentum II and Enhanced Momentum II. [2] (Compl., P 27.) The contracts are negotiated by a Group Purchasing Organization ("GPO") on behalf of member hospitals. [3] The Enhanced Momentum II contract, pursuant to which Warren General made purchases, structures the transaction so that Amgen sells Aranesp, Neupogen and Neulasta to wholesalers, which in turn sell to hospitals. Plaintiff acknowledges in its brief that it purchased through wholesaler **[*4]** Amerisource Bergen. [4]

Plaintiff alleges that Amgen offered substantial rebates to end user purchasers, such as Warren General, on the condition that they reach certain dollar volume requirements in their combined purchases of Amgen's RBCGF and

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[2] The Court notes, for the sake of clarity, that APCs apply to oncology clinics, whereas the Momentum contracts pertain to hospital customers. The Court also notes that the parties agree that, as documents explicitly referred to and relied on by the Complaint, the contracts may be considered by the Court on this motion to dismiss, even though the documents are extraneous to the Complaint. *In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir.1997)*; *Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993)*.

[3] Plaintiff's Opposition Brief defines GPOs as "organizations that negotiate standardized contracts with manufacturers and suppliers of medical devices on behalf of their members." Pl. Br. at 25 (*quoting* *Natchitoches Parish Hosp. Svc. Dist. v. Tyco Int'l Ltd., 247 F.R.D. 253, 256 (D.Mass. 2008))*. According to the helpful description of GPOs provided by the court in Natchitoches,

> GPOs pool the purchasing power of their members and leverage that power to negotiate lower prices. GPOs do not purchase any products, nor do they sign or otherwise enter into the contracts that they negotiate on behalf of their members. Instead, **[*5]** GPOs negotiate standard form, or model, contracts that the members themselves sign and enter into with manufacturers.

Id.

[4] The name of Plaintiff's wholesaler does not appear in the Complaint, but the Court takes judicial notice of it for the factual narrative of this Opinion.

WBCGF drugs. Under Amgen's pricing scheme, each account was given dollar volume usage targets that, once reached, allowed the clinic to earn a specified level of rebate. The greater the purchases of Amgen products, the greater the rebate earned. To obtain sufficient rebates on their WBCGF purchases and avoid losing money on the drugs, purchasers had to meet their dollar volume targets on Aranesp. The Complaint alleges that Amgen set the purchasing requirements and rebate levels knowing how the purchasers would be reimbursed for their WBCGF drugs by Medicare. It alleges that Amgen knew that "[a]bsent achieving the Aranesp purchase requirements, and thereby obtaining the highest possible rebates from **[*6]** Amgen, Plaintiff and the class would be reimbursed by Medicare less than the cost of the WBCGF drugs." (Compl., P 31.)

The Complaint alleges that the rebate and pricing scheme forced purchasers to buy less Procrit (the competing RBCGF drug) and more Aranesp in order to attain the higher rebates. It further alleges that these rebates were essential to end users to avoid losing money on the reimbursement they received from Medicare for administering Amgen's WBCGF drugs. Warren General contends that even though Aranesp had a higher list and acquisition price per dose than Procrit, its only viable option was to purchase all or nearly all of its RBCGF drugs from Amgen. According to the Complaint, this allegedly illegal tying scheme caused market share for Aranesp to grow and the competitor's market share to drop. Plaintiff claims, in sum, that

> Amgen's efforts to use its monopoly power in the WBCGF drug market to coerce direct purchasers such as hospitals, doctors and oncology clinics into buying substantial amounts of Aranesp caused those purchasers to substantially overpay for RBCGF drugs, 1) to avoid losing money on their essential purchases of Amgen's WBCGF drugs, as well as 2) causing **[*7]** overpayments on those purchasers' bundle of combined RBCGF and WBCGF drugs, and 3) because Amgen's illegal tying scheme impaired and foreclosed Ortho's ability to effectively compete in the RBCGF market, which would have led to lower prices on RBCGF drugs, and finally 4) because Aranesp was more expensive per dose than Procrit.

(Compl., P 60.)

II. DISCUSSION

A. Standard of Review

Amgen's principal basis for seeking dismissal of the Complaint in its entirety is Warren General's lack of antitrust standing as an indirect purchaser. Because Amgen has challenged Plaintiff's statutory standing to bring this suit, the Court reviews the motion to dismiss according to the standards applicable to *Federal Rule of Civil Procedure 12(b)(6)*. *Maio v. Aetna, Inc., 221 F.3d 472, 482 n. 7 (3d Cir. 2000)*.

A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that plaintiff's claims have facial plausibility. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)*. This means that the Complaint must contain sufficient factual allegations **[*8]** to raise a right to relief above the speculative level, assuming the factual allegations are true. *Id. at 1965*; *Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008)*. The Supreme Court has made clear that "a formulaic recitation of the elements of a cause of action will not do." *Twombly, 127 S.Ct. at 1964-65*; see also *Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)* ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

In evaluating a *Rule 12(b)(6)* motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the complainant's claims are based upon those documents. See *Pension Benefit Guar. Corp., 998 F.2d at 1196*. The issue before the Court "is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *Burlington Coat Factory Sec. Litig., 114 F.3d at 1420* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974))*.

B. Standing under *Illinois Brick*

Plaintiff claims it has been injured by the subject tying arrangement, in violation **[*9]** of federal antitrust laws and accordingly seeks damages from Amgen. Section 4 of the Clayton Act, *15 U.S.C. § 15*, authorizes any person injured by a violation of the antitrust laws to sue for treble damages, costs and attorneys' fees. It is, however, well-established under the rule known as the *Illinois Brick* doctrine, that only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations. *Illinois Brick Co. v. Illinois, 431 U.S. 720, 735, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; see also *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* (holding that direct purchaser is injured under Section 4 of Clayton Act by full amount of overcharge and foreclosing antitrust defendant from defending on grounds that overcharge was passed on to indirect purchasers). With very few and narrowly tailored exceptions, a party that has made a purchase indirectly through a middleman, rather than directly from the manufacturer accused of committing an antitrust violation, is barred under *Illinois Brick* from bring suit. *Kansas v. Utilicorp United, Inc., 497 U.S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*. The Supreme Court has identified three rationales for the direct purchaser rule of *Illinois Brick*: **[*10]** (1) it eliminates the complications of apportioning overcharges among purchasers in a chain of distribution, which is especially difficult in light of the wide range of considerations influencing a company's pricing decisions; (2) it eliminates a pass-on defense for manufacturers, which would reduce the effectiveness of Section 4 actions by diminishing the recovery available to a plaintiff; and (3) it eliminates the risk of multiple recoveries. *Id. at 206-207, 212*.

In this case, there is no question that Warren General purchased Amgen's WBCGF and RBCGF from a middleman wholesaler. Its allegations throughout the Complaint that it is a "direct purchaser" merely parrots the *Illinois Brick* requirement, without providing any factual basis to support this assertions. The Court need not assume the truth of legal conclusions. *Iqbal, 129 S.Ct. at 1949* ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). In fact, the Complaint's characterization of Warren General as a direct purchaser is squarely contradicted by the purchase contracts on which the Complaint relies, which demonstrate that Warren General pays a wholesaler, **[*11]** not Amgen for the products based on prices which have been set by the wholesaler. When there is a disparity between a complaint's allegations and the written instruments on which the allegations or claims are based, the written instrument controls. *ALA, Inc. v. CCAir, Inc., 29 F.3d 855, 859 n.8 (3d Cir. 1994)*. [5]

Warren General acknowledges that it purchases the Amgen WBCGF and RBCGF products from a wholesaler. It nevertheless argues that the mechanics of the transaction should not bar its antitrust action because insofar as the antitrust injury is concerned, the wholesaler is irrelevant and Warren General should be deemed the direct purchaser. It contends that the challenged tying arrangement does not implicate any overcharge experienced by the wholesaler but rather centers on the availability of rebates to the end user. Those rebates are negotiated directly between Amgen and the GPO to which Warren General belongs, and the purchases are made pursuant to the hospital's GPO-negotiated contract with Amgen. The rebates are then payable directly from Amgen to Warren General. Warren General maintains that although the transactions are structured so that the WBCGF and RBCGF products are purchased from Amgen by wholesaler Amerisource Bergen, which in turn sells them to the hospital, the crux of antitrust injury lies in the volume of RBCGF Warren General **[*13]** and other end users are forced to make to qualify for the rebates on WBCGF. Thus, Plaintiff argues that it should not be subject to a hypertechnical application of *Illinois Brick* because it bears the antitrust overcharge in the first instance. In other words, according

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[5] In an attempt to establish that it is a direct purchaser, Warren General also points out that Amgen has admitted, through pleadings publicly filed in other lawsuits, that many clinics buy WBCGF from Amgen. This argument is unavailing. First, that a hospital or clinic buys from Amgen does not necessarily mean it purchases the product directly from the manufacturer, as opposed to somewhere along the distribution chain. Second, the relationship between Amgen and "many clinics" or other unidentified end users is simply irrelevant. The question the Court must address is whether the Plaintiff in this case, Warren General, has alleged facts in support of its claim that it is a direct purchaser of RBCGF and WBCGF from Amgen. It is well-established that bringing a lawsuit as a class action does not dispense with the requirement that a named plaintiff must itself have standing to sue. **[*12]** *Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)*; *O'Shea v. Littleton, 414 U.S. 488, 494, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*; *Winer Family Trust v. Queen, 503 F.3d 319, 326 (3d Cir. 2007)*.

to Warren General, the wholesaler is completely unaffected by the tying scheme and thus Amgen would not face the risk of additional lawsuits brought by Amerisource Bergen or any other wholesaler.

Essentially, Warren General asks this Court to carve out an exception from the *Illinois Brick* doctrine to accommodate a business arrangement in which, according to Plaintiff's argument, the end user alone bears the tying scheme overcharge and the middleman could not have an antitrust claim. The Court declines to do so. Warren General has cited no authority in which either the Supreme Court, the Third Circuit, or any other court of appeals has recognized an exception for situations involving direct interaction between an indirect purchaser and the manufacturer.

Indeed, the antitrust jurisprudence indicates that courts are loath to recognize exceptions to the *Illinois Brick* doctrine. *See*, *e.g.*, *UtiliCorp United Inc., 497 U.S. at 208* **[*14]** (refusing to create exception for situation in which middleman passed on entire overcharge to indirect purchaser); *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson, 523 F.3d 1116, 1123-24 (9th Cir. 2008)* (holding that, under *Illinois Brick* rule, hospital that bought medical supplies from distributor lacked standing, even though price paid by hospital was set partly by GPO-negotiated agreement with manufacturer). The Court acknowledges that this is not a situation in which there appears to be particular difficulty in apportioning the alleged overcharge borne by the indirect purchaser. The Supreme Court, however, has held that for the direct purchaser rule of *Illinois Brick* to serve its purpose of maintaining stability and avoiding extensive fact-based litigation in antitrust suits, it must be applied as a bright-line rule, even if the rule's rationales are not significantly furthered in a particular case. *UtiliCorp United Inc., 497 U.S. at 211-12, 216*. It expressly rejected adopting an approach to *Illinois Brick* that would create exceptions to fit the peculiarities of certain markets or business arrangements. *Id. at 210-11*. The Supreme Court reasoned:

> The rationales underlying **[*15]** *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:
>
> "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' into treble-damages proceedings, albeit at a somewhat higher level of generality."
>
> In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe,* and adhered to it in *Illinois Brick,* we stand by our interpretation of § 4.

Id. at 216-217 **[*16]** (quoting *Illinois Brick, 431 U.S., at 744-745*) (citations omitted).

Guided in large part by the Supreme Court's reasoning in *UtiliCorp United,* the Ninth Circuit refused to carve out an exception for an indirect purchaser hospital in *Delaware Valley*, a case which is factually similar to the one at bar. *Delaware Valley Surgical Supply, Inc., 523 F.3d at 1123-24*. The case involved allegations that the defendant manufacturer Johnson & Johnson had impermissibly leveraged its monopoly power in sutures to create a monopoly in the market for endomechanical products by offering rebates and discounts on the condition that a buyer purchase the bulk of both kinds of products from Johnson & Johnson. *Id. at 1118*. The plaintiff hospital, Bamberg County Memorial Hospital and Nursing Center ("Bamberg Hospital"), urged the court to adopt a new exception to *Illinois Brick* that would, in the hospital's view, be "better attuned to the business relationships between health care providers and manufacturers." *Id. at 1123*. The hospital did not dispute that it placed orders for medical supplies through independent distributors. *Id. at 1122*. It argued that it was nevertheless the direct victim of the manufacturer's **[*17]** antitrust violations and resulting artificially high prices because the hospital's GPO had negotiated the price with the manufacturer and the injury stemmed from the GPO-negotiated contract between Bamberg Hospital and the manufacturer. *Id. at 1122-23*. Bamberg Hospital further argued that it would have a greater incentive than a distributor to bring an antitrust claim based on a manufacturer's price negotiations with a

GPO. *Id. at 1123*. The *Delaware Valley* court held that the established and deliberately strict rule under *Illinois Brick* did not permit the Court to deviate from the rule in consideration of the facts of the subject transaction. *Id. at 1123-24*. "The Court's firm rule does not provide us the leeway to make a policy determination on a case-by-case basis as to whether standing should be recognized when there are special business arrangements." *Id. at 1124* (citing *Illinois Brick, 431 U.S. at 744*).

Despite Warren General's arguments to the contrary, the Third Circuit adheres to *Illinois Brick*'s bright-line rule barring indirect purchasers from pursuing damages for federal antitrust violations. *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 258-59 (3d Cir. 2010)*; **[*18]** see also *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 371 (3d Cir. 2005)* (observing that Supreme Court has held that absence of an *Illinois Brick* concern in an individual case does not warrant removing the bar on indirect purchaser claim); *McCarthy v. Recordex Svc., Inc., 80 F.3d 842, 849-854 (3d Cir. 1996)* (discussing various cases in which Third Circuit applied *Illinois Brick* rule). The Court has considered Warren General's position that an *Illinois Brick* exception makes sense in the factual scenario presented by this case because, among other reasons, recognizing Warren General's standing "will serve to promote 'the vigorous enforcement of antitrust laws'" whereas the middleman wholesaler lacks any incentive to challenge the allegedly unlawful tying arrangement. (See Pl. Br. at 20 (quoting *UtiliCorp United Inc., 497 U.S. at 214*)). It remains clear, however, that Warren General is an indirect purchaser of the Amgen products at issue. Whatever the potential merits of the exception proposed by Warren General may be, this Court holds the view that such a matter is one for the Supreme Court or the Legislature to decide.

In the alternative, Warren General maintains **[*19]** that, even if considered an indirect purchaser, it should be permitted to proceed with the suit under the cost-plus exception to the *Illinois Brick* doctrine. The Supreme Court has recognized an *Illinois Brick* exception for situations in which the overcharged buyer has a pre-existing cost-plus contract. *Illinois Brick, 431 U.S. at 736*; *Hanover Shoe, 392 U.S. at 494*. The cost-plus exception applies when the customer is committed to buying a fixed quantity of the manufacturer's product regardless of price. *Illinois Brick, 431 U.S. at 736*; *Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 577 and n.9 (3d Cir. 1979)*. The Supreme Court reasoned that because the indirect purchaser's commitment to buy a fixed quantity of the product insulates the direct purchaser from market responses to the overcharge, the effect of the overcharge on the indirect purchaser is not complicated by the need to recreate whether and how much of the overcharge is borne by the indirect purchaser. *Illinois Brick, 431 U.S. at 736*.

Warren General's cost-plus argument is simply not applicable. The facts alleged in the Complaint do not demonstrate or even remotely suggest that Warren General had an agreement **[*20]** with Amgen to purchase a fixed amount of Aranesp. The pricing scheme described provided that Warren General had to reach a target volume of Aranesp purchases to qualify for rebates on the combined purchase of Aranesp and WBCGF drugs. This rebate schedule, however, does not equate with a commitment by the indirect purchaser to purchase a certain amount of Aranesp, notwithstanding Warren General's position that the rebates were essential to economic viability.

Thus, the Court concludes, based on the allegations of the Complaint and the documents on which it relies, that Warren General lacks standing, as an indirect purchaser, to pursue its claims for damages against Amgen for the complained-of antitrust violations. Accordingly, the Complaint will be dismissed pursuant to *Rule 12(b)(6)*.

C. Definition of Unlawful Tie

In addition to the standing deficiency discussed above, the Complaint also fails for failure to allege an unlawful tie under federal ***antitrust law***. An essential element of a tying claim is that the sale of one product be conditioned on the sale of another. *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. "Tying is selling one good (the tying product) on the condition **[*21]** that the buyer also purchase another, separate good (the tied product)." *Gordon v. Lewistown Hosp., 423 F.3d 184, 213 (3d Cir. 2005)*.

In this case, Warren General's tying theory is that Amgen leveraged its control over the WBCGF market to coerce purchases of its RBCGF products and thereby drive out competition from the RBCGF market. The Complaint does not, however, allege that Amgen attempted to achieve this by conditioning the sale of WBCGF drugs on a buyer's purchase of its RBCGF product, Aranesp. Rather, the alleged coercion and improper leveraging of its monopoly (to adopt the Complaint's characterization) occurred in the form of setting target purchase amounts to earn rebates on the WBCGF drugs, without which rebates, Plaintiff maintains, Amgen knew its buyers would lose money. The Complaint alleges, in other words, that Amgen conditioned the availability of rebates and discounts on one product, the WBCGF drugs, on a buyer's purchase of another, Amgen's RBCGF drug.

Under Third Circuit law, this allegation fails to set forth the conditioned sale element of an antitrust tying claim. *SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1061 n.3 (3d Cir. 1978)* (observing, in dicta, that **[*22]** Supreme Court has defined a tie-in as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product" (quoting *N. Pac. Ry., 356 U.S. at 5*)). The Complaint neither expressly charges nor inferentially alleges that Amgen will not sell WBCGF unless a buyer also purchases Aranesp. Amgen, rather, has created a pricing and discount scheme that a buyer may take advantage of if it buys both Amgen products. This arrangement does not present a tying problem. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* ("Where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price."). Having failed to plead facts establishing an essential element of an antitrust tying claim, Warren General's Complaint must be dismissed.

III. CONCLUSION

For the foregoing reasons, this Court will dismiss the Complaint in its entirety pursuant to *Rule 12(b)(6)* for Plaintiff's lack of statutory standing, and alternatively, for failure to plead a prima facie tying claim. An appropriate form of order will be filed together with this Opinion.

/s/ Stanley R. Chesler

[*23] STANLEY R. CHESLER

United States District Judge

DATED: June 7, 2010

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Danner Constr. Co. v. Hillsborough County

United States Court of Appeals for the Eleventh Circuit

June 9, 2010, Filed

No. 09-13951

Reporter

608 F.3d 809 *; 2010 U.S. App. LEXIS 11803 **; 2010-1 Trade Cas. (CCH) P77,045; 22 Fla. L. Weekly Fed. C 961

DANNER CONSTRUCTION CO., INC., a Florida corporation, GATEWAY ROLL-OFF SERVICES, LP, a Nevada limited partnership, Plaintiffs-Appellees, versus HILLSBOROUGH COUNTY FLORIDA, a political subdivision of the State of Florida, Defendant-Appellant. REPUBLIC SERVICES OF FLORIDA, LIMITED PARTNERSHIP, WASTE MANAGEMENT INC. OF FLORIDA, Intervenors-Appellants.

Prior History: [1]** Appeal from the United States District Court for the Middle District of Florida. D. C. Docket No. 09-00650-CV-T-17-TBM.

Danner Constr. Co. v. Hillsborough County, 2009 U.S. Dist. LEXIS 92716 (M.D. Fla., Sept. 24, 2009)

Disposition: REVERSED AND REMANDED.

Core Terms

immunity, ordinance, state action, anti trust law, preempted, Sherman Act, antitrust, collection, anticompetitive, solid waste, customers, district court, franchise, municipal, disposal, state policy, franchisees, hybrid, waste disposal, regulation, conflicts, rates, anticompetitive conduct, per se violation, antitrust claim, rule of reason, state law, articulated, controls, shielded

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Civil Procedure > ... > Summary Judgment > Appellate Review > Appealability

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

An order denying summary judgment on state action immunity grounds is immediately appealable.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

An appellate court reviews de novo the denial of a motion to dismiss based on state action immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > State & Territorial Governments > Legislatures

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

HN3[] **Exemptions & Immunities, Parker State Action Doctrine**

The antitrust laws are not intended to apply to actions taken by state governments. The U.S. Supreme Court has established a general immunity from antitrust liability for state governmental actors acting pursuant to state law, a concept now often denominated "Parker immunity" or "state action immunity." In a later case involving California's effort to enforce resale price maintenance, the Supreme Court has developed a two-part test for state action immunity. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > State & Territorial Governments > Legislatures

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

Governments > Local Governments > Ordinances & Regulations

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

A court needs apply the two-part Midcal test only when the state statute or ordinance is preempted by the federal antitrust laws. Challenges to state action not preempted by the Sherman Act fail. Preemption occurs only if there is an irreconcilable conflict between the state statute and the antitrust laws: The decisions of the U.S. Supreme Court in this area instructs, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Governments > State & Territorial Governments > Legislatures

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Whether state regulation is preempted depends largely on the character of the regulation. If the state acts unilaterally, such as by imposing rent controls, such action cannot be preempted by the antitrust laws and the antitrust challenge fails. If, however, the state empowers a private actor to violate the antitrust laws, by, for example, imposing price controls on downstream distributors, then the state has created a hybrid restraint that is preempted if it constitutes a per se violation of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Ordinances & Regulations

Governments > State & Territorial Governments > Legislatures

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

The U.S. Supreme Court has substantially clarified and revised the two-pronged Midcal test as it applies to municipal ordinances. First, though the first prong requires a clearly articulated and affirmatively expressed state policy of antitrust immunity for the municipality, the prong is satisfied when anticompetitive conduct is a foreseeable result of the state's authorizing statute. Explicit statements by the state legislature that it anticipated anticompetitive effects are not required. Second, the final prong, requiring active state supervision of the regulatory scheme, is not required when the defendant is itself a municipality and not a private actor.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Duties & Powers

Governments > State & Territorial Governments > Legislatures

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

A municipality is shielded from antitrust liability if its activity is undertaken pursuant to a clearly expressed state policy authorizing anticompetitive conduct. A state policy is clearly expressed when the state statute authorizing anticompetitive conduct clearly contemplates such a result, or where the anticompetitive effects logically would result. In the United States Court of Appeals for the Eleventh Circuit, an entity seeking state action immunity must show: (1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Environmental Law > Solid Wastes > General Overview

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Sanitation & Water

Governments > State & Territorial Governments > Legislatures

HN8[] **Exemptions & Immunities, Parker State Action Doctrine**

The Hillsborough County Solid Waste Disposal and Resource Recovery Act, 1983 Fla. Laws 166 (Chapter 83-415), explicitly provides that the county shall have exclusive control over the collection and disposal of solid waste. It further provides that no person except the county, its franchisee, licensee, lessee, or other designated person shall engage in the collection and disposition of solid waste. Such language confers on the county the right to exert control over the solid waste collection and to limit or exclude private competitors from the market.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Sanitation & Water

HN9[] **Exemptions & Immunities, Parker State Action Doctrine**

The United States Court of Appeals for the Eleventh Circuit has held that when the state confers on a municipality the power to regulate the provision of public services, it does so mindful of the inevitable anticompetitive effects such power will have.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Environmental Law > Solid Wastes > General Overview

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Sanitation & Water

HN10[] **Exemptions & Immunities, Parker State Action Doctrine**

Sections 5(8) and 8 of the Hillsborough County Solid Waste Disposal and Resource Recovery Act, 1983 Fla. Laws 166 (Chapter 83-415), do clearly establish the county's authority to regulate rates charged by the "facilities" used to store and convert solid waste, but nowhere do they speak of the county's obligation to set rates for those who collect and take the waste to these facilities.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Constitutional Law > Supremacy Clause > Federal Preemption

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Exemptions & Immunities, Parker State Action Doctrine**

Even if the Sherman Act preempts a state law or municipal ordinance, the court must still conduct the Parker/Midcal inquiry to determine if the defendant is entitled to immunity.

Counsel: For Hillsborough County Florida, Appellant: Stephen Mark Todd, Hillsborough County Attorney's Office, TAMPA, FL.

For Republic Services of Florida, Appellant: Limited Partnership, Marie Tomassi, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis P.A., Saint Petersburg, FL.

For Waste Management Inc. of Florida, Appellant: David Clark Borucke, Holland & Knight, LLP, TAMPA, FL.

For Danner Construction Co., Inc., Appellee: Andrew Kenyon MacFarlane, Macfarlane Ferguson & McMullen, TAMPA, FL.

For Gateway Roll-Off Services, LP, Appellee: William B. Taylor, IV, MacFarlane, Ferguson & McMullen, Tampa, FL.

Judges: Before DUBINA, Chief Judge, MARTIN and COX, Circuit Judges. MARTIN, concurring.

Opinion by: DUBINA

Opinion

[*811] DUBINA, Chief Judge:

Hillsborough County established a franchise system for waste collection, one now challenged under the antitrust laws by a service provider and a customer. The district court held that the franchise system implemented by the county constituted a hybrid restraint--one where the government enforces the anticompetitive practices of private parties. According **[**2]** to the district court, because such a hybrid restraint existed, it could not address the antitrust immunity of the state actors. The district court's conclusion was incorrect, and we reverse its order denying immunity. Even if the Sherman Act preempts a state practice, if it is undertaken by state actors pursuant to an expressed anticompetitve state policy, then those actors are immune from liability.

I. BACKGROUND

Appellant Hillsborough County, Florida ("the county"), together with Intervenor-Appellants Waste Management, Inc. of Florida and Republic Services of Florida (collectively "Appellants") appeal the district court order denying the county's motion to dismiss federal antitrust claims brought by Danner Construction Co. and Gateway Roll-Off Services, LP (collectively "Danner and Gateway") on the basis of state action immunity.

In 1983, the Florida legislature passed the Hillsborough County Solid Waste Disposal and Resource Recovery Act. 1983 Fla. Laws 166 (Chapter 83-415) ("the Act"). The Act empowered the county to take "exclusive control over the collection and disposal of solid waste" within the county. *Id*. at 169-70 (Section 4). The Act forbids any person or entity, except the **[**3]** county or its franchisees and licensees, to collect or dispose of solid waste within the county. *Id*.

Pursuant to the Act, the county passed an ordinance to implement its regulatory power over the area's waste disposal. *See* Hillsborough County, Fla. Ordinance 96-34 (Nov. 13, 1996) *amended by* Ordinance 97-8, Ordinance 97-11, Ordinance 03-15 ("the ordinance"). The ordinance established a two-pronged franchise system for waste disposal, one for residential customers and one for commercial customers. The county awards franchises within the service area to waste disposal services, *id*. § 3(k), and the Board of County Commissioners determines the collection charges assessed to residential customers. *Id*. § 3(i). For commercial entities, the county also awards franchises to disposal services, *id*. § 4(g), but it does not set collection rates, leaving those to negotiation between the franchisees and commercial customers. *Id*. § 4(f).

Danner, a commercial customer located within the county, and Gateway, a disposal service not awarded a franchise by the **[*812]** county, filed suit to enjoin continued application of the ordinance. Danner and Gateway alleged that the ordinance caused them harm by artificially **[**4]** inflating the cost of commercial waste disposal services and unlawfully barring service providers from competing in the market. Danner and Gateway asserted violations of the Sherman Act, *15 U.S.C. § 1 (2006)* (Counts I and II) and various violations of state law (Counts III-V).

Acting pursuant to the ordinance, the county awarded three franchises to waste disposal services for the county's commercial entities. Danner and Gateway allege that the county's restriction on the size of the competitive market essentially authorizes the franchisees to collude and impose fixed prices on their customers. They argue that this arrangement gives the franchisees a degree of governmental power over their customers, who are forced to use their services, referring to it in the antitrust lexicon as a "hybrid restraint" because it allows private parties to enforce their pricing decisions with governmental authority. Additionally, they argue that the Act under which the ordinance was promulgated requires the county to impose price controls on commercial collection service. Finally, they argue that the county's creation of a two-tiered pricing system--where the franchisees must charge below-market rates **[**5]** to residential customers and therefore must recoup their losses from commercial customers--forces the price-fixing they allege.

The county moved to dismiss the complaint's antitrust claims (Counts I and II) on the basis of state action immunity. [1] The Intervenor-Appellants are two of the three franchisees of the county that perform commercial waste disposal, and the district court permitted them to intervene after it denied the county's motion. Appellants now collectively challenge the district court order denying the motion to dismiss on the basis of state action immunity.

II. STANDARD OF REVIEW

HN2[] We review *de novo* the denial of a motion to dismiss based on state action immunity. *See Bolt v. Halifax Hosp. Med. Ctr., 980 F.2d 1381, 1384 (11th Cir. 1984)* (applying *de novo* review to legal question of state action immunity).

III. DISCUSSION

The first key principle governing this dispute is that ***HN3***[] the antitrust laws were not intended to apply to actions taken by state governments. *See Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 313, 87 L. Ed. 315 (1943)*. In *Parker*, the Supreme Court established a general immunity from antitrust liability for state governmental actors acting pursuant to state law, a concept now often denominated "*Parker* immunity" **[*813]** or "state action immunity." *See id*. In a later case involving California's effort to enforce resale **[**7]** price maintenance, the Supreme Court developed a two-part test for state action immunity. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Id. at 105, 100 S. Ct. at 943* (internal quotation marks omitted) (ultimately holding that the state did not adequately supervise the private pricing decisions that it enforced).

[1] The county actually moved to dismiss the entire complaint, but the district court order addressed only the federal antitrust claims and ordered the county to answer the remainder of the complaint. On appeal, we address only the decision respecting the federal antitrust claims. We have jurisdiction to hear this appeal under the collateral order doctrine because the immunity asserted here includes immunity from suit. *See 28 U.S.C. §§ 1291*, *1292 (2006)*; *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949)* (establishing three-part test for collateral orders excepted from the final **[**6]** judgment requirement for appealability); *Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1394-97 (5th Cir. 1996)* (explaining that orders denying claims of state action immunity are immediately appealable under *Cohen); Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1289-90 (11th Cir. 1986)* (holding that ***HN1***[] an order denying summary judgment on state action immunity grounds was immediately appealable).

The second key principle is that ***HN4***[] we need apply the two-part *Midcal* test only when the state statute or ordinance is preempted by the federal antitrust laws. *See [Rice v. Norman Williams Co., 458 U.S. 654, 662 n.9, 102 S. Ct. 3294, 3301 n.9, 73 L. Ed. 2d 1042 (1982)]*. Challenges to state action not preempted by the Sherman Act fail. *See [Fisher v. City of Berkeley, Cal., 475 U.S. 260, 270, 106 S. Ct. 1045, 1051, 89 L. Ed. 2d 206 (1986)]* (holding that ordinance was not a *per se* violation of the Sherman Act and concluding that "[w]e need not address whether . . . [it] would be exempt under the state-action doctrine from antitrust scrutiny"). Preemption occurs only if there is an "irreconcilable **[**8]** conflict" between the state statute and the antitrust laws:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

[Rice, 458 U.S. at 659, 661, 102 S. Ct. at 3299-3300].

HN5[] Whether state regulation is preempted depends largely on the character of the regulation. If the state acts unilaterally, such as by imposing rent controls, such action cannot be preempted by the antitrust laws and the antitrust challenge fails. *[Fisher, 475 U.S. at 270, 106 S. Ct. at 1051]* (holding that city's rent control ordinance was not an unlawful price-fixing scheme because the city acted unilaterally). If, however, the state empowers a private actor to violate the antitrust laws, by, for example, imposing price controls on downstream distributors, then the state has created a "hybrid restraint" that is preempted if it constitutes a *per se* violation of the antitrust laws. *[Id. at 267-68, 106 S. Ct. at 1050]*; **[**9]** *[324 Liquor Corp. v. Duffy, 479 U.S. 335, 342-43, 107 S. Ct. 720, 724-25, 93 L. Ed. 2d 667 (1987)]* (holding that New York's resale price maintenance scheme for liquor was preempted by the Sherman Act).

The third and final key principle relates only to applying state action immunity to *municipal ordinances* that *are preempted* by the antitrust laws. ***HN6***[] The Supreme Court substantially clarified and revised the two-pronged *Midcal* test as it applies to municipal ordinances in *[Town of Hallie v. City of Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)]*. First, though the first prong requires a clearly articulated and affirmatively expressed state policy of antitrust immunity for the municipality, the prong is satisfied when anticompetitive conduct is a "foreseeable result" of the state's authorizing statute. *[Id. at 42, 105 S. Ct. at 1718]*. Explicit statements by the state legislature that it anticipated anticompetitive effects are not required. *Id*. Second, the final prong, requiring active state supervision of the regulatory scheme, is not required **[*814]** when the defendant is itself a municipality and not a private actor. *[Id. at 46-47, 105 S. Ct. at 1720]*.

HN7[] A municipality is shielded from antitrust liability if its activity **[**10]** is undertaken "pursuant to a clearly expressed state policy" authorizing anticompetitive conduct. *[Town of Hallie, 471 U.S. at 40-41, 105 S. Ct. at 1717]*. A state policy is "clearly expressed" when the state statute authorizing anticompetitive conduct "clearly contemplates" such a result, or where the "anticompetitive effects logically would result." *[Id. at 42, 105 S. Ct. at 1718]*. In this circuit, an entity seeking state action immunity must show: "(1) that it is a political subdivision of the state; (2) that, through statutes, the state generally authorizes the political subdivision to perform the challenged action; and (3) that, through statutes, the state has clearly articulated a state policy authorizing anticompetitive conduct." *[Fed. Trade Comm'n v. Hosp. Bd. of Dirs. of Lee County, 38 F.3d 1184, 1187-88 (11th Cir. 1994)]*.

We assume, without deciding, that the challenged ordinance is preempted by the Sherman Act. [2] Even so, the county has demonstrated that all three criteria of the state action immunity test are satisfied. There is no dispute

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[2] Neither in the complaint, in brief, nor at oral argument did Danner and Gateway's counsel clarify whether their challenge to the ordinance was facial or as-applied. Regardless of whether the statute is challenged on its face or in its application, our review of the state action immunity question is the same. IA Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** *P* 221a (3d ed. 2006) ("In both [facial and as-applied] cases, once the inconsistency sufficient to warrant prima facie preemption is found, the statute or practice survives the test only if these additional requirements are met . . . ."). To reach the immunity question in this interlocutory appeal, we will assume that the Sherman Act preempts both the statute on its face and the county's application of the ordinance.

that the county is a political subdivision of the state. The parties tussle over the second and third criteria, which are really just an extrapolation **[**11]** of the "clearly expressed state policy requirement" contained in *Town of Hallie*. An examination of the Hillsborough County Solid Waste Disposal and Resource Recovery Act, 1983 Fla. Laws 166, resolves both questions in the county's favor.

HN8[] The Act explicitly provides that "the county shall have exclusive control over the collection and disposal of solid waste." *Id*. at 169-70 (Section 4). It further provides that "[n]o **[**12]** person except the county, its franchisee, licensee, leasee [sic], or other designated person shall . . . engage in the collection and disposition of solid waste." *Id*. Such language confers on the county the right to exert control over the solid waste collection and to limit or exclude private competitors from the market.

The final prong of this circuit's state action immunity test turns on the presence of a clearly articulated policy permitting anticompetitive conduct. In general, ***HN9***[] this court has held that when the state confers on a municipality the power to regulate the provision of public services, it does so mindful of the inevitable anticompetitive effects such power will have. *See, e.g., McCallum v. City of Athens, Ga., 976 F.2d 649, 654 (11th Cir. 1992)* (holding that state action immunity shielded city from antitrust claims stemming from its exclusive operation of waterworks, as authorized by statute). The provisions of section 4 of the Act, as discussed above, show that the state intentionally conferred upon the county exclusive power to administer and regulate waste collection. That anticompetitive results were foreseeable is a given--such a grant of exclusivity implies anticompetitive **[**13]** purpose. *See Commuter [*815] Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986)* (applying state action immunity to claims against state agency that regulated the number of limousine operators that could service the local airport pursuant to its authority to develop and administer public airports).

An additional indication that the legislature foresaw the anticompetitive effects of ordinances promulgated under the Act appears in section 19. In that section, the legislature specifically exempted from application of the Florida Antitrust Act the exercise of powers under the Act. 1983 Fla. Laws 176. This serves as another indication that the state legislature was imminently aware of the anticompetitive results that would flow from the exclusivity arrangement.

Danner and Gateway repeatedly assert that the county ordinance and its application are not saved by state action immunity because they do not comply with the Act's terms. Specifically, they argue that the Act requires the county, when implementing a franchise system, to establish rate controls on the commercial collection services. They contend that the county's failure to establish rate controls **[**14]** prevents state action immunity from shielding the county because no state law allows the county to enact incomplete or uncompliant regulations.

Danner and Gateway's general legal assertion--that a challenged ordinance must comply with state law in order to be shielded by that law--has great logical appeal. The problem they face is not the legal concept, however, but the application of that concept to the case at hand. Simply put, Danner and Gateway's interpretation of the Act, and their contention that it requires the county to set the rates for collection services, is inaccurate.

Danner and Gateway repeatedly point to two provisions of the Act that they claim require the county to set rates for commercial collection: sections 5(8) and 8. *See* 1983 Fla. Laws 172-74. Both of these sections speak specifically to "solid waste disposal and resource recovery system[s]," a term defined under the Act dealing with the "facilities" used to store and convert solid waste, such as landfills. 1983 Fla. Laws 168 (Section 2(8)). ***HN10***[] These sections do clearly establish the county's authority to regulate rates charged by these "facilities," but nowhere do they speak of the county's obligation to set rates **[**15]** for those who collect and take the waste to these facilities. Because there is no actual provision of the Act which requires the county to set rates for the collection of waste, the contention that the ordinance fails to comply with the state authorization is erroneous. [3]

[3] Danner and Gateway also argue that the ordinance conflicts with other provisions of state law not related to the enabling statute. For our purposes, the fact that a local ordinance may conflict with a different state law may present a state law cause of action, but the noncompliance does not rise to the level of a federal antitrust violation.

The crux of the district court's decision was this: "the County has engaged in a 'hybrid restraint' on trade, as alleged by Danner, [and] the County has committed a per se violation of the Sherman Act and is not entitled to immunity under the *Parker* doctrine." As the framework discussed above reveals, this conclusion was legal error; ***HN11***[] even if the Sherman Act preempts a state law or municipal ordinance, the court must still conduct the *Parker*/*Midcal* inquiry to determine if the defendant is entitled to immunity. *See* *Midcal, 445 U.S. at 103, 100 S. Ct. at 942* (holding that the challenged **[**16]** practice violated the Sherman Act but **[*816]** continuing to examine it under *Parker*); *Fisher, 475 U.S. at 265, 106 S. Ct. at 1048* ("Legislation that would otherwise be pre-empted under *Rice* may nonetheless survive if it is found to be state action immune from antitrust scrutiny under *Parker* . . . ."). Our analysis of the applicability of state action immunity shows that the county is immune from this suit even if its actions are preempted by the Sherman Act.

Even the district court, in spite of its faulty application of the state action immunity framework, acknowledged that *Parker* state action immunity should shield the county's conduct under the ordinance. The authorizing state legislation contemplated, and most likely intended, the anticompetitive effects that resulted when the county promulgated its ordinance. The ordinance complies with the authorizing statute, which allows the county to take exclusive control of waste collection. Because the county has acted pursuant to a clearly articulated anticompetitive policy of the state, we conclude that its actions are immune from antitrust liability.

IV. CONCLUSION

This antitrust challenge to a traditional area of state and municipal regulation **[**17]** fails because of the applicability of state action immunity. The county, acting in its authorized capacity as regulator of waste collection services, is immune from antitrust liability as a state actor. None of the federal antitrust claims now on appeal can stand against the county, and the district court should have ordered dismissal. We reverse the district court order denying dismissal of Counts I and II and remand for further proceedings regarding the remaining counts.

REVERSED AND REMANDED.

Concur by: MARTIN

Concur

MARTIN, concurring:

I concur in the majority's analysis of the state action immunity issue but write separately to elaborate on its assumption that the challenged ordinance is preempted by *Section 1* of the Sherman Act. See Slip. Op. at 9.

The majority's discussion of the "second key principle" suggests that preemption may be found only when the challenged statute or ordinance conflicts with *Section 1* *on it face*. Slip. Op. at 7 (citing *Rice v. Norman Williams Co., 458 U.S. 654, 661, 102 S. Ct. 3294, 3300, 73 L. Ed. 2d 1042 (1982))*. As the Supreme Court stated in Rice, this occurs when the "conduct contemplated by the statute is *in all cases a per se violation*." *Rice, 458 U.S. at 661, 102 S. Ct. at 3300* (emphasis **[**18]** added in part). If in at least one case, the conduct must be analyzed under the rule of reason, the law, in the abstract, does not conflict with *Section 1*. Id.

But federal preemption may also be found when a plaintiff challenges particular applications of a state or local law. 1 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***, P 217d & n.93, at 372-73, P 221, at 42 (3rd ed. 2006). Such an "as applied" challenge asks whether a particular application of the law conflicts with *Section 1* in that it results in a restraint of trade that is either per se illegal *or* illegal under the rule of reason. The two-part Midcal test for state action immunity thus applies not only to a law that conflicts with *Section 1* on its face, as the majority suggests, but also to a law that conflicts with *Section 1* only in its application. [1] Id.

[*817] As the majority correctly notes, we need not consider whether state action immunity applies unless the statute or ordinance conflicts with the Sherman Act. Slip. Op. at 6. Thus, with respect to facial challenges, there is no need to engage in the immunity inquiry if the challenged statute or ordinance does not result in an per se illegal restraint of trade *in all cases*. *Rice, 458 U.S. at 662 n.9, 102 S. Ct. at 3301 n.9*. This is true because absent such a finding a facial challenge fails as a matter of law. See *id. at 661-62 & n.9, 102 S. Ct. at 3300 & n.9* ("Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.").

But the same is not true when the plaintiff brings an "as applied" challenge. This is because the success of an "as applied" challenge does not turn on a finding that *all* applications of the challenged law would be per se illegal. Thus, **[**20]** we must go further and ask whether the challenged statute or ordinance, as it is applied to the plaintiff, results in a restraint of trade that is either per se illegal or unlawful under the rule of reason. Only if we answer that question affirmatively does it become necessary to consider whether state action immunity applies.

The majority is correct that we may assume without deciding that the county's ordinance conflicts with Section I. [2] The majority is also correct in noting that Danner and Gateway have been less than clear in describing their challenge to the county's ordinance as facial, "as applied," or both. [3] To the extent they bring a facial challenge, I therefore assume that the challenged conduct constitutes (1) a hybrid restraint that is (2) a per se violation of *Section 1* *in all cases*. Insofar as plaintiffs are making an "as applied" challenge, I assume that the challenged conduct constitutes (1) a hybrid restraint that is (2) either per se illegal or unlawful under the rule of reason. In either case, the majority correctly holds that state action immunity applies. I therefore concur in the majority's state action analysis and its conclusion that Danner and Gateway's antitrust **[**21]** claims must be dismissed.

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[1] For a conflict to exist, of course, the conduct contemplated by the statute or ordinance must also constitute a "hybrid" rather than a "unilateral" restraint. *Fisher v. City of Berkeley, 475 U.S. 260, 266-69, 106 S. Ct. 1045, 1049-50, 89 L. Ed. 2d 206 (1986)*; see also *324 Liquor Corp. v. Duffy, 479 U.S. 335, 345 n.8, 107 S. Ct. 720, 726 n.8, 93 L. Ed. 2d 667 (1987)*. This is so because a unilateral restraint **[**19]** cannot conflict with *Section 1* in light of the fact that it lacks the necessary element of concerted action. *Fisher, 475 U.S. at 266-69, 106 S. Ct. at 1049-50*.

[2] This is typical because resolution of the state action immunity issue may avoid the sometimes-thorny question of whether the conduct contemplated by the statute or ordinance falls within a category of restraints that are per se illegal, or failing that, having to undertake the fact-intensive inquiry required by the rule of reason.

[3] At oral argument, Danner and Gateway declined to label their challenge. I read their complaint, however, as only a challenge to how the county has applied the ordinance. On its face, the ordinance does not limit the number of exclusive franchisees. The county could therefore grant franchises to all players in the marketplace, including Gateway. Neither does the ordinance mandate or provide a formula by which the county must set residential rates. The ordinance therefore does not require the county to set the "below market" residential rates that allegedly force the franchisees to collude on the commercial side of their businesses.

United States v. Coleman

United States Court of Appeals for the Fifth Circuit

June 16, 2010, Filed

No. 09-30545

Reporter

609 F.3d 699 *; 2010 U.S. App. LEXIS 12349 **

UNITED STATES OF AMERICA, Plaintiff - Appellee v. JAMES RAY COLEMAN, Defendant - Appellant

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

Core Terms

offenses, conspiracy, business practice, firearm, conspiracy conviction, felony, district court, regulation of a business, predicate offense, practices, unfair trade practice, antitrust violation, similar offense, stalking, unconstitutionally vague, satellite, possession of a firearm, restraint of trade, felony offense, pertaining, convicted, falls, target offense, mail fraud, sentencing, possessed, target, felon, legislative history, granddaughter

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Dismiss

HN1[] **De Novo Review, Motions to Dismiss**

Where a motion to dismiss an indictment is based on the interpretation of a federal statute, an appellate court reviews the denial of the motion de novo.

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

HN2[] **Unregistered Firearm, Elements**

The felon in possession of a firearm statute, *18 U.S.C.S. § 922(g)(1)*, makes it a crime for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess a firearm or ammunition that has traveled in interstate or foreign commerce. The business practices exception" to *§ 922(g)(1)*, set out in *18 U.S.C.S. § 921(a)(20)*, excludes from the definition of a crime punishable by imprisonment for a term exceeding one year any federal or state offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices. Thus, a felon in possession of a firearm who has been convicted of one of the types of violations itemized in *§ 921(a)(20)(A)* cannot be found guilty under *§ 922(g)(1)* on the basis of that conviction.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN3[] Conspiracy, Elements

A conviction for conspiracy under 18 U.S.C.S. § 371 requires that the Government show: (1) an agreement between two or more persons to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the members of the conspiracy in furtherance of the objective of the conspiracy. Thus, § 371 requires that the Government prove as an element that the conspiracy was targeted at a specific offense or unlawful objective. Consequently, if the targeted offense requires the Government to prove an effect upon competition as an element of the offense, then the conspiracy conviction falls within the business practices exception to the felon in possession of a firearm statute, 18 U.S.C.S. § 922(g)(1).

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > Elements

HN4[] Larceny & Theft, Elements

To prove a violation of 47 U.S.C.S. § 605(e)(4), the Government must show that the defendant: (1) manufactured, assembled, modified, imported, exported, sold, or distributed; (2) any electronic, mechanical, or other device or equipment that was primarily of assistance in the unauthorized decryption of satellite cable programming or direct-to-home satellite services; (3) while knowing or having reason to know that the device or equipment was primarily of assistance in the unauthorized decryption of satellite cable programming or direct-to-home satellite services. These elements do not require any proof of an effect upon competition.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Governments > Legislation > Interpretation

HN5[] Weapons Offenses, Possession of Weapons

Courts have looked to the legislative history of a statute in order to determine whether it falls within the business practices exception to the felon in possession of a firearm statute, 18 U.S.C.S. § 922(g)(1), but legislative history remains secondary to an examination of the elements of the statute.

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

HN6[] Theft & Related Offenses, Larceny & Theft

The purpose of 47 U.S.C.S. § 605(e)(4) is to proscribe the piracy of programming signals, whether they be for commercial or personal use.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Copyright Infringement

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN7[] **Criminal Offenses, Copyright Infringement**

To prove a violation of *17 U.S.C.S. § 506(A)*, the Government must show that the defendant: (1) willfully infringed; (2) a valid copyright; (3) for commercial advantage, for private financial gain, or in a manner otherwise prohibited by the statute. For the conviction to fall within the business practices exception to the felon in possession of a firearm statute, *18 U.S.C.S. § 922(g)(1)*, the Government must have been required to prove, as an element of the predicate offense, that competition was affected; possible incidental effects are not relevant. Under *17 U.S.C.S. § 506(A)*, the Government is not required to prove any effect upon competition.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN8[] **Weapons Offenses, Possession of Weapons**

In evaluating whether a conspiracy conviction under *18 U.S.C.S. § 371* falls within the business practices exception to the felon in possession of a firearm statute, *18 U.S.C.S. § 922(g)(1)*, courts must evaluate the elements of *18 U.S.C.S. § 371* and the target offenses of the conspiracy. Where the conspiracy conviction for the target offenses does not fall within the business practices exception, a defendant's prior conspiracy conviction is a predicate offense for purposes of *18 U.S.C.S. § 922(g)(1)*.

Governments > Legislation > Vagueness

HN9[] **Legislation, Vagueness**

Whether a statute is unconstitutionally vague is a question of law, which is reviewed de novo. The vagueness doctrine bars enforcement of a statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. A principal element of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement. The touchstone of the analysis, however, is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

Governments > Legislation > Vagueness

HN10[] **Weapons Offenses, Possession of Weapons**

According to its terms, *18 U.S.C.S. § 921(a)(20)(A)* excludes those federal or state offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices. In the final phrase, the word "similar" limits the term "offenses," so that it refers back to the three enumerated offenses and is further limited by the phrase "relating to the regulation of business practices." Accordingly, the statute is not vague because an ordinary individual would have notice that the *§ 921(a)(20)(A)* exception applies only if he or she committed an enumerated or similar offense related to the regulation of business practices.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN11[] **Regulated Practices, Trade Practices & Unfair Competition**

Antitrust law is designed to protect trade and commerce from restraints, monopolies, price fixing, and price discrimination. While it is almost impossible to formulate an all inclusive definition of "unfair trade practice," implicit in the term itself is the requirement that the practice adversely affect either competitors or consumers. Likewise, "restraint of trade" has a definite meaning at common law and includes contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > General Overview

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Sentences

HN12[] **De Novo Review, Conclusions of Law**

Federal appellate courts review a district court's application of the sentencing guidelines de novo and its factual findings for clear error. In determining whether a guidelines enhancement applies, the district court is allowed to draw reasonable inferences from the facts, and those inferences are fact findings reviewed for clear error. A factual finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. A factual finding is not clearly erroneous if it is plausible in light of the record as a whole.

Criminal Law & Procedure > ... > Departures From Guidelines > Upward Departures > Weapons Violations

HN13[] **Upward Departures, Weapons Violations**

U.S. Sentencing Guidelines Manual § 2K2.1(b)(6) provides that, if the defendant used or possessed any firearm or ammunition in connection with another felony offense, increase by four levels. The enhancement applies where the firearm facilitated, or had the potential of facilitating, the other felony offense. Thus, to obtain an enhancement under *U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)*, the Government must establish by a preponderance of the evidence that the firearm facilitated, or had the potential of facilitating another felony offense and that the defendant used or possessed the firearm in connection with that offense.

Criminal Law & Procedure > ... > Stalking > Aggravated Stalking > Elements

HN14[] **Aggravated Stalking, Elements**

See *La. Rev. Stat. Ann. § 14:40.2(A)*.

Criminal Law & Procedure > ... > Stalking > Aggravated Stalking > Elements

HN15[] **Aggravated Stalking, Elements**

Stalking is a felony offense if the defendant is found to have placed the victim in fear of death or bodily injury by the actual use of or the defendant's having in his possession during the instances which make up the crime of stalking a dangerous weapon or is found to have placed the victim in reasonable fear of death or bodily injury. *La. Rev. Stat. Ann. § 14:40.2(B)(2)(a)*. Louisiana defines "harassing" as the repeated pattern of verbal communications or nonverbal behavior without invitation which includes but is not limited to making telephone calls, transmitting electronic mail, or sending messages via a third party. *La. Rev. Stat. Ann. § 14:40.2(C)(1)*.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Josette Louise Cassiere, Assistant U.S. Attorney, Carol Mignonne Griffing, Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Louisiana, Shreveport, LA.

For JAMES RAY COLEMAN, Defendant - Appellant: Billy James Guin, Jr., Rountree & Guin, Shreveport, LA.

Judges: Before GARWOOD, STEWART, and CLEMENT, Circuit Judges.

Opinion by: CARL E. STEWART

Opinion

[*701] CARL E. STEWART, Circuit Judge:

James Ray Coleman was charged with being a felon in possession of a firearm in violation of *18 U.S.C. § 922(g)(1)*. He sought dismissal on the ground that his underlying felony conviction was not a valid predicate offense. The underlying felony conviction was pursuant to *18 U.S.C. § 371* for conspiracy to pirate encrypted satellite signals and to infringe a copyright. Coleman alleged that the conviction should fall within the *18 U.S.C. § 921(a)(20)(A)* exception to *§ 922(g)(1)* for offenses relating to the regulation of business practices. The district court ruled that Coleman's prior conviction did not fall within the *§ 921(a)(20)(A)* exception and that the exception was not unconstitutionally **[**2]** vague, and denied the motion to dismiss. Coleman then conditionally pleaded guilty, and now appeals the denial of the motion to dismiss. He also appeals the assignment of a four-point increase to his offense level for "possession of a firearm in connection with another felony offense" for stalking under *LA. REV. STAT. § 14:40.2*. We AFFIRM.

I. FACTUAL AND PROCEDURAL HISTORY

A. Factual Background

Frankie Manley called 911 to report that James Ray Coleman was on his way to her residence to kill her, her adult granddaughter, and himself. Deputies from the East Carroll Parish Sheriff's Office responded **[*702]** to the call and, upon arrival, found a visibly intoxicated Coleman at his shop across the street from the Manley residence. When asked if he "had anything on him," it was discovered that he had a pistol in his waistband.

Manley explained to the deputies that Coleman had been living at her residence, but that she had asked him to leave three days earlier because of his drinking problem. Manley told officers that Coleman called her several times a day begging her to allow him to return and threatening her if she did not. He did this for three days straight, and became upset each time Manley refused **[**3]** to allow him to return. He became belligerent and threatened her and her granddaughter. Manley believed her life was in danger and was so upset that she could not write a statement. Coleman was arrested for felonious stalking under Louisiana law.

B. Procedural History

Coleman was charged with being a felon in possession of a firearm in violation of *18 U.S.C. § 922(g)(1)*. Coleman filed a Motion to Dismiss the indictment, alleging that the underlying felony conviction was not a valid predicate offense because it fell within the 18 U.S.C. § 921(a)(20)(A) exception to § 922(g)(1) for offenses relating to the regulation of business practices, and that Coleman was therefore not prohibited from possessing a firearm under § 922(g)(1). Coleman's underlying felony conviction was a 1994 conviction under 18 U.S.C. § 371 for conspiracy to manufacture or distribute equipment for decrypting satellite cable signals in violation of the Communications Act of 1934, 47 U.S.C. § 605(e)(4), and to willfully infringe a copyright in violation of the Criminal Copyright Infringement Statute, 17 U.S.C. § 506(a). *See United States v. Coleman*, No. 1:92-10016-3 (W.D. La. Feb. 4, 2009).

The district court denied the **[**4]** Motion to Dismiss. Relying on *Dreher v. United States, 115 F.3d 330, 332 (5th Cir. 1997)*, the district court found that the offense of conspiracy pursuant to § 371 is not excepted from the scope of the felon in possession statute by § 921(a)(20)(A). The district court also stated that even if it were to consider the target offenses of the conspiracy, Coleman's prior conviction would still qualify as a predicate felony for purposes of the firearm statute because theft of copyright-protected satellite programming was not an unfair business practice. In addition, the court rejected Coleman's argument that the statute was unconstitutionally vague. Coleman then entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to dismiss the indictment.

At sentencing, the Presentence Investigation Report (PSR) calculated Coleman's offense level at 15 with a criminal history category of I, yielding a Guidelines sentencing range of 18 to 24 months. After hearing testimony from an East Carroll Parish Sheriff's Deputy who participated in Coleman's arrest, the district court concluded that Coleman had possessed the firearm in connection with another felony offense--the **[**5]** Louisiana offense of felonious stalking--and increased his offense level by four. Coleman objected to this increase and the court overruled his objection. The court then imposed a 21-month term of imprisonment to be followed by a three-year term of supervised release. Coleman did not object to the reasonableness of his sentence.

II. DISCUSSION

A. Evaluating a Predicate Offense under the Business Practices Exception

Coleman first asserts that the district court erred by denying his Motion to **[*703]** Dismiss the indictment. He claims that his § 371 conviction for conspiracy to violate § 605(e)(4) and § 506(a) falls within the "business practices exception" created by § 921(a)(20)(A) for offenses "pertaining to antitrust violations, unfair trade practices, restraint of trade, or other similar offenses relating to the regulation of business practices." ***HN1***[] Because Coleman's motion to dismiss the indictment was based on the interpretation of a federal statute, this court reviews the denial of the motion *de novo. See* United States v. Perez-Macias, 335 F.3d 421, 425 (5th Cir. 2003).

HN2[] The "felon in possession of a firearm" statute, 18 U.S.C. § 922(g)(1), makes it a crime "for any person who has been convicted **[**6]** in any court of, a crime punishable by imprisonment for a term exceeding one year . . ." to possess a firearm or ammunition which has traveled in interstate or foreign commerce. The "business practices exception" to § 922(g)(1), set out in 18 U.S.C. § 921(a)(20), excludes from the definition of a "crime punishable by imprisonment for a term exceeding one year . . . any federal or state offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . ." Thus, a felon in possession of a firearm who has been convicted of one of the types of violations itemized in § 921(a)(20)(A) cannot be found guilty under § 922(g)(1) on the basis of that conviction.

In *Dreher v. United States*, this court applied a framework for evaluating whether a prior felony conviction falls within the § 921(a)(20)(A) business practices exception. 115 F.3d at 330. The defendant had been convicted of conspiracy to commit mail fraud and mail fraud in violation of 18 U.S.C. §§ 371, 1341 and 1342. *Id. at 331*. He petitioned for a declaratory judgment that he was not a convicted felon under § 922(g)(1) because the predicate **[**7]** offenses fell within the business practices exception. *Id*. The defendant argued that the court should evaluate the conduct underlying the convictions-- billing for services not rendered. The *Dreher* court, however, reasoned that "the plain meaning of the term 'offenses' in the context of the statute is the charged violation of law, not the facts underlying the violation of law." *Id. at 332*. The court evaluated whether the elements that the Government was required to prove under 18 U.S.C. §§ 371 and 1341 depended "on whether they have an effect upon competition." [1] Id. at 332-33. It analyzed the statutes as follows:

> The "offenses" (or violations of law) of which Dreher was convicted are conspiracy to commit mail fraud and mail fraud, pursuant to 18 U.S.C. §§ 371, 1341. To prove conspiracy under § 371, the government must show: (1) an agreement between two or more persons to commit **[*704]** an unlawful act and (2) an overt act by one of the conspirators in furtherance of the agreement. *See* United States v. Schmick, 904 F.2d 936, 941 (5th Cir. 1990). To convict under § 1341, the government must prove (1) a scheme to defraud; (2) intent to defraud; and (3) use of the mails in furtherance of the scheme. **[**8]** *See* United States v. Nguyen, 28 F.3d 477, 481 (5th Cir. 1994).

Id. at 332. The court then held that "[b]ecause violations of §§ 371 & 1341 in no way depend on whether they have an effect upon competition, they are not 'offenses' that are excluded from the § 921(a)(20) definition of 'crimes punishable by imprisonment for a term exceeding one year.'" Id. at 333.

The defendant in *Dreher* had been convicted of both conspiracy to commit mail fraud under § 371 and mail fraud under § 1341. Id. at 332. Both or either of those convictions could have potentially functioned as predicate offenses under § 922(g)(1). Consequently, the court's evaluation of the elements under both § 371 and § 1341 does not necessarily clarify whether, in cases such as the present one, the court must evaluate the elements of the offense underlying a conspiracy conviction where there is no conviction for the underlying offense. Additionally, although *Dreher* specifically rejected any examination of the *facts* underlying the charged crime, it did not clearly address whether the court might examine the *violation of the law* that is the target of the charged conspiracy.

The Government asserts that, consistent with the categorical approach of Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the district court properly **[**10]** evaluated only the elements of the *charged* offense for the prior conviction to determine whether an offense falls within the business practices exception. The Government claims that the offenses that were the target of the conspiracy are merely underlying facts and are irrelevant to *Dreher's* elements test. If we were to apply the approach advocated by the Government, we would not consider the target offenses of the conspiracy conviction, but would analyze only the elements of conspiracy pursuant to § 371. This reasoning would require the conclusion that *any* conspiracy conviction pursuant to § 371 would qualify as a predicate offense under § 922(g)(1).

We reject such a conclusion. According to the Government's position, a conviction under § 371 invariably qualifies as a predicate offense under § 922(g)(1), even where the "unlawful act" that was the object of the conspiracy is one of the offenses listed in § 921(a)(20)(A). But, for example, given that the language of § 921(a)(20)(A) exempts "any Federal or State offenses *pertaining to* antitrust violations," conspiracy to commit an antitrust violation would be an offense "pertaining to antitrust violations." (emphasis added).

Moreover, **[**11]** ***HN3***[] a conviction for conspiracy under § 371 requires that the Government show: (1) an agreement between two or more persons to pursue an unlawful objective; (2) the defendant's knowledge of the unlawful objective and voluntary agreement to join the conspiracy; and (3) an overt act by one or more of the members of the conspiracy in furtherance of the objective of the conspiracy. United States v. Peterson, 244 F.3d 385, 389 (5th Cir. 2001) (citing United States v. Dadi, 235 F.3d 945, 950 (5th Cir. 2000)). Thus, § 371 requires that

[1] Like this court in Dreher, other circuits have similarly adopted an elements test to determine whether a predicate offense has an effect on competition or on consumers for purposes of determining the applicability of § 921(a)(20). *See* United States v. Schultz, 586 F.3d 526, 530 (7th Cir. 2009) (holding that in order for an offense to fall within § 921(a)(20)(A)'s exception, the Government must "have been required to prove, as an element of the predicate offense, that competition or consumers were affected; possible incidental effects are not relevant."); United States v. Stanko, 491 F.3d 408, 421 (8th Cir. 2007) (holding that a prior conviction under the Federal Meat Inspection Act (FMIA) was not excepted by § 921(a)(20)(A) because "none of the provisions of the FMIA require the Government to prove an effect upon competition or **[**9]** commerce as an element of the offense."); United States v. Meldish, 722 F.2d 26, 28 (2d Cir. 1983) (refusing to apply the business practices exception where the defendant's prior conviction "in no way depends upon whether it has an effect on competition or consumers.").

the Government prove as an element that the conspiracy was targeted at a specific offense or "unlawful objective." [2] **[*705]** *See* *United States v. White, 571 F.3d 365, 372 (4th Cir. 2009)* ("[t]he Conspiracy Offense cannot be divorced from its . . . objective"). Consequently, if the targeted offense requires the Government to prove an effect upon competition as an element of the offense, then the conspiracy conviction falls within the business practices exception.

We therefore conclude that the district court erred by evaluating only *§ 371*; the analysis under *§ 921(a)(20)(A)* also requires an examination of the elements of the target offense of the conspiracy conviction. As the district court correctly held in the alternative, however, even considering the target offenses of the conspiracy, Coleman's prior offense qualifies as a predicate felony for purposes of *§ 922(g)(1)*. The first offense [3] charged as **[**13]** the target of Coleman's conspiracy conviction was *47 U.S.C. § 605(e)(4)*, the Communications Act of 1934. ***HN4***[] To prove a violation of *§ 605(e)(4)*, the Government must show that the defendant: (1) manufactured, assembled, modified, imported, exported, sold, or distributed; (2) any electronic mechanical, or other device or equipment that was primarily of assistance in the unauthorized decryption of satellite cable programming or direct-to-home satellite services; (3) while knowing or having reason to know that the device or equipment was primarily of assistance in the unauthorized decryption of satellite cable programming or direct-to-home satellite services. These elements do not require any proof of "an effect upon competition." *Dreher, 115 F.3d at 332*.

Coleman argues that the legislative history of the Communications Act indicates that the purpose of *§ 605* is to protect the competitive nature of the satellite industry and prohibit unfair trade practices. ***HN5***[] Courts have looked to the legislative history of a statute in order to determine whether it falls within the business practices exception. *See, e.g.,* *Stanko, 491 F.3d at 416-17* ("[T]he statement of congressional findings . . . includes concerns about the effects of unwholesome meat on competition and markets. These concerns, however, are subordinate to the FMIA's primary public-health purpose. . . "); *United States v. McLemore, 792 F. Supp. 96, 98 (S.D. Ala. 1992)* ("[O]dometer rollback is prohibited by *15 U.S.C. §§ 1984* and *1990c(a)* **[*706]** as an unfair trade practice exactly because of its 'effect on competition and consumers.' This interpretation is supported by the legislative history of the Truth in Mileage Act of 1986."). But legislative history remains secondary to an examination of the elements **[**15]** of the statute. *See* *Stanko, 491 F.3d at 416-17* ("[M]ore significantly, none of the provisions of the FMIA require the Government to prove an effect on competition or consumers as an element of the offense."). Regardless, even taking into account legislative history, this court has stated that ***HN6***[] *§ 605(e)(4)*'s "purpose is to proscribe the piracy of programming signals, whether they be for commercial or personal use." *United States v. Harrell, 983 F.2d 36, 39 (5th Cir. 1993)*.

The other offense charged as the target of Coleman's conspiracy conviction was *17 U.S.C. § 506(a)*, the Criminal Copyright Infringement Statute. ***HN7***[] To prove a violation of *§ 506(a)*, the Government must show that the

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[2] As described in the Fifth Circuit's pattern jury instructions:

> Title *18, United States Code, Section 371*, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United **[**12]** States. . . . For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt: First: That the defendant and at least one other person made an agreement to commit the crime of _ (describe) as charged in the indictment; Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

FIFTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS (2001) § 2.20.

[3] We evaluate both the alleged target offenses of the conspiracy conviction because it is unclear from the record which of the two target offenses (or both) provided the basis for the conspiracy conviction. Where there is only one conspiracy count and the finder of fact was required to find that the conspiracy has as its object each of the target offenses, then it would presumably be sufficient to deny the exception if there was at least one **[**14]** target offense that did not meet it. However, if the conviction could have been based on either target offense, and we cannot discern which one it was based on, then both must be evaluated.

defendant: (1) willfully infringed; (2) a valid copyright; (3) for commercial advantage, for private financial gain, or in a manner otherwise prohibited by the statute. *See* 17 U.S.C. § 506(a). For the conviction to fall within the business practices exception, the Government must "have been required to prove, as an element of the predicate offense, that competition . . . [was] affected; possible incidental effects are not relevant." Schultz, 586 F.3d at 530; *see also* Dreher, 115 F.3d at 332. Under § 506(a), **[**16]** the Government would not have been required to prove any effect upon competition.

We hold that **HN8**[] in evaluating whether a § 371 conspiracy conviction falls within the business practices exception, courts must evaluate the elements of § 371 and the target offenses of the conspiracy. Here, the conspiracy conviction for the target offenses of § 605(e)(4) and § 506(a) does not fall within the business practices exception. Coleman's prior conspiracy conviction is therefore a predicate offense for purposes of § 922(g)(1), and we affirm the conviction.

B. Constitutionality of the Business Practices Exception

In his second point of error, Coleman asserts that the phrase in § 921(a)(20) excluding as predicate offenses "any . . . offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offense relating to the regulation of business practices" is unconstitutionally vague. **HN9**[] Whether a statute is unconstitutionally vague is a question of law, which this court reviews *de novo*. United States v. Rudzavice, 586 F.3d 310, 315 (5th Cir. 2009) (citing United States v. Monroe, 178 F.3d 304, 308 (5th Cir. 1999)).

The vagueness doctrine "bars enforcement of 'a statute **[**17]** which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). A principal element of the vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (internal quotation marks and citation omitted). The touchstone of the analysis, however, "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." Lanier, 520 U.S. at 267.

[*707] Addressing § 921(a)(20), the dissent in *United States v. Stanko* stated that it "is a criminal statute that is impermissibly vague." 491 F.3d at 420 (Bright, J., dissenting) (citing Kolender, 461 U.S. at 357). The *Stanko* dissent explained that to apply the exemption for "similar offenses" under § 921(a)(20), courts must determine which business offenses are similar to antitrust violations, unfair trade practices, and restraints of trade. Id. at 420-21. **[**18]** It reasoned that "[t]he complete absence of Congressional guidance and scarcity of federal precedent leaves the meaning of the similar offenses clause unconstitutionally vague, and thus the class of individuals who may possess a firearm without the threat of prosecution is in part undefined." Id. at 421.

Rejecting the conclusion that § 921(a)(20) is unconstitutionally vague, the *Stanko* majority explained that "Congress used the comparative term 'similar' to modify 'offenses,' rather than saying 'any other offenses' or simply 'other offenses.'" Id. at 414. "The term 'similar' indicates an intent to limit the business practices clause's reach to offenses which are 'comparable' or 'nearly corresponding' to the enumerated offenses." *Id*. (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2120 (2002)). Because "the general phrase 'or other similar offenses relating to the regulation of business practices' refers back for its meaning to the three types of offenses Congress specifically enumerated," the court concluded that "the plain meaning of the statute indicates Congress's intent to limit the offenses that fall within the § 921(a)(20)(A) exclusion to those pertaining to antitrust violations, **[**19]** unfair trade practices, restraints of trade, or offenses similar to them." *Id*.

The Seventh Circuit in *United States v. Schultz* also rejected a vagueness challenge to the "similar offenses" clause of § 921(a)(20). 586 F.3d at 531. The *Schultz* court explained that:

> **HN10**[] According to its terms, § 921(a)(20)(A) excludes those "[f]ederal or state offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation

> of business practices." In the final phrase, the word "similar" limits the term "offenses," so that it refers back to the three enumerated offenses, and is further limited by "relating to the regulation of business practices." Accordingly, an ordinary individual would have notice that the *§ 921(a)(20)(A)* exception applies only if he or she committed an enumerated or similar offense related to the regulation of business practices.

Id.

Consistent with the reasoning of *Stanko* and *Schultz*, the business practices exception is not unconstitutionally vague because it requires that the excluded offenses be a specific type of business offense or similar to such specific offenses relating to the regulation of business practices. **[**20]** ***HN11***[] "***Antitrust law***" is "designed to protect trade and commerce from restraints, monopolies, price fixing, and price discrimination." BLACK'S LAW DICTIONARY, 104 (8th ed. 2004). While it is "almost impossible to formulate an all inclusive definition of 'unfair trade practice' . . . implicit in the term itself is the requirement that the practice adversely affect either competitors or consumers . . . ." *Stanko, 491 F.3d at 416*. Likewise, "restraint of trade" has a definite meaning at common law and includes "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which **[*708]** accrue to them from free competition in the market." *Apex Hosiery Co. v. Leader, 310 U.S. 469, 497, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*.

These exempted offenses demonstrate that Congress intended to exclude under *§ 921(a)(20)(A)* only commercial crimes violating statutes designed to prevent "an adverse economic effect on competition or consumers." *Dreher, 115 F.3d at 332*. The elements test used to determine whether an offense falls within **[**21]** the business practices exclusion is specific and overall gives fair warning as to which offenses meet the definition of a "crime punishable by imprisonment for a term exceeding one year" and which are excluded pursuant to the exception in *§ 921(a)(20)(A)*. We therefore affirm the district court's conclusion that *§ 921(a)(20)(A)* is not unconstitutionally vague.

C. *U.S.S.G. § 2K2.1(b)(6)* Enhancement

Finally, Coleman argues that the district court erred in assigning a four-point increase to the offense level for "possession of a firearm in connection with another felony offense." The felony offense to which the court referred was stalking under *LA. REV. STAT. § 14:40.2*, and Coleman claims there is insufficient evidence in the record to support a finding that he possessed a firearm while making any type of threat against the victim.

HN12[] This court reviews the district court's application of the Sentencing Guidelines *de novo* and its factual findings for clear error. *United States v. Delgado-Martinez, 564 F.3d 750, 751 (5th Cir. 2009)*. In determining whether a Guidelines enhancement applies, the district court is allowed to draw reasonable inferences from the facts, and these inferences are fact **[**22]** findings reviewed for clear error. *United States v. Caldwell, 448 F.3d 287, 290 (5th Cir. 2006)*. The district court's determination of the relationship between the firearm and another offense is a factual finding. *United States v. Condren, 18 F.3d 1190, 1199-1200 (5th Cir. 1994)*. "A factual finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Cooper, 274 F.3d 230, 238 (5th Cir. 2001)* (internal quotation marks and citation omitted). A factual finding is not clearly erroneous if it is plausible in light of the record as a whole. *Id*.

HN13[] *U.S.S.G. § 2K2.1(b)(6)* provides that "[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense . . . increase by four levels." The commentary to *§ 2K2.1(b)(6)* states that the enhancement applies where the firearm "facilitated, or had the potential of facilitating," the other felony offense. *U.S.S.G. § 2K2.1(b)(6), cmt. n.14*. Thus, to obtain an enhancement under *§ 2K2.1(b)(6)*, the Government must establish by a preponderance of the evidence "that the firearm 'facilitated, or had the potential **[**23]** of facilitating' another felony offense and that the defendant used or possessed the firearm in connection with that offense." *United States v. Anderson, 559 F.3d 348, 357 (5th Cir. 2009)*.

LA. REV. STAT. 14:40.2(A) provides as follows:

> *HN14*[] Stalking is the intentional and repeated following or harassing of another person that would cause a reasonable person to feel alarmed or to suffer emotional distress. Stalking shall include, but not be limited to the intentional and repeated uninvited presence of the perpetrator at another person's home . . . or any place which would cause a reasonable person to be alarmed, or to suffer emotional distress as a result of verbal or behaviorally implied threats of death, bodily injury, sexual assault, kidnapping, or any other statutory criminal act to himself **[*709]** or any member of his family or any person with whom he is acquainted.

HN15[] Stalking is a felony offense if the defendant "is found . . . to have placed the victim . . . in fear of death or bodily injury by the actual use of or the defendant's having in his possession during the instances which make up the crime of stalking a dangerous weapon or is found . . . to have placed the victim in reasonable fear of **[**24]** death or bodily injury." *LA. REV. STAT. § 14:40.2(B)(2)(a)*. Louisiana defines "harassing" as "the repeated pattern of verbal communications or nonverbal behavior without invitation which includes but is not limited to making telephone calls, transmitting electronic mail, [or] sending messages via a third party. . . ." *LA. REV. STAT. § 14:40.2(C)(1)*.

At sentencing, East Carroll Parish Sheriff's Deputy Brandon Wiltcher, who was present at the time of Coleman's arrest, testified that Manley made two 911 calls to request assistance and protection from Coleman. The first 911 call informed authorities that Coleman had stated that he was on his way to Manley's residence to kill her, her granddaughter, and himself. She called a second time shortly thereafter to report that Coleman was attempting to enter the residence and was making verbal threats to kill Manley and her granddaughter. When deputies arrived on the scene, Coleman was across the street from the Manley residence and armed with a pistol carried in his waistband. Deputy Wiltcher also testified that for three days Coleman had called Manley's home several times a day, making threats against her and her granddaughter. [4]

Coleman's contention that he did not possess the gun "in connection with" the felony stalking offense for purposes of *§ 2K2.1(b)(6)* is without merit. Regardless, at a minimum possession of the gun "had the potential of facilitating" the felony stalking offense. *See* *§ 2K2.1(b)(6)*, cmt. n.14. Coleman correctly notes that the deputies did not see him in possession of a firearm at the time he made the threats to the Manleys that day and or on the previous days. There was likewise no testimony that either of the victims saw him with a weapon when he threatened them. However, the deputies arrived soon after the second 911 call and found Coleman immediately across the street from the Manley residence and armed. As the Government argues, it is logical to infer and quite plausible that Coleman had the firearm with him only moments before his arrest **[**26]** when he was attempting to enter the Manleys' residence. Further, Coleman had previously threatened to kill the Manleys and himself.

It is entirely reasonable to infer that Coleman intended to accomplish these threats with the firearm in his possession at the time that he was arrested. The district court's finding of fact that Coleman possessed the firearm in connection with the commission of another felony is therefore not clearly erroneous and we affirm the four-point increase to Coleman's offense level.

III. CONCLUSION

For the reasons discussed, we AFFIRM Coleman's conviction and sentence.

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[4] In the sentencing **[**25]** context, a "district court may consider any relevant evidence without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." *United States v. Davis, 76 F.3d 82, 84 (5th Cir. 1996)* (internal quotation marks and citation omitted).

In re ATM Fee Antitrust Litig.

United States District Court for the Northern District of California

June 21, 2010, Decided; June 21, 2010, Filed

No. C 04-2676 CRB

Reporter

2010 U.S. Dist. LEXIS 61160 *; 2010-1 Trade Cas. (CCH) P77,066; 2010 WL 2557519

IN RE ATM FEE ANTITRUST LITIGATION

Subsequent History: Summary judgment granted by, Judgment entered by, Dismissed by *In re ATM Fee Antitrust Litig., 2010 U.S. Dist. LEXIS 97009 (N.D. Cal., Sept. 16, 2010)*

Prior History: *In re ATM Fee Antitrust Litig., 2009 U.S. Dist. LEXIS 83199 (N.D. Cal., Sept. 4, 2009)*

Core Terms

Network, customer, aftermarket, interchange, relevant market, derivative, transactions, brand, consumers, single-brand, market power, antitrust, Defendants', allegations, prices, banks, costs, photocopiers, foremarket, motion to dismiss, deposit account, replacement part, demand deposit, copier, routed, supracompetitive, lease-end, switching, locked, output

Counsel: **[*1]** For Pamela Brennan, Plaintiff: Daniel O. Myers, LEAD ATTORNEY, Richardson, Patrick, Westbrook and Brickman, LLC, Mt. Pleasant, SC; Joseph Richard Saveri, LEAD ATTORNEY, Brendan Patrick Glackin, Hector Daniel Geribon, Jahan C. Sagafi, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Andrew W. Hutton, Deborah Brown McIlhenny, Hutton & Hutton, LLC, Wichita, KS; Anthony J. Bolognese, Bolognese & Associates LLC, Philadelphia, PA; Bart D. Cohen, Merrill G. Davidoff, Michael J. Kane, Berger & Montague, P.C., Philadelphia, PA; Daniel Bruce Allanoff, Joel Cary Meredith, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA; Daniel E. Gustafson, Karla M. Gluek, Gustafson Gluek PLLC, Minneapolis, MN; David Felderman, Eugene A. Spector, Jeffrey J. Corrigan, William G. Caldes, Spector, Roseman & Kodroff & Willis, P.C., Philadelphia, PA; George A. Shohet, Attorney at Law, Venice, CA; Gretchen M. Nelson, Kreindler & Kreindler LLP, Los Angeles, CA; Joseph C. Kohn, William E. Hoese, Kohn Swift & Graf P.C., Philadelphia, PA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Kim Keevers, Richardson Patrick Westbrook & Brickman, Charleston, SC; Marc Howard **[*2]** Edelson, Edelson & Associates, LLC, Doylestown, PA; Marc S. Moller, Kreindler & Kreindler LLP, New York, NY; Mark G. Ayesh, Ayesh Law Offices, Wichita, KS; Michael Joseph Brickman, Richardson, Patrick, Westbrook & Brickman, LLC, Charleston, SC.

For Terry Crayton, Darla Martinez, on behalf of themselves & all others similarly situated, Plaintiffs: Daniel O. Myers, LEAD ATTORNEY, Richardson, Patrick, Westbrook and Brickman, LLC, Mt. Pleasant, SC; Joseph Richard Saveri, LEAD ATTORNEY, Brendan Patrick Glackin, Hector Daniel Geribon, Jahan C. Sagafi, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Andrew W. Hutton, Deborah Brown McIlhenny, Hutton & Hutton, LLC, Wichita, KS; Anthony J. Bolognese, Bolognese & Associates LLC, Philadelphia, PA; Bart D. Cohen, Merrill G. Davidoff, Michael J. Kane, Berger & Montague, P.C., Philadelphia, PA; Daniel Bruce Allanoff, Joel Cary Meredith, Meredith Cohen Greenfogel & Skirnick PC, Philadelphia, PA; Daniel E. Gustafson, Karla M. Gluek, Gustafson Gluek PLLC, Minneapolis, MN; David Felderman, Eugene A. Spector, Jeffrey J. Corrigan, William G. Caldes, Spector, Roseman & Kodroff & Willis, P.C., Philadelphia, PA; George A. Shohet, Attorney at Law, **[*3]** Venice, CA; Gretchen M. Nelson, Kreindler & Kreindler LLP, Los Angeles, CA; Joseph C. Kohn, William E. Hoese, Kohn Swift & Graf P.C., Philadelphia, PA; Joshua P. Davis, University of San Francisco School of Law, San Francisco, CA; Kim

Keevers, Richardson Patrick Westbrook & Brickman, Charleston, SC; Marc Howard Edelson, Edelson & Associates, LLC, Doylestown, PA; Marc S. Moller, Kreindler & Kreindler LLP, New York, NY; Mark G. Ayesh, Ayesh Law Offices, Wichita, KS; Michael Joseph Brickman, Richardson, Patrick, Westbrook & Brickman, LLC, Charleston, SC; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN.

For Cecilia Salvador, Plaintiff: Bart D. Cohen, Merrill G. Davidoff, Michael J. Kane, Berger & Montague, P.C., Philadelphia, PA; Brendan Patrick Glackin, Hector Daniel Geribon, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; David Felderman, Spector, Roseman & Kodroff & Willis, P.C., Philadelphia, PA; Eugene A. Spector, Jeffrey J. Corrigan, William G. Caldes, Spector, Roseman, Kodroff & Willis, P.C., Philadelphia, PA; Jayne Arnold Goldstein, Shepherd, Finkelman, Miller & Shah, LLP, Weston, FL; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, **[*4]** San Francisco, CA.

For Peter Sanchez, Plaintiff: David B. Krauss, LEAD ATTORNEY, Law Office of David B. Krauss, New York, NY; Bart D. Cohen, Merrill G. Davidoff, Berger & Montague, P.C., Philadelphia, PA; Brendan Patrick Glackin, Hector Daniel Geribon, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Eugene A. Spector, Spector Roseman Kodroff & Willis, PC, Philadelphia, PA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA.

For Deborah Fennern, Plaintiff: David B. Krauss, LEAD ATTORNEY, Law Office of David B. Krauss, New York, NY; Bart D. Cohen, Merrill G. Davidoff, Berger & Montague, P.C., Philadelphia, PA; Brendan Patrick Glackin, Hector Daniel Geribon, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, St. Paul, MN; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA.

For Darecia Miller, Lynette Williams, Plaintiffs: Reginald Von Terrell, LEAD ATTORNEY, The Terrell Law Group, Oakland, CA; Bart D. Cohen, Merrill G. Davidoff, Berger & Montague, P.C., Philadelphia, PA; Brendan Patrick Glackin, Hector Daniel Geribon, Lieff Cabraser Heimann & **[*5]** Bernstein, LLP, San Francisco, CA; Donald Chidi Amamgbo, Esq., Amamgbo & Associates, Oakland, CA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA.

For Melissa Griffin, Dorothy Stam, Plaintiffs: Laurence D. King, LEAD ATTORNEY, Linda M. Fong, Kaplan Fox & Kilsheimer LLP, San Francisco, CA; Bart D. Cohen, Merrill G. Davidoff, Berger & Montague, P.C., Philadelphia, PA; Brendan Patrick Glackin, Hector Daniel Geribon, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA; Linda Phyllis Nussbaum, Nussbaum LLP, Scarsdale, NY; Lori Sambol Brody, Kaplan Fox & Kilsheimer LLP, Los Angeles, CA.

For Steve Murray, Plaintiff: Beth E. Terrell, LEAD ATTORNEY, Terrell Marshall & Daudt PLLC, Seattle, WA; Bart D. Cohen, Merrill G. Davidoff, Berger & Montague, P.C., Philadelphia, PA; Brendan Patrick Glackin, Hector Daniel Geribon, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA.

For Grace P. Spohnholz, Plaintiff: George T. Freeman, LEAD ATTORNEY, Anchorage, AK; Bart D. Cohen, Merrill G. Davidoff, **[*6]** Berger & Montague, P.C., Philadelphia, PA; Brendan Patrick Glackin, Hector Daniel Geribon, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, CA; Joseph Richard Saveri, Lieff, Cabraser, Heiman & Bernstein, LLP, San Francisco, CA.

For Concord EFS, Inc., First Data Corp., Defendants: Benjamin Kneeland Riley, Howrey LLP, San Francisco, CA; Brian Douglas Wallach, Peter Edward Moll, Esq., Howrey Simon Arnold & White, LLP, Washington, DC; Stephen R. Cook, Howrey LLP, Irvine, CA; Buckmaster DeWolf, Howrey Simon Arnold & White, LLP, Menlo Park, CA.

For Bank of America Corporation, Defendant: Anita Fern Stork, Esq., LEAD ATTORNEY, Kelly Patrice Finley, Sonya Diane Winner, Covington & Burling LLP, San Francisco, CA; Erin C Smith, Tara M. Steeley, Covington & Burling, San Francisco, CA.

For Bank One, N.A., Defendant: Benjamin Jonathan Fox, Sylvia Rivera, Morrison & Foerster LLP, Los Angeles, CA; Robert Steven Stern, Morrison & Foerster, Los Angeles, CA.

For J.P. Morgan Chase & Co., Defendant: Sylvia Rivera, Morrison & Foerster LLP, Los Angeles, CA; W. Stephen Smith, Morrison & Foerster LLP, Washington, DC.

For Citibank (West), F.S.B., CitiGroup, Inc., Citibank, N.A., Defendants: David F. Graham, **[*7]** Eric Henry Grush, PRO HAC VICE, Sidley Austin LLP, Chicago, IL; Menesh S. Patel, Sidley Austin LLP, San Francisco, CA.

For Suntrust Banks, Inc., Defendant: Deborah Kay Croyle, Orrick Herrington & Sutcliffe, San Francisco, CA; M. Laurence Popofsky, Orrick, Herrington & Sutcliffe LLP, San Francisco, CA.

For Wachovia Corporation, Defendant: Jack R. Nelson, LEAD ATTORNEY, Kirsten Joy Daru, Michele D. Floyd, Reed Smith LLP, San Francisco, CA.

For Wachovia Bank NA, Defendant: Kirsten Joy Daru, Michele D. Floyd, Reed Smith LLP, San Francisco, CA.

For Wells Fargo & Co., Wells Fargo Bank, N.A., Defendants: Brett Davis Collins, Daniel Murray Wall, Erica T. Grossman, Latham & Watkins LLP, San Francisco, CA; Donald I Baker, Baker & Miller PLLC, Washington, DC; Katie Ya-yee Chang, Joshua N. Holian, Latham & Watkins, San Francisco, CA.

For Servus Financial Corp., Defendant: Brett Davis Collins, Daniel Murray Wall, Erica T. Grossman, Latham & Watkins LLP, San Francisco, CA; Katie Ya-yee Chang, Joshua N. Holian, Latham & Watkins, San Francisco, CA.

For Bank of America, N.A., Defendant: Anita Fern Stork, Esq., Kelly Patrice Finley, Sonya Diane Winner, Covington & Burling LLP, San Francisco, CA; Erin C Smith, **[*8]** Covington & Burling, San Francisco, CA.

For JP Morgan Chase Bank, N.A., Defendant: Robert Steven Stern, Morrison & Foerster, Los Angeles, CA; Sylvia Rivera, Morrison & Foerster LLP, Los Angeles, CA.

Gilberto Felix, Movant, Pro se, Salters, SC.

Gino Romano, Movant, Pro se, Endicott, NY.

Judges: CHARLES R. BREYER, UNITED STATES DISTRICT JUDGE.

Opinion by: CHARLES R. BREYER

Opinion

ORDER

In this antitrust action, Plaintiffs challenge the legitimacy of the fixed interchange fee that one member of the Star ATM Network charges another member when a customer of the second member uses an ATM owned by the first. Now pending before the Court is Defendants' joint motion to dismiss Plaintiffs' Third Amended Complaint ("TAC") on the ground that Plaintiffs have again failed to allege a legally adequate "relevant market." [1]

Having held oral argument on May 14, 2010 and carefully considered the submissions of the parties, the Court hereby GRANTS in part and DENIES in part Defendants' joint motion. The Court finds that Plaintiffs' alleged single-brand, derivative aftermarket is not a legally **[*9]** cognizable relevant market. At the same time, the Court finds that Plaintiffs' "all ATM Networks" market is both legally cognizable and adequately pled. Plaintiffs' TAC is therefore sufficient to survive the pleadings stage.

BACKGROUND

[1] Bank of America, N.A. ("BANA") has also filed a motion to dismiss on grounds unique to it. The Court will address BANA's motion in a separate order.

I. The Star Network [2]

This case challenges the right of a non-proprietary network to set network-wide "interchange" fees that govern the amount of money paid by an ATM card issuer -- generally a bank -- to a foreign ATM owner when the ATM is used by the issuer's customer. Customers at most commercial banks receive ATM cards that allow them to make withdrawals from their accounts electronically. Typically, these ATM cards permit withdrawals not only from ATM machines at the bank where they hold their accounts, but also from ATM machines elsewhere. Such "foreign ATM transactions" involve four parties: (1) the "cardholder," *i.e*. the customer who retrieves money from the ATM machine; (2) the "card-issuer bank," *i.e*. that bank at which **[*10]** the customer holds an account and from which the customer has received an ATM card; (3) the "ATM owner," *i.e*. the entity that owns the ATM machine from which the customer withdraws money on his account; and (4) the "ATM network," *i.e*. the entity that administers the agreements between various card-issuer banks and ATM owners and thereby ensures that customers can withdraw money from one network member's ATM as readily as from another's.

Foreign ATM transactions involves multiple fees. Generally, a customer must pay two fees -- one to the ATM owner for the use of that entity's ATM machine (known as a "surcharge"), and one to the bank at which he has an account (known as a "foreign ATM fee"). But that is not all. Out of the money that a customer pays directly to his own bank, the bank then also pays two fees. The first of the bank's fees is known as a "switch fee" and is paid directly to the ATM network. The second of the bank's fees -- and the one at issue in this lawsuit -- is known as an "interchange fee" and is paid directly to the owner of the foreign ATM. Since 2003, the interchange fee has been set at $ 0.46 for on-premise transactions (*i.e*., transactions at ATMs deployed on a **[*11]** bank's premises), and $ 0.54 for off-premise transactions.

In this case, Plaintiffs contest the legality of only the interchange fee. They contend that the manner in which this fee is set and administered violates antitrust laws. In their TAC, Plaintiffs allege that certain members of the Star ATM network had "fixed the interchange fee." TAC P 1.

The Star Systems, Inc. ("Star") network of ATM services was founded by a number of banks over twenty years ago. TAC P 70. Star has over 5,400 members nationwide. TAC P 74. It is one of approximately twenty-five ATM networks in the country. TAC P 69.

Until 1996, interchange fees and foreign ATM fees were the sole sources of revenue on foreign ATM transactions for bank issuers and ATM owners. TAC P 81. In 1996, Star and other ATM networks dropped their bans against customer surcharges. TAC P 82. As a result, ATM owners began imposing surcharges, with banks now charging users of foreign ATMs around one to three dollars per foreign transaction. TAC P 83. Plaintiffs allege that those surcharges are artificially inflated because the Star network continues to impose an arbitrary interchange fee, which gets passed on to customers through the foreign **[*12]** ATM fees. TAC P 93. Plaintiffs further allege that the interchange fee was set through an illegal agreement of the Defendants, who controlled Star's Board of Directors. TAC PP 92-109. Plaintiffs contend that the banks enforced their illegal agreement by requiring all Star members -- both banks and non-banks that own ATMs in the network -- to abide by the fixed interchange fee. TAC P 67.

II. Procedural History

On a previous motion to dismiss, this Court ruled that the Plaintiffs' allegations, if true, would establish that the Defendants had engaged in illegal price-fixing. *See* *Brennan v. Concord EFS, Inc., 369 F. Supp. 2d 1127 (N.D. Cal. 2005)* (Walker, J.). In its ruling, the Court first noted that the Plaintiffs' objection is not to the existence of an interchange fee, but rather to its fixed nature. *Id. at 1132*. In other words, Plaintiffs did not contend that it would be impermissible for a card-issuing bank to compensate foreign ATM owners, but only that they may not decide collectively what compensation to render. Further, the court noted that the Complaint had described a "naked" attempt to fix prices, as opposed to an attempt to fix price that the Star network members determined **[*13]** was "ancillary" to a legitimate, procompetitive venture. *Id. at 1133*. In other words, Plaintiffs alleged that Defendants

[2] The basic facts pled in the Plaintiffs' TAC are identical to those pled in Plaintiffs' SAC. As a result, the following overview of the Star Network is taken from the Court's September 4, 2009 Order Dismissing Plaintiffs' SAC.

fixed the interchange fee because they could, not because a fixed fee was necessary to sustain the ATM network. Because the Defendants could not defend against such allegations of "naked price fixing" without invoking evidence that was beyond the scope of the Complaint, the Court denied the motion to dismiss. *Id. at 1138*.

Shortly after the ruling on the motion to dismiss, Defendants filed a motion for partial summary judgment on the ground that, as of February 2001, the Star network ceased to be owned by a group of banks but instead was operated by Concord as a proprietary network. Taking a different tack, the Court issued a Memorandum and Order on November 30, 2006, terminating Concord's motion and directing the parties to address the fundamental question of whether a per se analysis applies to this case. The Court observed that "if Defendants can set forth evidence to support plausible, procompetitive justifications for their agreement to fix the interchange fee," then the per se rule would not apply. Mem. & Order at 5 (Docket No. 360).

Defendants moved for summary **[*14]** judgment on August 3, 2007, having adduced evidence bearing on the applicability of the per se rule. In an order issued on March 24, 2008, the Court granted Defendants' motion and held that rule of reason analysis applies to this case, thereby determining that the price-fixing challenged by Plaintiffs is not the kind of naked horizontal restraint that lacks any redeeming virtue. *In re ATM Fee Antitrust Litig., 554 F. Supp. 2d 1003, 1016-17 (N.D. Cal. 2008)*.

Given substantial uncertainty in the law regarding which mode of analysis to apply, the Court subsequently certified for appeal the issue of whether the per se or rule of reason rubric should be employed in this case. The Ninth Circuit declined to take the matter up, which led to Plaintiffs' SAC.

After Plaintiffs' filed their SAC, Defendants moved to dismiss it on a number of grounds, including that Plaintiffs had failed to properly allege a relevant market, as required by ***antitrust law***. In their SAC, Plaintiffs had defined the relevant market as the "provision of Foreign ATM Transactions routed over Star," which they identified as "wholly derivative from and dependent on the market for deposit accounts." SAC P P 119, 121. Defendants **[*15]** maintained that this single-brand, derivative aftermarket failed as a matter of law because the SAC lacked any allegations that consumers were locked into their deposit account relationship. Such lock-in was, in Defendants' view, a prerequisite to a finding that a derivative aftermarket exists.

In an order issued September 2009, the Court granted Defendants' motion to dismiss the SAC. The Court agreed with Defendants that the existence of customer "lock-in" was a crucial component of a derivative aftermarket theory and that Plaintiffs had failed "to plead a viable theory suggesting that once a customer signs up for a bank account, he is 'locked in' to that bank's services." Order at 18. Because Plaintiffs informed the Court at oral argument that they could add such allegations to a subsequent complaint, the Court granted Defendants' motion with leave to amend. *Id*.

III. Plaintiffs' Third Amended Complaint

In response to the Court's Order, Plaintiffs submitted a Third Amended Complaint. In their TAC, Plaintiffs attempt to correct the deficiencies in their "relevant market" allegations by doing two things. First, they allege a second, broader relevant market, composed of all "ATM Networks," **[*16]** rather than just the Star Network. TAC P 113.

Second, in an effort to bolster their previously alleged relevant market -- i.e., the derivative aftermarket composed over only those transactions routed over the Star Network -- they identify a number of alleged "monetary and non-monetary" switching costs that "economically lock[] in [bank customers to] their deposit accounts." TAC P 121. According to Plaintiffs, the monetary costs that impede customers from switching banks include: (1) "maintenance fees that Banks charge when consumers do not maintain minimum amounts in their deposit accounts"; (2) "forfeiture of 'rewards points'"; (3) "fees to obtain checks for new accounts"; (4) "funds that must remain in existing accounts to ensure that outstanding checks and recurring automated payments clear"; (5) "funds that must remain in both existing and new accounts to satisfy minimum deposit amount requirements"; and (6) "funds tied up in a new account placed on hold." TAC P 122.

The non-monetary costs include time expended to (1) "investigate options and open new accounts"; (2) "close existing accounts"; (3) "notify parties . . . to whom recurring payments are payable"; (4) "notify employer(s) **[*17]** and others to re-route direct deposits"; and (5) "learn the new Bank's online banking system." TAC P 123.

Now pending before the Court is Defendants' joint motion to dismiss Plaintiffs' TAC. Defendants maintain that Plaintiffs have again failed to plead a legally cognizable relevant market.

LEGAL STANDARD

A motion to dismiss under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* tests the legal sufficiency of the pleadings. *De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978)*. A complaint may be dismissed for failure to state a claim where the factual allegations do not raise the right to relief above the speculative level. *Bell Atlantic v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Conversely, a complaint may not be dismissed for failure to state a claim where the allegations plausibly demonstrate that the pleader may be entitled to relief. *Id*. In ruling on a *Rule 12(b)(6)* motion, a court must construe the pleadings in the light most favorable to the plaintiff, and must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them. *Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003)*.

The allegations in the complaint may not evade antitrust **[*18]** requirements by merely alleging a bare legal conclusion. *Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 736 (9th Cir. 1987)*. "[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," particularly in light of the fact that "antitrust discovery can be expensive." *Twombly, 550 U.S. at 558* (internal citation and quotation omitted). Plaintiffs alleging antitrust claims must set forth enough "factual matter" to "nudge[] their claims across the line from conceivable to plausible." *Id. at 570*.

DISCUSSION

The Defendants have collectively moved to dismiss Plaintiffs' TAC on the ground that neither of Plaintiffs' two alleged relevant markets are legally cognizable under ***antitrust law***. The Court agrees with Defendants that Plaintiffs' single-brand, derivative aftermarket theory fails as a matter of law. However, the Court also finds that Plaintiffs' "all ATM Networks" market is both plausible and sufficiently pled. In particular, the Court finds that Plaintiffs have sufficiently alleged that the Defendants and Star possess market power in this broader market. The Court therefore GRANTS Defendants' **[*19]** motion to dismiss with respect to Plaintiffs' single-brand "relevant market," but DENIES the motion with respect to the broader "all ATM Networks" market.

A. "Relevant Market" Principles

Under rule of reason analysis, "the plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)*. "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition where buyers can turn for alternate sources of supply." *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)* (internal citation and quotations omitted).

"There is no requirement that [the market definition] elements of the antitrust claim be pled with specificity." *Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*. "An antitrust complaint therefore survives a *Rule 12(b)(6)* motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect." *Id*. The existence of a "relevant market" is typically a factual **[*20]** inquiry for the jury. *Id*. However, a complaint may be dismissed if the market definition is "facially unsustainable." *Id.; see, e.g., Tanaka, 252 F.3d at 1063* (affirming dismissal where plaintiffs failed to identify an appropriate product market); *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1104 (9th Cir. 1999)* (affirming dismissal of monopolization claim where plaintiffs did not "sufficiently identify the markets affected by Defendants' alleged antitrust violations"); *Apple, Inc. v.*

Psystar Corp., 586 F. Supp. 2d 1190, 1203 (N.D. Cal. 2008) (dismissing claim because plaintiff's assertion of a relevant market "contravenes the pertinent legal standards").

"For antitrust purposes, a 'market is composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered.'" Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1163 (9th Cir. 2003) (citation omitted). "[T]he relevant market must include the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." Newcal, 513 F.3d at 1045 (citation omitted). Plaintiffs must plead **[*21]** facts showing that their product market "bear[s] a rational relation to the methodology courts prescribe to define a market for antitrust purposes -- analysis of the interchangeability of use or the cross-elasticity of demand, and it must be plausible." Chapman v. New York State Div. for Youth, 546 F.3d 230, 237 (2d Cir. 2008) (citation omitted).

B. Plaintiffs First Relevant Market: "Foreign ATM Transactions Routed Over the Star Network"

As in their SAC, Plaintiffs allege in their TAC that one "relevant product market for assessing Defendants' collusive conduct is the provision of Foreign ATM Transactions routed over Star." TAC P 114. They define this market as "wholly derivative from and dependent on the market for deposit accounts." TAC P 116. Thus, Plaintiffs allege that a single-brand, derivative market exists for "Star Network" foreign ATM transactions.

"[T]he law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue." Newcal, 513 F.3d at 1048. However, "[s]ingle brand markets are, at a minimum, extremely rare." Psystar, 586 F. Supp. 2d at 1198. "[C]ourts have usually rejected the claim that one brand is its own market when there **[*22]** are competing brands." Glen Holly Entm't, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1073, 1078 n.6 (C.D. Cal. 1999). For the reasons explained below, the Court finds that this is not one of the "extremely rare" instances in which a valid single-brand market exists.

Plaintiffs' "Star Network"-only derivative aftermarket theory can be summarized in the following way: After entering the market for bank demand deposit accounts, consumers choose a particular bank and open an account. The bank then issues its new customer an ATM card. If the customer's bank uses the Star Network, then the foreign ATM transactions that the customer conducts are routed over Star and the customer's bank incurs Star's supracompetitive interchange fee.

Per Plaintiffs' theory, the market for demand deposit accounts is a "foremarket" that gives rise to a "derivative aftermarket" consisting of foreign ATM transactions that are routed over the network that the customer's new bank has chosen. Moreover, because customers are "economically locked into" their chosen bank, they are "locked-in" to their bank's choice of foreign ATM network providers, which, in some cases, will be the Star Network. In other words, according **[*23]** to Plaintiffs, once a customer selects a bank that uses th Star Network to route foreign ATM transactions, that customer is "locked into" the Star Network because it would cost the customer too much to switch to a new bank that uses a different ATM network. In such cases, then, the other ATM networks are not "reasonably interchangeable" with the Star Network and the Star Network is its own "relevant market."

Although Plaintiffs' theory seems plausible at first glance, it suffers from a fatal defect: the market for demand deposit accounts and the market for ATM Network services involve two different sets of consumers. Individuals, businesses, and others purchase deposit accounts; *banks* purchase ATM Network services. As a result, the market for Star's services, as well as the market for ATM networks generally, is not a derivative aftermarket, in the anti-trust sense, of the market for demand deposit accounts. It is entirely separate.

Two seminal single-brand, aftermarket cases, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992), and Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038 (9th Cir. 2008), illustrate the contours of an appropriate single-brand, derivative **[*24]** aftermarket theory and reveal the error in Plaintiffs' approach. The *Kodak* case arose as a result of the initial purchase by consumers of Kodak brand photocopiers. *See* Kodak, 504 U.S. at 458. Because photocopiers, like many durable goods, require servicing and replacement parts, a consumer who purchased a Kodak copier was forced to participate in the "derivative aftermarket" for replacement parts and services for the copier. In other words, the foremarket for photocopiers begot an aftermarket in replacement parts and services. Moreover, "[b]ecause service and parts for Kodak equipment [were] not interchangeable with other manufacturers' services" and because the consumer could not respond to unappealing prices for Kodak replacement and services by returning to the foremarket and purchasing a different brand of copier, "the relevant market from the Kodak equipment owner's perspective [was] composed of only those companies that service Kodak machines." *Kodak, 504 U.S. at 455*. Under these conditions, the Supreme Court concluded that the market for replacement parts and services for a single brand of copiers, Kodak, was a cognizable relevant market. *See id*.

Similarly, the Ninth Circuit **[*25]** held in *Newcal* that plaintiffs had stated a valid "relevant market," where plaintiffs alleged a single-brand market for "lease-buyouts" and "lease-end services" for IKON brand photocopiers. *Newcal, 513 F.3d 1045-50*. As in *Kodak*, customers who had leased IKON photocopiers (in the foremarket for photocopier leases) were thrust into the "derivative aftermarket" for "replacement copiers and lease-end services." *Id. at 1049*. In addition, the "unique contractual relationship" between IKON and the lessees of its equipment (1) allegedly created switching costs that prevented lessees from returning to the foremarket for photocopier leases if they were unhappy with IKON's "lease-buyout" and "lease-end services" and (2) rendered IKON's "lease-buyout" and "lease-end services" unique and not interchangeable with other brands in the aftermarket. *Id. at 1050-51*. The Court therefore concluded that Plaintiff had stated a plausible single-brand market composed of "lease-end services" for IKON copiers. *Id. at 1051*.

As these two cases show, a valid single-brand, derivative aftermarket follows a particular model: First, a consumer purchases a particular brand of a good or service. Second, the nature of **[*26]** that good or service requires the *same* consumer to purchase a follow-on good or service in a derivative aftermarket. In *Kodak*, the "derivative aftermarket" was replacement parts and services for photocopiers, while, in *Newcal*, it was lease buy-out and lease-end services for photocopiers. Third, a "single brand" market exists in the derivative aftermarket if something about the good or brand of good purchased by the consumer in the foremarket (1) prevents the consumer from returning to the foremarket and switching to a different brand if the consumer is unhappy with the price of the follow-on good in the aftermarket and (2) the particular brand's follow-on good is not reasonably interchangeable with follow-on goods of other brands. In *Kodak*, for instance, the cost of a new photocopier precluded a customer from responding to supracompetitive prices in the market for replacement Kodak parts and services by returning to the foremarket and purchasing a copier from a different manufacturer. In addition, Kodak-brand replacement parts and services were not "reasonably interchangeable" with non-Kodak brand replacement parts and services. In *Newcal*, the unique contractual relationship between **[*27]** IKON and its lessees made it difficult for those lessees both to return to the foremarket for photocopier leases and switch to another brand of photocopier and to choose any brand other than IKON for "lease-buyout" and "lease-end services" in the aftermarket.

The "derivative aftermarket" identified by Plaintiffs in this case -- i.e., the market for transactions routed over the Star Network -- does not follow this pattern. Under Plaintiffs' theory, the foremarket consists of the market for demand deposit accounts purchased by consumers and the aftermarket consists of foreign ATM transactions. Plaintiffs are correct that foreign ATM transactions are an aftermarket of the demand deposit market in that consumers who open deposit accounts are, in essence, thrust into the market for foreign ATM transactions.

Plaintiffs' theory breaks down, however, with its allegation that the Star Network is the single-brand to which consumers are "locked-in." Consumers purchase and own a Bank A-brand deposit account, not a Star Network-brand deposit account. Thus, to the extent that a single-brand, derivative aftermarket exists for foreign ATM transactions from a consumer's perspective, it exists for each **[*28]** *individual bank* brand, not for the particular ATM Network that the individual bank has chosen. In other words, just like the purchase of a Kodak brand copier leads to a single-brand aftermarket in Kodak brand replacement parts, the purchase of a Bank A demand deposit account would lead to an aftermarket in Bank A foreign ATM transaction services. If anything, then, Bank A, with whom the consumers have a contractual relationship, would be the single-brand, not the Star Network.

To put this point another way, banks, not consumers, purchase foreign ATM Network services, such as those offered by Star. In order for a single-brand, derivative aftermarket to exist for Star's services, a bank, not the bank's customers, would have to be locked-in to the purchase of Star's services as a result of a purchase that the bank had made in some foremarket, just as purchasers of Kodak brand copiers are locked in to the purchase of Kodak brand replacement parts. Here, there is no foremarket purchase that constrains a bank's choice of network providers to the Star Network. Banks are presumably free to choose the foreign ATM Network provider that makes the most economic sense for it. Moreover, viewed from **[*29]** the bank's perspective, it is obvious that a customer's choice of a particular bank does not limit the bank's choice of network providers.

The error inherent in Plaintiffs' theory is further underscored by the fact that, if the Court were to accept Plaintiffs' theory, the number of potential single-brand, derivative aftermarkets would be substantial. For example, a single brand market would also exist for the particular computer software package that each bank uses to process a customer's foreign ATM transactions and for the particular individual each bank employs to monitor those transactions. A bank's customer is locked-in to these choices (and their associated costs) in the same manner that the customer is locked-in to his or her bank's decision to use the Star Network (and pay its associated interchange fee). The Court cannot accept such an expansive interpretation of the single-brand, aftermarket theory.

In sum, the market for Star services is not a single-brand, derivative aftermarket of the market for demand deposit accounts. The consumers who purchase demand deposit accounts do not participate in the market for Star's services. Moreover, the entities that do participate in the **[*30]** market for Star's services, banks, are not locked into Star's services as a result of the purchase of some previous product and are certainly not limited to Star's product by virtue of a customer's decision to open a deposit account.

For all of the above reasons, Plaintiffs' "derivative aftermarket" theory fails as a matter of law. Accordingly, Defendants' motion is GRANTED with respect to this theory.

C. Plaintiffs' Second Relevant Market: "Foreign ATM Transactions Routed Over ATM Networks"

Defendants concede that Plaintiffs' "'all ATM networks' market set forth in their TAC at least is theoretically plausible." Mtn. at 3. But, they maintain, this alleged "relevant market" is insufficient to support Plaintiffs' antitrust claims because Plaintiffs "do not, and cannot, allege any facts credibly supporting the conclusion that Star has market power in [the] highly competitive [all ATM Networks] market." *Id*. For the reasons discussed below, the Court disagrees.

An antitrust defendant possesses market power when the defendant "(1) **[*31]** can profitably set prices above its costs and (2) enjoys some protection against rival's entry or expansion that would erode such supracompetitive prices and profits." Areeda et al., ***Antitrust Law***, P 501 (2d ed. 2005). As the Ninth Circuit explained in *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir.1995)*,

> Market power may be demonstrated through either of two types of proof. One type of proof is direct evidence of the injurious exercise of market power. If the plaintiff puts forth evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power. *See* *FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. The more common type of proof is circumstantial evidence pertaining to the structure of the market. To demonstrate market power circumstantially, a plaintiff must: (1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run. *See* ***[*32]*** *Ryko Mfg. Co. v. Eden Serv., 823 F.2d 1215, 1232 (8th Cir.1987)*, cert. denied, *484 U.S. 1026, 108 S. Ct. 751, 98 L. Ed. 2d 763 (1988)*; *Ball Memorial Hosp., 784 F.2d at 1335*.

Id. at 1434.

In this case, Plaintiffs allege, in detail, that Defendants have set interchange fees at a level that is well above their costs and have maintained these supracompetitive prices (and the resulting profits) for many years. For instance, Plaintiffs allege that "[w]hen fees were originally fixed at $ .40 for on-premises and $ .60 for off-premises ATMs in 1984, they were set based on cost data. . . ." TAC P 135. They also aver that "[a]s of 1993, at least one ATM Network estimated the cost [of providing cash to other Banks' customers] to be approximately 25 cents per transaction" and that the "cost has only decreased over time as the costs of technology -- especially telecommunications costs -- have declined rapidly." TAC P 136.

These plausible factual allegations, which the Court must accept as true, lead to the reasonable inference that the cost to a bank of providing cash to another bank's customer has declined substantially since 1984 and is now well-below $ 0.25 per transaction. Yet, according to other allegations in the Plaintiffs' **[*33]** TAC, Star's Interchange Fee has not dropped accordingly. In fact, Star's current Interchange Fee of $ 0.46 per on-premises transaction is 15% *higher* than the fee Star charged in 1984. TAC P 135-37. It is also higher than the $ 0.45 fee that Star charged in 1990 and substantially higher than the estimated 1993 cost of $ 0.25 per transaction.

These facts, taken together, indicate that the Defendants, acting through Star, have been able to establish a fee for providing cash to other banks' customers that is well above their costs, and have done so since at least 1993. If true, this prolonged period of substantially-above-cost pricing provides a strong indication that the Defendants and Star possess market power in the ATM Networks market. *See* Areeda P 501 ("For antitrust purposes, therefore, market power is the abilities (1) to price substantially above the competitive level *and* (2) to persist in doing for a significant period of time without erosion by new entry or expansion.").

Plaintiffs also allege that the ATM Networks market "exhibit[s] economies of density or economies of ubiquity within a geographic area" that "inhibit new entrants, because a new entrant is at a substantial disadvantage **[*34]** to an established, wide-spread network (such as Star)." TAC P 141. These alleged barriers to entry help explain why Star and the Defendants have managed to reap supracompetitive profits for an extended period and thereby provide further support for Plaintiffs' allegation that Star possesses market power in the all ATM Networks market. *See* *Rebel Oil, 51 F.3d at 1434* (noting that the existence of significant barriers to entry in a market provide circumstantial evidence of the defendants' market power within that market).

In addition, Plaintiffs assert that Star is "the largest ATM Network in the United States," that "Star processes far more Foreign ATM Transactions than any other ATM Network," and that "in some geographic areas Star is dominant to the point that consumers would be hard-pressed to avoid paying Star's fixed Interchange Fee." TAC P P 11, 69, 74, 120. Though these allegations fall short of demonstrating that Star owns a "dominant share of [the all ATM Networks] market," *Rebel Oil, 51 F.3d at 1434*, they nonetheless would, if true, establish that Star has become the largest competitor in the all ATM Networks market, even though it has charged supracompetitive prices for many **[*35]** years. These allegations therefore also provide circumstantial evidence of Star's market power.

Defendants argue that Plaintiffs' "market power" allegations fail because Plaintiffs have not alleged that the Defendants and Star have the ability to affect marketwide prices and output in the all ATM Networks market. Mtn. at 11; Reply at 6. Though Plaintiffs do not expressly allege that Defendants' conduct has had an affect on marketwide prices and output, that conclusion can be reasonably inferred from the allegations Plaintiffs do make.

First, Plaintiffs allege that Star is the largest competitor in the "all ATM Networks" market. TAC P P 11, 69, 74. Star is therefore not, according to Plaintiffs' factual allegations, a niche player whose actions have little impact on the overall market.

Second, and crucially, Plaintiffs assert that Defendants and Star have charged an interchange fee that is well-above their costs for at least two decades. If Defendants and Star lacked market power, such appealing profit margins would attract competition from new or existing competitors and lead to a decline in prices and average profits. *See* Areeda P 501. Yet, that has not occurred. In fact, Star has maintained **[*36]** the same interchange fee for 20 years, despite steep declines in costs. These facts are not consistent with a highly competitive market in which Star lacks market power. Moreover, because price and output are inversely correlated, the fact that Star, the market leader, has charged supracompetitive interchange fees for two decades implies that marketwide output -- i.e., the number of foreign ATM transactions -- has been lower than it would have been had Star charged a competitive interchange fee. Thus, Plaintiffs have implicitly alleged that Defendants' conduct has had an adverse impact on marketwide prices and output.

In sum, Plaintiffs plausibly allege that Defendants and Star have been able to "profitably set prices above . . . costs" for a prolonged period of time due to entry barriers and other factors. Because such an ability is the hallmark of market power, *see* Areeda P 501, the Court finds that Plaintiffs have adequately pled that Defendants and Star possess market power in the relevant market.

CONCLUSION

Based on the foregoing, the Court hereby:

(1) GRANTS Defendants' joint motion to dismiss with respect to Plaintiffs' single-brand, derivative aftermarket theory;

(2) DENIES Defendants' **[*37]** motion with respect to Plaintiffs' "All ATM Networks" relevant market theory.

IT IS SO ORDERED.

/s/ Charles R. Breyer

CHARLES R. BREYER

UNITED STATES DISTRICT JUDGE

Dated: June 21, 2010

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Rectrix Aerodrome Ctrs. v. Barnstable Mun. Airport Comm'n

United States Court of Appeals for the First Circuit

June 23, 2010, Decided

No. 09-2173

Reporter

610 F.3d 8 *; 2010 U.S. App. LEXIS 12909 **; 2010-1 Trade Cas. (CCH) P77,068

RECTRIX AERODROME CENTERS, INC., Plaintiff, Appellant, v. BARNSTABLE MUNICIPAL AIRPORT COMMISSION, MICHAEL A. DUNNING, BRUCE P. GILMORE, FRANCISCO SANCHEZ and QUINCY MOSBY, Defendants, Appellees.

Subsequent History: As Amended July 27, 2010.

Prior History: [1]** APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Richard G. Stearns, U.S. District Judge.

Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n, 632 F. Supp. 2d 120, 2009 U.S. Dist. LEXIS 59216 (D. Mass., 2009)

Disposition: Affirmed.

Core Terms

airport, jet fuel, lease, district court, minimum standards, municipal airport, fuel, regulations, municipal, restrictions, tenant, Jet, entities, reserves, sentence, cases, space, antitrust claim, anti trust law, sales

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN1[] **Claims, Fraud**

A civil Racketeer Influenced and Corrupt Organizations Act claim, *18 U.S.C.S. § 1962(c)*, requires proof of several elements including the existence of a racketeering "enterprise" and its conduct through a "pattern" of racketeering activity, which requires at least two acts of racketeering so related, *18 U.S.C.S. § 1961(4)-(5)*; the acts are ones specified in the statute and include mail and wire fraud as possible predicate acts. *18 U.S.C.S. §§ 1961(1)*, *1962(c)*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act forbids monopolization, attempted monopolization and conspiracies to monopolize. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN3[] **Scope, Monopolization Offenses**

The Sherman Act, *15 U.S.C.S. § 2*, does not automatically forbid the state from imposing restrictions on competition that private citizens could not have adopted for themselves. Municipal entities can invoke state action immunity -- as can municipal officials acting for them -- if they act pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. The policy must authorize the municipal entity both to regulate the conduct and to "suppress competition," but the latter purpose is inferred if suppression is a foreseeable result of a broad delegation.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > State & Local Regulation

Transportation Law > Air & Space Transportation > Airports > Establishment, Maintenance & Operation

Transportation Law > Air & Space Transportation > Airports > Concessionaires

HN4[] **Air & Space Transportation, State & Local Regulation**

One provision of the Massachusetts statute governing municipal airports grants the power to "airport commissions" to adopt rules and regulations for the use of municipal airports, *Mass. Gen. Laws ch. 90, § 51J*; others grant airports authority to determine the charges or rentals for the use of any properties, facilities, installations, landing fees, concessions, uses and services, *Mass. Gen. Laws ch. 90, § 51H*, and to lease airport land for up to 20 years under such terms and conditions as it may prescribe, for hangars, shops, storage, industrial purposes, offices and other space rental, and for concessions, *Mass. Gen. Laws ch. 90, § 51F*.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > State & Local Regulation

Transportation Law > Air & Space Transportation > Airports > Establishment, Maintenance & Operation

HN5[] **Air & Space Transportation, State & Local Regulation**

The Massachusetts statute governing municipal airports includes a section specifically prohibiting exclusive contracts related to transportation to and from the airport, *Mass. Gen. Laws ch. 90, § 51M*.

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > State & Local Regulation

Transportation Law > Air & Space Transportation > Airports > Establishment, Maintenance & Operation

HN6[] **Air & Space Transportation, State & Local Regulation**

Mass. Gen. Laws ch. 90, §§ 51H, 51J, say that in the contracts airports execute, the public shall not be deprived of its rightful, legal and uniform use of such properties, facilities and installations and that airports' rules and regulations shall conform to and be consistent with the laws of the Commonwealth. This language does not negate an expectation that exclusivity arrangements might be employed.

Civil Rights Law > Protection of Rights > Section 1983 Actions > Scope

HN7[] Protection of Rights, Section 1983 Actions

42 U.S.C.S. § 1983 creates civil liability for civil rights violations by state and local governments.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN8[] Equal Protection, Nature & Scope of Protection

The Equal Protection Clause is usually deployed in cases involving state or local curtailment of personal constitutional rights and ordinarily against generic distinctions made in statutes or regulations. But economic interests can also be protected, although more latitude is allowed to the government; and individual inequalities, as opposed to ones imposed generically, are potentially -- although not easily -- reached by so-called "class of one" discrimination claims.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Evidence > Burdens of Proof > Allocation

HN9[] Equal Protection, Nature & Scope of Protection

Case law places the burden on the plaintiff in class-of-one Equal Protection cases to show identity of entities and circumstances to a high degree.

Counsel: Marc E. Kasowitz with whom Kasowitz, Benson, Torres & Friedman LLP was on brief for appellant.

Scott P. Lewis with whom Kevin D. Batt, Melissa C. Allison and Anderson & Kreiger LLP were on brief for appellees.

Judges: Before Lynch, Chief Judge, Boudin and Lipez, Circuit Judges.

Opinion by: BOUDIN

Opinion

[*9] BOUDIN, *Circuit Judge*. Rectrix Aerodrome Centers, Inc. ("Rectrix") is a tenant at the Barnstable Municipal Airport that provides certain aviation services to planes using the airport. It sued the Barnstable Municipal Airport Commission ("BMAC"), [1] two airport commissioners, two airport managers, and its outside counsel, claiming that

[1] Any city or town that establishes an airport must also establish an airport commission, "which shall have the custody, care and management of the municipal airport of said city or town." Mass. Gen. Laws ch. 90, § 51E (2010). Massachusetts law confers

they prevented Rectrix from competing with BMAC in the sale of jet fuel. The district court dismissed some of Rectrix's claims and on others granted summary judgment against Rectrix. The facts are as follows.

Beginning in 2002, Rectrix operated a hangar at the Barnstable Municipal Airport for private jets. Rectrix's lease with BMAC provided that it could apply to BMAC to expand the scope of Rectrix's operations and become what is known in the industry as a "fixed base operator" or **[*10]** "FBO"--a service center that provides such things as fuel, oil, and hangar storage. At the time, BMAC had in place a code of rules and regulations, which the parties refer to as the "minimum standards," that imposed standards of operation and maintenance on FBOs at the airport. Rectrix says it did not see a copy of the minimum standards until 2004.

These standards (which have since been altered) provided in Article III.e as follows:

> A Fixed base operator shall provide all fuel services, including the sale and storage of 80-octane, 100-octane, and jet fuel, for as long as these grades are normally available for resale. The Barnstable Municipal Airport Commission may limit the types **[**3]** of fuel to be sold.

Not surprisingly, in this controversy about Rectrix's ability to sell jet fuel, Rectrix relies heavily on the first sentence; Barnstable, on the second.

According to BMAC, at least since 1979 it has reserved for itself the right to sell jet fuel at the airport, has declined to allow FBOs to do so, refused specifically on a prior occasion in 1983 to allow another FBO (Griffin Avionics, Inc.) to sell jet fuel, and has the blessing of both Massachusetts law and the Federal Aviation Administration ("FAA") for its right to follow this policy. Rectrix claims that revenues generated by jet fuel sales were illegally diverted to help support the town as well as the airport, but BMAC disputes any charge of unlawful conduct.

BMAC also asserts that when Rectrix first became a tenant in 2002, it had full notice of this reservation. BMAC points to a set of so-called "self service standards"--which are distinct from the minimum standards referenced above--dated August 15, 2000, that Rectrix received prior to signing its lease; this document says that "[a]s the proprietor of the Barnstable Airport, the Airport Commission reserves the exclusive right unto itself to sell jet fuel on **[**4]** the Barnstable Airport." The lease thereafter signed with Rectrix in August 2002 gave it the right to operate a hangar for corporate jets, but not to conduct FBO operations, and contained the following terms:

> 2a. It is further agreed that Lessee shall not conduct or permit to be conducted on said premises any flight schools, or aircraft refueling activities specifically related to, and including resale of aviation or jet fuels, all subject to (2b) below.
>
> 2b. Lessee may at any time during the term of this Lease or additional terms thereof, submit in writing to the Barnstable Municipal Airport Commission, Lessee's desire to modify or expand its scope of operation. Lessee agrees that any change in its scope of operation may be subject to negotiable rates and charges, with agreed upon terms and conditions to be executed by both parties on separate letters of agreement.

Rectrix says it first learned of the minimum standards (as opposed to the self-service standards) in May 2004 and that it obtained a copy of those standards only in June 2004. Soon after, in October 2004, Rectrix requested permission to expand its operations and become a full-service FBO; it says it wanted to become a full-service **[**5]** FBO at this point because it believed that the minimum standards would give it the right to sell jet fuel. [2]

[*11] Rectrix says that to prevent it from selling jet fuel, BMAC refused to give proper consideration to its application to become an full-service FBO, delayed approval on other applications as well, and imposed operating restrictions that complicated Rectrix's ability to serve its customers. It says that it in various respects has been

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[2]** upon such commissions various powers relating to airport operations, including, among other things, the powers to lease land, acquire property, set charges and rentals, expend funds, and promulgate rules and regulations. *Id*. *§§ 51F-51J*.

[2] There is no evidence that Rectrix was granted permission to become a full-service FBO, but Rectrix's agreement with BMAC was modified to expand the size of its leasehold and the parties agreed to terms for Rectrix's self-fueling of aircraft it owned (or managed or leased under an exclusive contract of least 60 days); the memorandum specifically precluded Rectrix from selling fuel to third parties.

treated, to its disadvantage, differently than Griffin Avionics. After arguments back and forth with BMAC, Rectrix began the law suit that has led to this appeal.

In its complaint filed in federal district court, Rectrix asserted a variety of claims against BMAC and the individuals named above arising under the Racketeer Influenced and Corrupt Organizations **[**6]** Act ("RICO"), *18 U.S.C. § 1961 et seq. (2006)*, the Constitution and *section 1983*, *42 U.S.C. § 1983 (2006)*, and federal and state antitrust laws, *15 U.S.C. § 2 (2006)*; *Mass. Gen. Laws ch. 93, §§ 1-14A* (2010), along with various common law claims.

The district court granted a motion to dismiss Rectrix's antitrust claims, *Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n, 534 F. Supp. 2d 201 (D. Mass. 2008)* ("*Rectrix I*"), and later granted summary judgment in favor of Barnstable on its RICO and section 1983 claims, *Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n, 632 F. Supp. 2d 120 (D. Mass. 2009)* ("*Rectrix II*"). The district court then declined to retain supplemental jurisdiction over the remaining state law claims. *Id. at 132*.

Rectrix now appeals both the grant of the motion to dismiss and the grant of summary judgment, both rulings being subject to *de novo* review. *Gargano v. Liberty Int'l Underwriters, Inc., 572 F.3d 45, 48 (1st Cir. 2009)*; *Paparo v. M/V Eternity, 433 F.3d 169, 172 (1st Cir. 2006)*. We address first the RICO and antitrust claims, both of which directly attack BMAC's restriction on jet fuel sales; the remaining claim, complaining of a civil **[**7]** rights violation under *section 1983* and the Constitution, is considered thereafter.

RICO. Rectrix's first, and most detailed, argument on appeal is that the district court erred in rejecting Rectrix's RICO claim. ***HN1***[] A civil RICO claim, *18 U.S.C. § 1962(c)*, requires proof of several elements including the existence of a racketeering "enterprise" and its conduct through a "pattern" of racketeering activity, which requires at least two acts of racketeering so related, *id*. *§ 1961(4)-(5)*; the acts are ones specified in the statute and include mail and wire fraud as possible predicate acts. *Id*. *§§ 1961(1)*, *1962(c)*.

Rectrix's claim of fraud rests at bottom on the proposition that it was entitled under the minimum standards then in force to sell jet fuel, that the defendants falsely represented that Rectrix lacked that right and concealed the minimum standards until they were discovered by Rectrix in mid-2004, and that these acts of misrepresentation and concealment reflected a pattern of fraudulent acts that damaged Rectrix and are within the purview of the RICO statute. Rectrix also says that the defendants diverted revenues thus gained to Barnstable for its municipal use in violation of law **[**8]** and sought to conceal this as well.

The answer, as the district court ruled, *Rectrix II, 632 F. Supp. 2d at 126-27*, is that the minimum standards did *not* entitle Rectrix to sell jet fuel. Those standards provide that an FBO operator must supply fuel, including jet fuel, but qualify this in the next sentence by saying that BMAC "may limit the types of fuels to be sold." **[*12]** Before the lease was signed, and before Rectrix ever sought FBO status, the self-service standards BMAC gave to Rectrix told it that BMAC "reserves the exclusive right unto itself to sell jet fuel on the Barnstable Airport," and the lease itself expressly forbade Rectrix from selling any fuel.

Rectrix counters that the first sentence of the minimum standards describes jet fuel as a "grade" and the second sentence merely reserves BMAC's right to limit the particular "types" within the grade (Rectrix claiming there are separate "types" of jet fuel, such as Jet A-1, Jet A, and Jet B); but the straightforward reading is that the word "types" refers to the varieties given in the prior sentence, *i.e*., 80-octane, 100-octane, and jet fuel. In addition, the lease itself forbids Rectrix from providing any fuel.

It appears that the **[**9]** FAA itself is content to have municipal airports reserve jet fuel sales to themselves, seemingly so as to allow airports to fund maintenance and improvements. [3] Rectrix says that it was improper for BMAC to funnel any of the jet fuel profits for municipal use and that BMAC committed further acts of fraud by

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[3] *See* FAA Advisory Circular No. 150/5190-6, P 1.3(b)(1) (Jan. 4, 2007); FAA Advisory Circular No. 150/5190-5 , P 1-3(a) (June 10, 2002); *see also Jet 1 Ctr., Inc. v. Naples Airport Auth*., FAA Docket No. 16-04-03, Final Agency Decision, at 13 (July 15, 2005), *available at* http://part16.airports.faa.gov/pdf/16-04-03.pdf.

concealing this diversion from the FAA. But whether or not the diversion occurred or was improper--the district court made no finding--it was the reservation to BMAC of exclusive rights, not the diversion of BMAC profits, that caused damage to Rectrix.

Finally, Rectrix complains that when it sought FBO status, BMAC engaged in delays, proposed burdensome terms and otherwise hindered its application and operations. But nothing in the lease compels BMAC to surrender its exclusivity, and so long as BMAC maintained its exclusive rights, the premise of the RICO claim--that **[**10]** BMAC had no such exclusive rights--fails.

BMAC's minimum standards could have stated expressly its position that no one except itself could sell jet fuel at the airport instead of leaving this to the self-service standards and the lease. The lack of such a statement may explain some of its other actions, including its alleged delay in turning over the minimum standards and in processing Rectrix's request for FBO status. But given the qualification in the minimum standards, the explicit restrictions in the self-service standards and the lease with Rectrix amply establish that Rectrix never had a right under its lease or airport regulations to sell jet fuel at the airport.

Antitrust law. Alternatively, Rectrix claims that restricting Rectrix from selling jet fuels at the airport violates ***HN2***[] *section 2* of the Sherman Act, which forbids monopolization, attempted monopolization and conspiracies to monopolize. *15 U.S.C. § 2*. The district court rejected this claim without reaching the merits, relying on federal ***antitrust law***'s so-called state action doctrine (quite different from the constitutional doctrine that shares the same name) and a leading precedent of this court. *Rectrix I, 534 F. Supp. 2d at 203-06*.

The **[**11]** state action doctrine was originally adopted by the Supreme Court in *Parker v. Brown, 317 U.S. 341, 347-52, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, to immunize from attack under the federal antitrust laws a regulatory scheme, adopted by statute, by which California required raisin growers to deliver the majority of their raisins into a **[*13]** common pool in exchange for set payments--a practice that might be treated as unlawful price fixing if arranged without state approval. ***HN3***[] The Sherman Act, said the Court, does not automatically forbid the state from imposing restrictions on competition that private citizens could not have adopted for themselves. *Id. at 351-52*. From this decision has flowed a host of refining decisions, one subset of which is concerned with actions taken by municipalities.

Although not automatically treated as states, municipal entities (like BMAC) can invoke state action immunity--as can municipal officials acting for them, *Fisichelli v. Town of Methuen, 956 F.2d 12, 15-16 (1st Cir. 1992)* (Breyer, C.J.)--if they act pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation. [4] The policy must authorize the municipal entity *both* to regulate the conduct **[**12]** *and* to "suppress competition," *City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 372, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*; but the latter purpose is inferred if suppression is a foreseeable result of a broad delegation, *id. at 373*; *Town of Hallie, 471 U.S. at 42-43*; *Fisichelli, 956 F.2d at 14*.

The defendants' claim of immunity rests on the language of *Mass. Gen. Laws ch. 90, §§ 51D-51M*, the Massachusetts statute governing municipal airports. ***HN4***[] One provision grants the power to "airport commission[s]" to "adopt rules and regulations for the use of municipal airports," *id*. *§ 51J*; others grant airports authority to "determine the charges or rentals for the use of any properties, facilities, installations, landing fees, concessions, uses and services," *id*. *§ 51H*, and to lease airport land for up to 20 years "under such terms and conditions as it may prescribe, for hangars, shops, storage, industrial purposes, offices and other space rental, and for concessions," *id*. *§ 51F*.

This may seem **[**13]** a rather bland basis for attributing to the state legislature a purpose to allow the suppression of competition, but the case law has interpreted the protection hospitably. Hovenkamp, *supra*, § 20.6, at 753-54 &

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[4] *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*; *City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (plurality opinion); Hovenkamp, *Federal Antitrust Policy* § 20.6, at 753-54(3d ed. 2005).

n.12. In all events, ***HN5***[] the Massachusetts statute involved here goes out of its way to include a section specifically prohibiting exclusive contracts related to transportation to and from the airport, *id*. *§ 51M*, which surely suggests that the legislature did perceive that the airport might otherwise employ exclusivity restrictions (and chose to ban only this narrow set).

The most direct precedent is this court's reading of very similar language in the enabling statute that governs the Massachusetts Port Authority--the entity that runs Boston's Logan Airport--as conferring state action immunity on the authority. *Interface Group, Inc. v. Mass. Port Auth., 816 F.2d 9, 12-14 (1st Cir. 1987)*; *Mass. Gen. Laws ch. 91 app., §§ 1-3*, *1-14* (2010). Cases from other circuits have similarly found that municipal airports can benefit from state action immunity; of course, these decisions involved different statutes, but the operative language was in many instances similar and, anyway, their basic **[**14]** outlook is consistent with our reading of the Massachusetts statute. [5]

[*14] District court cases are in some tension in their construction of like statutes. *New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435, 1451 (D. Mass. 1985)*, said that Massachusetts law governing municipal airports "[did] not on [its] face demonstrate a clear intent on the part of the state to displace competition . . . in the management of **[**15]** [airports]." But this case preceded both the Supreme Court's *Omni* decision and our decision in *Interface*, which control this panel. *Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (1st Cir. 1995)*.

In its reply brief and at oral argument, Rectrix argued that provisions in ***HN6***[] *Mass. Gen. Laws ch. 90, §§ 51H*, *51J*, say that in the contracts airports execute "the public shall not be deprived of its rightful, legal and uniform use of such properties, facilities and installations" and that airports' "rules and regulations shall conform to and be consistent with the laws of the commonwealth." Apart from the rule that arguments not made in the opening brief are waived, *e.g., Sandstrom v. ChemLawn Corp., 904 F.2d 83, 86 (1st Cir. 1990)*, this language does not negate an expectation that exclusivity arrangements might be employed.

Cases like *Omni* reflect an ambivalence, shared by Congress as well, *e.g.*, *15 U.S.C. §§ 34-36* (restricting damages in antitrust suits against local governments and their officials acting in an "official capacity"), as to how far municipalities ought to be restricted by the antitrust laws. States and their subordinate units commonly mingle governmental services, regulation and **[**16]** financial self-interest, while being subjected in some measure to restrictions that do not apply to private entities engaged in the same activities. [6]

The evolution of the state action doctrine as applied to municipalities is far from over, but our own *Interface* decision is sufficient to resolve this case. It is worth adding that Rectrix is mistaken in its notion that its antitrust claim would otherwise face fair sailing. How far the antitrust laws require property owners to allow outsiders onto their property to compete with them in selling goods or services is disputable, and private owners--for example, shopping centers--commonly enter into leases with clauses that limit competition. [7]

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[5] *E.g., Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 96 (2d Cir.)*, *cert. denied*, ***479 U.S. 872, 107 S. Ct. 248, 93 L. Ed. 2d 172 (1986)***; *Indep. Taxicab Drivers' Employees v. Greater Houston Transp. Co., 760 F.2d 607, 610-11 (5th Cir.)*, *cert. denied*, ***474 U.S. 903, 106 S. Ct. 231, 88 L. Ed. 2d 230 (1985)***; *Four T's, Inc. v. Little Rock Mun. Airport Comm'n, 108 F.3d 909, 914-15 (8th Cir. 1997)*; *Cal. Aviation, Inc. v. City of Santa Monica, 806 F.2d 905, 907-08 (9th Cir. 1986)*; *Allright Colo., Inc. v. City & County of Denver, 937 F.2d 1502, 1508-09 (10th Cir.)*, *cert. denied*, ***502 U.S. 983, 112 S. Ct. 587, 116 L. Ed. 2d 612 (1991)***; *Commuter Transp. Sys., Inc. v. Hillsborough County Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986)*; *see also Hillman Flying Serv., Inc. v. City of Roanoke, 652 F. Supp. 1142, 1145-46 (W.D. Va. 1987)*, *aff'd mem*., ***846 F.2d 71 (4th Cir. 1988)***.

[6] For example, in this case, as already noted, Massachusetts has a statute that governs municipal airports that would not apply to a private airport. *Mass. Gen. Laws ch. 90, §§ 51D-51M*. *See also Town of Hallie, 471 U.S. at 45 n.9* (noting that municipal entities may be subject to disclosure regulations that do not apply to private entities).

[7] *See Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1194-95 (10th Cir. 2009)*; *Elliott v. United Ctr., 126 F.3d 1003, 1005 (7th Cir. 1997)* (Wood, J.), **[**17]** *cert. denied*, ***523 U.S. 1021, 118 S. Ct. 1302, 140 L. Ed. 2d 468 (1998)***; III Areeda & Hovenkamp, ***Antitrust Law*** P 703b, at 152-57 (2d ed. 2002); XI Hovenkamp, ***Antitrust Law*** P 1800a2, at 5-6 (2d ed. 2005);

[*15] *Civil rights*. Rectrix's remaining federal claim was brought under ***HN7***[] *42 U.S.C. § 1983*, which creates civil liability for civil rights violations by state and local governments, and the right invoked by Rectrix is the right of equal protection guaranteed under the *Fourteenth Amendment*, U.S. Const. amend. XIV, § 1. This claim differs from the RICO and antitrust claims because its main target is not the restriction of jet fuel sales but other alleged disparities in the treatment of Rectrix and other airport tenants.

The specifics of Rectrix's claim have evolved over time. In the district court, Rectrix claimed that another tenant--Griffin Avionics--was allowed to use a public ramp to which Rectrix was denied access and claimed that a third tenant Silvia Aviation received various forms of preferential treatment. *Rectrix II, 632 F. Supp. 2d at 129*. **[**18]** On appeal, Rectrix makes no mention of Silvia but tries to add two further alleged instances of discrimination favoring Griffin, which were at best only partially developed in the district court. [8]

HN8[] The *Equal Protection Clause* is usually deployed in cases involving state or local curtailment of personal constitutional rights (*e.g*., against racial discrimination) and ordinarily against generic distinctions made in statutes or regulations. But **[**19]** economic interests can also be protected, although more latitude is allowed to the government; and individual inequalities, as opposed to ones imposed generically, are potentially--although not easily--reached by so-called "class of one" discrimination claims. *E.g., Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)* (per curiam); *Wojcik v. Mass. State Lottery Comm'n, 300 F.3d 92, 104-05 (1st Cir. 2002)*.

The single clearly developed and specific claim of alleged discrimination was supported by only one sentence in an affidavit from Rectrix's CEO that reads (in full):

> Additionally, on occasions where Rectrix needs additional space to park aircraft (an issue necessitated in part by defendants' refusal to grant Rectrix's request for additional ramp space), Rectrix has been told that it cannot use various public areas of the Airport, although Griffin Avionics and other Airport tenants have been able to use the same space.

The district court, *Rectrix II, 632 F. Supp. 2d at 129-30*, said that this claim failed because Rectrix did not show that it was similarly situated to the other, allegedly favored tenants or users--a settled requirement for equal protection claims, *e.g., Vill. of Willowbrook, 528 U.S. at 564*; **[**20]** *Buchanan v. Maine, 469 F.3d 158, 177-78 (1st Cir. 2006)*.

In claiming that Griffin (and unnamed other companies) was allowed greater use of airport space outside its leased premises, Rectrix provided no details about the comparability of Griffin to itself and the precise circumstances of the episodes; it cites letters it wrote asking for more ramp space, but none even mentions Griffin's supposed better treatment. Still fewer details were provided on the other allegations Rectrix now says were instances of **[*16]** pro-Griffin discrimination. *See* note 8, above. The district court properly relied on holdings in our earlier ***HN9***[] cases that place the burden on the plaintiff in class-of-one cases to show such identity of entities and circumstances to a high degree. *See Rectrix II, 632 F. Supp. 2d at 130*. Rectrix argues that the principal case cited-- *Cordi-Allen v. Conlon, 494 F.3d 245, 251-52 (1st Cir. 2007)*--was a land-use case and so its language should not apply here. But core equal protection concerns aside, class-of-one plaintiffs face the same burden outside of the land-use context as well. *See, e.g., Buchanan, 469 F.3d at 178*; *Pagan v. Calderon, 448 F.3d 16, 34-37 (1st Cir. 2006)*.

Further, the *reason* **[**21]** articulated in *Cordi-Allen* for requiring a strict showing of comparability applies with full force here. Drawing distinctions is what legislators and regulators do every day: without this comparability sieve,

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XII *id*. P 2033c, at 195-97 (1999); XIII *id*. P 2134d1, at 204-07 (2d ed. 2005); Handler & Lazaroff, *Restraint of Trade and the* ***Restatement (Second) of Contracts, 57*** N.Y.U. L. Rev. 669, 695-703 (1982).

[8] First, Rectrix complains that the airport discriminated between Griffin and Rectrix with respect to fuel tank usage. However, Rectrix never developed this claim below: rather, Rectrix complained that BMAC allowed third parties to use Griffin's fuel tank while not allowing Rectrix to use Air Cape Cod's fuel tank; but at most these allegations would indicate discrimination between Air Cape Cod and Griffin or between other third parties and Rectrix--not between Griffin and Rectrix. Second, Rectrix says the airport refused to provide timely fuel service to Rectrix's customers and imposed on it a fueling policy that did not apply to Griffin. But below, Rectrix did not mention Griffin in connection with these allegations, much less show discrimination.

every routine governmental decision at the state and local level--of which there are millions every year--could become a class-of-one case in federal court. *Cf.* *Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146, 2156-57, 170 L. Ed. 2d 975 (2008)*; *Vill. of Willowbrook, 528 U.S. at 565-66* (Breyer, J., concurring in result); *Pagan, 448 F.3d at 34-35*.

To sum up, Rectrix was a commercial tenant of the airport and, given the self- service standards and lease terms, had no right and no reasonable expectation of being able to sell jet fuel at the airport and so no fraud claim whatever. The antitrust claim, dubious on the merits, is barred by the state action doctrine given the Massachusetts statute. And so far as its equal protection claim is aimed to secure a general right to make jet fuel sales, no private entity at the airport has the privilege sought by Rectrix.

Affirmed.

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Sterling Merch., Inc. v. Nestle, S.A.

United States District Court for the District of Puerto Rico

June 23, 2010, Decided; June 23, 2010, Filed

Civil No. 06-1015

Reporter

724 F. Supp. 2d 245 *; 2010 U.S. Dist. LEXIS 62814 **; 2010-2 Trade Cas. (CCH) P77,123

STERLING MERCHANDISING, INC., Plaintiff v. NESTLE, S.A., et al., Defendants

Subsequent History: Counsel Amended December 10, 2010.

Affirmed by Sterling Merch., Inc. v. Nestle, S.A., 2011 U.S. App. LEXIS 18214 (1st Cir. P.R., Sept. 1, 2011)

Prior History: Sterling Merch., Inc. v. Nestle, S.A., 2008 U.S. Dist. LEXIS 59384 (D.P.R., Aug. 5, 2008)

Core Terms

ice cream, merger, antitrust, monopolization, products, prices, brand, competitors, anti-competitive, retailers, sales, relevant market, market share, Sherman Act, distribute, distributor, foreclosure, conspiracy, Defendants', acquisition, consumers, monopoly, summary judgment, contracts, alleges, damages, relevant period, market power, increased price, anti trust law

Counsel: **[**1]** For Sterling Merchandising, Inc., Plaintiff: David C. Indiano-Vicic, Jeffrey M. Williams-English, LEAD ATTORNEYS, Seth Erbe, Indiano & Williams, PSC, San Juan, PR; PHV Adam C. Briggs, LEAD ATTORNEY, PRO HAC VICE, PHV David J. Gilles, PHV Josh Johanningmeier, PRO HAC VICE, Godfrey & Kahn, S.C., Madison, WI; Javier A. Morales-Ramos, Javier A. Morales Ramos Law Office, San Juan, PR; PHV Jennifer Cotner, PHV Kevin J. O'Connor, PRO HAC VICE, LaFollete Godfrey & Kahn, Madison, WI.

For Nestle, S.A., Nestle Puerto Rico, Inc., Payco Foods Corporation, Defendants: Luis A. Oliver-Fraticelli, LEAD ATTORNEY, Roberto A. Camara-Fuertes, Fiddler, Gonzalez & Rodriguez, San Juan, PR; PHV Erik T. Koons, PHV, Carmine R. Zarlenga, LEAD ATTORNEYS, PRO HAC VICE, Howrey LLP, Washington, DC.

For Nestle Holdings, Inc., Defendant: Luis A. Oliver-Fraticelli, LEAD ATTORNEY, Roberto A. Camara-Fuertes, Fiddler, Gonzalez & Rodriguez, San Juan, PR; PHV Erik T. Koons, PHV, Carmine R. Zarlenga, LEAD ATTORNEYS, PRO HAC VICE, Howrey LLP, Washington, DC.

For Department of Justice, Amicus: Lavinia Aparicio-Lopez, Commonwealth Department of Justice, San Juan, **[**2]** PR.

For PMC Marketing Corp., Interested Party: Javier I. Arbona, LEAD ATTORNEY, Quinones, Sanchez & Guzman, PSC, San Juan, PR.

For Sterling Merchandising, Inc., Counter Defendant: Seth Erbe, LEAD ATTORNEY, Indiano & Williams, PSC, San Juan, PR.

Judges: SALVADOR E. CASELLAS, U.S. Senior District Judge.

Opinion by: SALVADOR E. CASELLAS

Opinion

[*250] OPINION & ORDER

Plaintiff, Sterling Merchandising, Inc. ("Sterling"), brings this action against defendant **[*251]** corporations, Nestle, S.A., Nestle Holdings, Inc., Nestle Puerto Rico, Inc. ("Nestle PR"), and Payco Foods Corporation ("Payco")(collectively, "Nestle" or "Defendants"), alleging antitrust violations and injury stemming from the merger of two local ice cream distributors, and several subsequent business practices. The complaint charges Defendants with: conspiracy to monopolize, and unlawful restraint of trade in violation of Sections 1 & 3 of the Sherman Antitrust Act ("Sherman Act"), *15 U.S.C. § 1*, *3*; monopolization in violation of Section 2 of the Sherman Act, *15 U.S.C. § 2*, exclusive dealing in violation of Section 3 of the Clayton Antitrust Act ("Clayton Act"), *15 U.S.C. § 14*; unlawful restraint of trade in violation of the Puerto Rico Anti-Monopoly Act, *10 P.R. Laws Ann., §§ 257-276*; **[**3]** and monopolization and attempted monopolization in violation of *Section 260* of the Puerto Rico Anti-Monopoly Act, *10 P.R. Laws. Ann., § 260*. Defendants have moved this court for summary judgment on Counts I through VIII of the Amended Complaint, which allege violations of Sherman Act Sections 1, 2, and 3 (*15 U.S.C. §§ 1-3*), Clayton Act § 3 (*15 U.S.C. § 14*), and the Puerto Rico Anti-Monopoly Act (*10 P.R. Laws Ann. §§ 257-276*).

Given the complex nature of the present suit, and after an unsuccessful effort at mediation, this Court held a special hearing for the parties to further present any relevant arguments regarding the motion currently under review. Docket # 221. Taking into account the arguments presented there, and after reviewing the facts and the pertinent law, summary judgment **DISMISSING WITH PREJUDICE** Sterling's federal claims shall be **GRANTED,** while all state law causes of action shall be **DISMISSED WITHOUT PREJUDICE.**

Background

[1]

Relevant Cast

Sterling is an ice cream distributor, founded by John Williams ("Williams") and Stanley Pasarell ("Pasarell") in 1993. PSUF # 1. From its beginnings, the company has had the exclusive rights to distribute Edy's Ice Cream ("Edy's") in Puerto Rico, a brand manufactured by Dreyer's Grand Ice Cream, Inc. ("Dreyer's"). Id. Williams and Pasarell each own 50% shares in Sterling. DSUF # 11(a)&(b). Williams is President and Pasarell is Chairman of the Board. Id.

Nestle S.A., headquartered in Vevey, Switzerland, is currently the largest ice cream manufacturer in the world. PSUF # 4. A subsidiary, Nestec S.A., is responsible for the analysis and review of merger, acquisition, and divestiture proposals within the Nestle corporate structure. DOSUF # 5. Nestle S.A. operates in Puerto Rico through separate marketing subsidiaries that sell their products in the market. DSUF # 166. These include Nestle PR, **[**5]** which owns 100% of the shares of Payco. DSUF # 2. Dreyer's, manufacturer of Edy's, is also a subsidiary of Nestle S.A. [2] DSUF # 182.

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[1] Accompanying the Motion for Summary Judgment was Defendants' Statement of Uncontested Facts ("DSUF")(Docket # 191), to which Plaintiff replied with its Opposition to Statement of Uncontested Material Facts ("POSUF")(Docket # 198). Defendants replied **[**4]** (Docket # 208-3), and Plaintiff sur-replied (Docket # 212). Plaintiff also submitted its own Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment ("PSUF")(Docket # 197), Defendant replied (DOSUF)(Docket 208-33), and Plaintiff sur-replied (Docket # 213).

[2] Dreyer's entered into an agreement in 2002, with an effective date of June 26, 2003, whereby it combined with Nestle Ice Cream Company, LLC to form Dreyer's Grand Ice Cream Holdings, Inc.

[*252] Thomas Ward ("Ward") was the President and principal owner of Payco until the merger with Nestle PR in 2003, with the exception of the period between 1999 and 2001. DSUF # 9(a); POSUF # 9(a). However, even during said period, Ward acted as Chief Executive Officer ("CEO") and Chairman of the Board. Id. Valerie Cornut ("Cornut") is currently CEO of Payco, a position she has held since 2005. POSUF # 9(b).

Dr. Thomas Overstreet ("Overstreet") is an economist at CRA International, where he holds the position of Vice President. Sterling retained his services "to conduct an economic analysis of the issues raised in the Complaint filed in this matter." DSUF # 15(a). Sterling's other expert is David W. Whitehouse, a marketing specialist, who conducted two surveys about the ice cream market in Puerto Rico. DSUF # 15 (b). [3] Defendants' experts are David Scheffman, an economist and **[**6]** Director of LECG, LLC, an international consulting company, and Jose J. Villamil, President and CEO of Estudios Tecnicos, Inc., an economics and planning consulting firm in Puerto Rico. DSUF # 16.

Unilever is a major Nestle competitor in the ice cream business, producing brands such as Breyers and Ben and Jerry's. DSUF # 6. Breyers is distributed by Payco, while Sterling distributes other Unilever products, such as Ben and Jerry's ice cream. See DSUF # 19, DUSF # 17, PSUF # 3.

Market Structure

Beginning in 2002, Nestle managers studied and discussed purchasing Payco, along with other strategies within the Puerto Rico market. PSUF # 8. Nestle also expanded its presence in the world wide ice cream market after 2000, and in 2003 acquired Dreyer's. DSUF # 182. The Federal Trade Commission ("FTC") investigated and approved Nestle Holdings, Inc.'s acquisition of Dreyer's, but did not include Puerto Rico in its analysis. PSUF # 60. The FTC also required Defendants to provide advance written notification of the acquisition of any direct store delivery ice cream distribution business for $ 7.5 million or more in the United States, except for those in Puerto Rico. PSUF # 61.

Dreyer's products first entered the Puerto Rico market in 1992, and in 1993 the company assigned the exclusive right to distribute its Edy's line to **[**8]** Sterling. DSUF # 176. Sterling has distributed Dreyer's branded products in Puerto Rico since 1993. DSUF # 25. Since as early as April, 2001, Edy's has been, and continues to be, the number one selling ice cream brand in Puerto Rico. [4] DSUF # 26. In August, 2000, Sterling purchased selected assets from Caribbean Fruitti, an ice **[*253]** cream distributor in Puerto Rico, and thereby acquired the distribution rights to certain Unilever brands including Good Humor ice cream products. DSUF # 27. Sterling also added J & J Snacks, Rich's Ice Cream and Turkey Hill products to their offerings between 2005 and 2006. DSUF # 28. The amount and variety of ice cream brands and products offered in the relevant market has not diminished significantly since Nestle PR's acquisition of Payco. [5] DSUF ## 32-33.

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[3] Defendants have also filed a Motion to Strike the Rebuttal Declaration of Dr. Thomas Overstreet (Docket # 206), which was filed in response to Defendant' Motion for Summary Judgment, and after the window for expert discovery had closed in the case management calendar. Inasmuch as said declaration incorporated sales data produced after his original report was delivered and expounded upon his existing theories, Defendants' motion is **DENIED.** However, the report also includes new theories of liability, including foreclosure in certain sub-segments of the ice cream market, which were presented after the closure of expert discovery. These are an improper attempt to reformulate arguments regarding the relevant market, and shall be struck from the record. The present case is not as extreme as *Lohnes v. Level 3 Communications, Inc., 272 F.3d 49, 59 (1st. Cir. 2001)*, which is cited by Defendants. Nevertheless, the new theories regarding sub-regions would require new market definitions and expert work **[**7]** for both parties, and should thus not proceed at this advanced stage.

[4] This fact was not properly controverted with evidence to the contrary.

[5] Prior to the 2003 merger, the following brands, and possibly others, were available in Puerto Rico: Breyer's, Haägen Dazs, Blue Bunny, M&M Mars (Snickers, Dove, M&Ms), Payco, Flav-o-Rich, various private labels, Healthy Choice, Lady Richmond, Rich & Creamy, Blue Bell, and Carrusel, Nestle imported range, Edy's, Ben & Jerry's, Unilever **[**9]** (Good Humor), Barbers, Nestle products; Budget Saver, Tofutti, Natural Fruit Corp, Parmalat -- Kinnett, Hood, Schoep's. As of 2008 the market included a

Nestle PR entered the Puerto Rico ice cream distribution market in 1998 via the acquisition of Mantecados Nevada, Inc.'s ("Nevada") ice cream manufacturing and distribution business. DSUF # 21. Prior to the acquisition of a local distributor, Nestle PR sold its branded ice cream products, mostly imported from the U.S. mainland, via local distributors, including **[**10]** Sterling, Payco, and Nevada. PSUF # 9. Nevada ran an ice cream factory in addition to its distribution business, so Nestle PR offered ice cream products that were manufactured in the Puerto Rico factory, as well as Nestle branded products. PSUF # 10. The company's ice cream sales volume in this period (1999-2001) fluctuated between $ 18.1 million and $ 18.6 million. PSUF # 11. Nearly contemporaneously, Payco reported sales of $ 27.8 million, $ 29.1 million, and $ 31.1 million in 2000, 2001 and 2002, respectively. PSUF # 15.

From the time of the 1998 Nevada acquisition until the Payco merger in June 2003, Nestle PR's ice cream division suffered heavy losses. DSUF # 22. In response to this reality, and before the 2003 merger with Payco, Nestle PR approached Sterling about a possible joint approach for retail space, but this option was never seriously pursued. PSUF # 155. This did not lead to an agreement, and because Nestle PR was not economically successful, it began merger talks with Payco in 2001, and the two merged on June 11, or July 1, 2003 through Nestle's acquisition of 50% of Payco's stock, which was controlled by Ward. [6] DSUF ## 23 & 209; PSUF **[*254]** ## 22 & 27. On September 2, 2005, **[**11]** Nestle PR acquired the remaining 50% of Payco's shares from Ward. DSUF # 210. After the Nestle PR/Payco merger, Ward remained as President and CEO of Payco until 2005. PSUF # 53.

The **[**12]** Puerto Rico Office of Monopolistic Affairs ("PROMA") reviewed and ultimately approved the Nestle PR / Payco transaction, conditioned upon various stipulations. [7] DSUF # 30. The then head of PROMA, Jose Diaz Tejera, has no knowledge that the terms of the agreement have ever been breached. DUSF # 31. After the merger, all of the sales of ice cream that were previously made by Nestle PR, including all Nestle brands, were shifted to Payco. DSUF # 214.

During the years prior to the Nestle PR/Payco merger, Nestle explored the possibility of strategic collaboration, and even a possible merger with Sterling. PSUF # 51. Nestle also studied the possibility of exchanging its Unilever line for Sterling's Edy's line in order to promote brand alliance rationalization. PSUF ## 86 & 90. This included discussions with Sterling's co-owner, Pasarell, about the possible purchase of his share of the company. PSUF # 88.

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similar number of options for the consumer: Breyer's, Haägen Dazs, Nestle, Nestle Gold, Nestle Payaso, Nestle Nevada, Nestle impulse products, Dole, M&M Mars (Snickers, Dove, M&Ms), Payco, Flav-o-Rich, various private labels, Healthy Choice, Lady Richmond, Rich & Creamy, Blue Bell, and Carrusel, Edy's, Unilever (Good Humor), Natural Fruit Corp., Rich Ice Cream and Products, Turkey Hill, Schoeps, Ben & Jerry's, Hunter Farms, Budget Saver, J&J Snack, Old Meeting House, Gianni of New York ("Gianni") ice cream, and Gianni Italian ice. Plaintiffs have disputed the presence of Blue Bunny, and the relevance of various limber companies. They have not been included in this Court's analysis.

[6] Plaintiffs allege that the motivation for this merger was ". . . that Nestle executives responsible for investigating and approving the acquisition of Payco intended to monopolize ice cream distribution business in Puerto Rico and exclude or limit competitors such as Sterling, Unilever and Wells Dairy." POSUF # 23. Contemporaneous to this merger, between 2002 and 2005, Sterling and Nestle management discussed different possibilities for merger, purchase, or the sharing of distribution rights. DSUF ## 203-208. No agreement was ever reached. Part of Nestle P.R.'s pre merger difficulties were due to Payco's distribution network. "As Nestle recognized that continued competition with Payco would likely lead to further losses, acquiring Payco became an attractive option," because the local company controlled the best locations and key distribution channels. PSUF ## 24 & 28. Furthermore, this Court notes that the exact date of the merger is contested, but finds said fact to be immaterial for present purposes.

[7] PROMA staff expressed concern about the transaction's potential anti-competitive effects. PSUF # 46. Plaintiffs dispute this fact, however, their objections are centered on the merits of the decision, and not its existence. PROMA staff noted that the Payco/Nestle PR combination could create restrictions on competition, but the transaction was eventually approved, in part due to the fact that the Commonwealth wanted Nestle to continue operating its local ice cream factory. POSUF # 30. The approval was made official on March 25, 2003 (DSUF # 223), and stipulated that Nestle PR and Payco would not enter into exclusive contracts which closed more than 35% of the market to competition. DSUF # 224. Nestle P.R. also agreed that it would seek PROMA's **[**13]** approval before granting the distribution rights over Edy's ice cream, unless Sterling should acquire the distribution rights to either Breyer's or Blue Bunny ice cream (or any other brand with similar sales). PSUF # 49. PROMA defined the relevant market as dedicated to the distribution and sale of ice cream. PSUF # 47.

In the mid-1990s, Ward acquired Payco and began distributing various brands of ice cream. These came to include Payco, Lady Richmond, Carrusel, Flav-O-Rich, Unilever's Breyer's ice cream line, Masterfood Interamerica's Mars novelty ice cream line, and Wells' Dairy, Inc.'s ("Wells' Dairy") Blue Bunny line of ice cream products. DSUF ## 17-20; PSUF # 13. Prior to the Nestle PR / Payco merger in 2003, Blue Bunny ice cream **[**14]** products were Payco's most successful ice cream line. DSUF # 36. The merger caused Wells' Dairy to terminate its distributor agreement with Payco, because Payco started to distribute two of Blue Bunny ice cream's main competitors, Breyers and Nestle Gold. DSUF ## 36-37. Before Blue Bunny terminated its distribution agreement with Payco, it was at one time available in approximately 80 percent of stores selling take home ice cream in Puerto Rico. PSUF # 65. Wells' Dairy then granted a newly formed distributor, Palm Industries, Inc. ("Palm"), the right to distribute Blue Bunny ice cream products in Puerto Rico. DSUF # 38. Palm only survived until 2006, when Wells' Dairy formed a subsidiary in Puerto Rico, Wells' Dairy Puerto Rico, to self-distribute Blue Bunny take home products. DSUF # 38. On October 8, 2008, Wells Dairy informed Puerto Rico retailers that it would cease distributing Blue Bunny branded ice cream and novelty products no later than December 15, 2009. DSUF # 45.

[*255] After the 2003 Nestle PR/Payco merger there was analysis of whether Unilever would continue to provide Payco with some of its products, such as Breyer's ice cream. In undertaking this analysis, Unilever considered **[**15]** factors such as the reality that Defendants, by acquiring Dreyer's and Payco, became its distributor and also main competitor. Nevertheless, Breyer's was concerned that switching to Sterling could result in litigation due to breach of contract, and also the potential difficulties of single-brand self-distribution. PSUF # 113. After weighing its options, Unilever decided to stay with Payco, and in early 2006, entered into a new agreement with Nestle PR/Payco by which the company was appointed as the exclusive distributor of Unilever's Breyers as well as Good Humor brand packaged ice cream products in Puerto Rico. [8] PSUF ## 116 & 117.

Standard of Review

The Court may grant a motion for summary judgment when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *FED.R.CIV.P. 56 (c)*; See also *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Ramirez Rodriguez v. Boehringer Ingelheim, 425 F.3d 67, 77 (1st Cir. 2005)*. **[**16]** In reaching such a determination, the Court may not weigh the evidence. *Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668 (1st Cir. 1994)*. At this stage, the court examines the record in the "light most favorable to the nonmovant," and indulges all "reasonable inferences in that party's favor." *Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994)*.

Once the movant has averred that there is an absence of evidence to support the nonmoving party's case, the burden shifts to the nonmovant to establish the existence of at least one fact in issue that is both genuine and material. *Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990)* (citations omitted). "A factual issue is 'genuine' if 'it may reasonably be resolved in favor of either party and, therefore, requires the finder of fact to make 'a choice between the parties' differing versions of the truth at trial.'" *DePoutot v. Raffaelly, 424 F.3d 112, 116 (1st Cir. 2005)* (citing *Garside, 895 F.2d at 48 (1st Cir. 1990))*.

In order to defeat summary judgment, the opposing party may not rest on conclusory allegations, improbable inferences, and unsupported speculation. See *Hadfield v. McDonough, 407 F.3d 11, 15 (1st Cir. 2005)* **[**17]** (citing *Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)*. Nor will "effusive rhetoric" and "optimistic surmise" suffice to establish a genuine issue of material fact. *Cadle Co. v. Hayes, 116 F.3d 957, 960 (1st Cir. 1997)*. Once the party moving for summary judgment has established an absence of material facts in dispute, and that he or she is entitled to judgment as a matter of law, the 'party opposing summary judgment must present definite, competent evidence to rebut the motion.' *Mendez-Laboy v. Abbott Labs., 424 F.3d 35, 37 (1st Cir. 2005)* (quoting *Maldonado-Denis v. Castillo Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994)*. "The non-movant must

[8] Sterling alleges that Breyer's sales have stagnated as a result of the agreement, but this fact is in controversy, and not centrally relevant to the present motion.

'produce specific facts, in suitable evidentiary form' sufficient to limn a trial-worthy issue. [. . .] Failure to do so allows the summary judgment engine to operate at full throttle." Id.; see also *Kelly v. United States, 924 F.2d 355, 358 (1st Cir. [*256] 1991)* (warning that "the decision to sit idly by and allow the summary judgment proponent to configure the record is likely to prove fraught with consequence."); *Medina-Munoz, 896 F.2d at 8*, quoting *Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)* (holding **[**18]** that "[t]he evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact finder must resolve.").

Applicable Law & Analysis

Relevant Market

There are three retail distribution channels in the ice cream market 1) take-home, 2) impulse (single-serving packages sold for immediate consumption), and 3) food service customers (restaurants, hotels, ice cream parlors, etc.). PSMF # 189. The market shares of said distribution channels are approximately two thirds take-home, and one fourth impulse, with the remainder being food service customers, who make up less than one tenth of total ice cream consumption. [9]

Sterling has presented the relevant product market as the Puerto Rico market for the distribution and sale of ice cream products. DSUF # 46. PROMA also defined the relevant product market as the distribution of ice cream products, including the three segments in its definition. [10] POSUF # 47. Defendants have not offered a competing definition. Id. Moreover, Sterling's definition **[**19]** of the relevant geographic market, Puerto Rico, is unchallenged. Defendants' expert has not attempted to create a counter theory regarding the relevant product market. POSUF # 48; PSUF # 187.

Instead, Defendants signal that Sterling failed to include many important ice cream vendors in its relevant market definition, these include Baskin-Robbins [11] (DSUF ## 66-70), McDonald's (DSUF # 71-74), and "limbers," [12] a Puerto Rican version of the popsicle (DSUF ## 75-78). However, Defendants' own internal documents identify Sterling and Wells/Palm as principal competitors, and do not identify McDonald's, Baskin Robbins, or other retailers as part of the competitive landscape. POSUF # 58; DSUF # 58.

Defendants also criticize Sterling for not performing an econometric cross-elasticity of demand calculation to support its product market definition. Docket ## 47-48. They claim that Sterling has not performed an analysis of the reasonable interchangeability of use between products, or a price study, that are alleged to be part of the relevant market and potential substitutes. DSUF ## 49 & 52. Sterling does not deny that its expert ". . . has not produced econometric or regression computations relating specifically to cross-elasticity, but Plaintiff disputes Defendants' statement or implication that Plaintiff has not conducted an in-depth economic analysis concerning the characteristics and **[*257]** firms in the relevant product and geographic market." POSUF # 48.

The **rule of reason** governs this Court's analysis of the relevant market. *Recetas Por Menos, Inc. V. Five Development Corp., 368 F.Supp. 2d 124, 132 (D.P.R. 2005)*. When proving monopoly through indirect evidence, a

[9] This Court notes that Plaintiff posits its relevant market as the combination of these three segments.

[10] This conclusion is buttressed by *practical idicia* used by Overstreet, Plaintiff's expert. Internal Nestle documents refer to its competitors as Sterling, and Palm industries, excluding ice cream retailers. Accordingly, Sterling's expert determined that the data was not amenable to econometric analysis. Id.

[11] Baskin-Robbins distributed to a limited number of grocery stores at one point, but has since terminated this facet of its business. POSUF # 68.

[12] The name comes from a visit to the Island by Charles **[**20]** Lindbergh in the 1920s.

market power analysis requires the prior identification of the relevant market, which is bifurcated into a test regarding the relevant product market and another focusing on the relevant geographic **[**21]** market. *Id. at 131*; *Eastern Food Services, Inc. v. Pontifical Catholic University Services Assn, 357 F.3d 1, 5-6 (1st Cir. 2004)*. Because Defendants do not contest Sterling's assertion that the relevant geographic market is the entire geographic territory of Puerto Rico, this Court will accept Sterling's definition for the purpose of all further analysis. However, Defendants' objection to Plaintiff's market definition requires this Court's review.

Supreme Court case law establishes that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. U.S., 370 U.S. 294, 325, 82 S.Ct. 1502, 1524, 8 L. Ed. 2d 510 (1962)*; see also *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3rd Cir. 2007)*. This analysis concerns the fact that the ". . .ability of customers to turn to other suppliers restrains a firm from raising prices above the competitive level, [so] the definition of the relevant market rests on a determination of available substitutes." *Federal Trade Comn v. Cardinal Health, Inc., 12 F.Supp. 2d 34, 46 (D.D.C. 1998)*. To wit, the competing products that **[**22]** customers in the market view as substitutes for the product in question. *Id.* Accordingly, the central question is whether there are reasonable alternatives to the product in question.

In addition to this first test, a practical, fact-driven, approach may also guide a court's analysis as to, "[t]he boundaries of [. . .] submarket[s], [which] may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the products' peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co., 370 U.S. at 325*. This entails taking into consideration the economic and commercial realities of a particular industry. *Cardinal Health, 12 F.Supp. 2d at 46*. Failure to define this market may lead to the dismissal of the anti-trust complaint. *Broadcom, 501 F.3d at 307*.

Sterling alleges that the market in question is a secondary market for the distribution and sale of ice cream, which is a market for distribution services and wholesale marketing to intermediaries, and not for the sale of ice cream directly to its end consumers. Defendants **[**23]** contest that ice cream retailers are direct competitors for their business, and that excluding retailers from the relevant market definition is a fatal flaw on Sterling's part. They argue that if the price of Edy's, or another similar brand, were to rise sufficiently at a supermarket or impulse location, consumers would migrate to retail firms such as McDonald's and Baskin-Robbins.

Whether one examines a sub-market, or a separate market for services, Sterling's arguments prevail on this point, at least so far as a genuine dispute of material fact exists. It is telling that during the relevant period, all of the companies involved have engaged in practically the same economic activity, which is importing **[*258]** ice cream into Puerto Rico and distributing it to supermarkets, restaurants, and impulse locations. None of the parties engages in significant retail activity, [13] and they mutually consider each other to be their primary competitors. It is doubtful that another unmentioned group of existing sellers and producers in the relevant geographic market could have, during the pendency of this action, deprived the parties in this complaint of significant amounts of business. *Newcal Instustries, Inc., 513 F.3d at 1045*. **[**24]** While Defendants allege that firms such as McDonald's and Baskin-Robbins should be included in the ice cream market, their internal business communications belie the relevance of the retail ice cream market for Sterling and Nestle/Payco's operations. The consumers in this market are the retailers, not the end customers for the product.

This Court understands that the parties involved in the lawsuit provide a specific service that is distinguishable from the business of selling ice cream directly to consumers. Furthermore, even if the relevant market includes competitors such as Baskin-Robbins and McDonald's, there is most certainly a dispute of fact as to the existence of a submarket. *Newcal Instustries, Inc. v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008)*. Therefore, Defendants' prayer for summary judgment dismissing all claims for failure to properly define the relevant product market is **DENIED.**

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[13] The "limber" companies could be different, but Defendants have not presented evidence that "limber" distribution has had anything but a *de minimis* effect on the ice cream distribution market.

Antitrust Injury

Sterling alleges damages on two main fronts. First it avers that Nestle **[**25]** PR/Payco's exclusive contracts with some Puerto Rico retailers have illegally restricted them from enjoying a market share commensurate with their products' performance in competitive scenarios. Secondly, Nestle allegedly coordinated a "price squeeze" and restricted product support for Dreyer's products that Sterling distributes (*i.e.* Edy's). The Nestle PR/Payco merger allegedly led to ". . . a panoply of anti-competitive conduct including price increases to Sterling, denial of new products, and so forth." Docket # 198. Sterling argues that "but for" these activities, it would have achieved greatly higher sales, and enjoyed the profits these sales would have produced.

Specific antitrust standing is dependent on Sterling being able to show a plausible antitrust injury, ". . . linked to an illegal presence in the market[,] . . . which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. The injury must originate in proscribed anti-competitive activity, "by reason of that which made the [activity] unlawful," *id. at 488*, and it must also **[**26]** be sufficiently direct, non-speculative, and measurable to the extent that causality is not in doubt. *Associated Gen. Contractors of Cal., Inc., v. Cal. State Council of Carpenters, 459 U.S. 533, 102 S.Ct. 8907, 906 (1983)*.

The need for direct causality born from a specific anti-competitive act is of special importance, because "antitrust claims are concerned not with wrongs directed against the private interest of an individual business but with conduct that stifles competition." *E. Food Servs., 357 F.3d at 4* (citing *Brown Shoe Co., 370 U.S. **[*259]** at 344*). Antitrust ". . . harm does not mean a simple loss of business or even the demise of a competitor but an impairment of the competitive structure of the market." *Recetas Por Menos, Inc., 368 F.Supp. 2d at 132* (citing *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57 (1st Cir. 2004))*; see also *Brown Shoe Co., 370 U.S. at 344*. In sum, federal ***antitrust law*** seeks "the protection of competition, not competitors." *Leegin Creative Leather Products Inc. V. PSKS, Inc., 551 U.S. 877, 906, 127 S.Ct. 2705, 2724, 168 L. Ed. 2d 623 (2007)*(citing *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990))*; **[**27]** see also *Spectrum Sports v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 891, 122 L. Ed. 2d 247 (1993)*.

The law does not require that the illegal activity be the sole cause of the injury, "but only that it was a material cause." *Sullivan v. National Football League, 34 F.3d 1091, 1103 (1st Cir. 1994)*(citing *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 14 (1st Cir. 1979))*. Furthermore, the First Circuit's standard includes "but-for causation," leading to a direct injury resulting from anti-competitive activity. *Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51, 55 (1st Cir. 2003)*; see also *SAS of P.R., Inc. v. P.R. Tel. Co., 48 F.3d 39, 43 (1st Cir. 1995)*.

The Sterling damages model asks this Court to assume that "but for" the Nestle PR/Payco merger, the company would have had more than double the market share it had in 2003, when the period of Defendants' alleged anti-competitive and monopolistic actions began. Overstreet's damages model assumes that Sterling's sales accounted for roughly 50% of Supermax and Pueblo ice cream volume, and uses this volume as a benchmark. [14] DSUF # 234. It concludes that Sterling could have enjoyed up to a 50% market share, "but for" Payco's allegedly anti-competitive **[**28]** exclusivity agreements. DSUF # 230. Another benchmark used are depot center sales, of which Sterling alleges it enjoys 50% market share, and Walmart, which does not use exclusives, where Sterling enjoys 42% market share. DSUF ## 226-231.

Consistent with Plaintiff's theory of the case, its expert, Overstreet affirms that none of the ice cream distributors in Puerto Rico had market power prior to the summer of 2003, and before said date the market was competitive. DSUF ## 79 & 80. Overstreet, concedes that Payco, Nestle PR, Wells', Sterling and Dreyer's did not have monopoly or unilateral market power prior to the Nestle PR/Payco merger. DSUF # 144. If the base-line for a competitive environment in the ice cream market was the pre-merger landscape (see DSUF ## 79 & 80, 144), then

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[14] Sterling's expert accepted on its face the report of the company's executives that Sterling's sales accounted for the ice cream volume in SuperMax and Pueblo stores. DSUF # 235.

Sterling should have to show how it was harmed, and how "but for" the merger and the alleged illegal activity, it would have achieved, through legitimate competition, greater sales, market share, profits, etc.

The primary reality undermining **[**29]** Sterling's request for "but for" damages, is that the inference that the company has been unfairly hindered either by the exclusives or by product price increases is implausible in light of Sterling's increased profits, sales, and market share. Far from showing that the merger hurt their business, the record shows that Plaintiff was **better off** during the relevant period.

[*260] Despite the allegedly competitive marketplace, between fiscal years 2001 and 2003, Sterling's sales **declined from** $ 8.07 million to $ 7.01 million. DSUF # 90. However, after the Nestle PR/Payco merger, Sterling's sales **increased,** expanding to $ 12.02 million by the end of 2008, a 70% **increase** over the company's 2003 results. DSUF # 90. By contrast, some products distributed by Nestle PR/Payco lost market share and access to important locations. See, e.g., DSUF ## 119, 134, & 139

The same trend is observable in Sterling's gross profit, which rose by an annual rate of 12% between 2003 and 2008, and during which time its operating income **increased** by 300%. In 2007, Sterling's gross profit was 60% **higher** than in 2003. DSUF # 93. Moreover, Sterling's market share grew, from approximately 12.6% in 2002 to 20.7 % in 2007, and **[**30]** the company is expanding its ice cream distribution operations by building new and larger facilities. [15] DSUF ## 96-97 & 100; PSUF # 196. In contrast, the Nestle PR/Payco joint venture **lost** nearly $ 5 million in sales revenue to Sterling and other competitors in its first six months of operations. DSUF # 139.

Regarding the market as a whole, Puerto Rico's ice cream distribution industry has grown in terms of total sales since 2003. DSUF # 98. There is insufficient data in the record of the case to evaluate how much Puerto Rico consumers paid at the retail level before the 2003 Nestle PR/Payco merger, and whether during the pre-merger period price increases to consumers were greater than or less than the rate of inflation, and supplier price increases. [16] **[**31]** DSUF ## 82-85. What the record does show is that inflation in Puerto Rico averaged 11.9% annually between 2003 and 2007, encompassing the relevant period for this action. DSUF # 87. Despite this, both Blue Bunny and Edy's ice cream retailed for **lower** prices in 2007 than in 2001. DSUF # 141.

Furthermore, Sterling alleges that exclusivity contracts between Defendants and many Puerto Rico retailers after the Nestle PR/Payco merger caused it antitrust injury. However, exclusive contracts have been used in the Puerto Rico ice cream business since the 1990s. DSUF # 113. Payco's sales of ice cream to exclusive accounts **decreased** from $ 15.16 million in 2004 to $ 10.62 million in 2007. DSUF # 116. Sterling's internal documents show that Payco's exclusive accounts foreclosed 28.2% of the Puerto Rico ice cream market in 2004, 30.8% in 2005, 29.4% in 2006, and 19.5% in 2007. DSUF # 118. Moreover, these exclusive contracts were at the distribution level, and not directed at consumers. DSUF # 127. Defendants' **[**32]** 100% exclusive agreements are virtually all one or two years in duration. [17] Docket # 128. Additionally, Overstreet **[*261]** did not find any evidence that Defendants ever sold ice cream products at prices below their cost. DSUF # 142.

Nevertheless, it is not contested that Defendants' gross margins were higher in stores with exclusivity agreements. PSUF # 158.After the merger, Sterling managed to move into various supermarkets that had previously been

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[15] For much of the relevant period, Sterling did not carry "cheap and sweet" ice cream lines, which are an important seller at many supermarkets catering to lower income customer bases. DUSF ## 102-104. Furthermore, an important customer, Unilever, complained that Sterling does not have specific routes for impulse, single serving, ice cream sales. DSUF # 110. These factors may have limited Sterling's growth *vis a vis* Nestle PR/Payco.

[16] Sterling responds to this fact with an affidavit by one of its lawyers of a review of advertised prices. POSUF # 84. However, this Court finds said evidence insufficient to controvert these facts.

[17] A small number of Payco's agreements surpassed two years, including those with Mr. Special, Supermax, and Blockbuster that were for three years. See Docket # 191-88 at 30-33. Sterling points out Payco's 5 year deal with Ralph's as an example of an illegally long contract, but this was not 100% exclusive. Id. at 30. Plaintiff admits that it was 90% exclusive. POSUF # 211. Additionally, Plaintiff alleges that Payco and Nestle PR colluded regarding the terms of the Ralph's agreement about the payment terms to the supermarket chain. Id.

covered by Payco exclusives. DSUF # 129. These stores included Grande and Pitusa supermarkets, and, in 2007, Sterling also obtained a 30% exclusive agreement with Econo stores, which had previously been a Nestle PR/Payco **[**33]** exclusive retailer. DSUF ## 132 & 133.

In terms of other competitors, Nestle PR/Payco distributes Unilever's Breyers brand to most retailers, but Econo and military bases receive the brand through other routes. DSUF ## 150-151. Matosantos Commercial Co. distributed Baskin Robins to Supermercados Grande, but stopped doing so in 2007. DSUF # 157. At the end of 2008, Gianni of New York ("Gianni"), an ice cream and Italian ice distributor entered the Puerto Rico market, distributing to various supermarkets. DSUF # 160.

If the market place was competitive when Payco alone utilized exclusives, why should the same practice, at very similar levels, somehow injure Plaintiff now that Payco and Nestle PR have merged? Exclusives have existed in the Puerto Rico marketplace since before the merger, and have not increased as a total percentage of market share since 2003. Beyond the fact that exclusive dealing is not *per se* illegal, and that in the present case Defendants' contracts have not violated the law, as will be discussed further below in Section II, the pre-existence of the practice prior to the merger weakens any claim for antitrust injury.

While Sterling's business concerns regarding Defendants' **[**34]** acquisition of Dreyer's, who manufactures its marquee product (Edy's), are legitimate from a business point of view, they do not involve any overt anti-competitive act. To wit, the acquisition was approved by the FTC (PSUF # 60), and Defendants have not withdrawn Edy's, nor have they significantly increased the unit price to Sterling. DSUF # 87. Accordingly, prices to consumers have stayed stable and volume of sales has increased, strongly suggesting that the competitive structure of the market has not been harmed, thus precluding antitrust injury.

Furthermore, allegations regarding price increases, along with the non-assignment of some product lines (*i.e.* Skinny Cow), also cannot be linked to tangible damages. The facts of the case show that Sterling's business was not in rapid expansion before the merger (DSUF # 90), nor did it appear to be in a position to dominate the local market. After the merger, however, Sterling's sales grew by 70% (see DSUF # 90), and its market share grew from the low teens to over 20% during the relevant period. More importantly, the company's gross profit increased by 60% (DSUF ## 96-97), and it has not faced significant increases in its input costs for **[**35]** the products it purchases from Dreyer's. (DSUF ## 82-85 & 141). This expansion has been made possible through aggressive price competition and the successful entry into new retail outlets, previously controlled by Payco in the pre-merger period and then by Defendants during the **[*262]** relevant period for this action. See, *e.g.,* DUSF # 129.

Sterling argues that the benchmark that should be used are those stores where no exclusives are in place, namely Walmart and depot centers, where they have achieved between 40% and 50% sales shares. This Court finds the suggested benchmark speculative for various reasons. Foremost is that exclusive dealing contracts are not illegal *per se,* and it is not reasonable to completely exclude their existence from the market when envisioning a competitive marketplace. Moreover, in the pre-merger period Sterling's market share was nowhere near this large, and it is unrealistic to posit that the company's sales and market presence would have grown four-fold had the Nestle PR/Payco merger never occurred.

Proving antitrust injury requires establishing a causal relationship between an illegal, anti-competitive act and actual damages, or at minimum plausible "but for" **[**36]** damages. This Court finds that Plaintiff has failed to present facts supporting a plausible theory of damages. As a result, Plaintiff's damages model is too speculative and improbable to survive summary judgment.

This holding alone would support dismissal of all of Plaintiff's federal antitrust claims. However, for the purpose of thoroughness, we will discuss each cause of action individually. The discussion will address Plaintiff's three factual groupings of claims. Namely:

I. Plaintiff's first and fourth causes of action for Unlawful Restraint of Trade in Violation of Sections 1 & 3 of the Sherman Act and Exclusive Dealing in Violation of Section 3 of the Clayton Act.

II. Plaintiff's second and third causes of action for Monopolization and Attempted Monopolization under Section 2 of the Sherman Act.

III. Plaintiff's fifth cause of action for Conspiracy to Monopolize in Violation of Sections 1 and 3 of the Sherman Act.
IV. Plaintiff's sixth, seventh, and eighth causes action, and Defendant's Counterclaim, brought under Commonwealth Antimonopoly law.

I. Unlawful Restraint of Trade (Causes of Action I and IV: Sherman Act Section 1; Clayton Act Section 3)

The central component of Sterling's **[**37]** claims for unlawful restraint of trade under Section 1 of the Sherman Act and Section 3 of the Clayton Act are Defendants' exclusivity agreements with some Puerto Rico retailers. Section 3 of the Clayton Act prohibits arrangements that have a probability to ". . . substantially lessen competition or tend to create a monopoly in any line of commerce." *18 U.S.C. § 15*. Likewise, Section 1 of the Sherman Act requires a similar, but subtly different showing, that ". . . the alleged agreement involved the exercise of power in a relevant economic market, that this exercise had anti-competitive consequences, and that those detriments outweighed efficiencies or other economic benefits. This is the rule of reason calculus." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island, 373 F.3d 57, 61 (1st Cir. 2004)*.

Sterling's claims for unlawful restraint of trade, and illegal exclusive dealing, are focused on contracts between Defendants and retailers for the exclusive use of freezer space in Puerto Rico stores and supermarkets. The Amended Complaint alleges that this practice has foreclosed, or cut off, a sufficient portion of the relevant market **[*263]** from the entrance of new competitors, **[**38]** violating ***antitrust law***, and stifling meaningful competition. However, because the Amended Complaint has not alleged that the exclusive dealing arrangements in question (i.e. the "exclusives") are *per se* violations, this Court must balance the efficiencies gained by their implementation and contrast these with any harm to the structure of the market place. *Id. at 62* (citing *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

Section 1 of the Sherman Act requires substantial foreclosure. *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1059 (8th Cir. 2000)*. A similar analysis applies to exclusive dealing claims under Section 3 of the Clayton Act. In other words, some instances of limited foreclosure may be acceptable, and an antitrust plaintiff must show that the exclusivity has "anti-competitive effects outweighing the legitimate economic advantages that it might provide." *Eastern, 357 F.3d at 5*. Harm to competition requires that the practice ". . . create or enhance market power - meaning the power to control prices or exclude competition . . .," but market power is not in itself sufficient to "condemn the conduct" because potential benefits must also be weighed. Id. **[**39]** Therefore, when analyzing a practice, which is not *per se* illegal, under the rule of reason the courts must consider ". . . both a practice's likely anti-competitive effects and its beneficial business justifications." *Leegin Creative, 551 U.S. at 909*.

Case law has established that exclusivity agreements can promote reduced-costs, stable long-term supply, and "predictable prices," and as such are to be reviewed favorably. *Stop & Shop, 373 F.3d at 66*; see also *Eastern, 357 F.3d at 8* (elaborating "it is widely recognized that in many circumstances [exclusivity contracts] may be highly efficient - to assure supply, price stability, outlets, investment, best efforts or the like-and pose no competitive threat at all."). Accordingly, given the tendency to liberally review "exclusives," for them to be found illegal, they must have harmed the very structure of the relevant market, and not competitors or competing interests. This determination is made by examining if they have foreclosed a sufficiently large, or crucial, part of the market to effectively block competitors from entering or expanding to compete for new business.

First Circuit case law uses market share figures as initial guides **[**40]** for determining if foreclosure rates are facially dubious or presumably harmless, but a significant share is only a presumptive signal of market power as entry barriers may be low. *Eastern, 357 F.3d at 6*. The inference of market power requires an antitrust plaintiff to "plead and prove that a firm has a dominant share in a relevant market, and that significant 'entry barriers' protect that market." *Broadcom, 401 F.3d at 307*. In the case at bar, Plaintiff challenges the levels of foreclosure caused by Nestle PR/Payco exclusives, which are ". . . unlikely to be of concern when they are less than 30 or 40 percent" of the market." *Stop & Shop, 373 F.3d at 68*. In other words, "low numbers make dismissal easy," but high numbers do not guarantee success for a plaintiff. Id. (citing *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 45-*

46, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984); Areeda & Hovenkamp, Federal Antitrust Policy, The Law of Competition and Its Practice, 3d). Beyond First Circuit case law, PROMA's decision approving the Nestle PR/Payco merger echoes this threshold rule by proffering a 35% market share as the highest possible permissible limit for foreclosure due to the Nestle PR/Payco exclusives. This **[**41]** limit **[*264]** has never been exceeded on a Puerto Rico wide basis. DSUF # 118-119.

In the present case, sales from stores participating in Nestle PR/Payco exclusivity agreements have never exceed 30.8% of total market share and averaged just under 27% for the relevant period, **dropping** to under 20% for the final year. This fact weighs strongly in favor of Defendants because, as previously stated, ". . . foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent." [18] Stop & Shop, 373 F.3d at 68. These numbers are below the range of concern, and should not be considered anti-competitive. However, beyond this threshold approach, the practices underlying the abovementioned foreclosure percentages predate the Nestle PR/Payco merger, and have actually **decreased** since said merger.

In the post-merger period, the percentage of supermarkets covered by exclusives did not increase, and both Sterling's market share and total sales have grown. Presently, a Sterling brand, Edy's, is Puerto Rico's number one brand of ice cream. Sterling has also managed **[**42]** to enter (and establish preeminence with its Edy's brand) major Puerto Rico supermarkets, such as Grande, Pitusa, and Econo, where Defendants' brands had previously enjoyed exclusivity. DUSF # 129. Sterling's inroads into new Puerto Rico retailers are not isolated instances of competitive success in the ice cream market. Gianni products also entered various important supermarket chains since 2007, and have maintained their presence to date. In fact, Nestle PR/Payco's combined market share is currently **lower** than in the pre-merger period. [19]

In responding to the Motion for Summary Judgment, Sterling points to higher than acceptable foreclosure rates in some sub-regions of the Commonwealth. The argument is specious as the market Plaintiff defined for purposes of the present suit is the sale and distribution of ice-cream in all of Puerto Rico. Analyzing sub-regions or sub-markets would call for not only local data supporting individual claims for each region and market, but also fragmenting Plaintiff's broad claims into many market-specific ones. In addition, Plaintiff also makes arguments about foreclosure rates in take-home sales of ice cream (see PSUF # 203 (citing that these could have been as high as 36% during the relevant period)), but these too are misplaced as they do not address the relevant antitrust market. The problem with Plaintiff's analysis regarding take-home sales is not the veracity of the data they proffer; rather it is that their data describes markets beyond the scope of this case.

By agreeing with Plaintiff that the correct relevant market is the sale and distribution of ice cream in Puerto Rico, this Court precludes **[**44]** itself from making conclusions about antitrust violations in sub-markets, not properly established in the four corners of the complaint. Other courts **[*265]** have rejected similar gerrymandering of markets attempting to artificially show high levels of foreclosure. See Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3rd Cir. 1997). The Amended Complaint is not framed to include sub-regions or sub-markets, and it is therefore unnecessary to examine foreclosure rates outside those of the already defined relevant market. Doing so would lead to false analogies and unsubstantiated conclusions.

As mentioned above, exclusive dealing is only considered a threat to competition in "very discrete circumstances," mostly concerning long-term foreclosure (*i.e.* contracts for longer than two years). Eastern, 357 F.3d at 8. Even

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[18] In fact, PROMA's guidelines would have allowed Nestle/Payco exclusive to have constituted up to 35% of the relevant market.

[19] Even accepting *arguendo* that said agreements could be construed as illegal, the entry of Gianni, coupled with Sterling's strong growth, clearly suggest the competitive structure of the market has not been impaired, and the market appears to have equal or greater competitiveness than it did prior to the 2003 merger. It is therefore impossible for this Court to infer "but for" damages, where their calculation, even in the light most favorable to Sterling, "would 'necessitate wide ranging' speculation." Sullivan v. Tagliabue, 25 F.3d 43, 51 (1st Cir. 1991). The rule of reason does not permit an inference that Sterling has experienced real anti-competitive **[**43]** prejudice, and would have been any more or less successful had these agreements not existed.

given market concentration, if the exclusionary contracts are short-term in nature, or entrance is easy, substantial foreclosure cannot be demonstrated. *Id. at 8-9*.

The tradition of exclusive dealing contracts in Puerto Rico ice cream distribution dates to at least the 1990s, and the undisputed facts reveal that the present levels are well below their pre-Nestle PR/Payco **[**45]** merger peak. In this context, low market-wide rates of foreclosure are sufficient for this Court to sustain the legality of the exclusives. Nevertheless, the record also reflects that most of the exclusivity agreements in question were for periods of between one and two years. The First Circuit has found that agreements of this length are lawful, because any possible interruption to competition that they might cause is only for a short period after which competitors may gain entry to foreclosed outlets. *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227. 236-238 (1st Cir. 1983)*. This Court notes a small number of the exclusivity agreements are for more than three years. See Docket # 191-88 & 200-8 - 200-13. Nevertheless, these do not constitute a sufficient portion of the relevant market to sustain an antitrust claim.

Of course, this Court agrees with Plaintiff that there is no automatic percentage where market foreclosure rates either ratify the legality of exclusivity agreements or make them *per se* illegal. The law does not seek to immunize potentially illegal activity in restraint of trade, but exclusive dealing contracts are not disfavored, and the present case demonstrates **[**46]** no substantial harm to the market

Arguing against the low foreclosure rates' significance, Sterling repeatedly urges this Court to examine the practical effects of the exclusives, and not a more bright-line approach, and mentions various barriers to entry, [20] and suggest that the market has had no new entries since the 1990s. This is not supported by the record, which shows that Gianni is a recent, **[*266]** albeit smaller entry, and those retailers such as Costco, Sam's, and Econo have begun to market their own private label brands, and that distribution channels remain open. *Omega Environmental v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997)*. Furthermore, this Court disagrees with Plaintiff's proposition that Law 75 creates a disincentive to the entry of new ice cream brands to the local market. On the contrary, Law 75 can potentially protect smaller distributors by guaranteeing them a stable product supply and business relationship, granted they meet reasonable sales expectations. Furthermore, prices have remained relatively stable, volume has grown, and so have Sterling's revenues. Therefore, even adopting the holistic view of the illegal behavior, as put forth by Sterling, does not **[**47]** bolster its claims of unreasonable foreclosure.

In addition to the exclusive dealing charges, Plaintiff also refers to *per se* illegal horizontal agreements and the allegedly unlawful coordination of activities between Nestle PR and Payco before their merger. These both must be examined as part of a merger occurring nearly seven years ago. Absent other facts suggesting an intentional strategy to restrain trade and foreclose the market, Ward's statements about controlling the local marketplace (see supra at 12-13) can only be interpreted as isolated incidents (PSMF # 43) and do not constitute facts sufficient to support a claim under the relevant statutes, more so when market data does not support Plaintiff's conclusion that the exclusionary contracts "choked" competition.

In sum, exclusive dealing contracts are a frequent practice in retail/wholesale food sales and distribution. Given their long-term presence before the Nestle PR/Payco merger (DSUF # 113), there is minimal cause for concern. *Joyce Beverages, Inc.. 555 F.Supp. 271, 277-278 (S.D.N.Y. 1983)*. The exclusivity agreements under analysis are licit, and have not negatively affected the structure **[**49]** of the market. Moreover, the record does not reflect

[20] To bolster its antitrust claims based on market foreclosure in detriment to competition, Sterling alleges that there are high entry barriers to the local ice cream distribution market, including: 1) the necessity of establishing a Direct Store Delivery System ("DSD system"), 2) purchasing trucks and freezers, 3) establishing sufficient route density, 4) obtaining ice cream brands to distribute, 5) failed entry by previous competitors, 6) market concentration between incumbents, 7) Puerto Rico Law 75, and 8) Payco's exclusivity agreements. PSUF # 198-199. Plaintiff alleges that Puerto Rico is a unique market because of its small size, and that local supermarkets, allegedly unlike those in the United States, do not have sufficient freezer warehouse capacity to store ice cream as inventory, requiring investment in a DSD system. As a result, ice cream must be frequently delivered in smaller quantities to in-store freezers, versus more infrequent deliveries to storage freezers, which is allegedly how the market works in the continental United States. Plaintiff alleges that this leads market entrants in Puerto Rico to face higher capital costs **[**48]** because they must invest in greater refrigeration technology and more frequent routes.

illegal horizontal agreements in the pre-merger period, and Plaintiff has not shown significant price increases to consumers, despite years of inflation. Therefore, Plaintiff's claims under Section 1 of the Sherman Act for illegal restraint of trade and under Section 3 of the Clayton Act for illegal exclusive dealing are **DISMISSED WITH PREJUDICE.**

II. Monopolization and Attempted Monopolization (Causes of Action II and II: Section 2 of the Sherman Antitrust Act)

As to the applicable law, ". . . § 2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455, 113 S.Ct. 884, 890, 122 L. Ed. 2d 247 (1993)*. The first is established by showing: "(1) the defendant has monopoly power and (2) the defendant has engaged in impermissible 'exclusionary' practices with the design or effect of protecting or enhancing its monopoly position." *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196 (1st Cir. 1996)*; see also *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L. Ed. 2d 701 (1977)*; *United States v. Grinnell Corp., 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*(stating **[**50]** "This is distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident."). Case law has firmly established that "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports, 506 U.S. at 457*. Finding **[*267]** anti-competitive conduct requires identifying acts that ". . . harm the competitive process, and thereby harm consumers [. . .as opposed to] harm to one or more competitors . . ." *U.S. v. Microsoft, 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*; see also *Cargill v. Monfort of Colo., 479 U.S. 104, 107, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*(stating "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation."). Such prohibited conduct includes exclusionary acts, or others with an anti-competitive exclusionary effect, which "tend[] to destroy competition itself." *Spectrum, 506 U.S. at 447*. Therefore, courts should **[**51]** not search for malice in business dealing, rather they should look for those which may lead to lessened competition, *Brooke Group Ltd, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*, in the sense that the potential injury is, as mentioned in the damages section, only "of the type that the statute was intended to forestall." *Microsoft, 253 F.3d at 59* (citing *Brunswick Corp., 429 U.S. at 487-488*). If potentially anti-competitive conduct is found to exist, then this Court must discern if the conduct also has pro competitive effects, and using the rule of reason, balance the harms. Id. However, this must focus on the acts, and not on "the intent behind it." Id.

Establishing monopolization also requires a showing that the defendant possesses market power, which is the ability to negatively affect competition in the relevant market. *Coastal Fuels, 79 F.3d at 196*. Here, the relevant market has been established, so this Court must ask if Defendants are able to set prices substantially above costs, and also if they enjoy protection from the entry or expansion of rivals who could challenge potentially supra-competitive pricing. Id. (citing *Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421 (9th Cir. 1995)*. In other **[**52]** words, "[m]arket power is the power to 'force a purchaser to do something that he would not do in a competitive market.'" *Eastman Kodak, 504 U.S. 451, 464, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*(citing *Jefferson Parish, 466 U.S. at 14*). Furthermore, "merely possessing monopoly power is not itself an anti-trust violation." *Microsoft, 253 F.3d at 51*.

Likewise, attempted monopolization under Section 2 requires showing that the defendant has acted in a predatory or anti-competitive manner within the market place, that this reflects a "specific intent to monopolize," and that there is a "dangerous probability of success." *Ramallo Bros. Printing, Inc. v. El Dia, Inc., 392 F. Supp. 2d 118, 130 (D.P.R. 2005)*(citing *Spectrum Sports v. McQuillan, 506 U.S. 447, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. Actual monopolization must be dangerously threatened, because ". . .the notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act." *Spectrum Sports, 506 U.S. at 456-457*.

In light of this general framework for Section 2 of the Sherman Act, this Court must first ask if Defendants have market, or monopoly, power within the Puerto Rico ice cream **[**53]** market. The 2003 merger certainly created a dominant firm, which is also linked in a corporate relationship with the producer of Edy's, the star product for Sterling. While this market landscape certainly raises a red flag at first glance, it does not necessarily lead to **[*268]** Plaintiff's assertion that Defendants exercise market power. Market power exists only when competitors lack capacity to increase short run output, allowing for the monopolist to unilaterally restrict output in order to charge higher prices. *Rebel Oil, 51 F.3d at 1434*. Therefore, such a conclusion requires answering whether prices can be set to supra-competitive levels.

The record shows that Defendants cannot control prices, and that Sterling, and other competitors, continue to successfully compete. Namely, the uncontested facts do not reflect that prices are being set well above costs, nor does the record show that prices to consumers have grown significantly in the years following the merger. Furthermore, the price of ice cream offered to Sterling from Dreyer's has **remained virtually flat for nearly a decade,** despite high rates of inflation. Such price stability suggests Nestle PR/Payco cannot set prices well above **[**54]** costs, which would be required for a finding of monopoly power. *Coastal, 79 F.3d at 196*. This, combined with the steady increase in sales volume in the whole relevant market, weighs heavily against any inference that Defendants are able to raise prices by restricting output.

In building its case that a monopoly exists in the relevant market, Plaintiff again reverts to arguments regarding alleged entry barriers, such as Puerto Rico's small size, the high fixed capital costs of distributing ice cream, and Law 75. It is established in ***antitrust law*** that an entry barrier is a cost that is greater for a new competitor than for established rivals. *Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1428 (9th Cir. 1993)*(referencing 2 Areeda & Hovencamp, ***Antitrust Law*** parr. 409e at 303). These factors are equally challenging to Nestle PR/Payco, and may play to Sterling's benefit, given that it distributes an already popular brand in a small market. Regarding the exclusives, these could potentially act as barriers, but as discussed in the previous section, this Court does not find them to be illegal, and they have not stopped Sterling's strong expansion, nor various new entries into the market. **[**55]** Sterling's sales and market share have increased during the relevant period to this action. [21] DSUF ## 97 & 129. Thus, the presence of new competitors, and Sterling's own expansion, weigh heavily against a finding of market power. *Ramallo Bros., 392 F. Supp. 2d 118*.

Nevertheless, it is illustrative to discuss Plaintiff's specific averments regarding anti-competitive conduct. Specifically, Sterling alleges: i) that the merger was an illegal attempt to create a monopoly, and that ii) Defendants directed Dreyer's to stop selling SkinnyCow to Sterling and that they increased the price of Edy's to weaken Sterling.

A. The Merger

A first obstacle faced by Sterling in questioning the merger, is that the uncontested facts of the case establish that Nestle PR purchased Payco after years of stagnation and losses in Puerto Rico. Accordingly, the company's share of the Puerto Rico ice cream distribution market may **[**56]** be attributed to an historical accident of necessity, or a legitimate boardroom decision, whereby Nestle PR had to acquire a more viable competitor in order to survive. Plaintiff points to various conversations, **[*269]** mostly involving Ward and other representatives of Defendants, both in Switzerland and Puerto Rico, that suggest the combination aimed at creating a dominant firm. These are insufficient to bear the weight of an anti-trust claim, where damage to competition, not malice, is the operative test.

Sterling has also pointed to many instances of market share being a *sine qua non* requirement for success in Puerto Rico. PSUF # 69. Of course, such an argument is facially incongruent with the position that the Nestle PR/Payco merger hurt competition, because, if 40% market share is necessary as suggested by this fact, then no

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[21] As previously stated, Gianni recently entered the market, and while presumably on a smaller scale than both Plaintiff and Defendants' businesses, its entry is still significant for this Court's analysis, and Econo and Costco have also begun to self-distribute ice cream in their stores.

more than two firms could exist. PSUF # 69. Sterling's claims further fall short because nothing on the record suggests the Puerto Rico consumer is paying monopoly prices for ice cream. Even more, as in Brunswick, the Nestle/Payco combination seems to have enhanced competition.

Beyond the record painting a picture of sustained growth for Sterling, entry into the market **[**57]** by a new competitor (Gianni), shows entry barriers are not insurmountable and that the ice cream market remains highly competitive. Sterling argues as if it had a right to an ideal relationship with Dreyer's where its own business needs would dictate the price and variety of products supplied. ***Antitrust law*** does not pretend to provide such a guarantee, rather a competitive marketplace. Therefore, Sterling's monopolization claim simply cannot prosper. [22]

As to the charge that Dreyer's, Nestle S.A., and Nestle PR, illegally shared confidential data regarding Sterling's business, these facts do not substantiate any claim of an anti-competitive strategy by Defendants. The allegations of data sharing are too vague to point to any real harm to competition, and this, even if illegal for other reasons, does not point to an antitrust violation. In light of **[**58]** the above, this Court finds that Defendants do not possess and have not exercised monopoly power in the relevant market, and that the alleged anti-competitive acts were not illegal.

B. Price Squeeze

In both 2004 and 2005, Dreyer's reduced the price support for Edy's ice cream given to Sterling, first by $ 0.10 per unit (from seventy-five cents per unit to sixty-five cents per unit), and then by an additional five-cents per unit for a total of 15 cents. DSUF ## 190-194; PSUF ## 139&142. [23] Price changes during the relevant period were limited to 15 cents per gallon. These were the only increases over almost a decade, when inflation in Puerto Rico neared 11% annually. DSUF # 87. During the relevant period, the price of Edy's has remained stable at $ 2.36. Between 2000 and 2001, Sterling received a forty-cent promotional allowance, this increased to seventy five cents in 2002, which was reduced by fifteen cents between 2004-2005, as mentioned above. See Docket # 191-88 at 17. Accordingly, the present net price to Sterling for Edy's is 10% less than it was in 2000. Id.

There is a controversy of **[**59]** fact as to how and why Dreyer's, possibly in conjunction **[*270]** wth Nestle officials, made the decision to reduce the price support to Sterling in 2004 and 2005. See, e.g., PSUF ## 93 & 95. Plaintiff alleges that the company responded to Ward's plan to squeeze Sterling, while Defendants allege that price increases were due to raw material price increases. DOSUF # 146. Sterling also alleges that Dreyer's assigned a product line, Skinny Cow, to Nestle PR/Payco after having previously encouraged Sterling to distribute the product before the merger. PSUF # 147 & 149. Defendants deny this assertion, citing the existence of an existing agreement with Dreyer's. DOSUF # 149.

Plaintiff points to a range of documents regarding Defendants' business analysis of the Puerto Rico ice cream market, as proof of intent to monopolize. These ideas included the idea of swapping the Breyers line for the Edy's line (PSUF # 31), and eliminating Blue Bunny from the Payco portfolio (DSUF # 30), which eventually occurred due to Wells' initiative. Ward made comments to Nestle during the merger negotiations that he believed that this would eliminate Blue Bunny as a competitor in the Puerto Rico market. PSUF # 39. During **[**60]** the negotiations for the Nestle PR and Payco acquisition, Ward, who had a personal interest in Payco's market position, promoted eliminating Sterling's price subsidy as a way of pressuring the distributor and strengthening the company's value for the second stage of the Payco acquisition. PSUF # 121 & 127. Defendants allege these statements regarding price increases to Sterling were made by Ward acting as a self-interested party during the sale of Payco, and in no way reflected Nestle's position, nor did it reflect the fact that Dreyer's is a separate operational entity.

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[22] This Court also finds that Sterling's attempted monopolization claim must be dismissed for failing to establish a dangerous probability that Nestle will achieve market power. The merger occurred over 6 years ago and the market remains "robustly competitive." *Springfield Terminal Ry. v. Canadian Pac. Ltd., 133 F.3d 103, 110 (1st Cir. 1997)*.

[23] Defendants allege that price increases were due to raw material price increases. DOSUF # 146.

Ward continued his campaign to eliminate the Edy's price support after the merger. PSUF ## 134 & 138. However, Nestec and Nestle PR executives informed Ward that his language and tactics were not acceptable under the corporate guidelines of each entity, and that they did not conform to the companies' established marketing policies. DOSUF # 138.

Sterling argues that Defendants acted in an illegal predatory fashion when Dreyer's withheld SkinnyCow and increased the price per unit of Edy's in Puerto Rico. However, this Court can identify no antitrust case law supporting the proposition that Dreyer's was obliged to grant **[**61]** distributorship of SkinnyCow to Sterling. Doing so might have been a magnanimous act towards a successful business partner, but businesses do not have a legal obligation to act loyally and Sterling has not shown why Dreyer's had an antitrust duty to deal with them.

In further argumentation, Sterling also alleges size-reductions in the Edy's half-gallon product line. However, this has not been sufficiently established in the uncontested facts, and appears to reflect general marketing practices, not any specific strategy regarding the Puerto Rico market. Furthermore, the record does not show that Sterling had to reduce prices to consumers as a result of the size change, nor that sales decreased.

In the context of "price squeeze" claims, the Supreme Court has held that ". . . a defendant with no antitrust duty to deal with its rivals has no duty to deal under the terms and conditions preferred by those rivals." *Pacific Bell Telephone Co. v. Linkline Communications, Inc. 129 S.Ct. 1109, 1123, 172 L. Ed. 2d 836 (2009)*. Linkline reiterated that the courts are ". . . ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'" *129 S. Ct. at 1121* (citing *Verizon Communications Inc. v. Law Offices of **[*271]** Curtis V. Trinko, LLP, 540 U.S. 398, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004))*. **[**62]** In the present action, Dreyer's and Defendants may well have a "duty to deal" with Sterling on the wholesale level that arises out of the Puerto Rico fair dealership law and their particular contract, but this is not an antitrust question. Thus, Linkline renders Sterling's price squeeze and denial of new products claims toothless, because "[a]n upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; anti-trust law does not forbid lawfully obtained monopolies from charging monopoly prices." *Id. at 1122*.

Even before Linkline, claims by distributors were disfavored. For example, the ramifications on efficiency of a vertical merger, such as a producing firm (Nestle PR) acquiring existing distributors (Payco), and then reducing costs by only dealing with wholly-owned distributors, may constitute an injury-in-fact, but not an antitrust injury as long as alternative sources of product exist. *Serpa Corp. v. McWane, Inc., 14 F.Supp.2d 147, 150 (D.Mass. 1998)*(citing Areeda & Hovenkamp, ***Antitrust Law*** 432-33 (1997 Supp.)). Accordingly, "an intermediary distributor may only bring anti-trust claims when it: i) is injured by the direct anti-trust violation **[**63]** of a rival; ii) suffers directly as a result of illegal distribution restraints, or iii) qualifies as an exception." Id.; see also *Florida Seed Co., Inc. V. Monsanto Co., 915 F.Supp. 1167, 1175 (M.D. Ala. 1995)*. Moreover, "[w]here, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group, 509 U.S. at 237*.

Dreyer's is a separate corporate entity from all Defendants, but they are nonetheless owned and ultimately controlled by said company, thus barring conspiracy claims involving these two entities for the alleged "panoply of anti-competitive conduct." [24] On the other hand, if Dreyer's pricing and product allocation activities are found anti-competitive then they could be liable for damages under *Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, n. 16, 97 S.*

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[24] Sterling also alleges conspiracy claims related to the price increase. These are unfounded because the parties are commonly owned, and any discussions regarding joint marketing strategies occurred during the process of the Nestle/Payco merger. Even if this were not the case Sterling's conspiracy claim would be very weak, because any price increases occurred after the merger and involve actions permitted under *Linkline*. Therefore, even Sterling's conspiracy claims are hindered by the need to show plausible causality between prohibited conduct and actual injury. *Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*(stating ". . . respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. . ." so injury does not result from ". . . alleged conspiracies . . . that tend to benefit respondents. . .").

Ct. 2061, 52 L. Ed. 2d 707 (1977). This point of law is not in controversy, and the question remains if any acts seen as predatory or conspiratorial can be construed from the **[**64]** record of this case.

Sterling avers that Dreyer's decision to assign some new brands to Payco is proof of a conspiracy to cripple its distribution business. This Court can find no reason why new brands, such as Skinny Cow, must have necessarily been offered to Sterling. Under *Trinko* **[**65]** no claim on that front exists. Sterling has not been terminated as a distributor for Dreyer's products, and continues to distribute, Edy's, **[*272]** Puerto Rico's leading brand. Under such circumstances, the relationship can hardly be construed as predatory, and Sterling has brought no actions against Dreyer's for breach of contract or breach of fiduciary duty.

As has been discussed, Sterling's "price squeeze" and foreclosure claims are stymied by evidence of a competitive marketplace, and the merger of competitors is not in and of itself sufficient to prove antitrust damages. *Cargill, 479 U.S. at 107*. This Court agrees with Defendants that there is a dearth of evidence indicating increased consumer pricing or restricted output in the Puerto Rico ice cream market during the relevant period. Dreyer's never took any steps to make distributing Edy's unprofitable for Sterling. And there is even less indication that prices have risen to a supra-competitive level as required by the Clayton and Sherman Acts. *Pool Water Products v. Olin Corp, 258 F.3d 1024, 1034 (9th Cir. 2001)*(stating ". . . the antitrust laws are only concerned with acts that harm allocative efficiency and raise the price of goods **[**66]** above their competitive level or diminish their quality.")(internal citations omitted). Puerto Rico consumers have not been hurt by either increased prices or reduced selection.

In light of the foregoing, this Court concludes that no monopoly has existed during the relevant period. Therefore, Plaintiff's claims under Section 2 of the Sherman Act for monopolization are **DISMISSED WITH PREJUDICE.**

Furthermore, the attempted monopolization claims also fail. First Circuit case law establishes that the requisite "dangerous probability" of monopolization cannot be shown when a plaintiff continues to compete and expand in the relevant market. *Ramallo Bros., 392 F. Supp. 2d 118*. Here, Sterling's success and continued growth acts as a poison pill for their claims of attempted monopolization. Furthermore, *Springfield Terminal Railway v. Canadian Pacific, Ltd., 133 F.3d 103, 110 (1st Cir. 1997)*, held that an attempted monopolization claim is to be presumed implausible if the challenged conduct has continued for over two years without damage to the competitive structure of the relevant market. The challenged merger in the present case took place in 2003, the information sharing was contemporaneous **[**67]** to the merger, the alleged price squeeze occurred in 2005 and 2006, and Payco's exclusives have existed since the 1990s. These facts do not permit an inference that there is a dangerous probability of success in monopolizing the market in question. Therefore, Plaintiff's Section 2 Sherman Act attempted monopolization claims are **DISMISSED WITH PREJUDICE.**

III. Conspiracy to Monopolize (Claim V; Sections 2 and 1 of the Sherman Antitrust Act)

Sterling's final cause of action is for conspiracy under Sections 1 and 2 of the Sherman Act, for alleged collusion between Nestle PR and Payco beginning in 2001 up until their 2003 merger. The standard for a conspiracy claim under Section 1 of the Sherman Act, includes the following elements which require showing: "(1) a contract, combination, or conspiracy among two or more independent actors; 2) that unreasonably restrains trade; and 3) is in, or substantially affects, interstate or foreign commerce." *Dyno Nobel, Inc. v. Amotech Corp., 63 F.Supp. 2d 140, 147 (D.P.R. 1999)*(citing *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. The test for a Section 2 claim for conspiracy to monopolize is similar, although with a slightly higher **[**68]** burden of **[*273]** proof. *Id. at 150*. To wit, a plaintiff must show: "(1) the existence of a conspiracy, (2) an overt act in furtherance of the conspiracy, and (3) specific intent to monopolize." Id. (citing *United States v. Yellow Cab Co., 332 U.S. 218, 225, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947))*. In other words, Sterling must show that the different Nestle actors and Payco shared a similar intent. However, Sterling's allegations that Nestle and Payco have illegally conspired to monopolize the ice cream distribution market necessarily fail as to all post-merger acts, because the coordinated acts of parent companies and their subsidiaries cannot constitute a Sherman Act claim for conspiracy. *Copperweld, 467 U.S. at 776*. This Court understands that said rule applies to both Section 1 and Section 2 claims.

Moreover, the record does not contain evidence of any conspiratorial acts, beyond the declarations of Ward during the process of promoting the sale of his business, Payco, to Nestle, a potential buyer. Such "boardroom ruminations" should not be construed as predatory behavior. *William Inglis / Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1028 (9th Cir. 1981)*. Other discussions of coordinated marketing alluded **[**69]** to by Sterling occurred after Nestle and Payco had entered into the merger process with PROMA, and have caused no conceivable damage to Sterling, whose business has grown.

It is important to note that the two companies were in the process of exploring a merger, and conducting due diligence. In this sense, the allegation that the two were sharing financial information is specious. ***Antitrust law*** is not intended to stand as an obstacle to potential mergers and acquisitions. Adopting such a strict view, as proposed by Plaintiff, would substantially hinder legitimate business undertakings. Moreover, no link has been proffered between this alleged improper sharing of information and a cognizable injury to Sterling. Therefore, the company is not entitled to a favorable inference regarding this exchange of information, because they have failed to proffer a plausible theory of injury. As such, the required link of an act unreasonably restraining trade cannot be met.

The alleged illegal sharing of information led to the eventual combination of Nestle PR and Payco, which was approved by PROMA. This Court does not find that the merger itself was conspiratorial, and it did not lead to an uncompetitive **[**70]** market place. Such a merger, even if it creates a large or dominant firm, is not *per se* illegal. *Cargill, 479 U.S. at 116*.

Also at issue here is the sharing of financial information in the pre-merger period, and the acquisition of 90% of retail freezer space at Ralph's. Docket # 196 at 53-54. Defendants allegedly colluded by discussing the possible ramifications of Payco potentially losing Unilever, a major Nestle competitor if the merger were to go through. See PSUF 106. Moreover, no valid conspiracy claim can be brought against commonly-owned companies. *Copperweld, 467 U.S. at 752*. Therefore, any claims based on acts occurring after the merger, which was finalized either on June 11 or July 2, 2003, are facially without merit. The undisputed facts of the case show that said agreement with Ralph's was signed in August, 2003, well after the merger. Even if discussions occurred in the months leading up to the combination, this Court finds that they could not sustain a charge of conspiracy as they would be an inextricable part of the acquisition.

The rhetoric cited by Plaintiff in its efforts to oppose summary judgment is eye-opening, but ultimately fails to sustain the **[*274]** theory of a pre-merger **[**71]** conspiracy alleged in the Amended Complaint. [25] Therefore, given the absence of facts plausibly supporting a clear conspiracy, and the apparent lack of antitrust damages related to these acts, Plaintiff's claims for conspiracy under both Sections 1 and 2 of the Sherman act are **DISMISSED WITH PREJUDICE.**

IV. Commonwealth Antimonopoly Claims

The remainder of Sterling's claims are grounded on Puerto Rico law. Exercising jurisdiction over pendent state law claims once the federal law claims are dismissed is discretional. See *Newman v. Burgin, 930 F. 2d 955, 963-964 (1st Cir. 1991)*(holding that "the power of a federal court to hear and to determine state-law claims in non-diversity cases depends upon the presence of at least one substantial federal claim in the lawsuit…[and] the district court has considerable authority whether or not to exercise this power, in light of such considerations **[**72]** as judicial economy, convenience, fairness to litigants, and comity). Because this Court will grant summary judgment as to the federal law claims, it will not exercise supplemental jurisdiction over the state law claims. Therefore, Sterling's claims arising from Puerto Rico law and Payco's Counterclaim for tortious interference are **DISMISSED without prejudice.**

[25] The Court has not discussed in detail said allegations, or Defendants' replies thereto, because they have not been linked to any specific acts creating antitrust injury or affecting the relevant market. Such a lack of causality to any antitrust harm leaves the allegations moot, even if the facts were proven true.

Conclusion

The applicable law and the undisputed facts of this case demonstrate that Sterling has not established antitrust injury with respect to either its Sherman Act or Clayton Act claims, nor has it established the necessary elements for any of the federal antitrust violations alleged in the Amended Complaint. Accordingly, Defendants' motion for summary judgment is **GRANTED** and Plaintiff's federal claims are **DISMISSED WITH PREJUDICE.** Sterling's state law claims shall be **DISMISSED WITHOUT PREJUDICE,** as will be Defendant's Counterclaim.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 23rd day of June, 2010.

/S/ Salvador E. Casellas

SALVADOR E. CASELLAS

U.S. Senior District Judge

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Manabat v. Sierra Pac. Mortg. Co.

United States District Court for the Eastern District of California

June 24, 2010, Decided; June 25, 2010, Filed

CASE NO. CV F 10-1018 LJO JLT

Reporter
2010 U.S. Dist. LEXIS 70377 *; 2010 WL 2574161

EDITH MANABAT, Plaintiff, vs. SIERRA PACIFIC MORTGAGE COMPANY, INC., et al., Defendants.

Subsequent History: Dismissed without prejudice by *Manabat v. Sierra Pac. Mortg. Co., 2010 U.S. Dist. LEXIS 68637 (E.D. Cal., July 6, 2010)*

Core Terms

rescission, borrower, foreclosure, alleges, notice, lender, mortgage, trust deed, non-judicial, accounting, business practice, motion to dismiss, default, obligor, fails, cause of action, consumer, conspiracy, violations, practices, security interest, quiet title, unconscionable, private right of action, unfair competition, modification, collection, fraudulent, recorded, damages

Counsel: **[*1]** For Edith Manabat, Plaintiff: Peter Jason Cabbiness, LEAD ATTORNEY, Law Office Of Peter J. Cabbiness, Clovis, CA.

Judges: Lawrence J. O'Neill, UNITED STATES DISTRICT JUDGE.

Opinion by: Lawrence J. O'Neill

Opinion

ORDER ON DEFENDANTS CHASE AND MERS' F.R.Civ.P. 12 MOTION TO DISMISS

(Doc. 8.)

INTRODUCTION

Defendants Chase Home Finance LLC ("Chase") and Mortgage Electronic Registration Systems, Inc. ("MERS") seek to dismiss as meritless and time barred plaintiff Edith Manabat's ("Ms. Manabat's") claims arising from her defaulted home loan. This Court considered Chase and MERS' *F.R.Civ.P. 12(b)(6)* motion to dismiss on the record and VACATES the August 2, 2010 hearing, pursuant to this Court's sua sponte dismissal of the claims against Chase and MERS.

BACKGROUND

Ms. Manabat's Home Loan

In December 2006, Ms. Manabat obtained a $ 476,772 adjustable rate loan from defendant Sierra Pacific Mortgage Co., Inc. ("Sierra Pacific") to purchase her Bakersfield property ("property"). Ms. Manabat took title to the property by way of a grant deed recorded on December 22, 2006. [1]

The loan was secured by a Deed of Trust ("DOT") encumbering **[*2]** the property and recorded on December 22, 2006. The DOT identifies Sierra Pacific as lender, Greenhead Investments, Inc. ("Greenhead") as trustee, and MERS as beneficiary.

After Ms. Manabat failed to make loan payments, a Notice of Default and Election to Sell Under Deed of Trust ("NOD") was recorded on February 24, 2009. The NOD indicated that past due payments plus permitted costs and expenses was $ 34,168.78.

A Substitution of Trustee was recorded on April 3, 2009 by which defendant NDEx West, LLC ("NDEx") substituted as trustee under the DOT in place of Greenhead. Pursuant to an Assignment of Deed of Trust recorded on April 7, 2009, all beneficial interest under the DOT was assigned to U.S. Bank National Association ("U.S. Bank").

A Notice of Trustee's Sale was recorded on July 29, 2009 for the property.

Ms. Manabat's Claims

Ms. Manabat proceeds on her complaint ("complaint") filed March 23, 2010 in Kern County Superior Court prior to Chase and MERS' removal to this Court. The complaint accuses Chase, MERS and the other defendants of "negligent, fraudulent, and unlawful conduct concerning a residential mortgage purchase loan transactions [sic] with plaintiff." The complaint alleges **[*3]** 16 claims, 11 of which target Chase and/or MERS and which will be discussed below. The complaint seeks to recover actual, statutory and punitive damages and to enjoin non-judicial foreclosure of the property.

DISCUSSION

F.R.Civ.P. 12(b)(6) **Motion To Dismiss Standards**

Chase and MERS contend that the complaint attempts to avoid Ms. Manabat's loan obligations although it alleges no wrongdoing by Chase or MERS, "relies on boilerplate allegations and fails to state essential elements of the claims" to fail as a matter of law.

"A trial court may dismiss a claim sua sponte under *Fed.R.Civ.P. 12(b)(6)*. . . . Such dismissal may be made without notice where the claimant cannot possibly win relief." *Omar v. Sea-Land Service, Inc., 813 F.2d 986, 991 (9th Cir. 1987)*; *see* *Wong v. Bell, 642 F.2d 359, 361-362 (9th Cir. 1981)*. Sua sponte dismissal may be made before process is served on defendants. *Neitzke v. Williams, 490 U.S. 319, 324, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)* (dismissals under *28 U.S.C. § 1915(d)* are often made sua sponte); *Franklin v. Murphy, 745 F.2d 1221, 1226 (9th Cir. 1984)* (court may dismiss frivolous in forma pauperis action sua sponte prior to service of process on defendants).

A *F.R.Civ.P. 12(b)(6)* motion to dismiss **[*4]** is a challenge to the sufficiency of the pleadings set forth in the complaint. "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately

[1] Documents pertaining to Ms. Manabat's loan and default were recorded with the Kern County Official Records.

prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997)*. A *F.R.Civ.P. 12(b)(6)* dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)*; *Graehling v. Village of Lombard, Ill., 58 F.3d 295, 297 (7th Cir. 1995)*.

In resolving a *F.R.Civ.P. 12(b)(6)* motion, a court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996)*. **[*5]** Nonetheless, a court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citation omitted). A court "need not assume the truth of legal conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v. Ringrose, 788 F.2d 638, 643, n. 2 (9th Cir.1986)*, and a court must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L. Ed. 2d 723 (1983)*. A court need not permit an attempt to amend if "it is clear that the complaint could not be saved by an amendment." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940, 946 (9th Cir. 2005)*.

"While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the **[*6]** elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)* (internal citations omitted). Moreover, a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes, 181 F.R.D. 629, 634 (S.D. Cal. 1998)*. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly, 550 U.S. at 562, 127 S.Ct. at 1969* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984))*.

In *Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*, the U.S. Supreme Court recently explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility **[*7]** standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. (Citations omitted.)

After discussing *Iqbal,* the Ninth Circuit Court of Appeals summarized: "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)* (quoting *Iqbal, __ U.S. __, 129 S.Ct. at 1949*).

The U.S. Supreme Court applies a "two-prong approach" to address a motion to dismiss:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . **[*8]** But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not "show[n]"-"that the pleader is entitled to relief." *Fed. Rule Civ. Proc. 8(a)(2)*.

> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, __ U.S. __, 129 S.Ct. at 1949-1950.

For a *F.R.Civ.P. 12(b)(6)* motion, a court generally cannot consider material outside the complaint. *Van Winkle v. Allstate Ins. Co., 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003)*. Nonetheless, a court may consider exhibits submitted with the complaint. *Van Winkle, 290 F.Supp.2d at 1162, n. 2*. In addition, a "court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; **[*9]** (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)*. A court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir.2003)*. Such consideration prevents "plaintiffs from surviving a *Rule 12(b)(6)* motion by deliberately omitting reference to documents upon which their claims are based." *Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998)*. [2] A "court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint." *Sumner Peck Ranch v. Bureau of Reclamation, 823 F.Supp. 715, 720 (E.D. Cal. 1993)* (citing *Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.1987)*). Moreover, "judicial notice may be taken of a fact to show that a complaint does not state a cause of action." *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd., 245 F.2d 67, 70 (9th Cir. 1956)*; *see* *Estate of Blue v. County of Los Angeles, 120 F.3d 982, 984 (9th Cir. 1997)*. **[*10]** A court properly may take judicial notice of matters of public record outside the pleadings'" and consider them for purposes of the motion to dismiss. *Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988)* (citation omitted).

With these standards in mind, this Court turns to Chase and MERS' challenges to Ms. Manabat's claims.

Truth In Lending Act

The complaint's first claim alleges against MERS a violation of the Truth In Lending Act ("TILA"), *15 U.S.C. §§ 1601, et seq.*, and its implementing Regulation Z, 12 C.F.R. §§ 226, et seq., that Ms. Manabat was not provided a notice of cancellation or Consumer Handbook on Adjustable Rate Mortgage to entitle her to rescind the "loan transaction."

Residential Mortgage Transaction Exemption

Chase **[*11]** and MERS contend that Ms. Manabat is unable to seek TILA rescission because Ms. Manabat took "a purchase money loan."

A "residential mortgage transaction" is exempt from TILA rescission. *15 U.S.C. § 1635(e)(1)*. A "residential mortgage transaction" is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." *15 U.S.C. § 1602(w)*; *Turczynski v. Friedman, 2007 U.S. Dist. LEXIS 78902, 2007 WL 4556923, * 4 (E.D. Cal. 2007)* ("The transaction for which plaintiff seeks rescission was a 'residential mortgage transaction,' within the meaning of *§*

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[2] "We have extended the 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)* (citing *Parrino, 146 F.3d at 706*).

1602(w) (security interest sought against plaintiff's dwelling for the purpose of acquiring it), and was therefore expressly exempt from TILA's disclosure and rescission rights . . .")

Chase and MERS correctly point to the complaint's allegations that Ms. Manabat obtained a "purchase money loan" to bar her TILA rescission claim. There is no statutory right of rescission "where the loan at issue involves the creation of a first lien to **[*12]** finance the acquisition of a dwelling in which the customer resides or expects to reside." *Betancourt v. Countrywide Home Loans, Inc., 344 F. Supp. 2d 1253, 1261 (D. Colo. 2004)*; *see* *Watts v. Decision One Mortgage Co., LLC., 2009 U.S. Dist. LEXIS 19668, 2009 WL 648669, *4 (S.D. Cal. 2009)* (dismissing with prejudice TILA rescission claim in that "while home equity loans and refinancing transactions would be amenable to rescission, Plaintiff's purchase money mortgage is not"); *Kamara v. Columbia Home Loans, LLC, 654 F. Supp. 2d 259, 2009 WL 2230733, *3 (E.D. Pa. 2009)* ("Here, it is undisputed that the loan was obtained to finance the acquisition of the plaintiff's dwelling. Rescission therefore is not available for the loan at issue. This claim is dismissed."); *Wellman v. First Franklin Home Loan Services, 2009 U.S. Dist. LEXIS 68389, 2009 WL 243961, *2 (S.D. Cal. 2009)* ("'residential mortgage transactions' such as Plaintiff's purchase money mortgage, are expressly excluded from coverage"); *Manown v. Cal-Western Reconveyance Corp., 2009 U.S. Dist. LEXIS 68392, 2009 WL 2406335, *5 (S.D. Cal. 2009)* ("Plaintiffs are not entitled to seek rescission for their purchase money mortgage.")

Chase and MERS are correct that "the recorded documents confirm that the Loan was a purchase money **[*13]** loan." Ms. Manabat acquired property title by a grant deed recorded on December 12, 2006, the same date on which the DOT was recorded. The DOT identifies Ms. Manabat as "borrower." The complaint alleges that the loan was to purchase Ms. Manabat's property. The grant deed and DOT demonstrate that they are part of a purchase money transaction in which the DOT permitted Ms. Manabat to acquire the property. Ms. Manabat's loan transaction is residential mortgage transaction exempt from TILA rescission. The TILA rescission claim fails as a matter of law.

Rescission Limitations Period

Chase and MERS further contend that a TILA rescission claim is time barred.

TILA's "buyer's remorse" provision allows borrowers three business days to rescind, without penalty, a consumer loan that uses their principal dwelling as security. *Semar v. Platte Valley Federal Sav. & Loan Ass'n, 791 F.2d 699, 701 (9th Cir. 1986)*;*15 U.S.C. § 1635(a)*. TILA rescission may be extended up to three years if the lender fails to comply with TILA disclosure requirements. *Semar, 791 F.2d at 701-702*; *15 U.S.C. § 1635(f)*.

15 U.S.C. § 1635(f) addresses the outer most limit to seek rescission:

> An obligor's right of rescission **shall [*14] expire three years after the date of consummation of the transaction** or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor . . . (Bold added.)

The U.S. Supreme Court has described as "manifest" Congress' intent to prohibit rescission after the three-year period has run:

> *Section 1635(f)*, however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the "right of rescission [under the Act] shall expire" at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous. There is no reason, then, even to resort to the canons of construction that we use to resolve doubtful cases, such as the rule that the creation of a right in the same statute that provides a limitation is some evidence that the **[*15]** right was meant to be limited, not

> just the remedy. *See* Midstate Horticultural Co., supra, at 360, 64 S.Ct., at 130; Burnett, supra, at 427, n. 2, 85 S.Ct., at 1054 n. 2; Davis v. Mills, 194 U.S. 451, 454, 24 S.Ct. 692, 693-694, 48 L.Ed. 1067 (1904).

Beach v. Ocwen Fed. Bank, 523 U.S. 410, 417, 419, 118 S.Ct. 1408, 140 L. Ed. 2d 566 (1998).

The complaint alleges, and matters subject to judicial notice reflect, that Ms. Manabat's loan was consummated in December 2006 to render her rescission remedy expired prior to March 23, 2010 filing of Ms. Manabat's complaint. TILA rescission is time barred.

Failure To Tender

Chase and MERS challenge TILA rescission as barred in that Ms. Manabat "fails to satisfy the tender requirement." Chase and MERS hold Ms. Manabat "to make a tender offer to pay the lender what she received in the original mortgage transaction (minus interest, finance charges, etc)."

The "voiding of a security interest may be judicially conditioned on debtor's tender of amount due under the loan." American Mortgage Network, Inc. v. Shelton, 486 F.3d 815, 821 (4th Cir. 2007).

15 U.S.C. § 1635(b) governs the return of money or property when a borrower has rescinded effectively:

> . . . Within 20 days after **[*16]** receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

12 C.F.R. § 226.23(d) address rescission effects and provides:

> (2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall **[*17]** return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.
>
> (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, **the consumer shall tender the money or property to the creditor** or, where the latter would be impracticable or inequitable, tender its reasonable value. At the consumer's option, tender of property may be made at the location of the property or at the consumer's residence. Tender of money must be made at the creditor's designated place of business. If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation. (Bold added.)

Neither TILA nor its Regulation Z "'establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract.'" Yamamoto v. Bank of New York, 329 F.3d 1167, 1172 (9th Cir. 2003) (quoting Large v. Conseco Financing Servicing Corp., 292 F.3d 49, 54-55 (1st Cir. 2002)). **[*18]** The Ninth Circuit Court of Appeals, relying on *Large,* explained:

> Instead, the "natural reading" of the language of § 1635(b) "is that the security interest becomes void when the obligor exercises a right to rescind that is available in the particular case, either because the creditor

> acknowledges that the right of rescission is available, or because the appropriate decision maker has so determined. . . . Until such decision is made the [borrowers] have only advanced a claim seeking rescission."

Yamamoto, 329 F.3d at 1172 (quoting *Large, 292 F.3d at 54-55*)).

A rescission notice is not automatic "without regard to whether the law permits [borrower] to rescind on the grounds asserted." *See* *Yamamoto, 329 F.3d at 1172*. Entertaining rescission automatically "makes no sense . . . when the lender contests the ground upon which the borrower rescinds." *Yamamoto, 329 F.3d at 1172*. "In these circumstances, it cannot be that the security interest vanishes immediately upon the giving of notice. Otherwise, a borrower could get out from under a secured loan simply by *claiming* TILA violations, whether or not the lender had actually committed any." *Yamamoto, 329 F.3d at 1172* (italics in original).

Moreover, **[*19]** although *15 U.S.C. § 1635(b)* "provides for immediate voiding of the security interest and return of the money within twenty days of the notice of rescission, we believe this assumes that the notice of rescission was proper in the first place." *In re Groat, 369 B.R. 413, 419 (Bankr. 8th Cir. 2007)*. A "court may impose conditions on rescission that assure that the borrower meets her obligations once the creditor has performed its obligations." *Yamamoto, 329 F.3d at 1173*. The Ninth Circuit has explained that prior to ordering rescission based on a lender's alleged TILA violations, a court may require borrowers to prove ability to repay loan proceeds:

> As rescission under *§ 1635(b)* is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures after deciding that rescission is warranted, may not do so before deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what. Such a decision lies within the court's equitable discretion, taking into consideration all **[*20]** the circumstances including the nature of the violations and the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the evidence that the borrower lacks capacity to pay back what she has received (less interest, finance charges, etc.), the court does not lack discretion to do before trial what it could do after.

Yamamoto, 329 F.3d at 1173 (affirming summary judgment for lender in absence of evidence that borrowers could refinance or sell property); *see* *American Mortgage, 486 F.3d at 821* ("Once the trial judge in this case determined that the [plaintiffs] were unable to tender the loan proceeds, the remedy of unconditional rescission was inappropriate."); *LaGrone v. Johnson, 534 F.2d 1360, 1362 (9th Cir. 1974)* (under the facts, loan rescission should be conditioned on the borrower's tender of advanced funds given the lender's non-egregious TILA violations and equities heavily favoring the lender). [3]

Neither the complaint nor record references Ms. Manabat's notice to rescind or tender of indebtedness. Chase and MERS correctly contest Ms. Manabat's attempt to rescind. The complaint does not address conditions precedent to permit rescission. The complaint is not a timely, valid rescission notice. The complaint's silence on Ms. Manabat's tender of or ability to tender loan proceeds is construed as her concession of inability to do so. "Clearly it was not the intent of Congress to reduce the mortgage company to an unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest." *American Mortgage, 486 F.3d at 820-821*. Without Ms. Manabat's meaningful tender, TILA rescission is an empty remedy, not capable of being granted. The absence of a sufficiently alleged notice of rescission and tender of loan proceeds dooms a TILA rescission claim to warrant its dismissal.

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[3] The Fourth Circuit Court of Appeals agrees with the Ninth Circuit that *15 U.S.C. § 1635(b)* does not compel a creditor to remove a mortgage lien in the absence of the debtor's tender of loan proceeds:

> Congress did not intend to require a lender to relinquish **[*21]** its security interest when it is now known that the borrowers did not intend and were not prepared to tender restitution of the funds expended by the lender in discharging the prior obligations of the borrowers.

Powers v. Sims & Levin, 542 F.2d 1216, 1221 (4th Cir. 1976).

Damages Limitations [*22] Period

Chase and MERS argue that a TILA damages claim is barred by the one-year limitations period.

A TILA damages claims is subject to *15 U.S.C. § 1640(e)*, which provides that an action for a TILA violation must proceed "within one year from the date of the occurrence of the violation." "TILA requires that any claim based on an alleged failure to make material disclosures be brought within one year from the date of the occurrence of the violation." *Hallas v. Ameriquest Mortg. Co., 406 F.Supp.2d 1176, 1183 (D. Or. 2005)*. The limitations period runs from the date of a transaction's consummation which is the time that a consumer becomes contractually obligated on a credit transaction. *Monaco v. Bear Stearns Residential Mortgage Corp., 554 F.Supp.2d 1034, 1039 (C.D. Cal. 2008)*. The Ninth Circuit noted in *Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th Cir. 2003)*:

> The failure to make the required disclosures occurred, if at all, at the time the loan documents were signed. The [plaintiffs] were in full possession of all information relevant to the discovery of a TiLA violation and a *§ 1640(a)* damages claim on the day the loan papers were signed.

Ms. Manabat consummated her loan in **[*23]** December 2006 and filed her complaint on March 23, 2010, more than three years after her loan transaction to render a TILA damages claim time barred.

The complaint lacks a viable TILA claim.

California Civil Code Sections 2923.5* And *2923.6

The complaint's second claim alleges that MERS violated *California Civil Code section 2923.5* ("*section 2923.5*") in that MERS "failed to make contact with plaintiff thirty (30) days prior to the filing and service of the Notice of Default to discuss the plaintiff's financial situation and explore options for the plaintiff to avoid foreclosure and provide a toll-free HUD telephone number." "As a result," the claim continues, "MERS failed to declare in the Notice of Default that it had made the required contact . . ."

Section 2923.5(a)(2) requires a "mortgagee, beneficiary or authorized agent" to "contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." *Section 2923.5(b)* requires a default notice to include a declaration "from the mortgagee, beneficiary, or authorized agent" of compliance with *section 2923.5*, including attempt "with due diligence to contact **[*24]** the borrower as required by this section."

The record reveals that the NOD included the necessary declaration to satisfy *section 2923.5*. The complaint lacks a cognizable claim that Chase or MERS was required to modify Ms. Manabat's loan in that *section 2923.5* imposes no such mandate. *Section 2923.5* requires only contacts or attempted contacts to "assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." *See Cal. Civ. Code, § 2923.5(a)(2)*. An alleged *section 2923.5* claim fails.

The complaint's third claim alleges that MERS violated *California Civil Code section 2923.6* ("*section 2923.6*") in that it "failed to offer a modification to the existing principal [sic] to the existing principal on the loan."

Chase and MERS note that *section 2923.6* "does not mandate that the lender provide the borrower with a loan modification" in that "such action is only encouraged."

Section 2923.6(b) notes the California Legislature's intent that a mortgagee "offer the borrower a loan modification or workout plan if such modification or plan is consistent with its contractual or other authority." "[N]othing in *Cal. Civ. Code § 2923.6* imposes a duty on servicers of loans **[*25]** to modify the terms of loans or creates a private right of action for borrowers." *Farner v. Countrywide Home Loans, 2009 U.S. Dist. LEXIS 5303, 2009 WL 189025, at *2 (2009)*. In *Vikco Ins. Services, Inc. v. Ohio Indem. Co., 70 Cal.App.4th 55, 62-63, 82 Cal.Rptr.2d 442 (1999)*, the California Court of Appeal explained the absence of a private right of action arising from a statute silent on the issue:

> Adoption of a regulatory statute does not automatically create a private right to sue for damages resulting from violations of the statute. Such a private right of action exists only if the language of the statute or its legislative history clearly indicates the Legislature intended to create such a right to sue for damages. If the Legislature intends to create a private cause of action, we generally assume it will do so '"directly[,] … in clear, understandable, unmistakable terms ….' (Citation.)" (*Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 294-295 [250 Cal.Rptr. 116, 758 P.2d 58]* (Moradi-Shalal); *see also* *Crusader Ins. Co. v. Scottsdale Ins. Co., supra, 54 Cal.App.4th at pp. 125-137* (because a judge may not insert what has been omitted from a statute, legislative intent alone determines whether **[*26]** a statute creates a new private right to sue); *Schaefer v. Williams (1993) 15 Cal.App.4th 1243, 1248 [19 Cal.Rptr.2d 212]* (nothing in Elections Code creates a private cause of action to enforce a pledge to follow fair campaign practices; "Surely, if the Legislature had intended to create such a private action, it would have done so by clear and direct language"); *Nowlon v. Koram Ins. Center, Inc. (1991) 1 Cal.App.4th 1437, 1444-1445 [2 Cal.Rptr.2d 683]* (absent some express provision for civil liability, courts cannot assume a private cause of action for negligence may be brought any time a legislative enactment is violated).)

Neither a private right of action nor actionable duty is discernable from *section 2923.6* to defeat a claim based on its violation. *Section 2923.6* does not require a lender to enter into a loan modification to serve the parties' best interests.

Ms. Manabat lacks actionable claims under *sections 2923.5* and *2923.6*.

Wrongful Foreclosure -- Note Possession

The complaint's fourth claim alleges "wrongful foreclosure" against Chase and MERS in that they lack "possession of the Promissory Note" and "are not 'person[s] entitled to enforce' the security interest on the Property, **[*27]** as that term is defined in *Commercial Code § 3301* [('*section 3301*')]."

Chase and MERS explain that Ms. Manabat incorrectly alleges that Chase and MERS must possess the promissory note to initiate foreclosure in that *section 3301* "permits non-holders of notes to enforce the provisions of the deeds of trust securing the obligation. *Section 3301* provides: '"Person entitled to enforce' an instrument means (a) the holder of the instrument, (b) **a nonholder in possession of the instrument who has the rights of a holder** . . ." (Bold added.)

Chase and MERS further correctly note that under California law, a lender may pursue non-judicial foreclosure upon default with a deed of trust with a power of sale clause. "Financing or refinancing of real property is generally accomplished in California through a deed of trust. The borrower (trustor) executes a promissory note and deed of trust, thereby transferring an interest in the property to the lender (beneficiary) as security for repayment of the loan." *Bartold v. Glendale Federal Bank, 81 Cal.App.4th 816, 821, 97 Cal.Rptr.2d 226 (2000)*. A deed of trust "entitles the lender to reach some asset of the debtor if the note is not paid." *Alliance Mortgage Co. v. Rothwell, 10 Cal.4th 1226, 1235, 44 Cal.Rptr.2d 352, 900 P.2d 601 (1995)*.

If **[*28]** a borrower defaults on a loan and the deed of trust contains a power of sale clause, the lender may non-judicially foreclose. *See* *McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 236-237, 286 P. 693 (1930)*. The California Court of Appeal has explained non-judicial foreclosure under the applicable California Civil Code sections:

> The comprehensive statutory framework established to govern nonjudicial foreclosure sales is intended to be exhaustive. . . . It includes a myriad of rules relating to notice and right to cure. It would be inconsistent with the comprehensive and exhaustive statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated cure provision into statutory nonjudicial foreclosure proceedings.

Moeller v. Lien, 25 Cal.App.4th 822, 834, 30 Cal.Rptr.2d 777 (1994); *see* I.E. Assoc. v. Safeco Title Ins. Co., 39 Cal.3d 281, 285, 216 Cal.Rptr. 438, 702 P.2d 596 (1985) ("These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.")

Under California Civil Code section 2924(a)(1), a "trustee, mortgagee or beneficiary or any of their authorized agents" may conduct the foreclosure process. Under California Civil Code section 2924(b)(4), **[*29]** a "person authorized to record the notice of default or the notice of sale" includes "an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee." "Upon default by the trustor, the beneficiary may declare a default and proceed with a nonjudicial foreclosure sale." Moeller, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777.

A "trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there has been an illegal, fraudulent or wilfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust." Munger v. Moore, 11 Cal.App.3d 1, 7, 89 Cal.Rptr. 323 (1970).

"Under Civil Code section 2924, no party needs to physically possess the promissory note." Sicairos v. NDEX West, LLC, 2009 U.S. Dist. LEXIS 11223, 2009 WL 385855, *3 (S.D. Cal. 2009) (citing Cal. Civ. Code, § 2924(a)(1)). Rather, "[t]he foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee." Moeller, 25 Cal.App.4th at 830, 30 Cal.Rptr.2d 777. An "allegation that the trustee did not have the original note or had not received it is insufficient **[*30]** to render the foreclosure proceeding invalid." Neal v. Juarez, 2007 U.S. Dist. LEXIS 98068, 2007 WL 2140640, *8 (S.D. Cal. 2007).

In the case at hand, the DOT includes of power of sale to permit MERS as DOT beneficiary and Chase as loan servicer to commence non-judicial foreclosure. Ms. Manabat's challenge to produce an original note is unsupported. The complaint alleges no facts of failure to comply with the statutory scheme for non-judicial foreclosure. A purported unlawful foreclosure claim fails as a matter of law, especially in the absence of allegations of misconduct in the foreclosure proceedings.

Wrongful Foreclosure -- Loan Modification

The complaint's fifth claim alleges that Chase and MERS "failed to suspend the foreclosure action to allow plaintiff to be considered for alternative foreclosure prevention options."

Chase and MERS construe the claim as premised on their "purported failure to provide Plaintiff with a loan modification in violation of the Home Affordable Modification Program ('HAMP')." Chase and MERS explain that HAMP is part of the Troubled Assets Relief Program ("TARP") which was enacted as a subchapter of the Emergency Economic Stabilization Act ("EESA"), 12 U.S.C. §§ 5201, et seq. TARP **[*31]** directs the Treasury Department and other federal agencies to modify loans which they own or control and expands the "HOPE for Homeowners" program by altering eligibility and increasing the ability of the Department of Housing and Urban Development to help families keep their homes. 12 U.S.C. §§ 5211-5212, 5219-5220.

Treasury Department guidelines require TARP recipients to suspend foreclosures and consider alternative prevention options. With TARP, Congress provided a private right of action for those directly harmed by the actions of the Secretary of the Treasury Department. *See* 12 U.S.C. § 5229(a). However, courts limit the private right of action to claims against the Secretary of the Treasury Department. "12 U.S.C. § 5229(b)(1) shows Congress' intent to limit private action under TARP solely to actions against the Secretary as provided in § 5229, and not extend any obligations or liabilities to those receiving TARP funds. Thus, the Court finds that there is no implied private right to sue fund recipients under TARP." Pantoja v. Countrywide Home Loans, Inc., 640 F.Supp.2d 1177, 1185 (N.D. Cal. 2009). Chase and MERS correctly conclude that by omission of reference to claims against **[*32]** other than the Treasury Secretary, "Congress did not intend to create a private right of action for violation of HAMP against lenders that received HAMP funds." The complaint's fifth claim fails in the absence of an underlying private right of action.

Rosenthal Fair Debt Collection Practices Act

The complaint's eleventh claim alleges that Chase and MERS are "debt collectors under California's Rosenthal Fair Debt Collections Act, Civil Code *§ 1788.2(c)*" and acted "unfairly and unlawfully" to collect a debt from Ms. Manabat by pursuing non-judicial foreclosure.

Chase and MERS fault the claim's failure to allege that they are debt collectors under the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), *Cal. Civ. Code, §§ 1788, et seq.* Chase and MERS further take issue with the claim's failure "to allege what acts Defendants took in violation of the RFDCPA or any fact which would support these allegations."

The RFDCPA's purpose is "to prohibit debt collectors from engaging in unfair or deceptive practices in the collection of consumer debts and to require debtors to act fairly in entering into and honoring such debts." *Cal. Civ. Code, § 1788.1(b)*. The RFDCPA defines "debt collector" as **[*33]** "any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection." *Cal. Civ. Code, § 1788.2(c)*. "[F]oreclosure does not constitute debt collection under the RFDCPA." *Izenberg v. ETS Services, LLC, 589 F.Supp.2d 1193, 1199 (C.D. Cal. 2008)*. The "law is clear that foreclosing on a property pursuant to a deed of trust is not a debt collection within the meaning of the RFDCPA or the FDCA [Fair Debt Collection Practices Act, *15 U.S.C. §§ 1692, et seq.*]." *Gamboa v. Trustee Corps, 2009 U.S. Dist. LEXIS 19613, 2009 WL 656285, * 4 (N.D. Cal. 2009)*. As this Court has explained previously, "[l]ogic suggests that non-judicial foreclosure is not a debt collector's act under *California Civil Code section 1788.2(c)*." *Swanson v. ECM Mortgage Corp., 2009 U.S. Dist. LEXIS 107912, 2009 WL 3627925 (E.D. Cal. 2009)*.

The RFDCPA claim is barred in that complaint points to only non-judicial foreclosure, which as discussed above is proper pursuant to the DOT's power of sale provision. Moreover, the claim is doomed with failure to allege applicable RFDCPA violations or violated RFDCPA sections. The complaint's reference to *California Civil Code section 1788.13(i)* is unavailing given the propriety of **[*34]** non-judicial foreclosure and the lack of Chase or MERS' debt collector status under RFDCPA. The RFDCPA claim is subject to dismissal.

Unconscionability

The complaint's twelfth unconscionability claim alleges that Chase and MERS "prepared the pre-printed form documents that plaintiff was required to sign as a condition plaintiff's [sic] 'take it or leave it' manner with no opportunity for plaintiff to negotiate the mortgage interest or payment terms" and "defendants . . . used their superior bargaining power to convince plaintiff that he [sic] could not obtain more favorable mortgage terms from any other lender."

Chase and MERS contend that *California Civil Code section 1670.5* ("*section 1670.5*") unconscionability is not an actionable claim but rather "a defense to contract formation."

Section 1670.5(a) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Unconscionability **[*35]** has "procedural" and "substantive" elements. *A & M Produce Co. v. FMC Corp., 135 Cal.App.3d 473, 486, 186 Cal.Rptr. 114 (1982)*. The procedural element focuses on: (1) "oppression," which "arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice'"; and (2) "surprise" which "involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." *A & M Produce, 135 Cal.App.3d* at 486, 186 Cal.Rptr. 114 (citations omitted). The substantive element turns on "allocation of risks between the parties, and therefore that a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner" to constitute a "one-sided" result without "justification" for it. A & M Produce, 135 Cal.App.3d at 487, 186 Cal.Rptr. 114 (citations omitted).

Chase and MERS point to the complaint's absence of facts that they engaged in "oppression, surprise, or overly-harsh conduct in connection with the originating of the Loan." Chase and MERS further note their lack of involvement in loan **[*36]** origination given that "Sierra Pacific was the lender and contracting party."

Chase and MERS are correct that they are not subject to an unconscionability claim to warrant dismissal of the claim against them.

Civil Conspiracy

The complaint's thirteenth claim alleges that Chase, MERS and other defendants "were acting in concert with each other and ratified and approved the above-described fraudulent conduct by the other defendants" and committed "acts pursuant to an agreement by and between each of the other of these defendants to defraud plaintiff into entering the subject loan agreements."

Chase and MERS fault the absence of allegations that they "knew that a tort was planned or concurred in the tortious scheme with knowledge of its unlawful purpose" and of facts "as to the formation and operation of the alleged conspiracy."

"[C]ivil conspiracy is not an independent tort." Kidron v. Movie Acquisition Corp., 40 Cal.App.4th 1571, 1581, 47 Cal.Rptr.2d 752 (1995). "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." **[*37]** Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 510-511, 28 Cal.Rptr.2d 475, 869 P.2d 454 (1994) (citing Wyatt v. Union Mortgage Co., 24 Cal.3d 773, 784,157 Cal.Rptr. 392, 598 P.2d 45 (1979)). "Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort." Applied Equipment, 7 Cal.4th at 511, 28 Cal.Rptr.2d 475. "The essence of the claim is that it is merely a mechanism for imposing vicarious liability; it is not itself a substantive basis for liability." Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., 131 Cal.App.4th 802, 823, 32 Cal.Rptr.3d 325 (2005).

The civil conspiracy elements are: "(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct." Kidron, 40 Cal.App.4th at 1582, 47 Cal.Rptr.2d 752. "The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." Kidron, 40 Cal.App.4th at 1581, 47 Cal.Rptr.2d 752; *see* Wyatt v. Union Mortgage Co., 24 Cal.3d 773, 784-786, 157 Cal.Rptr. 392, 598 P.2d 45 (1979) ("a plaintiff is **[*38]** entitled to damages from those defendants who concurred in the tortious scheme with knowledge of its unlawful purpose"); People v. Austin, 23 Cal.App.4th 1596, 1607, 28 Cal.Rptr.2d 885 (1994) ("without knowledge of the illegal purpose there is no basis for inferring an agreement"). "The effect of charging . . . conspiratorial conduct is to implicate all . . . who agree to the plan to commit the wrong as well as those who actually carry it out. Black v. Sullivan, 48 Cal.App.3d 557, 566, 122 Cal.Rptr. 119 (1975).

The conspiracy claim fails in the absence of facts to support necessary elements. Of key importance, the complaint lacks allegations of facts of wrongful conduct attributable to Chase and MERS directly or through their concurrence in a tortious scheme with knowledge of its unlawful purpose. The complaint fails to allege facts of Chase and MERS' agreement between themselves or with others to plan to commit wrongs along with actual commission of an actionable tort. As such, the conspiracy claim is subject to dismissal.

Unfair Competition Law

The complaint's fourteenth claim accuses Chase and MERS of "unlawful business and/or practices within the meaning of *California Business and Professions Code §§ 17200, et seq.* **[*39]** ['Unfair Competition Law' ('UCL')]."

Standing

Chase and MERS argue that Ms. Manabat lacks standing to purse a UCL claim in absence of cognizable injury or damage.

California Business and Professions Code section 17204 limits standing to bring a UCL claim to specified public officials and a private person "who has suffered injury in fact and has lost money or property as a result of the unfair competition."

Business and Professions Code section 17203 addresses UCL relief and provides in pertinent part:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to restore to any person in interest any **money or property,** real or personal, which may have been acquired by means of such unfair competition. (Bold added.)

"In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution.'" *Kasky v. Nike, Inc., 27 Cal.4th 939, 950, 119 Cal.Rptr.2d 296, 45 P.3d 243 (2002)* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999))*.

Quality **[*40]** correctly notes the complaint's absence of facts of Ms. Manabat's money or property allegedly lost due to a UCL violation. The UCL claim offers an insufficient, bare allegation that unlawful business practices have "damaged plaintiff's creditworthiness." The complaint lacks sufficient allegations of Ms. Manabat's standing to warrant dismissal of the UCL claim.

Unfair, Fraudulent Or Deceptive Business Practices

Chase and MERS further challenge the claim's failure to allege anything constituting an "unlawful" business practice.

"Unfair competition is defined to include 'unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising.'" *Blank v. Kirwan, 39 Cal.3d 311, 329, 216 Cal.Rptr. 718, 703 P.2d 58 (1985)* (quoting *Cal. Bus. & Prof. Code, § 17200*). The UCL establishes three varieties of unfair competition -- "acts or practices which are unlawful, or unfair, or fraudulent." *Shvarts v. Budget Group, Inc., 81 Cal.App.4th 1153, 1157, 97 Cal.Rptr.2d 722 (2000)*. An "unlawful business activity" includes anything that can properly be called a business practice and that at the same time is forbidden by law. *Blank, 39 Cal.3d at 329, 216 Cal.Rptr. 718* (citing *People v. McKale, 25 Cal.3d 626, 631-632, 159 Cal.Rptr. 811, 602 P.2d 731 (1979))*. **[*41]** "A business practice is 'unlawful' if it is 'forbidden by law.'" *Walker v. Countrywide Home Loans, Inc., 98 Cal.App.4th 1158, 1169, 121 Cal.Rptr.2d 79 (2002)* (quoting *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992))*.

The UCL prohibits "unlawful" practices "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838, 33 Cal. Rptr. 2d 438 (1999)*. The UCL "thus creates an independent action when a business practice violates some other law." *Walker, 98 Cal.App.4th at 1169, 121 Cal.Rptr.2d 79*. According to the California Supreme Court, the UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL. *Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992)*.

A fellow district court has explained the borrowing of a violation of law other than the UCL:

> To state a claim for an "unlawful" business practice under the UCL, a plaintiff must assert the violation of any other law. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999)* **[*42]** (stating, "By proscribing 'any unlawful' business practice, *section 17200* 'borrows' violations of other law and treats them as unlawful practices that the unfair competition law makes independently actionable.") (citation omitted). Where a plaintiff cannot state a claim under the "borrowed" law, she cannot state a UCL claim either. *See, e.g., Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal.App.4th 700, 718, 113 Cal.Rptr.2d 399 (2001)*. Here, Plaintiff has predicated her "unlawful" business practices claim on her TILA claim. However, as discussed above, Plaintiff's attempt to state a claim under TILA has failed. Accordingly, Plaintiff has stated no "unlawful" UCL claim.

Rubio v. Capital One Bank (USA), N.A., 572 F.Supp.2d 1157, 1168 (C.D. Cal. 2008).

"Unfair" under the UCL "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cal-Tech Communications, 20 Cal.4th 163 at187, 83 Cal.Rptr.2d 548*.

The "fraudulent" prong under the UCL requires a plaintiff to "show deception to some **[*43]** members of the public, or harm to the public interest," *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc., 178 F.Supp.2d 1099, 1121 (C.D. Ca. 2001)*, or to allege that "members of the public are likely to be deceived." *Medical Instrument Development Laboratories v. Alcon Laboratories, 2005 U.S. Dist. LEXIS 41411, 2005 WL 1926673, at *5 (N.D. Cal. 2005)*.

"A plaintiff alleging unfair business practices under these statutes [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993)*.

The complaint is insufficient to establish that Chase or MERS engaged in unfair business practices under the UCL. In the absence of violation of a borrowed law, a UCL claim fails in that it cannot rest on alleged irregularities in the loan transaction or aborted foreclosure proceedings. The complaint lacks claims under the federal and state statutes addressed above. The complaint points to no predicate violation of law. The complaint lacks reasonable particularity of facts to support a UCL claim. The complaint's bare reference to federal and state statutes and common law claims provides not the **[*44]** slightest inference that Ms. Manabat has a viable UCL claim. The UCL claim lacks particularity of fraudulent circumstances, such as a misrepresentation, for a UCL claim. The complaint lacks allegations of ongoing wrongful business conduct or a pattern of such conduct. The complaint lacks facts to hint at a wrong subject to the UCL to warrant the UCL claim's dismissal against Chase and MERS.

Injunctive Relief

The complaint's fifteenth claim seeks to enjoin MERS "from conducting a foreclosure sale during the pendency of this action."

Chase and MERS explain that the complaint's injunctive relief claim fails in the absence of a viable claim to support it.

"Equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but an idly and expensively futile act, nor will it purposely speculate in a field where there has been no proof as to what beneficial purpose may be subserved through its intervention." *Karlsen, 15 Cal.App.3d at 117, 92 Cal.Rptr. 851*. "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted." *Shell Oil Co. v. Richter, 52 Cal.App.2d 164, 168, 125 P.2d 930 (1942)*. **[*45]** Neither a viable claim nor "an independent duty" supports injunctive relief to doom the injunctive relief claim.

Quiet Title

The complaint's sixteenth claims "seeks to quiet title against the claim of defendant MERS and all other persons or parties that may claim against the Property."

Chase and MERS fault the quiet title claim as "procedurally deficient" and lacking necessary elements.

California Code of Civil Procedure section 760.010 provides for an action "to establish title against adverse claims to real or personal property or any interest therein." *California Code of Civil Procedure section 761.020* mandates a "verified" complaint for a quiet title action to include:

1. A legal description and street address of the subject real property;
2. The title of plaintiff as to which determination is sought and the basis of the title;
3. The adverse claims to the title of the plaintiff against which a determination is sought;
4. The date as of which the determination is sought; and
5. A prayer for the determination of the title of the plaintiff against the adverse claims.

Chase and MERS correctly note that the complaint is unverified and fails to establish "adverse claims" to Ms. Manabat's title. **[*46]** Neither Chase nor MERS holds a claim adverse to Ms. Manabat's title in that a deed of trust "carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in payment of his debt." *Lupertino v. Carbahal, 35 Cal.App.3d 742, 748, 111 Cal.Rptr. 112 (1973)*. The quiet title remedy "is cumulative and not exclusive of any other remedy, form or right of action, or proceeding provided by law for establishing or quieting title to property." *Cal. Code Civ. Proc., § 760.030*. MERS, as DOT beneficiary, and Chase, as loan servicer, lack an interest in the property subject to a quiet title claim. Chase and MERS correctly note that a quiet title claim is premature given that a foreclosure sale has not occurred.

Moreover, a quiet title claim is doomed in the absence Ms. Manabat's tender of her debt. "It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673 (1934)*; *see* *Mix v. Sodd, 126 Cal.App.3d 386, 390, 178 Cal.Rptr. 736 (1981)* ("a mortgagor in possession may not maintain an action to quiet title, even though the **[*47]** debt is unenforceable"); *Aguilar v. Bocci, 39 Cal.App.3d 475, 477, 114 Cal.Rptr. 91 (1974)* (trustor is unable to quiet title "without discharging his debt"). With the complaint's absence of a meaningful ability or willingness to tender Ms. Manabat's indebtedness, her quiet title claim fails.

Accounting

The complaint's seventeenth claim alleges that the "amount of money still owed any defendant or any other beneficiary claimant is unknown to plaintiff and cannot be determined without an accounting."

Chase and MERS contend that an accounting is unwarranted in the absence of a fiduciary relationship with Ms. Manabat.

An accounting cause of action is equitable and may be sought where the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable. *Civic Western Corp. v. Zila Industries, Inc., 66 Cal.App.3d 1, 14, 135 Cal.Rptr. 915 (1977)*. A suit for an accounting will not lie where it appears from the complaint that none is necessary or that there is an adequate remedy at law. *Civic Western, 66 Cal.App.3d at 14, 135 Cal.Rptr. 915*. An accounting will not be accorded with respect to a sum that a plaintiff seeks to recover and alleges in his complaint to be **[*48]** a sum certain. *Civic Western, 66 Cal.App.3d at 14, 135 Cal.Rptr. 915*.

"A right to an accounting is derivative; it must be based on other claims." *Janis v. California State Lottery Com., 68 Cal.App.4th 824, 833-834, 80 Cal.Rptr.2d 549 (1998)*. Moreover, as an equitable matter, an accounting frequently "presents a fiduciary relation between the parties in the nature of a trust which brings it especially within equitable remedies." *Kritzer v. Lancaster, 96 Cal.App.2d 1, 6, 214 P.2d 407 (1950)*.

The complaint lacks allegations of complexity or a fiduciary relationship to warrant an accounting to plaintiffs. "A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such." *Downey v. Humphreys, 102 Cal. App. 2d 323, 332, 227 P.2d 484 (1951)*. "The same principle should apply with even greater clarity to the relationship between a bank and its loan customers." *Price v. Wells Fargo Bank, 213 Cal.App.3d 465, 476, 261 Cal.Rptr. 735 (1989)*. Moreover, the complaint does not allege that Chase and MERS owe Ms. Manabat money to invoke an accounting. Ms. Manabat lacks a derivative basis for an accounting given the failure of her claims. The complaint fails to invoke **[*49]** this Court's equity powers to provide Ms. Manabat accounting relief to warrant dismissal of the accounting claim.

Attempt At Amendment And Malice

Ms. Manabat's claims are insufficiently pled and barred as a matter of law. Ms. Manabat is unable to cure her claims by allegation of other facts and thus is not granted an attempt to amend.

Moreover, this Court surmises that Ms. Manabat has brought this action in absence of good faith and that Ms. Manabat exploits the court system solely for delay or to vex defendants. The test for maliciousness is a subjective one and requires the court to "determine the . . . good faith of the applicant." *Kinney v. Plymouth Rock Squab Co., 236 U.S. 43, 46, 35 S. Ct. 236, 59 L. Ed. 457 (1915)*; *see* *Wright v. Newsome, 795 F.2d 964, 968, n. 1 (11th Cir. 1986)*; *cf.* *Glick v. Gutbrod, 782 F.2d 754, 757 (7th Cir. 1986)* (court has inherent power to dismiss case demonstrating "clear pattern of abuse of judicial process"). A lack of good faith or malice also can be inferred from a complaint containing untrue material allegations of fact or false statements made with intent to deceive the court. *See* *Horsey v. Asher, 741 F.2d 209, 212 (8th Cir. 1984)*. An attempt to vex or delay provides further grounds **[*50]** to dismiss this action against Chase and MERS.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DISMISSES with prejudice this action against Chase and MERS;

2. DIRECTS the clerk to enter judgment against plaintiff Edith Manabat and in favor of defendants Chase Home Finance LLC and Mortgage Electronic Registration Systems, Inc. in that there is no just reason to delay to enter such judgment given that Ms. Manabat's claims against Chase and MERS and their alleged liability are clear and distinct from claims against and liability of other defendants. *See* *F.R.Civ.P. 54(b)*; and
3. ORDERS Ms. Manabat's counsel, no later than July 1, 2010, to file papers to show cause why this Court should not dismiss this action against defendants Sierra Pacific Mortgage Company, Inc., McMillan Tuscany, LLC, NDEx West, LLC and Priority Posting and Publication.

This Court ADMONISHES Ms. Manabat and her counsel that this Court will dismiss this action against defendants Sierra Pacific Mortgage Company, Inc., McMillan Tuscany, LLC, NDEx West, LLC and Priority Posting and Publication if Ms. Manabat's counsel fails to comply with this order and fails to file timely papers to show cause why this [*51] Court should not dismiss this action against defendants Sierra Pacific Mortgage Company, Inc., McMillan Tuscany, LLC, NDEx West, LLC and Priority Posting and Publication.

IT IS SO ORDERED.

Dated: June 24, 2010

/s/ Lawrence J. O'Neill

UNITED STATES DISTRICT JUDGE

Deutscher Tennis Bund v. ATP Tour, Inc.

United States Court of Appeals for the Third Circuit

November 2, 2009, Argued; June 25, 2010, Filed

No. 08-4123

Reporter
610 F.3d 820 *; 2010 U.S. App. LEXIS 13098 **; 2010-1 Trade Cas. (CCH) P77,080

DEUTSCHER TENNIS BUND, German Tennis Federation; ROTHENBAUM SPORTS GMBH; QATAR TENNIS FEDERATION, Appellants v ATP TOUR, INC.; ETIENNE DE VILLIERS; CHARLES PASARELL; GRAHAM PEARCE; JACCO ELTINGH; PERRY ROGERS; IGGY JOVANOVIC; JOHN DOE 7; JOHN DOE 8; JOHN DOE 9

Subsequent History: US Supreme Court certiorari denied by *Deutscher Tennis Bund v. ATP Tour, Inc., 131 S. Ct. 658, 178 L. Ed. 2d 482, 2010 U.S. LEXIS 9253 (U.S., 2010)*

Costs and fees proceeding at, Decision reached on appeal by, Remanded by *Deutscher Tennis Bund v. ATP Tour Inc., 2012 U.S. App. LEXIS 9591 (3d Cir. Del., May 11, 2012)*

Prior History: **[**1]** On Appeal from the United States District Court for the District of Delaware. D.C. Civil Action No. 07-cv-00178. (Honorable Gregory M. Sleet).

Bund v. ATP Tour, Inc., 2009 U.S. Dist. LEXIS 97851 (D. Del., Oct. 19, 2009)

Core Terms

tournaments, Federations, players, tennis, Tier, rule of reason, district court, anticompetitive, procompetitive, sports, top, single entity, relevant market, entities, top-tier, compete, antitrust, ranking, loyalty, Sherman Act, self-interested, enterprise, league, teams, breach of fiduciary duty, geographic, effects, courts, prize money, cooperation

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN1[ ] **Regulated Practices, Price Fixing & Restraints of Trade**

Because even beneficial legitimate contracts or combinations restrain trade to some degree, *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, has long been interpreted to prohibit only those contracts or combinations that are unreasonably restrictive of competitive conditions.

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

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

HN2[] **Regulated Practices, Private Actions**

The selection of a mode of antitrust analysis is a question of law over which the court of appeals exercises plenary review.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN3[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Most restraints are analyzed under the traditional rule of reason. The rule of reason requires the fact-finder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The inquiry is whether the restraint at issue is one that promotes competition or one that suppresses competition. A plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects or the defendant's market power. If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective. To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN4[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Some categories of restraints, such as horizontal price-fixing and market allocation agreements among competitors, because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable. Such plainly anticompetitive agreements or practices are deemed to be illegal per se, without an elaborate inquiry into the reasonableness of a challenged business practice. Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. Accordingly, the courts are reluctant to adopt per se rules where the economic impact of certain practices is not immediately obvious.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In addition to the traditional rule of reason and the per se rule, courts sometimes apply what amounts to abbreviated or quick look rule of reason analysis. It is an intermediate standard and applies in cases where per se condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint. In such cases, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets. In other words, quick look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. Under quick look analysis, the competitive harm is presumed, and the defendant must promulgate some competitive justification for the restraint. If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and the court condemns the practice without ado. If the defendant offers sound pro-competitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN6[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

There is often no bright line separating the different modes of analysis for determining whether a business combination unreasonably restraints. There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than can be hoped for. Nevertheless, the quality of proof required should vary with the circumstances. The categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. Regardless of the standard used, the purpose of the inquiry is always to assess the effect of the conduct on competition: Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether or not the challenged restraint enhances competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN7[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. Thus, the three modes of analysis (per se, quick look, and rule of reason) should be viewed as a single inquiry that, depending on the circumstances, may sometimes be conducted by applying various presumptions.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN8[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Even where anticompetitive effects are obvious, quick look condemnation is proper only after assessing and rejecting the logic of proffered procompetitive justifications. Although competitive harm is initially presumed under quick look, if the defendant offers sound procompetitive justifications, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis. Where procompetitive justifications are proffered, their logic must be assessed and rejected in order to avoid reverting to full-scale rule of reason analysis. The burden remains on the challenger to demonstrate that the proffered procompetitive effect does not plausibly result in a net procompetitive effect, or possibly no effect at all on competition. If, after examining the competing claims of anticompetitive and procompetitive effects, it remains plausible that the net effect is procompetitive or that there is no effect on competition, then the obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN9[] Per Se Rule Tests, Manifestly Anticompetitive Effects

Once a defendant comes forward with plausible procompetitive justification for the challenged restraint, the quick look presumption disappears and the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN10[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The application of the quick look analysis is a question of law to be determined by the court, and therefore the concept of quick look has no application to jury inquiry.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

HN11[] Fiduciary Duties, Business Judgment Rule

Under Delaware law, the business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Thus, the burden is on the party challenging the decision to establish facts rebutting the presumption. The business judgment rule presumption can be rebutted by establishing that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders. To establish that a board was interested, a plaintiff must allege facts as to the interest of the individual members of that board. Thus, a plaintiff must normally demonstrate that a majority of the director defendants have a financial interest in the transaction.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

HN12[] Fiduciary Duties, Business Judgment Rule

The Delaware Supreme Court has defined "interest" to mean that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally. In the absence of self-dealing, it is not enough to establish the interest of a director by alleging that he received any benefit not equally shared by the stockholders. Such benefit must be alleged to be material to that director. Materiality means that the alleged benefit was significant enough in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the shareholders without being influenced by her overriding personal interest. In determining the sufficiency of factual allegations made by a plaintiff as to a director's interest, the Delaware Supreme Court requires the application of a subjective actual person standard to determine whether a particular director's interest is material and debilitating.

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

HN13[] **Fiduciary Duties, Business Judgment Rule**

A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders.

Counsel: ROBERT D. MacGILL, ESQUIRE (ARGUED), PETER J. RUSTHOVEN, ESQUIRE, STANLEY C. FICKLE, ESQUIRE, HAMISH S. COHEN, ESQUIRE, MATTHEW B. BARR, ESQUIRE, Barnes and Thornburg, Indianapolis, Indiana; C. BARR FLINN, ESQUIRE, KAREN E. KELLER, ESQUIRE, Young Conaway Stargatt & Taylor, Wilmington, Delaware, Attorneys for Appellants.

BRADLEY I. RUSKIN, ESQUIRE (ARGUED), JENNIFER R. SCULLION, ESQUIRE, COLIN A. UNDERWOOD, ESQUIRE, ROBERT D. FORBES, ESQUIRE, Proskauer Rose, New York, New York; LAWRENCE C. ASHBY, ESQUIRE, CAROLYN S. HAKE, ESQUIRE, TONI-ANN PLATIA, ESQUIRE, PHILIP TRAINER, JR., ESQUIRE, Ashby & Geddes, Wilmington, Delaware, Attorneys for Appellees.

Judges: Before: SCIRICA, JORDAN and GREENBERG, Circuit Judges.

Opinion by: SCIRICA

Opinion

[*824] OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

Men's professional tennis is a worldwide enterprise and every year, professional tennis players compete in various tournaments around the world. The principal men's professional tennis events are the four Grand Slams, the Davis Cup, and the ATP Tour, a worldwide professional tennis circuit organized **[**2]** by the Association of Tennis Professionals ("ATP"). This lawsuit arises out of the reorganization of the ATP Tour--known as the Brave New World plan--designed to revitalize its popularity, enabling it to better compete with other sports and entertainment events. The redesigned format channeled more top-tier players to the top-tier ATP tournaments and also redesignated the tier categories of some tournaments. The changes included a downgrade of the Hamburg, Germany tournament from the first tier to second tier status.

Dissatisfied with the downgrade, Hamburg tournament owners, the German and Qatar Tennis Federations (the "Federations"), sued ATP and certain of its officers and directors. The suit alleged that the Brave New World plan violated *§§ 1* and *2 of the Sherman Act* and that ATP's Directors breached fiduciary duties owed to the Federations. At trial, the District Court granted ATP's motions for judgment as a matter of law, dismissing the personal liability claims against the Directors for alleged antitrust violations and breach of fiduciary duty. The antitrust claims against ATP were submitted to a jury, which returned a verdict for ATP. The jury found the Federations failed to **[**3]** prove ATP entered into a contract, combination, or conspiracy with any separate entity under *§ 1 of the Sherman Act*, and did not establish a relevant product market under *§ 2*.

The Federations appeal the jury verdict on *§ 1 of the Sherman Act*, asserting the District Court erred in instructing the jury on a "single entity or enterprise defense," and in failing to instruct on the "quick look" mode of analysis. The Federations also appeal the judgment as a matter of law dismissing the antitrust claims against the Directors and the breach of duty of loyalty claim against Director Charles Pasarell. We will affirm the jury verdict on the Sherman Act *§ 1* claim based on the Federations' failure to prove the relevant market. Consequently, the question of personal director liability for antitrust claims is moot. We also will affirm the judgment as a matter of law dismissing the breach of duty of loyalty claim against Director Pasarell because neither he individually nor the ATP Board of Directors as a whole were materially self-interested when they voted in favor of the Brave New World plan.

I.

A.

Initially an association of the world's top men's professional tennis players, ATP evolved into a non-profit **[**4]** corporation consisting of a membership of men's professional tennis players and organizers of men's professional tennis tournaments. ATP operates a worldwide tennis tour **[*825]** composed of the member tournaments, culminating in ATP's end-ofseason championship tournament, the Tennis Masters Cup. [1] Tennis players earn prize money and ATP ranking points through playing in ATP tournaments.

ATP ranking points determine each player's world ranking. The player rankings are important because they govern entry into and seeding in the Grand Slams [2] as well as ATP top-tier tournaments--the most important professional tennis tournaments. In turn, these tournaments award the most prize money and ranking points.

ATP tournament members are divided into three categories: (1) Tier I (formerly "Masters Series"); (2) Tier II (formerly "International Series Gold"); (3) Tier III (formerly "International Series"). The categories of tournaments are distinguished by different levels of minimum prize money and different amounts of ranking points awarded on the basis of performance.

ATP is governed by a seven-member Board of Directors--three elected by tournament members (representing different geographic regions), three elected by player members, and a Chairman/President. ATP's Bylaws give the ATP Board discretion over the Tour's format.

In 2007, the Board voted to adopt several **[**6]** changes to the ATP Tour. According to ATP, this restructuring was necessitated by market changes and conditions: ATP was losing ground in the sports and entertainment markets. ATP's market research revealed that tennis fans wanted to see the top tennis players play against each other more often. ATP perceived that a growing decline in player participation in its top-tier events undermined its prestige and also the profile of the sport, leading to a decline in ticket sales and weakening the member tournaments' ability to secure television coverage and sponsorships. By strengthening its top-tier events and simplifying its tournament structure, ATP believed it could better compete with other sports events and other forms of entertainment, and also award more prize money to the players.

The Brave New World plan's objective was to increase the value and appeal of top-tier tournaments by channeling top players to compete in them. It also aimed to make the progression of the Tour easier for fans to follow by clearly communicating each tournament's tier and differentiating between the different tiers. To achieve these goals, the Brave New World plan altered the number of ranking points awarded **[**7]** to winning players in different tiers of tournaments. Tier I tournaments would award 1000 points instead of 500; Tier II tournaments would award 500 points instead of a range between 250 and **[*826]** 300; Tier III tournaments would award 250 points instead of a range between 175 and 250. Additionally, the Brave New World plan renamed the tournament tiers to correspond to the new ranking points system: Tier I became the "ATP World Tour Masters 1000"; Tier II became the "ATP World

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[1] In 2009, the Tennis Masters Cup was replaced by the Barclays ATP World Tour Finals.

[2] The four Grand Slams (Australian Open, French Open, Wimbledon, and US Open) and the Davis Cup are not ATP tournaments and are regulated by the International Tennis Federation ("ITF"). But the Grand Slams have agreed to use ATP entry and ranking systems as the basis for determining entry and seeding of men's professional players into their events (Wimbledon has its own method of seeding calculation, which also takes **[**5]** into account players' past performances on grass over the previous two years, as well as their ATP ranking). In return, playing in the Grand Slams is mandatory for top ATP players. The Grand Slams also agreed not to organize a year-end event competing with the ATP's Tennis Masters Cup and ATP agreed not to combine the Masters Cup with the Women's Tennis Association's year-end event. Additionally, ATP has an agreement with ITF not to schedule ATP events against Davis Cup matches and to award ATP ranking points to Davis Cup tournaments.

Tour 500"; and Tier III became the "ATP World Tour 250." The new ranking point distribution was designed in part as an incentive for the top tennis players to play the ATP top-tier events.

The Brave New World plan also reconfigured the Tour calendar to create geographic "swings" or "seasons" around the Grand Slams because of their size, prestige, history, and popularity, and their significantly greater amount of prize money. Thus, the Brave New World plan scheduled the top-tier ATP tournaments in the weeks before the Grand Slams with corresponding court surfaces--e.g., the Tier I tournament in Madrid, Spain on a clay surface was scheduled in the weeks before the French Open, a Grand Slam tournament also on clay. According **[**8]** to ATP, scheduling their tournaments in this way attracts the top tennis players because of their desire to play on the same surface as the upcoming Grand Slam tournaments.

Notably, the Brave New World plan also amended ATP rules so that qualifying players were required, under threat of sanctions--suspension, loss of ranking, and loss of ability to earn ranking points--to play all Tier I events, at least four Tier II events, and at least two Tier III events. Further, all qualifying players were also required to play in the year-end Tennis Masters Cup championship. In addition, the Brave New World plan imposed a "Special Events" rule on the top 50 players, prohibiting them from participating in any non-ATP, non-Grand Slam events during the weeks of and surrounding ATP events. As noted, these changes were prompted by the decline in top player participation in ATP tournaments. In turn, ATP increased the tournaments' minimum prize money levels to benefit the players.

The Brave New World plan also spurred significant capital investments in facilities on the part of the tournaments--the Tier I and Tier II tournaments committed to approximately $ 864 million in capital investments. ATP undertook **[**9]** to create a more unified branding approach for the Tour and increased spending on promotion and marketing. It projected a $ 9 million marketing amount for 2009; previous budgets provided for only $ 800,000 in 2005 and 2006, and $ 5 million in 2007 and 2008. It also enhanced pooling for existing broadcast and digital media rights.

In sum, ATP designed the Brave New World plan as a comprehensive plan to address the perceived decline of ATP in the sports and entertainment markets. Concluding that fans desired a better structured Tour, featuring the best players playing against each other more often, ATP decided to simplify the Tour's format and to introduce regulations ensuring top player participation in ATP top-tier tournaments. Both ATP and the member tournaments committed to make investments to improve the quality of the Tour and promote it more effectively. The tournament members agreed to increase the prize money levels to compensate the players for agreeing to play in more top-tier events.

B.

Plaintiff German Tennis Federation promotes tennis in Germany and claims to be the world's largest national tennis federation, with approximately 1.7 million members. It stages an annual clay-court **[**10]** tournament in Hamburg, Germany. From 1990 to 2009, Hamburg tournament was a **[*827]** Tier I ATP tournament. Under the Brave New World plan, the Hamburg tournament was demoted to Tier II. The overall number of Tier I events remained at nine, with the addition of Shanghai, China. [3] In Tier II, the number of events was increased from nine to eleven. Plaintiff Qatar Tennis Federation was established in Qatar and has owned and operated a Tier III tournament in Doha, Qatar. It also owns a 25% stake in Hamburg tournament.

ATP contends the Hamburg tournament was demoted to Tier II because of its lack of significant investment, a decrease in attendance, unfavorable weather, and the decline of interest in tennis in Germany. ATP asserts that Hamburg tournament can succeed as a Tier II tournament.

C.

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[3] The Federations contend that initially the Brave New World plan downgraded the Monte Carlo tournament to Tier II. But after Monte Carlo sued ATP, the parties settled with Monte Carlo having a hybrid status--it awards 1,000 ranking points but is not a mandatory tournament for players.

The Federations sued ATP alleging its adoption of the Brave New World plan violated *§§ 1* and *2 of the Sherman Act* and constituted **[**11]** a breach of the directors' fiduciary duties. The § 1 claim contended defendants conspired and combined to control the supply of top men's professional tennis players' services, establishing a favored class of tournaments in which top-player participation was mandatory, while precluding other tournaments from competing for such player services. Similarly, the § 2 claim alleged monopolization, attempt to monopolize, and conspiracy to monopolize the market for men's professional tennis players' services. Plaintiffs also asserted the ATP directors' adoption of the Brave New World plan breached their fiduciary duties of due care, loyalty, and good faith owed to the Federations.

The case was tried to a jury. At the close of the Federations' case, the District Court granted ATP's *Fed. R. Civ. P. 50(a)* motions for judgment as a matter of law on all claims of personal liability against the Directors for alleged antitrust violations and breach of fiduciary duties. The court held that personal civil liability for antitrust violations is limited to participation in inherently unlawful acts. The court reasoned that under ***antitrust law***, only *per se* violations are inherently unlawful. Finding that **[**12]** the alleged conduct could not be classified as classic *per se* violations, the court concluded that individual directors could not be liable. Addressing the breach of fiduciary duty claims against the Directors, it found the Federations failed to satisfy their initial burden of rebutting the presumption of the business judgment rule by showing the Directors violated any of their fiduciary duties. Accordingly, the District Court granted defendants' motion for judgment as a matter of law and dismissed all claims against the individual Directors.

The court then addressed proposed jury instructions. ATP submitted a proposed instruction on the "single entity or enterprise defense," stating that where entities "are commonly controlled or substantially integrated in their operations, they may be considered a 'single entity' or 'single enterprise' under the antitrust laws." The Federations objected, arguing that the instruction misstated the law and created a significant risk of confusion. Overruling the Federations' objections, the District Court gave the "single entity or enterprise defense" jury instruction as proposed by ATP. The court also considered whether the alleged restraints should **[**13]** be analyzed under "quick look" or the full rule of reason analysis. The court instructed the jury on the latter.

[*828] The jury returned a verdict for ATP on all claims. On the Sherman Act § 1 claim, it found the Federations did not prove ATP "entered into contract(s), combination(s) or conspiracy(ies) with any separate entity or entities." And on the Sherman Act § 2 claim, it found the Federations did not establish "the existence of any relevant product market(s) within any geographic market(s)."

The Federations filed a timely appeal of the Sherman Act § 1 claim against ATP and the Directors and the breach of fiduciary duty of loyalty claim against Director Charles Pasarell. Specifically, they contend the District Court erred by instructing the jury on the single entity defense, refusing to instruct the jury to apply "quick look" analysis, and granting defendants' motion for judgment as a matter of law on all claims against the individual Directors. [4]

II.

A.

Even assuming, *arguendo*, that the District Court erred in instructing the jury on the single entity defense, the Federations could not have succeeded on their Sherman Act § 1 claim because they failed to prove "the existence of any relevant product market(s) within any geographic market(s)." [5] On the § 1 claim, the jury found no concerted action, so it did not reach the issue of relevant market. But on the Sherman Act § 2 claim, the jury did find the Federations failed to prove the existence of a relevant market.

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[4] The District Court had subject-matter jurisdiction under *28 U.S.C. §§ 1331* and *1337* based on claims alleged under Sherman Act, *15 U.S.C. §§ 1*, *2* and *26*, and under *28 U.S.C. § 1367* for supplemental state law claims. We have appellate jurisdiction **[**14]** under *28 U.S.C. § 1291*.

[5] Because the Federations did not carry their burden of proving a relevant market, we do not need to decide whether the District Court's single entity instruction was given in error. *See infra* Part III.

The Federations contend that market definition and proof under *§ 2* differ from those under *§ 1*, arguing that insufficient § 2 market proof does not establish insufficiency under *§ 1*. In *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20 (3d Cir. 1978)*, we said that "inquiries into the scope of competition under *§ 1* and *§ 2* are not precisely the same." *Id. at 27 n.11*. But in this case, the Federations asserted identical market **[**15]** definitions under *§§ 1* and *2*, as evidenced by the jury instructions. [6] *Cf. Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 724 n.3 (3d Cir. 1991)* ("On this record, however, the plaintiffs do not **[*829]** present a sufficiently close factual issue to demarcate a distinction between product market definitions in section 1 and section 2 cases . . . ."). The jury verdict forms posed the same question regarding proof of the relevant market for the purposes of §§ 1 and 2 claims: "Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market?" App. 5, 10, 14, 18. Therefore, the jury's conclusion that the Federations failed to prove a relevant market under *§ 2* is equally applicable to § 1 analysis. *See Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 59-61 (1st Cir. 2002)* (affirming the judgment on § 1 claims based on the jury finding that plaintiffs failed to establish a relevant market under *§ 2*).

B.

The Federations also contend they did not need to prove a relevant market because the District Court should have instructed the jury to conduct a "quick look" analysis, which does not require detailed market analysis. The Federations proposed a "quick look" jury instruction that the alleged restraints caused substantial harm to competition as a matter of law, so that the jury needed only consider "whether the restraint produces countervailing competitive benefits," and if so, "balance **[**18]** the competitive harm against the competitive benefit." App. 451. But the District Court reasoned that "[t]he evidence [presented] could perhaps be evidence of . . . antitrust violations, but only after one engaged in a detailed examination of the industry in question, and furthermore, only after taking the industry in question to be top-tier men's professional tennis, rather than, for example, professional sports or spectator events more generally." *Id*. at 25. The court concluded that "the plaintiffs failed to show evidence [of acts] that have no purpose except to stifle competition . . . ." *Id*. Accordingly, the court required the jury to analyze the alleged restraint under full rule of reason principles and rejected the proposed "quick look" instruction. [7] ***HN1***[] Because even beneficial legitimate contracts or combinations restrain trade to some degree, *§ 1 of the Sherman Act* has long been interpreted to prohibit only those contracts or combinations that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. Historically, "[t]hree general standards have emerged for determining whether a business combination unreasonably restraints **[**19]** trade under *[§ 1]*." *United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993)*.

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[6] Giving the jury an overview of the rule of reason analysis for the purposes of *§ 1*, the court stated: "[Y]ou must first determine whether Plaintiffs have carried their burden to show that any challenged restraint has resulted **[**16]** or is likely to result in a substantial harm to competition in a relevant product or geographic market(s)." App. 257 (Antitrust Jury Instruction 10--Antitrust Claims: Sherman Act Section 1--Rule of Reason--Overview). Explaining the requirement of proof of competitive harm, the court repeated: "[I]t is Plaintiffs' burden to show that the harm to competition occurred in an identified market, known as a 'relevant market.' There are two aspects to a relevant market. The first aspect is known as the relevant product market. The second aspect is known as the relevant geographic market." *Id*. at 258 (Antitrust Jury Instruction 11--Antitrust Claims: Sherman Act Section 1--Rule of Reason--Proof of Competitive Harm). Closely following the Model Jury Instructions, the court then instructed the jury on the substance of the relevant market inquiry. *Id*. at 261 (Antitrust Jury Instruction 13--Rule of Reason--Proof of Relevant Market). Later, describing the elements of the monopolization claim under *§ 2*, the court explained: "Plaintiffs must prove by a preponderance of the evidence that the defendants had monopoly power in a relevant market." *Id*. at 272 (Antitrust Jury Instruction 21--Monopolization: **[**17]** Relevant Market--General). Using the nearly identical language as for the rule of reason instructions, the court continued: "There are two aspects you must consider in determining whether plaintiff has met its burden to prove the relevant market by a preponderance of the evidence. The first is the relevant product market; the second is the relevant geographic market." *Id*. No relevant market inquiry instructions specific to § 2 claims were proposed or provided. *See also* ABA Section of ***Antitrust Law***, Model Jury Instructions in Civil Antitrust Cases A-6 (2005) (suggesting that the instruction describing the relevant market for the purposes of § 1 claim incorporate the § 2 relevant market instructions).

[7] ***HN2***[] The selection of a mode of antitrust analysis is a question of law over which we exercise plenary review. *See Arizona v. Maricopa County Med. Soc'y., 457 U.S. 332, 337 n.3, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982))*.

HN3[] "Most restraints are analyzed under the traditional 'rule of reason.'" *Id*. (citing Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)); see also Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, **[*830]** 164 L. Ed. 2d 1 (2006) ("[T]his Court presumptively applies rule of reason analysis . . . ."); State Oil v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). "The rule of reason requires the fact-finder to 'weigh [] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Brown, 5 F.3d at 668 (quoting GTE Sylvania, 433 U.S. at 49). The inquiry is whether the restraint at issue "is one that promotes competition or one that suppresses competition." Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). "The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects **[**20]** within the relevant product and geographic markets." Brown, 5 F.3d at 668. "The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects," or defendant's market power. *Id*. "If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." Id. at 669. "To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective." *Id*.

HN4[] Some categories of restraints, such as horizontal price-fixing and market allocation agreements among competitors, "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Id*. (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)). "Such 'plainly anticompetitive' agreements or practices are deemed to be 'illegal *per se*,'" *id*. (quoting Prof'l Eng'rs, 435 U.S. at 692), without an "elaborate inquiry into the reasonableness of a challenged business practice," *id*. (quoting Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)). **[**21]** "*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" Dagher, 547 U.S. at 5 (quoting Prof'l Eng'rs, 435 U.S. at 692); *see also* State Oil Co., 522 U.S. at 10 ("*Per se* treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" (quoting Maricopa County Med. Soc'y, 457 U.S. at 344)). Accordingly, the courts are reluctant "to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious." State Oil Co., 522 U.S. at 10 (internal quotation marks omitted).

HN5[] "In addition to the traditional rule of reason and the *per se* rule, courts sometimes apply what amounts to abbreviated or 'quick look' rule of reason analysis." Brown, 5 F.3d at 669; *see* NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.39, 104 S. Ct. 2948, 82 L. Ed. 2d 70. It is "an intermediate standard" and "applies in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitve character of an inherently suspect restraint." Brown, 5 F.3d at 669 **[**22]** (internal quotation marks omitted); *see* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986); NCAA, 468 U.S. at 109 (1984); Prof'l Eng'rs, 435 U.S. at 692. In such cases, "an observer with even a rudimentary understanding of economics could conclude that the arrangements **[*831]** in question would have an anticompetitive effect on customers and markets." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). In other words, "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained." *Id*. Under "quick look" analysis, the competitive harm is presumed, and "the defendant must promulgate 'some competitive justification' for the restraint." Brown, 5 F.3d at 669 (quoting NCAA, 468 U.S. at 110). "If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and 'the court condemns the practice without ado.'" *Id*. (quoting Chicago Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 674 (7th Cir. 1992)). "If the defendant offers sound pro-competitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis." *Id*.

HN6[] "[T]here is **[**23]** often no bright line separating" the different modes of analysis. NCAA, 468 U.S. at 104 n.26. "'There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for. . . . Nevertheless, the quality of proof required should vary with the circumstances.'" Cal. Dental, 526 U.S. at 779 (quoting Philip E. Areeda, ***Antitrust Law*** P 1507, at 402 (1986)). "[The] categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear." *Id*. Regardless of the standard used, the purpose of the inquiry is always to assess the effect of the conduct on competition: "Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether or not the challenged restraint enhances competition." NCAA, 468 U.S. at 104. As the Supreme Court summarized:

> **HN7**[] [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, **[**24]** is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Cal. Dental, 526 U.S. at 780-781. Thus, the three modes of analysis should be viewed as a single inquiry that, depending on the circumstances, may sometimes be conducted by applying various presumptions. *See generally* 7 Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** P 1511, at 418 (2d ed. 2000).

C.

The Federations contend that the Brave New World plan "allocates and divides the player services market among horizontal competitors" and "[t]his obviates competition among favored tournaments for the player services vital for success, while making it impossible for other tournaments . . . to compete for such services." Appellant's Br. 48. The Federations allege an output-limiting horizontal restraint. Nevertheless, the *per se* rule does not apply because for a tennis tour, like other sports leagues, "horizontal restraints on competition **[**25]** are essential if the product is to be available at all." NCAA, 468 U.S. at 101; *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 **[*832]** L. Ed. 2d 1 (1979) (rejecting *per se* treatment "where the agreement on price is necessary to market the product at all"); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959 (6th Cir. 2004) ("Because there is no doubt that horizontal restraints are necessary to make the kind of league competition at issue available, the rule of reason applies."); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[C]ourts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product . . . .").

Under "quick look," the rationale for presuming competitive harm without detailed market analysis is that the anticompetitive effects on markets and consumers are obvious. Cal. Dental, 526 U.S. at 770. Although the Federations contended the Brave New World Plan restrained the "top player services" market, the definition of the relevant market was one of the most contested issues at trial--so much so that after all the evidence was presented **[**26]** the District Court saw the bounds of the relevant market as "ambiguous." App. 25. Because "the contours of the market" here are not "sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition," "quick look" is not appropriate and proof of relevant market is required under full-scale rule of reason. Worldwide Basketball & Sport Tours, 388 F.3d at 961.

Further, **HN8**[] even where anticompetitive effects are obvious, "quick look" condemnation is proper only after assessing and rejecting the logic of proffered procompetitive justifications. Cal. Dental, 526 U.S. at 771; *see* N. Tex. Speciality Physicians v. FTC, 528 F.3d 346, 362 (5th Cir. 2008). Although competitive harm is initially presumed under "quick look," "[i]f the defendant offers sound procompetitive justifications, . . . the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis." Brown, 5 F.3d at 669; *see also* Cal. Dental, 526 U.S. 756, 771, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999) (holding that full rule of reason analysis was required where challenged restraint "might plausibly be thought to have a net **[**27]** procompetitive effect, or possibly no effect at all on competition"); Bogan v. Hodgkins, 166 F.3d 509, 514 n.6 (2d Cir. 1999) (observing that courts must apply the full rule of reason once defendant has introduced "sound allegations of procompetitive benefit"). Where procompetitive justifications are proffered, their logic must be assessed and rejected in order to avoid reverting to full-scale rule of reason analysis. "[T]he burden remains on the challenger to demonstrate that the proffered procompetitive effect does not plausibly result in 'a net procompetitive effect, or possibly no effect at all on competition.'" N. Tex. Speciality Physicians, 528 F.3d at 362 (quoting Cal. Dental, 526 U.S. at 771). "If, after examining the competing claims of anti-and procompetitive effects, it remains plausible that the net effect is procompetitive or that there is no effect on competition, then "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* (quoting *Cal. Dental, 526 U.S. at 778*); *see also* 11 Areeda & Hovenkamp, *supra*, P 1911c, at 305 (2d ed. 2005) (explaining that when defendant offers preliminary evidence suggesting that the challenged restraint **[**28]** is justified, and the court finds such evidence plausible, the restraint must be "subjected to general rule of reason analysis requiring full consideration of power and anticompetitive effects").

[*833] ATP proffered evidence of procompetitive justifications for the Brave New World plan. The plan was developed to make the ATP Tour more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events. The modifications to the tour calendar, increase of investment, higher payments to players, and expanded geographic reach were all designed to improve the Tour. Such rules and regulations can be procompetitive where they enhance the "character and quality of the 'product.'" *NCAA, 468 U.S. at 102*.

In fact, the Federations seem to concede that ATP offered procompetitive justifications. But they would have the jury balance the proffered procompetitive justification against the presumed anticompetitive harm. They argue that under "quick look," the jury's inquiry "starts from the premise--already determined by the court as a matter of law--that the restraint's anticompetitive effect is evident without need for detailed market analysis, **[**29]** requiring no proof by plaintiff of market definition or power." Appellant's Reply Br. 7. The Federations misapprehend the reasonableness analysis. ***HN9***[] Once a defendant comes forward with plausible procompetitive justification for the challenged restraint, the "quick look" presumption disappears and the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis. *Brown, 5 F.3d at 669*. ***HN10***[] "The application of the quick look analysis is a question of law to be determined by the court," and therefore the concept of "quick look" has no application to jury inquiry. ABA Section of ***Antitrust Law***, Model Jury Instructions in Civil Antitrust Cases A-8 n.2 (2005). The jury was properly instructed to analyze the alleged restraints under the rule of reason, and their finding that the Federations failed to prove the relevant market defeats the Sherman Act § 1 claim. [8]

III.

A.

On the Sherman Act § 1 claim, the jury also found the Federations did not prove **[*834]** that ATP entered into "contract(s), combination(s) or conspiracy(ies) with any separate entity or entities." In other words, the jury did not find the requisite concerted action to support a § 1 claim. The Federations assert the jury reached this conclusion based on the "single entity or enterprise defense" instruction, which allowed the jury to find that defendants' actions

[8] The Federations also appeal the District Court's grant of judgment as a matter of law on all antitrust liability claims against individual ATP directors. Relying on *Murphy Tugboat Co. v. Shipowners & Merchs. Towboat Co., 467 F. Supp. 841 (N.D. Cal. 1979)*, *aff'd sub nom.* ***Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981)***, **[**30]** the District Court held "that civil liability for antitrust violations is limited to participation in inherently unlawful acts, that is, [] per se violation[s] of ***antitrust law***." App. 24. It concluded that "the evidence [in this case] shows the individuals' conduct was not the type of inherently wrongful activity that gives rise to personal liability under ***antitrust law***," but "seem[s] within or at least bordering that gray area of socially acceptable economically justifiable business conduct that the law, in fact, permits." *Id. at 25*.

The Federations argue that the District Court's limitation of directors' personal liability to *per se* antitrust violations is legally incorrect. We question the persuasive value of *Murphy Tugboat*. *See, e.g., Monarch Marking Sys., Inc. v. Duncan Parking Meter Maint. Co., No. 82 C 2599, 1986 U.S. Dist. LEXIS 28261, 1986 WL 3625, at *2 (N.D. Ill. Mar. 13, 1986)*; Gregory Walker, Note, *The Personal Liability of Corporate Officers in Private Actions Under the Sherman Act*: Murphy Boat *in Distress*, *55 Fordham L. Rev. 909* (1987) (criticizing *Murphy Tugboat* approach to corporate officers' personal liability for antitrust violations). But we need not decide whether the District Court erred in **[**31]** imposing a limitation on directors' personal liability and dismissing the antitrust claims against them. Because the Federations could not sustain their antitrust claims and failed to prove an antitrust violation, they would not be able to sustain the same claim against the Directors. Therefore, even assuming the District Court erred in granting summary judgment on the antitrust claims against the directors, plaintiffs cannot prevail on these claims.

were undertaken as a single entity, instead of as independent actors. The Federations contend the instruction misstated the law and thus was given in error. [9]

To **[**32]** prevail under *§ 1 of the Sherman Act*, a plaintiff must first establish a "contract, combination . . . or conspiracy." *Section 1* applies only to concerted action and does not proscribe independent action by a single entity, regardless of its purpose and effect on competition. *Am. Needle, Inc. v. NFL, No. 08-661, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *5 (U.S. May 24, 2010)*; *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. [10]

Under *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, in certain cases, distinct legal entities are incapable of concerted action for the purposes of *§ 1* and must be viewed as a single entity. [11] Although *Copperweld* did not set clear parameters for what constitutes a single economic entity beyond the parent-subsidiary context, "it nonetheless encouraged the courts to analyze the substance, not the form, of economic arrangements." [12] *Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1132 (3d Cir. 1995)*; *see* *Am. Needle, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *8* ("As *Copperweld* exemplifies, **[**33]** 'substance, not form, should determine whether a[n] . . . entity is capable of conspiring under *§ 1*.'" (quoting *Copperweld, 467 U.S. at 773 n.21*)). Courts have applied the single-entity concept to **[*835]** joint ventures of separately owned entities. In determining whether *Copperweld* applies to joint ventures, courts have focused primarily on whether the venture "bring[s] together the economic power of actors which were previously pursuing divergent interests and goals." [13] *Siegel Transfer, 54 F.3d at 1137*. "The key is whether the alleged 'contract, combination . . ., or conspiracy' is concerted action--that is, whether it joins together separate decisionmakers." *Am. Needle, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *8*. "The relevant inquiry, therefore, is whether there is a 'contract, combination . . . or conspiracy' amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Id*. (internal quotation marks omitted). Indisputably, joint ventures can be economically beneficial. But "the fact that joint venturers **[**34]** pursue

[9] "We exercise plenary review to determine whether jury instructions misstated the applicable law . . . ." *Cooper Distrib. Co. v. Amana Refrigeration., Inc., 180 F.3d 542, 549 (3d Cir. 1999)*.

[10] Independent action by a single entity can still be scrutinized under *§ 2 of the Sherman Act*. ***Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 205 (3d Cir. 1992)***.

[11] In *Copperweld*, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single **[**35]** enterprise for purposes of *§ 1 of the Sherman Act*." *467 U.S. at 771*. The Court reasoned that § 1 scrutiny is not justified because "[a] parent and its wholly owned subsidiary have a complete unity of interest," and when they agree to a course of action, "there is no sudden joining of economic resources that had previously served different interests." *Id*. The antitrust laws treat concerted behavior more strictly than unilateral behavior because "[c]oncerted activity inherently is fraught with anticompetitive risk." *Id. at 768-69*. Concerted action "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id. at 769*. But although parent and wholly owned subsidiaries are distinct corporate entities and independent legal persons, they nevertheless compose a single economic entity for antitrust scrutiny because "[t]hey share a common purpose," *id. at 771*. Since they always have a "unity of purpose or a common design," *id*., they are "incapable of conspiring with each other for purposes of *§ 1 of the Sherman Act*," *id. at 777*.

[12] Courts have extended *Copperweld* to situations involving sibling-subsidiaries of the same parent corporation, *see* *Eichorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001)*, **[**36]** subsidiaries owned by the same co-owners who maintained control over them, *see* *Century Oil Tool, Inc. v. Prod. Specialties, 737 F.2d 1316 (5th Cir. 1984)*, and franchisors and franchisees, *see* *Williams v. I.B. Fischer Nev., 999 F.2d 445 (9th Cir. 1993)*.

[13] *See, e.g.,* *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1035 (9th Cir. 2005)* (holding that a national club and its regional affiliates were incapable of conspiring as separate entities because they were not competitors and maintained an economic unity); *City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268 (8th Cir. 1988)* (holding that a rural electrical cooperative consisting of three tiers of cooperatives with interlocking ownership was a single entity because member cooperatives shared a common goal of providing low-cost electricity).

the common interests of the whole is generally not enough, by itself, to render them a single entity." *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148 (9th Cir. 2003)*. "[A] commonality of interest exists in every cartel." *Id*. (quoting *L.A. Mem'l Coliseum v. NFL, 726 F.2d 1381, 1389 (9th Cir. 1984))*. The formalities should not detract from the necessity to examine the economic realities of the restraints imposed on competition by a joint venture. *See* *Am. Needle, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *6* ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."). The focus of the inquiry under *§ 1 of the Sherman Act* centers on diminution of competition that would otherwise exist. *Id. at *8*. When the agreement joins together independent centers of decisionmaking, "the entities are capable of conspiring under *§ 1*, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Id. at *9*.

B.

At trial, ATP contended it constitutes a single enterprise, and under *Copperweld*, its internal decisions cannot violate *§ 1 of the Sherman Act*. It asserted each of its tournament members is dependent on the others to produce a common product--a marketable annual professional tennis tour that competes with other forms of entertainment, within and without the **[**37]** sports arena. ATP maintained its members do not compete but instead cooperate to produce the Tour, and its adoption of the Brave New World plan was the core activity of producing this product. For their part, the Federations contended ATP operates in the market for top tier men's professional tennis players, and individual tournaments compete to attract top players. They asserted the Brave New World plan was an agreement unreasonably restraining trade in this alleged market. Both parties presented expert testimony. The District Court concluded "there [were] at least underlying facts that [were] critical to" a determination of "whether the ATP and its members function as a single business entity," and that these facts are "beyond [the] Court's purview and in need **[*836]** of attention by a jury." App. 36. Accordingly, the court gave the jury ATP's proposed single enterprise instruction.

C.

In the context of the professional sports industry, courts have historically subjected sports leagues to antitrust scrutiny under *§ 1 of the Sherman Act*. In *NCAA v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, decided eight days after *Copperweld*, the Supreme Court considered a § 1 challenge to the NCAA's restrictions **[**38]** on member institutions' ability to enter into separate contracts to televise their football games. The Court acknowledged that "a certain degree of cooperation is necessary" to preserve the "type of competition that [the NCAA] and its member institutions seek to market." *Id. at 117*. But the Court concluded that because the challenged plan "prevent[ed] member institutions from competing against each other," they had "created a horizontal restraint--an agreement among competitors on the way in which they will compete with one another." *Id. at 99*. After analyzing the reasonableness of the alleged restraint, the Court held it violated *§ 1 of the Sherman Act*. *Id. at 120*.

Many other courts have resisted single entity arguments involving sports industries. [14] But the Court of Appeals for the Seventh Circuit in *Chicago Professional Sports Limited Partnership v. NBA, 95 F.3d 593 (7th Cir. 1996)* ("*Bulls*

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[14] *See e.g.,* *NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 470 (6th Cir. 2005)* (holding that the hockey league's adoption of a players-eligibility rule was "an agreement between multiple actors"); *Sullivan v. NFL, 34 F.3d 1091, 1099 (1st Cir.1994)* **[**40]** (refusing to hold as a matter of law that the NFL is a single entity under *Copperweld*); *L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1388-89 (9th Cir. 1984)* (rejecting the NFL's argument for single entity treatment because "[w]hile the NFL clubs have certain common purposes . . . NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly"); *Mid-South Grizzlies v. NFL, 720 F.2d 772, 778, 787 (3d Cir. 1983)* (describing ways in which NFL teams compete with each other); *N. Am. Soccer League v. NFL, 670 F.2d 1249, 1257-58 (2d Cir. 1982)* (refusing to treat the NFL as a single economic entity and exempt it from liability under *§ 1 of the Sherman Act*); *accord* *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 71 (2d Cir. 1995)* (holding that an association consisting of representatives of national tennis associations, tournament owners and directors, and professional tennis players was a joint venture, consisting of multiple entities, and able to conspire under *§ 1 of the Sherman Act*). *But see* *Seabury Mgmt., Inc. v. PGA of Am., Inc., 878 F.*

II"), suggested that a sports league can sometimes be viewed as a single entity for antitrust purposes. *Id. at 598* ("We see no reason why a sports league *cannot* be treated as a single firm . . . ."). The court concluded that *Copperweld's* rule is not limited to the circumstances where cooperating **[**39]** parties have a "complete unity of interest." *Id*. Recognizing that whether the NBA "is more like a single firm . . . or like a joint venture . . . is a tough question" because "it has characteristics of both," the court concluded that "the league looks more or less like a firm depending on which facet of the business one examines." *Id. at 599*. "From the perspective of fans and advertisers . . . 'NBA Basketball' is one product from a single source," "[b]ut from the perspective of college basketball players who seek to sell their skills, the teams are **[*837]** distinct," and "the league looks more like a group of firms acting as a monopsony." *Id*. Remanding to the district court for determination of the issue, the court observed: "Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld's* functional question one league at a time--and perhaps one facet of a league at a time . . . ." *Id. at 600*.

The parties in *Bulls II* settled after the case was remanded, but the Court of Appeals for the Seventh Circuit revisited the issue in *American Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008)*, *rev'd*, *130 S. Ct. 2201, 176 L. Ed. 2d 947, 2010 U.S. LEXIS 4166, 2010 WL 2025207 (U.S. May 24, 2010)*. Guided by principles enunciated in *Bulls II*, the court affirmed the district court's grant of summary judgment for the NFL on a claim stemming from its practice of centralized licensing of intellectual property. *Id. at 744* (concluding "the NFL teams are best described as a single source of economic power when promoting NFL football though licensing the teams' intellectual property"). But the Supreme Court reversed, finding the court's reasoning unpersuasive. *2010 U.S. LEXIS 4166, 2010 WL 2025207, at *10*. The Court observed that each of the teams in the NFL is a "substantial, independently owned, and independently managed business." *Id. at *9*. The Court further noted **[**42]** the NFL teams "compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel." *Id*. Specifically relevant to the case, the Court found "the teams compete in the market for intellectual property." *Id. at *9*. Therefore, the Court concluded "[d]ecisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions 'that depriv[e] the marketplace of independent centers of decisionmaking,' and therefore of actual or potential competition." *Id*. (quoting *Copperweld, 467 U.S. at 770*).

Similarly, the agreement among the ATP's tournament members in the Brave New World Plan might have deprived the marketplace of potential competition. Professional sports teams or tournaments always have an interest in obtaining the best players possible. *Brown v. Pro Football, Inc., 518 U.S. 231, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*. The record in this case indicates that the individual tennis tournaments traditionally compete for player talent. An agreement restricting this competition should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing **[**43]** the ATP Tour. "The justification for cooperation is not relevant to whether that cooperation is concerted or independent action." *Am. Needle, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *11*. The necessity of cooperation does not "transform[] concerted action into independent action." *Id*. "The mere fact that the teams operate jointly in some sense does not mean that they are immune." *Id*.

But we need not decide whether the single enterprise instruction was given in error. As noted, even if the jury had found concerted action, the Federations' antitrust claims still fail because they did not satisfy their burden of proving a relevant market. [15]

Supp. 771, 778 (D. Md. 1994) (holding that the PGA could not conspire with its regional **[**41]** sections as a matter of law), *aff'd in relevant part*, ***52 F.3d 322 (4th Cir. 1995)*** (Table); ***NFL v. N. Am. Soccer League, 459 U.S. 1074, 1077, 103 S. Ct. 499, 74 L. Ed. 2d 639 (1982)*** (Rehnquist J., dissenting from denial of certiorari) (arguing that the NFL is a single entity because it "competes as a unit against other forms of entertainment").

[15] In *American Needle*, the Supreme Court emphasized that "teams that need to cooperate are not trapped by ***antitrust law***," *id. at *12*, because "'[t]he special characteristics of this industry may provide a justification' for many kinds of agreements." *Id*. (quoting *Brown, 518 U.S. at 252*). "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Id*. (quoting *NCAA, 468 U.S. at 101*). As we explained *supra* Part II.C, **[**44]** given the circumstances of this case, the District Court correctly instructed the jury to evaluate the alleged restraints under the full rule of reason.

[*838] IV.

A.

In their complaint, the Federations asserted claims of breach of fiduciary duties of loyalty, due care, and good faith against six individual directors of ATP, all of whom voted in favor of the Brave New World plan. The District Court granted ATP's motion for judgment as a matter of law on these claims. The Federations appeal the judgment only in relation to their claim of breach of duty of loyalty by Director Charles Pasarell. Notably, they do not appeal the judgment in relation to their breach of fiduciary duty claims against the other five directors.

As noted, ATP is governed by a seven-member Board of Directors--three elected by tournament members, each representing a geographic region ("Tournament Representatives"), three elected by player members ("Player Representatives"), and a Chairman/President. Section 12.9 of ATP's Bylaws requires certain corporate actions to be approved by two affirmative votes of both the three Tournament Representatives and the three Player Representatives. The Brave New World plan required such an **[**45]** approval. The European Tournament Representative, Zejlko Franulovic, voted against most provisions of the Brave New World plan, citing concerns about restrictions on competition. Accordingly, the votes of the other two Tournament Representatives were necessary for adoption of the Brave New World plan.

Director Pasarell served as a Tournament Representative from 1990. At the same time, he also was employed as Tournament Director of the Indian Wells Masters Series Event and held a 24% ownership in the Indian Wells tournament. Indian Wells is a tournament member of ATP. The Federations claimed that his vote in favor of the Brave New World plan constituted a breach of duty of loyalty because it was self-interested.

The District Court rejected the Federations' argument, concluding that they failed to rebut the business judgment rule presumption with sufficient evidence that Pasarell was materially self-interested in the Brave New World transaction. The District Court observed that although Pasarell, like other tournament owners, stood to benefit from any projected success of the Brave New World plan, Indian Wells was already among the most financially successful tournaments, and did not need **[**46]** the Brave New World plan to make money. Further, the court also held that the other directors were not materially self-interested and the Federations do not appeal that finding.

B.

HN11[] Under Delaware law, the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)*, *overruled on other grounds by* *Brehm v. Eisner, 746 A.2d 244 (Del. 2000)*. Thus, "[t]he burden is on the party challenging the decision to establish facts rebutting the presumption." *Id*. The business judgment rule presumption can be rebutted by establishing "that the *board* was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders." *Orman v. Cullman, 794 A.2d 5, 22 **[*839]** (Del. Ch. 2002)*. [16] "To establish that a *board* was interested[,] . . . a plaintiff must allege facts as to the interest . . . of the *individual members* of that board." *Id*. Thus, a plaintiff must normally **[**47]** demonstrate "that a *majority* of the director defendants have a financial interest in the transaction . . . ." *Id*. (internal quotation marks and citation omitted); *see also* *Malpiede v. Townson, 780 A.2d 1075, 1084-85 (Del.*

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[16] The presumption can also be rebutted by showing that "one or more directors less than a majority of those voting" suffers from a material and disabling interest and that "the interested director *controls or dominates* the board as a whole or [that] the interested director *fail[ed] to disclose his interest* in the transaction to the board *and* a reasonable board member would have regarded the existence of the material **[**48]** interest as a significant fact in the evaluation of the proposed transaction." *Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995)* ("*Technicolor III*") (alteration in original) (quoting *Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1153 (Del. Ch. 1994))*; *see also* *In re Transkaryotic Therapies, Inc., 954 A.2d 346, 363 (Del. Ch. 2008)*. Because the Federations do not allege Pasarell controlled the ATP Board or failed to disclose his interest in Indian Wells, the only issue relevant to this appeal is whether the Board as a whole was interested and/or lacked independence. *See* *Orman, 794 A.2d at 23*.

2001) (concluding that the claim of breach of fiduciary duty of loyalty was insufficient because it alleged self-interest of only one director); Brehm v. Eisner, 746 A.2d 244, 257 (Del. 2000) (determining whether a majority of the board was disinterested and independent); Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995) ("*Technicolor III*") (affirming Court of Chancery determination that "if actual self-interest is present and affects a *majority of directors* approving a transaction, the entire fairness standard applies" (emphasis added)).

C.

The Federations cannot prevail on their claim of breach of duty of loyalty because they failed to rebut the business judgment rule presumption. The District Court found that Pasarell was not materially self-interested in his Brave New World vote. ***HN12***[] The Delaware Supreme Court has defined "interest" to "mean[] that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Aronson, 473 A.2d at 812*. **[**49]** "[I]n the absence of self-dealing, it is not enough to establish the interest of a director by alleging that he received *any* benefit not equally shared by the stockholders. Such benefit must be alleged to be *material* to that director." [17] *Orman, 794 A.2d at 23* (citing *Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 363 (Del. 1993)*, *modified*, *636 A.2d 956* ("*Technicolor II*")). "Materiality means that the alleged benefit was significant enough '*in the context of the director's economic circumstances*, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without **[*840]** being influenced by her overriding personal interest.'" *Id*. (omission in original) (quoting *In re Gen. Motors Class H S'holders Litig., 734 A.2d 611, 617 (Del. Ch. 1999))*. "In determining the sufficiency of factual allegations made by a plaintiff as to . . . a director's interest . . . the Delaware Supreme Court . . . requires the application of a subjective 'actual person' standard to determine whether a *particular* director's interest is material and debilitating . . . ." *Id. at 24* (quoting *Technicolor III, 663 A.2d at 1167*).

Pasarell was not materially self-interested because he did not stand to obtain any unique benefits from the Brave New World plan. ***HN13***[] "A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders." *Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993)*; *see also* *Aronson, 473 A.2d at 812*. The Brave New World plan was designed to benefit **[**51]** all the ATP top tier tournaments--Pasarell's supposed benefits from the Brave New World plan were not unique. Moreover, Pasarell's alleged interest could not be subjectively material because the evidence showed that Indian Wells was already doing well financially, attracting top tennis players before the Brave New World plan was adopted. Therefore, the alleged benefit was not "significant enough in the context of the director's economic circumstances" to interfere with Pasarell's ability to perform his fiduciary duties "without being influenced by [his] overriding personal interest." *In re Gen. Motors Class H S'holders Litig., 734 A.2d at 617*. Because the Federations failed to show Pasarell was self-interested, his vote is entitled to the protection of the business judgment rule. [18]

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[17] The materiality requirement is not applicable to **[**50]** cases involving "classic self-dealing" where a director "stand[s] on both sides of a transaction." *HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94, 113-115 (Del. Ch. 1999)*. Although the Federations label Pasarell's vote as "self-dealing" instead of "self-interested," such characterization is misleading because Pasarell's Brave New World vote did not involve Indian Wells transacting with ATP. Pasarell's financial stake in Indian Wells was not "antithetic to the corporate interest in a . . . proposed course of action." 1 David A. Drexler et al., *Delaware Corporation Law and Practice* § 15.05[1]. The Federations allege that Pasarell received a special benefit. Thus, they must show materiality of the interest to rebut the business judgment rule presumption. *See generally id*.

[18] Further, regardless of whether Pasarell's vote was materially self-interested, to rebut the business judgment rule presumption, the Federations would need to show that the ATP Board was materially self-interested. But because the Federations do not now dispute that the remaining five directors, who voted for the Brave New World plan, were not materially self-interested, the disinterested directors made **[**52]** up the majority of the Board (six out of seven) and the majority of directors voting to approve the Brave New World plan (five out of six). Therefore, the Federations cannot establish that the majority of the ATP directors were materially self-interested. The Federations emphasize that the Brave New World plan could not have been adopted without Pasarell's vote. They argue that the disinterested majority rule should not apply here because the ATP Bylaws' "super-majority" voting provisions made simple majority approval insufficient to adopt the Brave New World plan.

[*841] V.

For these reasons, we will affirm the jury verdict for defendants on the Sherman Act § 1 claim, and the District Court's judgment as a matter of law for defendant Pasarell on the breach of fiduciary duty of loyalty claim.

Because we hold the District Court was correct in its finding that Pasarell was not self-interested, we do not need to decide how the super-majority voting provisions might affect the self-interest inquiry. However, we note that the Delaware Supreme Court has previously addressed a similar issue. In *Technicolor III*, the corporation's certificate of incorporation included a provision which could be repealed with a recommendation made through a unanimous vote of qualified directors. *663 A.2d at 1170-71*. The directors voted unanimously to recommend repealing the provision, but one of the directors was found to have been interested, **[**53]** and plaintiffs argued that the transaction was therefore voidable. The Delaware Supreme Court affirmed the Court of Chancery's conclusion that the unanimity provision in the charter "should not be construed to include an implied exclusion of interested directors from eligibility to participate in the unanimous vote." *Id. at 1171*. Similarly, Pasarell's necessary vote, even if materially interested, is not excluded by the super-majority provision of the ATP Bylaws. The provision states that "two affirmative votes of the Tournament Tour Board Representatives plus two affirmative votes of the Player Tour Board Representatives" are required. App. 2692. Like the provisions in *Technicolor III*, the bylaws here do not require exclusion of the interested votes, and *Technicolor III* suggests that no such exclusion can be implied. But although in *Technicolor III* the board's actions were examined under the business judgment rule and found not to have breached the duty of loyalty, neither the Court of Chancery nor the Delaware Supreme Court explicitly stated that the super-majority voting requirement does not affect the applicability of the business judgment rule presumption. As noted, because Pasarell **[**54]** was not self-interested, we do not need to decide this issue.

Romero v. Philip Morris Inc.

Supreme Court of New Mexico

June 25, 2010, Filed

Docket No. 31,433

Reporter

148 N.M. 713 *; 2010-NMSC-035 **; 242 P.3d 280 ***; 2010 N.M. LEXIS 370 ****; 2011-1 Trade Cas. (CCH) P77,351

BEATRICE C. ROMERO and MICHAEL FERREE, on behalf of themselves and all others similarly situated, Plaintiffs-Respondents, v. PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, Defendants-Petitioners.

Prior History: **[****1]** ORIGINAL PROCEEDING ON CERTIORARI. James A. Hall, District Judge.

Romero v. Philip Morris, Inc., 2009 NMCA 22, 145 N.M. 658, 203 P.3d 873, 2008 N.M. App. LEXIS 147 (N.M. Ct. App., 2008)

Core Terms

pricing, summary judgment, conspiracy, cigarettes, tends, retail, discount, parallelism, factors, oligopolistic, Plaintiffs', oligopoly, anti trust law, ambiguous, antitrust, independent action, act independently, present evidence, market share, price-fixing, conscious, wholesale, coordination, Defendants', gap, fix prices, collusion, quotation, marks, tiers

LexisNexis® Headnotes

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

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

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

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party. Summary judgment is reviewed on appeal de novo.

Civil Procedure > Judgments > Summary Judgment > General Overview

HN2[] **Judgments, Summary Judgment**

New Mexico courts, unlike federal courts, view summary judgment with disfavor, preferring a trial on the merits. Federal courts, on the other hand, following the "Celotex trilogy," have become more inclined to grant summary judgment and substantially increased the availability of summary judgment and encouraged greater use of the motion by trial courts. The Celotex trilogy favored greater use of summary judgment and gave strong rhetorical support to summary judgment as a means of case management and resolution.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN3[] **Entitlement as Matter of Law, Appropriateness**

The New Mexico Supreme Court continues to refuse to loosen the reins of summary judgment, as doing so would turn what is a summary proceeding into a full-blown paper trial on the merits. The supreme court does not wish to grant trial courts greater authority to grant summary judgment than has been traditionally available in New Mexico. Permitting trial courts a license to quantify or analyze the evidence in a given case under whatever standard may apply would adversely impact the jury system and infringe on the jury's function as the trier of fact and the true arbiter of the credibility of witnesses. By the supreme court's refusal to align our state's approach with that of the federal courts, it does not intend to imply that summary judgment is never appropriate.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN4[] **Entitlement as Matter of Law, Appropriateness**

In New Mexico, summary judgment may be proper when the moving party has met its initial burden of establishing a prima facie case for summary judgment. By a prima facie showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. Once this prima facie showing has been made, the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits. A party may not simply argue that such evidentiary facts might exist, nor may it rest upon the allegations of the complaint. Rather, the party opposing the summary judgment motion must adduce evidence to justify a trial on the issues. Such evidence adduced must result in reasonable inferences. An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor. When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment. Only when the inferences are reasonable is summary judgment inappropriate.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN5[] **Entitlement as Matter of Law, Materiality of Facts**

In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment. To determine which facts are material, the court must look to the substantive law governing the dispute. The inquiry's focus should be on whether, under substantive law, the fact is necessary to give rise to a claim.

Antitrust & Trade Law > Sherman Act > Claims

HN6[] **Sherman Act, Claims**

As substantive law is the filter through which the New Mexico Supreme Court applies summary judgment, and to construe state law in harmony with federal law, *N.M. Stat. Ann. § 57-1-15*, the supreme court must first undertake an analysis of substantive federal ***antitrust law***. To establish a violation of *Section 1* of the Sherman Act, a plaintiff must be able to show: (1) concerted action, (2) by two or more persons, (3) which unreasonably restrains interstate or foreign trade or commerce, *15 U.S.C.S. § 1*. It is important to note that *Section 1* is not violated when the alleged conspirators act independently. The essence of a *Section 1* claim is the existence of an agreement. Unilateral action simply does not support liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful agreement. Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN7[] **Conspiracy to Monopolize, Sherman Act**

Contrary to most markets, it is not always obvious whether firms in an oligopoly have acted independently. Firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions. An oligopolist's price and output decisions will have a noticeable impact on the market and on its rivals. For example, in a market served by three large companies, each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] **Conspiracy to Monopolize, Sherman Act**

Where there are very few sellers (firms) within a market, the actions of one seller will have a noticeable effect on the actions taken by the other sellers. The other sellers may perform a cost-benefit analysis and react to the actions of the leader, producing results similar to an unlawful price-fixing agreement, but actually resulting from lawful, independent action. This tacit collusion or independent conduct describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions. In an oligopolistic setting, the distinction between lawful, independent conduct and illegal conduct is most at issue when circumstantial evidence is used to prove the existence of an agreement to fix prices.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Evidence > Types of Evidence > Circumstantial Evidence

HN9[] **Cartels & Horizontal Restraints, Price Fixing**

To prove a violation of *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, plaintiffs can produce direct or circumstantial evidence of an illegal agreement to fix prices. Direct evidence of such an agreement is explicit and requires no inferences to establish the proposition or conclusion being asserted. In contrast, circumstantial evidence necessarily requires that inferences be drawn. While direct evidence, the proverbial smoking-gun, is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN10[] **Scope, Monopolization Offenses**

As a result of the need to draw inferences from circumstantial evidence and the likelihood that parallel conduct in an oligopoly stems from lawful, independent conduct, federal courts require antitrust plaintiffs to present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Without requiring such a showing, pro-competitive conduct, the conduct that the antitrust laws are designed to protect, may be deterred. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy and plaintiffs must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed them.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN11[] **Scope, Monopolization Offenses**

As a result of the limited inferences that can be drawn from circumstantial evidence and the interdependent nature of an oligopoly, the plaintiffs must present more than evidence of parallel pricing to prove the existence of an agreement between the defendants to fix prices. Although parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Evidence of parallel pricing without more is inherently ambiguous in the oligopolistic setting because there are so many different means, lawful and unlawful, by which parallel pricing can be achieved.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN12[] **Scope, Monopolization Offenses**

It is the judge's duty to review the evidence presented by the plaintiffs and make a threshold legal determination as to whether it tends to exclude the possibility that the defendants acted independently. If the evidence offered by the plaintiff is ambiguous and can equally lead to the conclusion that the alleged conduct was the result of independent action as opposed to illegal conduct, the plaintiff has failed to establish a genuine issue of material fact that there was a conspiracy.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN13[] **Scope, Monopolization Offenses**

To assist in determining which evidence would tend to exclude independent action, federal courts have created "plus factors." Any showing that tends to exclude the possibility of independent action can qualify as a plus factor. These plus factors remove the plaintiff's evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism. In determining whether evidence constitutes a plus factor, i.e., tends to exclude independent conduct, the court should consider the following: If a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor, the evidence presented by the plaintiffs must be economically sensible or plaintiffs must come forward with more persuasive evidence to support their claim. In addition, a showing that the defendants' behavior would not be reasonable or explicable (i.e. not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade also constitutes a plus factor. The requirement of tending to exclude independent conduct necessarily requires that the court view the plaintiffs' evidence in light of the defendants' evidence to determine whether the plaintiffs' evidence tends to exclude the possibility that defendants were acting independently.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN14[] **Scope, Monopolization Offenses**

The phrase "plus factors" refers simply to the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy. Whether the courts want to call them plus factors or not, the requirement that the plaintiffs tend to exclude independent conduct does not change.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN15[] **Conspiracy to Monopolize, State Regulation**

The New Mexico Antitrust Act states that every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful, *N.M. Stat. Ann. § 57-1-1*. To prove a cause of action under the Antitrust Act the Legislature requires that the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices, *N.M. Stat. Ann. § 57-1-15*. It is therefore the duty of the courts to ensure that New Mexico ***antitrust law*** does not deviate substantially from federal interpretations of ***antitrust law***.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN16[] **Conspiracy to Monopolize, Sherman Act**

Material facts are those necessary to give rise to a claim, and to give rise to a *15 U.S.C.S. § 1* claim, evidence that tends to exclude independent action by the defendants is necessary to show that there was an unlawful agreement. The United States Supreme Court has explicitly stated that when allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. Without this showing, an essential element of the conspiracy claim is absent and there can be no issue of material fact.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN17[] **Sherman Act, Claims**

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market, and that plus factors are the tool for reviewing the evidence presented. The requirement that only reasonable inferences can be drawn from ambiguous evidence is a substantive component of federal ***antitrust law***, and that Plaintiffs must present evidence tending to exclude independent conduct to ensure uniform application of federal and state laws, *N.M. Stat. Ann. § 57-1-15*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN18[] **Cartels & Horizontal Restraints, Sherman Act**

Retail pricing is influenced by so many variables that the cigarette oligopoly cannot exert collective control over it through independent conduct. Cigarette wholesalers, who buy direct from cigarette manufacturers at wholesale list prices, set prices for retailers, who then set retail prices for consumers. All levels of pricing are affected by various manufacturer discounts and promotions. Therefore, to coordinate in an effective manner at the retail level the cigarette companies would have been required, without communicating, to establish parallel practices with respect to each of these variables, many of which, like consumer stickers or coupons, were difficult to monitor. This complexity explains why independent conduct is an improbable means of coordinating parallel retail pricing and why Brooke Group suggests that independent conduct should be rejected as a likely explanation in that circumstance. This conclusion, however, cannot be logically extended to wholesale list prices, which are simply determined by the manufacturers. It would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices, because in an oligopoly setting price competition is most likely to take place through less observable and less regulable means than list prices.

Counsel: Montgomery & Andrews, P.A., Sarah M. Singleton, Walter J. Melendres, Victor R. Ortega, Santa Fe, NM; Arnold & Porter, L.L.P., Kenneth L. Chernof, Washington, DC; Boies, Schiller & Flexner, L.L.P., David Boies, Armonk, NY; Jack G. Stern, New York, NY; Amy J. Mauser, Washington, DC for Petitioner Philip Morris Incorporated.

Rodey, Dickason, Sloan, Akin & Robb, P.A., Andrew G. Schultz, Albuquerque, NM; Jones Day, Edwin L. Fountain, Washington, DC; Thomas Demitrack, Cleveland, OH, for Petitioners R.J. Reynolds Tobacco Company and Brown & Williamson Tobacco Corporation.

Youtz & Valdez, P.C., Shane C. Youtz, Albuquerque, NM; Ball & Scott Law Offices, Gordon Ball, Knoxville, TN; Cuneo Gilbert & Laduca, L.L.P., Jonathan W. Cuneo, Daniel Cohen, Washington, DC; Hausfeld, L.L.P., Michael D. Hausfeld, Megan E. Jones, Washington, DC, for Respondents.

Judges: EDWARD L. CHAVEZ, Justice. WE CONCUR: CHARLES W. DANIELS, Chief Justice, PATRICIO M. SERNA, Justice, PETRA JIMENEZ MAES, Justice, RICHARD C. BOSSON, Justice.

Opinion by: EDWARD L. CHAVEZ

Opinion

[*284] [*717] CHAVEZ, Justice.**

[1]** In this class action lawsuit, Plaintiffs allege that Defendants engaged in an agreement to fix the **[****2]** price of cigarettes from 1993 to 2000. The district court granted summary judgment in favor of Defendants, because although Plaintiffs offered evidence of parallel pricing, they failed to establish a genuine issue of material fact regarding whether any evidence, in addition to the parallel pricing, tended to exclude independent conduct on Defendants' part, as required by federal substantive law. On appeal, the Court of Appeals **[***285] [*718]** rejected the federal "plus factor" approach, and instead held that Plaintiffs could prove a conspiracy by parallel conduct alone, as long as independent conduct was an implausible explanation. *Romero v. Philip Morris, Inc.,*

2009-NMCA-22, PP 24, 44, 2009 NMCA 22, 145 N.M. 658, 203 P.3d 873. The Court of Appeals also concluded that when looking at the evidence in the light most favorable to Plaintiffs, a genuine issue of material fact existed, therefore precluding summary judgment. *Id. PP 43-44*. *Romero v. Philip Morris Inc., 2009-NMCERT-2, 145 N.M. 705, 204 P.3d 30*.

[2]** We granted Defendants' petition for writ of certiorari to consider two issues. First, we consider whether the Court of Appeals applied the incorrect standard for summary judgment. Second, we consider whether the **[****3]** Court of Appeals correctly applied federal substantive law regarding alleged agreements to fix prices. Although we agree with the summary judgment standard applied by the Court of Appeals, we hold that the Court of Appeals did not correctly apply federal substantive law as required by *NMSA 1978, Section 57-1-15* (1979). Under federal substantive ***antitrust law***, *15 U.S.C. § 1 (2006)*, evidence of parallel price increases alone is not sufficient in the context of an oligopoly to prove an agreement to fix prices. Such evidence is always ambiguous, and therefore plaintiffs who allege a price-fixing agreement must also provide evidence that tends to exclude the possibility that parallel price increases were the result of independent conduct. Because federal law limits the inferences available to a jury to those that are reasonable, plaintiffs relying upon circumstantial evidence cannot survive summary judgment, as a matter of law, unless the evidence tends to exclude the possibility that the alleged conspirators acted independently. Independent conduct is also referred to in case law as "conscious parallelism," "tacit collusion," or "legal independent conduct." We therefore affirm the district **[****4]** court's grant of summary judgment and reverse the Court of Appeals.

BACKGROUND

[3]** The following facts are undisputed. Plaintiffs are "[p]ersons in the State of New Mexico . . . who purchased cigarettes indirectly from Defendants, or any parent, subsidiary or affiliate thereof, at any time from November 1, 1993 to the date of the filing of this action [April 10, 2000]." The original Defendants were Philip Morris, R.J. Reynolds ("RJR"), Brown & Williamson ("B&W"), Lorillard, and Liggett. The events leading up to this lawsuit were set in motion in response to a Philip Morris strategy beginning with an event known as "Marlboro Friday." [1] Prior to Marlboro Friday, Philip Morris, the market leader, had been steadily losing market share to discount and deep discount cigarettes since 1980, when Liggett pioneered the development of generic cigarettes. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 212, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. In an attempt to regain market share, Philip Morris announced Marlboro Friday on April 2, 1993, "a nationwide promotion on Marlboro that reduced prices at retail by approximately 20 percent, an average of 40[cents] per pack." In response, RJR and B&W instituted similar **[****5]** promotions. As part of its strategy, Philip Morris announced on July 20, 1993, that there would be a similar reduction on all premium brands, discount brands, and deep discount brands starting on August 9, 1993. Defendants RJR and B&W also followed these price reductions. After these decreases, Defendants began to increase their wholesale list prices on premium and discount cigarettes in near lock-step fashion. Some increases were due to settlements with the 50 states, some because of increases in federal excise taxes, and others were simply planned. Even with these increases, wholesale list prices did not exceed pre-Marlboro Friday levels until August 3, 1998, or when adjusted for inflation, ongoing settlement costs, and federal excise taxes, the list prices did not surpass pre-Marlboro Friday amounts until August 1999. During the time period of the alleged agreement to fix prices, 1993 to 2000, Defendants were engaged in competition with one another regarding promotions at **[***286]** **[*719]** the retail level, resulting in a direct reduction of the retail prices of cigarettes.

[4]** Plaintiffs filed this class action lawsuit on April 10, 2000, alleging violations of New Mexico antitrust and consumer protection laws. *See NMSA 1978, §§ 57-1-1 to -15* (1979, as amended through 1987); *NMSA 1978, §§ 57-12-1 to -22* (1967, as amended through 1999). Defendants filed motions for summary judgment. In granting the motion for summary judgment, the district court held that Plaintiffs had met their initial burden of showing a pattern

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[1] We adopt the Court of Appeals recitation of the facts of the pre-Marlboro Friday events. *See Romero v. Philip Morris, Inc., 2009-NMCA-22, PP 4-10, 145 N.M. 658, 203 P.3d 873* **[****6]** .

of parallel behavior, but failed to meet their second burden of showing the existence of plus factors that would tend to exclude the possibility that the alleged conspirators acted independently. Plaintiffs argued that the following were plus factors that tended to exclude Defendants' independent conduct: (1) the economics of the marketplace; (2) Defendants' strong motivation to conspire; (3) the fact that Defendants condensed the price tiers to facilitate their conspiracy; (4) Defendants acted contrary to their own self-interests; (5) alleged conspiratorial meetings in foreign markets; (6) Defendants had engaged in past conspiracies, such as misrepresenting the health consequences of smoking; **[****7]** (7) Defendants monitored their conspiracy through monthly factory shipment data reports prepared by Management Science Associates ("MSA"); (8) opportunities to conspire, including inter-firm communications and meetings; and (9) pricing decisions were made by those in high-level positions. However, the district court relied on the Eleventh Circuit case of *Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1300 (11th Cir. 2003)*, to reject Plaintiffs' plus factors. The district court also held that even with the presentation of plus factors, "there still exists the opportunity for the defendant[s] to rebut the inference of collusion by presenting evidence establishing that no reasonable fact-finder could conclude that they entered into a price-fixing conspiracy." Plaintiffs appealed.

[5]** On appeal, the Court of Appeals acknowledged that "Marlboro Friday and the industry-wide price reductions that occurred afterward represented the triumph of competition over oligopolistic price coordination." *Romero, 2009-NMCA-22, P 27*; *see also id. P 44*. Although the Court affirmed summary judgment in favor of Lorillard and Liggett because the evidence showed that they had merely acted "consistent **[****8]** with conscious parallelism," *id. P 46*, the Court reversed summary judgment in favor of Philip Morris, RJR, and B&W because "[a]pplying *Brooke Group,* and relying on the opinions of Plaintiffs' expert, Dr. [Keith] Leffler, we think that a reasonable factfinder could view conscious parallelism as a relatively implausible explanation for the anticompetitive scenario that played out following Marlboro Friday," *Romero, 2009-NMCA-022, P 44*. The Court acknowledged that New Mexico follows "federal case law interpreting *Section 1* of the Sherman Act for substantive rules defining the scope of liability under [the New Mexico Antitrust Act] NMAA *Section 1*." *Id. P 18*. It held that "behavior of market participants characterizable as mere conscious parallelism does not satisfy the conspiracy element requirement of NMAA *Section 1*," *id. P 22*, and noted that federal courts have recognized the "doctrine of conscious parallelism as a substantive principle of ***antitrust law***," *id. P 23*. The Court also noted that federal law requires plaintiffs to present evidence of "plus factors" that tend to exclude the possibility of independent conduct. *Id. PP 23-24*. However, it did not follow federal precedent regarding **[****9]** plus factors, but held that "the sounder approach for a New Mexico court is to engage in an independent and rigorous evaluation of the evidence in deciding whether or not the plaintiffs' evidence tends to suggest a degree of coordination that *exceeds* the parallelism that could be accomplished through lawful conscious parallelism." *Id. P 24* (emphasis added). In addition, the Court held that "[t]he non-existence of conscious parallelism is not a separate element of the plaintiff's case." *Id. P 25*.

> If the plaintiff comes forward with evidence that would allow a reasonable factfinder to exclude lawful conscious parallelism as the most likely explanation for the parallelism proved by the plaintiff, then the plaintiff has made out a prima facie case that would defeat summary judgment. **[***287]** **[*720]** At trial, then, the burden of negating the exculpatory inference of lawful conscious parallelism simply merges into the plaintiff's ultimate burden of convincing the factfinder that the parallelism proved by the plaintiff was more likely than not the result of a conspiracy.

Id. The Court of Appeals then constructed a hypothetical situation in which the jury could find that Defendants entered into an agreement **[****10]** to fix prices. *Id. PP 27-30*. Although rejecting the concept of plus factors, the Court held that

> [t]estimony by a qualified economics expert that the character or degree of parallelism actually exhibited by prices exceeds the parallelism that economic theory predicts would result from independent competitive behavior is precisely the type of evidence that tends to exclude the possibility that the defendants acted independently . . . [and] constitutes an extremely forceful "plus factor" . . . .

Id. P 32. The Court also held that "Dr. Leffler's testimony is sufficient to meet Plaintiffs' burden of production," *id.,* and that "conscious parallelism in a complex, multi-variable industry is 'improbable,'" *id. P 35* (citation omitted). In its conclusion, the Court of Appeals noted numerous ways in which the parallelism cited by Plaintiffs could not reasonably have been the result of Defendants' independent conduct. *Id. PP 44-45*.

[6]** As stated previously, we granted certiorari to determine whether the Court misapplied the summary judgment standard and whether the Court failed to follow substantive federal ***antitrust law***. We reverse the Court of Appeals and affirm the district court's grant of summary **[****11]** judgment.

SUMMARY JUDGMENT

[7]** Defendants argue that the Court of Appeals applied the incorrect summary judgment standard by referring to the "traditional stringent standard that a movant must meet." *Id. P 15*. The standard, as articulated by the Court of Appeals, is to "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Id. P 17* (internal quotation marks and citation omitted). This was a correct statement of the standard for summary judgment in New Mexico:

> ***HN1***[] Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party.

Montgomery v. Lomos Altos, Inc., 2007-NMSC-2, P 16, , 141 N.M. 21, 150 P.3d 971 (filed 2006) (internal quotation marks and citations omitted). "Summary judgment is reviewed on appeal de novo." *Juneau v. Intel Corp., 2006-NMSC-2, P 8, 139 N.M. 12, 127 P.3d 548* (filed 2005).

[8]** ***HN2***[] New Mexico courts, unlike federal **[****12]** courts, view summary judgment with disfavor, preferring a trial on the merits. *Compare Handmaker v. Henney, 1999-NMSC-43, P 21, 128 N.M. 328, 992 P.2d 879* (noting that "the policy in New Mexico disfavor[s] summary judgment"), *and Pharmaseal Lab., Inc. v. Goffe, 1977- NMSC 071, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977)* ("Summary judgment is a drastic remedy to be used with great caution."), *with Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . ."), *and* 11 James William Moore, *Moore's Federal Practice § 56.03[1]* (3d ed. 2007) (discussing the trend in the federal courts to use summary judgment as a means of case management and resolution). Federal courts, on the other hand, following the "*Celotex* trilogy," [2] have become more inclined to grant summary judgment and "substantially increased the availability of summary judgment and encouraged greater use of the motion by trial courts." 11 *Moore, supra § 56.03[1]*, at 56-23. The *Celotex* trilogy favored greater use **[***288]** **[*721]** of summary judgment and "gave strong rhetorical support to summary judgment as a **[****13]** means of case management and resolution." 11 *Moore, supra § 56.03[1]*, at 56-23; *see also* § 56.03[2][c], at 56-28 (noting that *Matsushita* abrogated "big case" and "defendant motive and state of mind" exceptions to summary judgment and allowing summary judgment where it traditionally had not been allowed (internal quotation marks omitted)); § 56.03[3], at 56-30 (noting that *Anderson* requires the courts to consider the substantive evidentiary burden at the summary judgment stage, thus creating a heightened evidentiary burden for those opposing summary judgment); § 56.03[5], at 56-36 (noting that *Celotex* held that movant for summary judgment could meet burden by demonstrating absence of support for essential element of claim and not just affidavits).

[9]** ***HN3***[] We continue to refuse to loosen the reins of summary judgment, as doing so would "turn what is a summary proceeding into a full-blown paper trial on the merits." *Bartlett v. Mirabal, 2000-NMCA-36, P 32, 128 N.M. 830, 999 P.2d 1062* (internal quotation marks and citation **[****14]** omitted). We do not wish to grant trial courts greater authority to grant summary judgment than has been traditionally available in New Mexico. *See id. PP 37-38*. "Permitting trial courts a license to quantify or analyze the evidence in a given case under whatever standard may apply . . . would adversely impact our jury system and infringe on the jury's function as the trier of fact and the true

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[2] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*, and *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

arbiter of the credibility of witnesses." *Id. P 38*. By our refusal to align our state's approach with that of the federal courts, we do not intend to imply that summary judgment is never appropriate.

[10]** ***HN4***[] In New Mexico, summary judgment may be proper when the moving party has met its initial burden of establishing a prima facie case for summary judgment. *See Roth v. Thompson, 1992 - NMSC 011, 113 N.M. 331, 334-35, 825 P.2d 1241, 1244-45 (1992)*. "By a prima facie showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Goodman v. Brock, 1972- NMSC 043, 83 N.M. 789, 792-93, 498 P.2d 676, 679-80 (1972)* (citations omitted). Once this prima facie showing has been made, the burden shifts to the non-movant "to demonstrate the existence of specific evidentiary **[****15]** facts which would require trial on the merits." *Roth, 113 N.M. at 335, 825 P.2d at 1245*. "A party may not simply argue that such [evidentiary] facts might exist, nor may it rest upon the allegations of the complaint." *See Dow v. Chilili Coop. Ass'n, 1986 - NMSC 084, 105 N.M. 52, 55, 728 P.2d 462, 465 (1986)*. Rather, "[t]he party opposing the summary judgment motion must adduce evidence to justify a trial on the issues." *Clough v. Adventist Health Sys., Inc., 1989- NMSC 056, 108 N.M. 801, 803, 780 P.2d 627, 629 (1989)* (citation omitted). Such evidence adduced must result in reasonable inferences. *See Montgomery, 2007-NMSC-2, P 16*. "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." *Stambaugh v. Hayes, 1940- NMSC 048, 44 N.M. 443, 451, 103 P.2d 640, 645 (1940)* (citation omitted). When disputed facts do not support reasonable inferences, they cannot serve as a basis for denying summary judgment. Only when the inferences are reasonable is summary judgment inappropriate.

[11]** ***HN5***[] In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment. To determine which facts are material, **[****16]** the court must "look to the substantive law governing the dispute," *Farmington Police Officers Ass'n v. City of Farmington, 2006-NMCA-077, P 17, 139 N.M. 750, 137 P.3d 1204*. The inquiry's focus should be on whether, under substantive law, the fact is "necessary to give rise to a claim." *Eoff v. Forrest, 1990 - NMSC 033, 109 N.M. 695, 702, 789 P.2d 1262, 1269 (1990)*; *see also Martin v. Franklin Capital Corp., 2008-NMCA-152, P 6, 145 N.M. 179, 195 P.3d 24* ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute."); *Parker v. E.I. Du Pont de Nemours & Co., 1995- NMCA 086, 121 N.M. 120, 124, 909 P.2d 1, 5 (Ct. App. 1995)* ("A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case."). In **[***289]** **[*722]** this case, substantive federal ***antitrust law*** is the filter through which we must determine whether genuine issues of material fact exist. *See § 57-1-15*.

FEDERAL SUBSTANTIVE *ANTITRUST LAW*: PROVING THE CONSPIRACY

[12]** ***HN6***[] As substantive law is the filter through which we apply summary judgment, and to construe our law in harmony with federal law, *see § 57-1-15*, **[****17]** we must first undertake an analysis of substantive federal ***antitrust law***. To establish a violation of *Section 1* of the Sherman Act, a plaintiff "must be able to show: (1) concerted action, (2) by two or more persons, (3) which unreasonably restrains interstate or foreign trade or commerce." *In re Med. X-ray Film Antitrust Litig., 946 F. Supp. 209, 215 (E.D.N.Y. 1996)*; *see also 15 U.S.C. § 1*. It is important to note that *Section 1* is not violated when the alleged conspirators act independently. *See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* ("Independent action is not proscribed.").

> The essence of a *Section 1* claim is the existence of an agreement. Unilateral action simply does not support liability; there must be a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful agreement. Concerted action is established where two or more distinct entities have agreed to take action against the plaintiff.

Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005) (internal quotation marks and citations omitted). ***HN7***[] Contrary to most markets, it is not always obvious whether firms in an oligopoly have acted independently. *See In re Wireless Tel. Servs. Antitrust Litig., 385 F. Supp. 2d 403, 420 n.24 (S.D.N.Y. 2005)* **[****18]** (defining oligopoly as "control or domination of a market by a few large sellers, creating high prices and low output similar to those found in a monopoly" (internal quotation marks and citation omitted)). "[F]irms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd., 509 U.S. at 227*.

> [A]n oligopolist's price and output decisions will have a noticeable impact on the market and on its rivals. . . . [For example,] in a market served by three large companies, each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. . . . Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently.

VI Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* P 1429a (2d ed. 2003). To summarize, ***HN8***[] where there are very few sellers (firms) within a market, the actions of one **[****19]** seller will have a noticeable effect on the actions taken by the other sellers. The other sellers may perform a cost-benefit analysis and react to the actions of the leader, producing results similar to an unlawful price-fixing agreement, but actually resulting from lawful, independent action. This "[t]acit collusion [or independent conduct] . . . describes the process, *not in itself unlawful,* by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group Ltd., 509 U.S. at 227* (emphasis added). In an oligopolistic setting, the distinction between lawful, independent conduct and illegal conduct is most at issue when circumstantial evidence is used to prove the existence of an agreement to fix prices.

[13]** ***HN9***[] To prove a violation of *Section 1* of the Sherman Act, plaintiffs can produce direct or circumstantial evidence of an illegal agreement to fix prices. *See Monsanto Co., 465 U.S. at 764*. Direct evidence of such an agreement is "explicit and requires no inferences to establish the **[****20]** proposition or conclusion being asserted." *In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999)*. In contrast, circumstantial evidence necessarily requires that **[***290]** **[*723]** inferences be drawn. *See Williamson Oil Co., 346 F.3d at 1300* ("The problem with this reliance on circumstantial evidence, however, is that such evidence is by its nature ambiguous, and necessarily requires the drawing of one or more inferences in order to substantiate claims of illegal conspiracy."). "While direct evidence, the proverbial 'smoking-gun,' is generally the most compelling means by which a plaintiff can make out his or her claim, it is also frequently difficult for antitrust plaintiffs to come by." *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 465 (3d Cir. 1998)*.

[14]** ***HN10***[] As a result of the need to draw inferences from circumstantial evidence and the likelihood that parallel conduct in an oligopoly stems from lawful, independent conduct, federal courts require antitrust plaintiffs to present evidence "that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (internal quotation marks and citation omitted); **[****21]** *see also Monsanto Co., 465 U.S. at 763* (noting that "it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements"); *Williamson Oil Co., 346 F.3d at 1300* (holding that evidence tending to exclude independent conduct is necessary only when the plaintiff relies on circumstantial evidence to prove a conspiracy). Without requiring such a showing, pro-competitive conduct, the conduct that the antitrust laws are designed to protect, may be deterred. *See Matsushita Elec. Indus. Co., 475 U.S. at 593-94*. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy . . . [and plaintiffs] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [them]." *Id. at 588* (citations omitted).

[15]** ***HN11***[] As a result of the limited inferences that can be drawn from circumstantial evidence and the interdependent nature of an oligopoly, the plaintiffs must present more than evidence of parallel pricing to prove the **[****22]** existence of an agreement between the defendants to fix prices. Although "parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotation marks and citation omitted) (alterations in original); *see also* *In re Baby Food Antitrust Litig., 166 F.3d at 122* ("[N]o conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons."). Evidence of parallel pricing without more is inherently ambiguous in the oligopolistic setting because there are so many different means, lawful and unlawful, by which parallel pricing can be achieved. *See* VI Areeda & Hovenkamp, *supra* P 1431b (discussing the numerous explanations for parallel pricing, including "imperfect express collusion, merely interdependent behavior, and fairly independent and non-interdependent conduct").

[16]** ***HN12***[] It is the judge's duty to review the evidence presented by the plaintiffs and make a threshold legal determination as to **[****23]** whether it tends to exclude the possibility that the defendants acted independently. *See* *Williamson Oil Co., 346 F.3d at 1304* (holding that the judge does not act as fact-finder, but only makes a determination of the "reasonableness of the inferences that c[an] be drawn from the evidence, [which are] threshold legal determinations that appropriately [are] made by the district court"). If the evidence offered by the plaintiff is ambiguous and can equally lead to the conclusion that the alleged conduct was the result of independent action as opposed to illegal conduct, the plaintiff has failed to establish a genuine issue of material fact that there was a conspiracy. *See* *Monsanto Co., 465 U.S. at 763*; *Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 232, 836 P.2d 1249, 1253 (Ct. App. 1992)* (holding that failure to establish an essential element **[***291]** **[*724]** of plaintiff's claim is sufficient grounds for summary judgment); *see also* *In re Baby Food Antitrust Litig., 166 F.3d at 118* (noting that plaintiffs must "meet [a] demanding standard of proof required in the context of an antitrust case"); *Bell Atl. Corp., 550 U.S. at 554* (recognizing "proof of a *§ 1* conspiracy must include evidence tending to **[****24]** exclude the possibility of independent action").

[17]** ***HN13***[] To assist in determining which evidence would tend to exclude independent action, federal courts have created "plus factors." "[A]ny showing . . . that 'tend[s] to exclude the possibility of independent action' can qualify as a 'plus factor.'" *Williamson Oil Co., 346 F.3d at 1301* (citation omitted). These "'plus factors' . . . remove [the plaintiff's] evidence from the realm of equipoise and render that evidence more probative of conspiracy than of conscious parallelism." *Id.* In determining whether evidence constitutes a plus factor, *i.e.,* tends to exclude independent conduct, the court should consider the following: "[I]f a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor," *id. at 1310*; the evidence presented by the plaintiffs must be economically sensible or plaintiffs must "come forward with more persuasive evidence to support their claim," *Matsushita Elec. Indus. Co., 475 U.S. at 587*; *see also* *In re Vitamins Antitrust Litig., 320 F. Supp. 2d 1, 12 (D.D.C. 2004)* ("[I]n the face of economic factors dictating that the nonmoving party's theory is irrational, **[****25]** that party must submit evidence to establish that the theory remains practical and genuine despite economic evidence to the contrary."). In addition, "a showing that the defendants' behavior would not be reasonable or explicable (i.e. not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade" also constitutes a plus factor. *Williamson Oil Co., 346 F.3d at 1301* (internal quotation marks and citation omitted). The requirement of tending to exclude independent conduct necessarily requires that the court view the plaintiffs' evidence in light of the defendants' evidence to determine whether the plaintiffs' evidence tends to exclude the possibility that defendants were acting independently. *See* Rule 1-056(C) NMRA (stating that the judge must review "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits"); *see also* *Clough, 108 N.M. at 804-05, 780 P.2d at 630-31* (determining that plaintiff's antitrust conspiracy claim should not survive summary judgment by considering plaintiff's evidence in light of evidence presented by defendants). ***HN14***[] The phrase "'plus factors' refers simply to **[****26]** the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy." VI Areeda & Hovenkamp, *supra* P 1433e. Whether the courts want to call them plus factors or not, the requirement that the plaintiffs tend to exclude independent conduct does not change.

NEW MEXICO ANTITRUST PLAINTIFFS MUST PRESENT EVIDENCE TENDING TO EXCLUDE THE POSSIBILITY THAT DEFENDANTS ACTED INDEPENDENTLY

[18]** Plaintiffs allege that Defendants violated***HN15***[] the New Mexico Antitrust Act, which states that "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful." Section *§ 57-1-1*. To prove a cause of action under the Antitrust Act the Legislature requires that "the Antitrust Act *shall* be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices." *Section 57-1-15* (emphasis added). It is therefore the duty of the courts to ensure that New Mexico ***antitrust law*** does not deviate substantially **[****27]** from federal interpretations of ***antitrust law***. *See State v. Guerra, 2001-NMCA-031, P 14, 130 N.M. 302, 24 P.3d 334* ("The word 'shall' as used in a statute is generally construed to be mandatory.").

[19]** Federal substantive law as it relates to oligopolies controls in this case. **[***292]** **[*725]** There is no doubt that the tobacco industry, in which five companies manufacture more than 97% of the cigarettes sold in the United States, is a classic oligopoly. *See Williamson Oil Co., 346 F.3d at 1291*. Because the cigarette industry is an oligopoly, it is likely that when one tobacco company (*i.e.,* Philip Morris) acts in a certain manner (*i.e.,* Marlboro Friday and subsequent price increases), the other firms (RJR, B&W, Lorillard, and Liggett) will determine whether it is in their best interest to follow the leader's actions. As we will discuss below, when Philip Morris began raising prices after Marlboro Friday, RJR's and B&W's conduct in following subsequent price increases was just as likely due to their own independent analysis of what was in their best interests as it was the result of an illegal price-fixing agreement. Therefore, Plaintiffs must present evidence that tends to exclude the possibility that **[****28]** Defendants acted independently or they can not meet their burden of establishing a genuine issue of material fact. Because Plaintiffs rely on circumstantial evidence to prove the existence of a price-fixing agreement, *see Romero, 2009-NMCA-22, P 20*, if they have not presented evidence that tends to exclude the possibility that Defendants acted independently, they have not met their burden of establishing a genuine issue of material fact.

[20]** ***HN16***[] Material facts are those "necessary to give rise to a claim," *Eoff, 109 N.M. at 702, 789 P.2d at 1269*, and to give rise to a *Section 1* claim, evidence that tends to exclude independent action by the defendants is necessary to show that there was an unlawful agreement. *See Bell Atl. Corp., 550 U.S. at 557* ("An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a *§ 1* [Sherman Act] complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"); *see also Monsanto Co., 465 U.S. at 763* ("On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry **[****29]** its burden of proving that there was such an agreement."). The United States Supreme Court has explicitly stated that "when allegations of parallel conduct are set out in order to make a *§ 1* claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Bell Atl. Corp., 550 U.S. at 557*. Without this showing, an essential element of the conspiracy claim is absent and there can be no issue of material fact.

[21]** In rejecting the plus factor approach used by the federal courts and holding that parallel conduct can be enough to prove a conspiracy, the Court of Appeals fails to construe the New Mexico Antitrust Act in harmony with judicial interpretations of federal ***antitrust law*** required by *Section 57-1-15*. *See Romero, 2009-NMCA-22, P 24*. This ignores the United States Supreme Court's holding that ***HN17***[] "[t]he inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," **[****30]** *Bell Atl. Corp., 550 U.S. at 554*, and that plus factors are the tool for reviewing the evidence presented, *see* VI Areeda & Hovenkamp, *supra* P 1432a ("We conclude that the Sherman Act *§ 1* requirement of a contract, combination, or conspiracy is not satisfied by uniform anticompetitive pricing that results *merely* from recognized interdependence without the addition of any facilitators."). Contrary to the holding of the Court of Appeals that proof tending to exclude independent conduct is not a separate element of Plaintiffs' case, *Romero, 2009-NMCA-22, P 25*, we hold that the requirement that only reasonable inferences can be drawn from ambiguous evidence is a substantive component of federal ***antitrust law***, and that Plaintiffs must present evidence tending to exclude independent conduct to ensure uniform application of federal and state laws. *See § 57-1-15*.

[22]** In reversing the district court and holding that an agreement to fix prices can **[***293]** **[*726]** be shown only with parallel conduct, the Court of Appeals requires a different quantum of proof than the federal court and, as a result, fails to construe our law in harmony with federal law. The Court of Appeals assumes that a jury could find a conspiracy, **[****31]** *see* Romero, 2009-NMCA-22, PP 27-30, without discussing Defendants' evidence that the in-tandem increases, shifts in market share, and supposed behavior contrary to self-interest were just as likely the result of independent, rational business decisions made to maximize profits, rather than an agreement to fix prices, because any alternative other than following the price increases was a losing option. In its hypothesis, the Court of Appeals errs in accepting certain plus factors with no discussion of whether they actually tend to exclude independent conduct. *Id. P 29* (discussing signaling and clandestine communications). Additionally, in assuming the jury could find a conspiracy based solely on parallel behavior, the Court allows an inference that is per se unreasonable. *Id.* Rather than reviewing Plaintiffs' evidence in light of all of the evidence presented, the Court asserts that it just upheld its "obligation to view the evidence in the light most favorable to the non-movant and to allow the non-movant the benefit of any reasonable inferences supported by the evidence . . . ." *Id. P 31*. The Court fails to use substantive federal ***antitrust law*** as the filter to first determine whether **[****32]** genuine issues of material fact exist in favor of summary judgment. Instead, the Court employs New Mexico's summary judgment standard to overcome the strict requirements of substantive law. This is exactly the rationale rejected in *Matsushita. See* 475 U.S. at 587-88 ("Respondents correctly note that '[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' But ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a § 1 case." (citation omitted)).

[23]** We also disagree with the Court of Appeals in *Romero* that both Dr. Leffler's opinion and *Brooke Group* set forth "major points of departure" from the plus factor approach discussed in *Williamson Oil.* The Court noted that Dr. Leffler stated that "[t]he economic evidence indicates that it is highly unlikely that independent competitive behavior explains the price restructuring and price changes for cigarettes during the alleged conspiracy period." *Id. P 32* (internal quotation marks omitted). The Court also held that "Dr. Leffler's opinion testimony, if believed, would permit a reasonable factfinder to exclude lawful **[****33]** parallelism as the most likely explanation for the parallelism demonstrated by cigarette prices during the class period." *Id.* Although the Court held that it was "not inclined to appoint [itself an] amateur econo[mist] and attempt to second guess Dr. Leffler's reasoning," *id. P 39*, it did not give consideration to the fact that there were several ambiguities in Dr. Leffler's opinion that were drawn out in his deposition. While Dr. Leffler opined that the parallel price increases were not the result of lawful parallelism, he also agreed that the factors he used to determine the existence of a price-fixing conspiracy could not "tell you one way or the other whether you have conscious parallelism or you've got something beyond conscious parallelism like a price fixing agreement." He also offered the opinion that an explicit agreement was a violation of *Section 1* of the Sherman Act as opposed to oligopolistic coordination and there was no explicit agreement in this case. Dr. Leffler stated that rational oligopolists would act to maximize profits, rational oligopolists would have matched the Marlboro Friday price reduction, and RJR and B&W were most likely acting to maximize their profits **[****34]** by failing to re-widen the price gap. Dr. Leffler even went so far as to acknowledge that the cigarette industry "responded as I would have expected them to respond . . . [t]o match the price cut and then to anticipate future price increases, to extend the oligopoly cooperation to the discount sector."

[24]** In general, Dr. Leffler's report concludes that following Marlboro Friday, Defendants' actions amounted to illegal price-fixing. However, his statements and responses in his deposition demonstrate that he actually thought it was just as likely that Defendants would have behaved in the same **[***294]** **[*727]** manner if they were acting independently and not under an illegal price-fixing agreement, because to act any other way would have been less profitable and, as such, against their economic interest.

[25]** Without becoming amateur economists, the Court of Appeals could have easily recognized inconsistencies between Dr. Leffler's report and his deposition. Based on these ambiguities in the evidence, it would have been necessary under substantive ***antitrust law*** to hold that the evidence did not tend to exclude independent conduct because it was also consistent with independent conduct. *See* *Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1270 (N.D. Ga. 2002)* **[****35]** ("If, when considered in its entirety, [the evidence] is totally ambiguous or to the opposite effect, it is not relevant and may not be relied upon by the jury."). By holding that such ambiguous evidence tended to exclude independent conduct and would allow the jury to reach a reasonable inference, the Court of Appeals failed to ensure uniform application of state and federal ***antitrust law***.

[26]** The Court of Appeals also relied heavily on several facets of the United States Supreme Court's analysis in *Brooke Group* to bolster both its reliance on Dr. Leffler's opinion and its conclusion that independent action was an unlikely explanation for the parallel pricing observed during the period of the alleged agreement to fix prices. *Romero, 2009-NMCA-22, PP 33-37, 40*. In each instance, however, reliance on *Brooke Group* is premised on a misreading of the Supreme Court's analysis. While the Court of Appeals correctly observed that *Brooke Group* recognizes the "inherent limitations" of independent conduct and that it is an "improbable" explanation for "multivariable coordination," that conclusion was based on an analysis of "the net price in the market" or retail pricing, not on list or wholesale **[****36]** prices, which underlie the basis of the claim in the instant case. *Brooke Group Ltd., 509 U.S. at 239*. Similarly, while *Brooke Group* did analyze "the likelihood that tacit collusion could result in industry-wide, in-tandem increases in the prices of both generic and premium cigarettes," *Romero, 2009-NMCA-22, P 40*, it did so only in the context of retail pricing.

[27]** ***HN18***[] Retail pricing is influenced by so many variables that the cigarette oligopoly cannot exert collective control over it through independent conduct. *See Brooke Group Ltd., 509 U.S. at 239* (noting that retail prices are determined in part by "list prices, but also by a wide variety of discounts and promotions to consumers and by rebates to wholesalers"). Cigarette wholesalers, who buy direct from cigarette manufacturers at wholesale list prices, set prices for retailers, who then set retail prices for consumers. All levels of pricing are affected by various manufacturer discounts and promotions. Therefore, "to coordinate in an effective manner [at the retail level] . . . the cigarette companies would have been required, without communicating, to establish parallel practices with respect to each of these variables, many of which, **[****37]** like consumer stickers or coupons, were difficult to monitor." *Id. at 239*. This complexity explains why independent conduct is an improbable means of coordinating parallel *retail* pricing and why *Brooke Group* suggests that independent conduct should be rejected as a likely explanation in that circumstance. *Id.* This conclusion, however, cannot be logically extended to wholesale list prices, which are simply determined by the manufacturers. *Brooke Group* is very clear that "it would be *unreasonable* to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect *only* list prices," because "in an oligopoly setting . . . price competition is most likely to take place through less observable and less regulable means than list prices." *Id. at 236* (emphasis added).

[28]** Despite these significant distinctions between *Brooke Group* and the instant case, the Court of Appeals nonetheless suggests that "Defendants' theory of the present case seems . . . easily as complex as the recoupment theory rejected in *Brooke Group.*" *Romero, 2009-NMCA-22, P 36*. The Court holds that only a "single-tier market" can be effectively **[***295]** **[*728]** controlled by legal oligopolistic coordination, **[****38]** because a two-tier wholesale market is too complex and has too many variables, making independent conduct an implausible explanation for parallel pricing. *Id. P 40* ("The present case does not involve the type of simple price leadership in a single-tier market that characterized the tobacco industry prior to the introduction of generic cigarettes."). Finding the two-tier system complex, the Court of Appeals rejects independent conduct as a plausible explanation for the observed list pricing. *Id. P 37* ("[L]awful oligopolistic coordination was incapable of containing the competition from non-premium cigarettes.").

[29]** The point of Marlboro Friday and subsequent price reductions, however, was to simplify the wholesale pricing scheme, collapsing the market from ten pricing tiers to two, so there would be a less complex pricing system. Due to the interdependent nature of an oligopoly, "oligopolistic rationality" can "provide for price increases through . . . price leadership[]" if the other firms believe that following the pricing leader will maximize their profits. VI Areeda & Hovenkamp, *supra* P 1429a-b (internal quotation marks omitted) (discussing interdependent decision-making and how the **[****39]** actions of one firm may result in the independent decision of other firms to follow if doing so will maximize profits). To stem the flow of market share into the discount sector, Philip Morris realized the need to close the price gap between premium and discount cigarettes, and set about undertaking this task with Marlboro Friday and the subsequent price reductions in the premium and discount sectors. With the price gap closed and only two price tiers remaining, Philip Morris was able to take advantage of the expected "oligopolistic rationality" when prices began to ascend to pre-Marlboro Friday levels. Dr. Leffler opined that RJR and B&W were acting as rational oligopolists by following Philip Morris in subsequent price increases to prevent further price cuts similar to Marlboro Friday. Compliance was ensured by the looming threat of continued revenue losses should Philip Morris institute a second Marlboro Friday. [3] By relying on "oligopolistic rationality" and having condensed the ten-tier system to two tiers, Philip Morris used its dominant market position and the inherent interdependencies of the cigarette oligopoly to force the other manufacturers to comply with its subsequent **[****40]** price increases in *both* pricing tiers. These strategic moves were all part of Philip Morris's strategy to "box in its competitors" and advance its own competitive position.

[30]** Prior to Marlboro Friday, Philip Morris attempted to box in its competitors and reduce the discount-premium price gap by independently raising generic and discount cigarette prices. However, this attempt failed. *Romero, 2009-NMCA-22, P 37*. No discount cigarette manufacturers responded because with ten pricing tiers and the large price gap between discount and premium cigarettes, discount cigarettes could continue to grow revenue by cannibalizing the premium cigarette market share; it was not in their interest at that point to follow Philip Morris's price leadership, and they had no incentive to do so. Contrary to the Court of Appeals's conclusion that "[t]his evidence [supports] Dr. Leffler's opinion that by itself, lawful oligopolistic coordination **[****41]** was incapable of containing the competition from non-premium cigarettes," *Romero, 2009-NMCA-22, P 37*, this initial failure to control discount list prices simply explains Philip Morris's rationale and motivation for both Marlboro Friday and its subsequent pricing strategy. Philip Morris needed to simplify the pricing structure and exert its market influence before the oligopoly would respond to its price leadership.

[31]** Nothing about the cigarette oligopoly's coordination of the wholesale two-tier market is multi-variable or complex as described in *Brooke Group.* Retail pricing, not list pricing, is multi-variable and complex and makes independent conduct an improbable **[***296]** **[*729]** explanation for parallel pricing. *See* *Brooke Group Ltd., 509 U.S. at 239*. Therefore, simultaneous coordinated pricing in both tiers does not, by itself, tend to exclude independent conduct due to complexity. Rather the opposite is true. It is undisputed by Plaintiffs that Philip Morris's Marlboro Friday was the initiation of a highly competitive strategy. That strategy did not end on Marlboro Friday, but persisted throughout the alleged conspiracy as Philip Morris worked to maintain a narrow price gap between discount and **[****42]** premium cigarettes *and* worked to raise prices in both tiers. With this strategy, Philip Morris maintained its newly-acquired market share and increased its revenue, while manufacturers that depended on the discount sector lost market share and revenue. Philip Morris sought to regain market share it had lost to the discount sector prior to Marlboro Friday, and over a roughly six-year period, it increased wholesale prices to regain the status quo prior to Marlboro Friday.

[32]** The result of Philip Morris's market dominance was that premium cigarettes *and* discount cigarettes became subject to interdependent conduct, whereas prior to Marlboro Friday only premium cigarettes were subject to such oligopolistic control. Plaintiffs' expert, Dr. Leffler, stated that Marlboro Friday "caused a restructuring in the industry and a change in the competitive relationships." As a result of this restructuring, oligopolistic functioning and rationale extended to the discount sector where there had been no such functioning prior to Marlboro Friday. Indeed, Dr. Leffler even acknowledged in his deposition that the industry merely "extend[ed] the oligopoly cooperation to the discount sector." As oligopolistic **[****43]** control is lawful in the premium price tier, there is no rationale for arguing that it is illegal in the discount price tier. For these reasons, the Court of Appeals's reliance on *Brooke Group* was misplaced.

[33]** Thus, we must determine whether Plaintiffs' proffered evidence of plus factors tends to exclude the possibility that Defendants acted independently. Plaintiffs cite to the following plus factors, in addition to parallel pricing, as tending to exclude the possibility that Defendants acted independently: (1) the economies of the marketplace, such as a highly concentrated market, cigarette fungibility, high barriers to entry in the industry, absence of close substitutes, and a history of collusion; (2) a strong motivation to conspire, resulting from the desperate times facing the cigarette industry, including "a dramatic decline in its sales as a result of . . . increased

[3] Declaration of RJR CEO: "[B]ased on Marlboro Friday, RJR believed that [Philip Morris] would not allow a competitor to take market share away from Marlboro by cutting prices. Thus, RJR believed, any further price reduction would be futile and would result in lower profits."

public awareness of the detrimental health effects of smoking"; (3) the condensation of price tiers to facilitate the conspiracy; (4) actions contrary to self-interest, including Philip Morris's pre-announcing its price reductions and Defendants' failure to attempt to re-widen the price gap by reducing discount prices; **[****44]** (5) conspiratorial meetings in other markets; (6) a smoking and health conspiracy; (7) the manner in which Defendants monitored the conspiracy through Management Science Associates ("MSA") [4] ; (8) opportunities to conspire; and (9) pricing decisions made at high levels. Although the ambiguities in Dr. Leffler's opinion have previously been discussed, *see supra, PP 23-25*, we will further review the evidence presented by Dr. Leffler, since this is the only plus factor cited by the Court of Appeals.

[34]** We reject Plaintiffs' plus factors for reasons similar to those set forth in *Williamson Oil Co.* because Defendants' conduct is just as consistent with lawful, independent action as it is with price fixing, and therefore it does not tend to exclude independent conduct. We briefly discuss Plaintiffs' **[****45]** plus factors to address why they do not tend to exclude the possibility of independent conduct by Defendants. (1) The majority of the economies of the marketplace to which Plaintiffs cite are nothing more than inherent characteristics of an oligopoly and cannot tend to exclude independent action. **[***297] [*730]** *See Holiday Wholesale Grocery Co., 231 F. Supp. 2d at 1305*. In fact, Plaintiffs' expert agreed that these factors are "conducive to collusion, whether it be in the form of tacit collusion [independent conduct] or some kind of explicit agreement fixing prices," and that "looking at [these] structural factors alone, just like prices, does not allow you . . . to distinguish between whether the prices in this industry are the result of price fixing conspiracy on the one hand or conscious parallelism on the other hand." In addition, the history of collusion cited by Plaintiffs is based on a 1946 violation of the Sherman Act. *See Am. Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*. However, Plaintiffs do not explain how a case from more than fifty years ago is indicative of a present day price-fixing agreement, especially when only one of the current Defendants, RJR, was a defendant in the 1946 **[****46]** case. *See Williamson Oil Co., 346 F.3d at 1317-18. (2)* The motivation to conspire cited by Plaintiffs cannot serve as tending to exclude independent conduct because "[p]rofit is a legitimate motive in pricing decisions, and something more is required before a court can conclude that competitors conspired to fix pricing in violation of the Sherman Act." *In re Baby Food Antitrust Litig., 166 F.3d at 134-35. (3)* When Philip Morris took action to condense the price tiers, it is just as likely that they did so to reduce the price gap and maximize profits as to facilitate a price fixing agreement, and thus this does not tend to exclude independent conduct. (4) Plaintiffs argue that Defendants took actions contrary to self-interest by pre-announcing price decisions and failing to re-widen the price gap. Philip Morris argues that the June 20, 1993 pre-announcement of a price decrease to take effect twenty days later was not a signal to the other cigarette manufacturers, but was made to allow wholesalers and retailers to avoid an immediate reduction in the value of their inventory and to accommodate the burden of implementing a price reduction. *See id. at 133* (holding that advance price announcements **[****47]** can serve an important purpose in the industry). In addition, failure to re-widen the price gap does not tend to exclude independent conduct. Plaintiffs' expert testified that RJR and B&W were acting as rational oligopolists in following Philip Morris's price reduction, and that RJR and B&W made rational business decisions not to re-widen the price gap because they would not have made more money doing so. *See* VI Areeda &Hovenkamp, *supra* P 1429b (discussing that other firms in an oligopoly will follow the price leader "when they believe that it will maximize industry profits"). (5) The alleged conspiratorial meetings in other markets cannot serve as tending to exclude independent conduct because Plaintiffs offered no support to connect the actions in foreign markets with the actions in the United States. In addition, Plaintiffs' expert testified that he knew of no such connection and price changes in the United States were independent of those in the international market. (6) Similarly, concluding that an alleged smoking and health conspiracy facilitated coordination of a conspiracy in this case would require the jury to engage in speculation, and therefore it does not tend to exclude **[****48]** independent conduct. *See Williamson Oil Co., 346 F.3d at 1316-17*; *Matsushita Elec. Indus. Co., 475 U.S. at 595*. (7) The manner in which Defendants monitored the conspiracy through MSA is not evidence tending to exclude independent conduct because there is an equally rational legal explanation for this such as to "devise

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[4] "[MSA] provides data collection, processing, and storage services to numerous Fortune 500 companies, including American Express, MCI, Coca-Cola, and Michelin Tires." "MSA Inc. shipment-to-wholesale data are aggregated, historical data on manufacturer shipments of cigarettes to wholesalers that manufacturers provide to MSA Inc. for processing, and do not contain any cigarette pricing information."

competitive strategies, gauge the success of their promotions, monitor the impact of new styles or packing on the market, and determine whether increased promotional spending was needed in certain geographic areas to compete with competitors' programs." In addition, Dr. Leffler acknowledged under oath that the information exchanged was not pricing information. As this information is ambiguous at best, it can not be seen as tending to exclude independent conduct. *See* *Williamson Oil Co., 346 F.3d at 1315*. (8) Plaintiffs allege that Defendants had many opportunities to conspire because high-ranking officials from each manufacturer met on numerous occasions. However, the fact that Defendants may have met does not reasonably lead to the inference that they conspired to discuss price fixing. "[M]ere contacts and communications, or the mere opportunity to conspire, among antitrust **[****49]** defendants is insufficient evidence **[***298]** **[*731]** from which to infer an anticompetitive conspiracy . . . ." *Clough, 108 N.M. at 804, 780 P.2d at 630* (internal quotation marks and citation omitted); *see also* *Williamson Oil Co., 346 F.3d at 1319*. (9) Finally, pricing decisions made at high levels do not tend to exclude independent conduct as "[f]irms routinely consolidate decisionmaking authority in high ranking officers for a multitude of wholly legitimate reasons." *Williamson Oil Co., 346 F.3d at 1319*. In light of the ambiguous nature of Plaintiffs' plus factors, we hold that they do not tend to exclude independent conduct.

[35]** We also affirm the district court's ruling that "even after going through the plus factors, there still exists the opportunity for the defendant to rebut the inference of collusion by presenting evidence establishing that no reasonable fact-finder could conclude that they entered into a price-fixing conspiracy." Plaintiffs and the Court of Appeals erred in failing to acknowledge any legitimate rational explanations for the actions taken by Defendants. Plaintiffs ignore both retail competition and the effect that competition had on the "actual 'transaction' prices." Defendants **[****50]** competed "vigorously" on retail pricing, spending a combined total of over $ 25 billion. This competition led to RJR and B&W filing a lawsuit against Philip Morris alleging violations of the Sherman Act and unfair competition for conduct that occurred in the midst of the alleged conspiracy. *See* *R. J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002)*. RJR and B&W argued that Philip Morris "designed and executed Retail Leaders to monopolize and restrain trade in the United States cigarette market by paying retailers for advantageous display and signage space which Plaintiffs say restricts information needed by consumers, disrupts the price-setting mechanism of the market, and limits Plaintiffs' abilities to promote their products." *Id. at 365*. It would be unreasonable to infer that companies who fiercely competed at the retail level to the extent of suing one another would at the same time agree to fix prices.

[36]** Plaintiffs also fail to explain the economic rationale for Defendants competing so fiercely on retail promotions that would undermine any benefit they may have been receiving from a price-fixing conspiracy at the wholesale level. *See* *Williamson Oil Co., 346 F.3d at 1321* **[****51]** ("[I]f prices are fixed . . . there is no rational reason to undertake extremely significant and expanding retail promotional expenditures, which are a paradigmatically competitive activity."). From 1994 to 1999, Philip Morris's increased spending on retail promotions increased by $ 1.651 billion, which equaled 60% of its operating income. From 1993 to 1999, RJR's increased spending on retail promotions increased by $ 570 million, which was 141.6% of its operating income. B&W increased its spending on retail promotions from 1992 to 1998 by $ 492.5 million. This retail competition caused retail prices to vary, "even among brands that were priced identically at list."

[37]** In addition, market shares did not remain static but shifted and resulted in clear winners, such as Philip Morris, and clear losers, such as RJR and B&W. Philip Morris walked away a winner by ensuring that the price gap remained at a desirable level, while RJR and B&W, both of which had relied heavily on discount cigarettes, lost market share. During the period of the alleged conspiracy, Philip Morris's market share grew from 42.2% to 50.5%; RJR's share shrunk from 30.6% to 23.0%; and B&W's share declined from 16.6% to **[****52]** 11.7%. These shifts in market share also resulted in substantial revenue adjustments, further highlighting the winners and losers. For example, "in 1999 alone [Philip Morris] realized an additional $ 2.9 billion in revenues as a result of its cumulative increase in market share since 1993." In 1999, RJR was down approximately $ 3 billion in annual revenues compared to 1993, and B&W lost $ 1.3 billion in annual revenues from 1993 to 1999. Plaintiffs offer no evidence to explain why RJR and B&W would participate in a conspiracy that would result in lost market share and revenue. Rather, it is more likely that RJR and B&W acted as they did because it was the best option for them to follow out of a number of bad options. Philip Morris argued that each price increase subsequent to Marlboro Friday was for legitimate business reasons and independently made. Philip Morris stated that Plaintiffs **[***299]** **[*732]** had produced no evidence to support the allegation that the pricing actions taken were "intended to accomplish anything other than to advance [Philip Morris's] economic self-interest." There is no doubt that Marlboro Friday was a competitive act. In fact, Plaintiffs' economic expert stated that RJR **[****53]** and B&W were acting to maximize their profits in the way they reacted to Marlboro Friday and that any other options, such as attempting to reduce the price gap, would have led to inferior profits. In other words, Defendants had no choice but to follow the lead of Philip Morris and Plaintiffs failed to present evidence showing otherwise.

[38]** Defendants made a prima facie case supporting summary judgment by providing evidence of fierce retail competition that undermined the plausibility of a price-fixing agreement, demonstrating that wholesale prices remained lower than pre-Marlboro Friday levels and did not exceed pre-Marlboro Friday levels until almost five years later, and by highlighting the ambiguities in Dr. Leffler's opinion. This evidence showed that Defendants "'had no rational economic motive to conspire, and . . . their conduct is consistent with other, equally plausible explanations.'" *Clough, 108 N.M. at 804, 780 P.2d at 630* (quoting *Matsushita Elec. Indus. Co., 475 U.S. at 596-97*). In reviewing Plaintiffs' plus factors, we find that the district court properly granted summary judgment.

CONCLUSION

[39]** Failing to produce evidence tending to exclude independent action, Plaintiffs have **[****54]** not raised a genuine issue of material fact that there was an agreement between Defendants to fix the prices of cigarettes. Therefore, we reverse the Court of Appeals and affirm summary judgment in favor of all Defendants.

[40] IT IS SO ORDERED.**

EDWARD L. CHAVEZ, Justice

WE CONCUR:

CHARLES W. DANIELS, Chief Justice

PATRICIO M. SERNA, Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

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In re TFT-LCD (Flat Panel) Antitrust Litig.

United States District Court for the Northern District of California

June 28, 2010, Decided; June 28, 2010, Filed

No. M 07-1827 SI; MDL. No. 1827; No. C 09-4997 SI

Reporter

2010 U.S. Dist. LEXIS 65023 *; 2010-1 Trade Cas. (CCH) P77,085; 2010 WL 2609434

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION; This Order Relates To: AT&T MOBILITY LLC, et al., Plaintiffs, v. AU OPTRONICS CORP., et al., Defendants.

Subsequent History: Motion granted by, Dismissed without prejudice by *In re TFT-LCD (Flat Panel) Antitrust Litig., 2010 U.S. Dist. LEXIS 65037 (N.D. Cal., June 28, 2010)*

Prior History: *Nokia Corp. v. AU Options Corp. (In re TFT-LCD Antitrust Litig.), 2010 U.S. Dist. LEXIS 61760 (N.D. Cal., May 28, 2010)*

Core Terms

panels, allegations, conspiracy, price-fixing, products, plaintiffs', defendants', amended complaint, motion to dismiss, due process, leave to amend, antitrust, mobile, prices, technologies, contacts

Counsel: **[*1]** For Fern M Smith, Special Master: Fern M. Smith, JAMS, San Francisco, CA.

For LG Display Co., Ltd., (D, I), formerly known as LG Philips LCD Co., LTD., LG Display America, Inc., (D, I), formerly known as LG Philips LCD America, Inc., Defendants: Jerome Cary Roth, LEAD ATTORNEY, Munger Tolles & Olson LLP, San Francisco, CA; Michael Robert Lazerwitz, LEAD ATTORNEY, Cleary Gottlieb Steen & Hamilton, Washington, DC.

For Samsung Electronics Co. Ltd., (D, I), Samsung Electronics America, Inc., (D, I), Defendants: Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA.

For Sharp Corporation, LEAD ATTORNEY (D, I), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA.

For Sharp Electronics Corporation, LEAD ATTORNEY (D, I), Defendant: Jacob R. Sorensen, LEAD ATTORNEY, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; August Orval Stofferahn, Ryan Takemoto, Susan Greenberg, Tara Michele Desautels, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA; Fusae Nara, Pillsbury Winthrop LLP, San Francisco, CA.

For Toshiba Corporation, (D, I), Toshiba Matsushita Display Technology Co., Ltd., (D, I), Toshiba America Information **[*2]** Systems, Inc., (D, I), Defendants: John H. Chung, LEAD ATTORNEY, Wayne A. Cross, White & Case LLP, New York, NY.

For Hitachi Ltd., (D, I), Hitachi Displays, Ltd., (D, I), IPS Alpha Technology, LTD., (D), dismissed from IP amended complaint on 2/21/08, Defendants: Michael W. Scarborough, Morgan Lewis & Bockius LLP, San Francisco, CA.

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For AU Optronics Corporation, (D, I), Defendant: Carl Lawrence Blumenstein, Nossaman Guthner Knox & Elliott LLP, San Francisco, CA.

For AU Optronics Corporation America, (D, I), Defendant: John C. McGuire, LEAD ATTORNEY, Sedgwick, Detert, Moran & Arnold, Newark, NJ; Matthew Clark Lovell, LEAD ATTORNEY, Sedgwick Detert Moran & Arnold, LLP, San Francisco, CA; Carl Lawrence Blumenstein, Nossaman Guthner Knox & Elliott LLP, San Francisco, CA; Christopher Alan Nedeau, Sedgwick Detert Moran & Arnold LLP, San Francisco, CA; Jason Haruo Wilson, Willenken Wilson Loh & Lieb LLP, Los Angeles, CA; Michael F. Healy, Esq., Sedwick, Detert, Moran & Arnold, San **[*3]** Francisco, CA.

For Chi Mei Optoelectronics USA, Inc., (D, I), Defendant: Nathan Loy Walker, LEAD ATTORNEY, WilmerHale, Palo Alto, CA; Gordon Pearson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC, DC; Therese Lee, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Chunghwa Picture Tubes Ltd., (D, I), Defendant: Joshua David Hess, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For Hannstar Display Corporation, (D, I), Defendant: Hugh F. Bangasser, K&L Gates LLP, Seattle, WA; Hugh Frederick Bangasser, Julie Anne Halter, K&L Gates, Seattle, WA; Jeffrey L. Bornstein, K&L Gates LLP, San Francisco, CA; Ramona M. Emerson, K&L GATES, Seattle, WA.

For Samsung Semiconductor, Inc., (D, I), Defendant: Gary L. Halling, LEAD ATTORNEY, Michael W. Scarborough, Sheppard Mullin Richter & Hampton LLP, San Francisco, CA; Tyler Mark Cunningham, Sheppard Mullin Richter & Hampton, San Francisco, CA.

For CMO Japan Co., Ltd., (D, I), Chi Mei Corporation, (D, I), Chi Mei Optoelectronics Corporation, (D, I), Nexgen Mediatech, Inc. ("Nexgen"), (D), Defendants: Gordon Pearson, **[*4]** Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC.

For Nexgen Mediatech USA Inc, (D), Defendant: Caren K. Khoo, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr, New York, NY; Gordon Pearson, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC; Steven F. Cherry, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC, DC; Therese Lee, Wilmer Cutler Pickering Hale & Dorr LLP, Washington, DC; Wilmer Cutler, Hale and Dorr LLP, Washington, DC.

For Epson Electronics America, Inc., (D), Dismissed as a indirect purchaser defendant on 4/1/08, Defendant: Kevin C. McCann, LEAD ATTORNEY, Paul Hastings Janofsky & Walker LLP, San Francisco, CA; Chad A. Westfall, Sean David Unger, Paul, Hastings, Janofsky & Walker LLP, San Francisco, CA.

For Tatung Company of America, Inc. ("Tatung America"), (D), Defendant: Bruce H. Jackson, LEAD ATTORNEY, Baker & McKenzie, San Francisco, CA; Karen Sewell, PRO HAC VICE, Baker & McKenzie LLP, Chicago, Il; Nancy Chung Allred, Baker & McKenzie LLP, San Francisco, CA; Patrick J. Ahern, PRO HAC VICE, Baker & McKenzie, Chicago, IL; Robert Walter Tarun, Baker & McKenzie LLP, San Francisco, CA; Roxane C. Busey, PRO HAC VICE, BAker & McKenzie LLP, Chicago, **[*5]** IL.

For Toshiba America Electronics Components, Inc., (D, I), Defendant: John H. Chung, Wayne A. Cross, LEAD ATTORNEYS, White & Case LLP, New York, NY; Kristen J. McAhren, LEAD ATTORNEY, White & Case LLP, Washington, DC.

For State of California, Amicus: Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

For United States Antitrust Division, Department of Justice, Intervenor: Alexandra Jill Shepard, U.S. Department of Justice, Antitrust Division, San Francisco, CA; David J. Ward, U.S. Department of Justice, Antritrust Divsion, San Francisco Field Office, San Francisco, CA; Heather S. Tewksbury, United States Department of Justice, Antitrust Division, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA; Niall Edmund Lynch, U.S. Department of Justice, Antitrust Division, San Francisco, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING DEFENDANTS' JOINT MOTION TO DISMISS AND GRANTING PLAINTIFFS LEAVE TO AMEND

On June 23, 2010, the Court held a hearing on defendants' joint motion to dismiss the complaint. For the reasons set forth below, the Court GRANTS defendants' joint motion to dismiss and GRANTS plaintiffs leave **[*6]** to amend the complaint.

BACKGROUND

On October 20, 2009, plaintiffs [1] filed an individual complaint in this Court against numerous domestic and foreign defendants for violations of state and federal antitrust laws. Pursuant to the Judicial Panel on Multidistrict Litigation's April 20, 2007 transfer order consolidating pretrial proceedings for a number of actions and this Court's July 3, 2007 related case pretrial order # 1, the Clerk of this Court designated this case as related to MDL No. 1827, M 07-1827.

The amended complaint, filed on January 29, 2010, alleges a global price-fixing conspiracy by suppliers of liquid crystal display (LCD) panels [2] used in mobile wireless handsets, two-way radios, computer monitors, televisions and other electronic products. Amended Compl. PP 1-6. Plaintiff AT&T Mobility is a provider of mobile wireless telecommunications services and sells mobile handsets to its customers. *Id*. P 5. Plaintiff AT&T [3] is a provider of voice and data communications **[*7]** services, including traditional and long-distance services, internet access services, private enterprise network services, and other telecommunications services. *Id*. P 6. The amended complaint alleges that during the conspiracy period (1996-2006), AT&T Mobility purchased more than 300 million mobile wireless handsets for resale to its customers, and that "as a result of defendants' conspiracy to fix the price of LCD Panels, the prices of these handsets containing LCD Panels were also were artificially inflated." *Id*. P 5. In addition, plaintiffs allege that defendants' conspiracy raised the price of LCD panels incorporated into products such as desktop computers and notebook computers that AT&T Mobility and AT&T purchased for their own internal use between 1996 and 2006. *Id*. PP 5-6. Plaintiffs' claims are based on both their direct purchases of products from defendants, as well as indirect purchases through original equipment manufacturers (OEMs).

Plaintiffs' first claim for relief seeks treble damages and injunctive relief under *Section 1* of the Sherman Act, and *Sections 4* and *16* of the Clayton Act. Plaintiffs' second claim for relief seeks treble damages under California's Cartwright Act. "In the alternative" to the federal and Cartwright Act claims, plaintiffs' third claim for relief alleges claims under California's Unfair Competition law, as well as the antitrust, consumer protection, unfair trade and deceptive practices laws of twenty other states, the District of Columbia, and Puerto Rico. *Id*. P 190.

LEGAL STANDARD

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[1] Plaintiffs are AT&T Mobility LLC; AT&T Corp.; AT&T Services, Inc.; Bellsouth Telecommunications, Inc.; Pacific Bell Telephone Company; AT&T Operations, Inc.; AT&T Datacomm, Inc.; and Southwestern Bell Telephone Company.

[2] As discussed *infra*, the amended complaint defines "LCD panels" as including three different types of panels using three different technologies: thin film transistor (TFT) panels, color super-twist nematic (CSTN) panels, and monochrome super-twist **[*8]** nematic (MSTN) panels. *Id*. P 16.

[3] With the exception of AT&T Mobility, the amended complaint refers to all of the other plaintiffs collectively as "AT&T." *Id*. P 26.

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than **[*9]** a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See* *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* **[*10]** (citations and internal quotation marks omitted).

DISCUSSION

I. Contacts with states/due process

Defendants move to dismiss all of plaintiffs' state law claims on the ground that the complaint does not allege sufficient contacts between the respective states and plaintiffs' claims to satisfy Due Process. In particular, defendants argue that plaintiffs' failure to allege that they bought the products at issue in California, or any of the other states whose laws they seek to invoke, requires dismissal of the state law claims. Defendants rely on several cases in which courts have dismissed state antitrust claims, either for lack of standing or on due process grounds, where the plaintiffs did not allege that they purchased price-fixed products in those states. *See, e.g.,* *Pecover v. Electronics Arts Inc., 633 F. Supp. 2d 976, 984 (N.D. Cal. 2009)* (dismissing antitrust claims under laws of 18 states in which plaintiffs did not purchase products); *In re Graphics Processing Units Antitrust Litig. ("GPU"), 527 F. Supp. 2d 1011, 1027-29 (N.D. Cal. 2007)* (dismissing for lack of standing antitrust claims under laws of states in which plaintiffs did not purchase products, and striking all references **[*11]** to a nationwide class under California law because extraterritorial application of California law would violate due process). Defendants also argue that plaintiffs do not explain why or under what circumstances the Court would apply, "in the alternative" to California law, the laws of the numerous other states to any of the claims alleged in the amended complaint.

To decide whether the application of a particular State's law comports with the *Due Process Clause*, the Court must examine "the contacts of the State, whose law [is to be] applied, with the parties *and* with the occurrence or transaction giving rise to the litigation." *Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)* (emphasis added); *see also* *Phillips Petroleum v. Shutts, 472 U.S. 797, 821-22, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* (Due Process requires a "significant contact or significant aggregation of contacts" between the plaintiff's claims and the state at issue). In a price-fixing case, the relevant "occurrence or transaction" is the plaintiff's purchase of an allegedly price-fixed good. *See* *GPU, 527 F. Supp. 2d at 1028-29*.

With regard to California, plaintiffs contend that the application of California law comports with Due Process because defendants **[*12]** did business in California, certain defendants maintained offices and/or sales agents in California, and because one of the AT&T plaintiffs is headquartered in California. However, these allegations do not provide a link between plaintiffs' claims that they purchased price-fixed products and California. Plaintiffs also rely on various defendants' plea agreements, which state that "acts in furtherance of this conspiracy were carried out in the Northern District of California." The plea agreements state that the "acts in furtherance" of the conspiracy were sales of TFT-LCD panels and products to customers within the Northern District. *See, e.g.*, Plea Agreement at 4, *United States v. LG Display Co*., (Docket No. 14 in CR 08-803). However, the fact that some defendants have admitted to selling price-fixed goods to customers in this District does not establish the requisite connection with California because those plea agreements do not state, nor have plaintiffs alleged, that any defendants sold products to any of the plaintiffs in California.

In addition, plaintiffs argue that there is a sufficient nexus between their claims and all of the various state laws because plaintiffs conduct a **[*13]** substantial amount of business in each of the states. Again, however, the fact that plaintiffs have a presence in the various states does not establish a link between plaintiffs' antitrust claims and the States. Plaintiffs also argue that they expect that defendants will assert, as a defense under the various state laws, that plaintiffs passed-on the alleged overcharges when AT&T sold the finished products to end consumers. Plaintiffs do not cite any authority for the proposition that Due Process can be satisfied by on the location of a plaintiff's resale of a product.

The Court agrees that in order to invoke the various state laws at issue, plaintiffs must be able to allege that "the occurrence or transaction giving rise to the litigation" -- plaintiffs' purchases of allegedly price-fixed goods -- occurred in the various states. *Allstate Ins. Co., 449 U.S. at 308*. The Court GRANTS defendants' motion to dismiss all of the state law claims and GRANTS plaintiffs leave to amend the complaint to allege each plaintiffs' contacts with each State -- here, purchases of price-fixed goods -- in order to satisfy Due Process. Because Due Process requires the court to apply "an individualized choice **[*14]** of law analysis to each plaintiff's claims," *Georgine v. Amchem Prods.., 83 F.3d 610, 627 (3d Cir. 1996)*, the amended complaint shall contain plaintiff-specific allegations. In addition, if plaintiffs decide to plead claims "in the alternative" in the amended complaint, plaintiffs shall explain under what circumstances plaintiffs would pursue the alternative claims. [4]

II. Allegations regarding non-TFT technology

The amended complaint alleges that the conspiracy had the effect of "raising, fixing, maintaining, **[*15]** and/or stabilizing the prices of" LCD panels that utilized three different technologies: TFT panels, color super-twist nematic ("CSTN") panels, and monochrome super-twist nematic ("MSTN") panels. Compl. PP 16, 154. The amended complaint's factual allegations regarding a price-fixing conspiracy all relate to TFT-LCD panels, and there are no allegations specifically regarding price-fixing STN-LCD panels.

Defendants contend that plaintiffs have not alleged any facts to support their assertion that the alleged conspiracy encompassed LCD panels using CSTN or MSTN technology. These two super-twist nematic panel technologies (also referred to as "STN" or "passive matrix") are older technologies with slower response times than TFT-LCD panels (referred to as "active matrix"). Defendants contend that plaintiffs do not support their broader conspiracy claims with any factual allegations that are separately and specifically directed to STN panels. Defendants also note that neither the class cases nor the DOJ's investigation into the LCD industry have alleged any price-fixing conspiracy related to STN LCD panels.

Plaintiffs respond that the complaint satisfies *Twombly* because in light of the admitted **[*16]** conspiracy to fix the price of TFT-LCD panels, it is plausible that defendants also conspired to fix the prices of STN-LCD panels because these panels are close substitutes for TFT-LCD panels. Plaintiffs have also cited information, not contained in the complaint, in support of their assertion that STN-LCD panels are close substitutes for TFT-LCD panels. *See* Opposition at 10:7-17; Murray Decl. Ex. 7. Plaintiffs rely on cases in which courts have held that an admitted

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[4] Relying on this Court's earlier decision in the MDL class actions, defendants have also separately moved to dismiss plaintiffs' indirect purchaser claims under Puerto Rico's antitrust statute. In the MDL, the Court held that indirect purchasers do not have standing under Puerto Rico's antitrust statute because that statute is to be construed in harmony with federal ***antitrust law***, and there has been no repeal of *Illinois Brick* in Puerto Rico. Plaintiffs' opposition concedes that dismissal of their Puerto Rico indirect purchaser claims is appropriate. Accordingly, the Court GRANTS defendants' motion to dismiss plaintiffs' indirect purchaser claims under the Puerto Rico antitrust statute.

conspiracy to fix the price of one product makes plausible the allegation that the same defendants also conspired to fix the product of a related product. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002)*; *In re SRAM Antitrust Litig., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008)*; *In re Chocolate Confectionary Antitrust Litig. 602 F. Supp. 2d 538, 576-77 (M.D. Pa. 2009)*. However, as defendants note, in these cases there were specific factual allegations to support the conspiracy claims with respect to the specific products or markets at issue, in addition to allegations concerning guilty pleas with respect to the other products or markets. For example, in *SRAM* the complaint contained **[*17]** allegations about the susceptibility of the SRAM market to collusion, as well as specific communications between the defendants about the price and demand for *SRAM. 580 F. Supp. 2d at 902*. Judge Wilken held that the plaintiffs could rely on the guilty pleas entered by numerous defendants in the DRAM litigation because "the same actors associated with certain Defendants were responsible for marketing both SRAM and DRAM." *Id. at 903*. However, Judge Wilken also noted that "[a]lthough the allegations regarding the DRAM guilty pleas are not sufficient to support Plaintiffs' claims standing on their own, they do support an inference of a conspiracy in the SRAM industry." *Id.; see also In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d at 661* (reversing summary judgment in favor of defendants where plaintiffs adduced evidence of agreement to fix prices of high fructose corn syrup, as well as admission by one defendant that it fixed prices on two related products during overlapping time period); *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d at 551-52, 557* (allegations of price-fixing in Canadian chocolate market supported allegations of price-fixing in U.S. chocolate **[*18]** market where plaintiffs alleged specific anticompetitive conduct in U.S. as well as integration of the two markets).

"To state a claim under *Section 1* of the Sherman Act, . . . claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which if true, will prove" a conspiracy. *Kendall v. VISA U.S.A. Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*. Here, the amended complaint does not contain any specific factual allegations that defendants conspired to fix prices of STN-LCD panels, and the Court cannot infer the existence of such an expanded conspiracy based solely on allegations of price-fixing in the TFT-LCD market. The Court GRANTS defendants' motion to dismiss and GRANTS plaintiffs leave to amend. [5]

CONCLUSION

For the foregoing reasons, the **[*19]** Court hereby GRANTS defendants' joint motion to dismiss and GRANTS plaintiffs leave to amend the complaint. (Docket No. 35 in C 09-4997 SI, and Docket No. 1558 in M 07-1827 SI). The amended complaint shall be filed no later than **July 23, 2010**.

IT IS SO ORDERED.

Dated: June 28, 2010

/s/ Susan Illston

SUSAN ILLSTON

United States District Judge

End of Document

[5] Plaintiffs' opposition asserts that newly discovered evidence "confirms the validity of their STN allegations." Opposition at 12:20. Defendants dispute the significance of the deposition and email excerpts cited by plaintiffs in their opposition. The Court makes no finding at this time about whether the evidence described in plaintiffs' opposition would support allegations of a conspiracy to fix prices of STN-LCD panels.

In re TFT-LCD (Flat Panel) Antitrust Litig.

United States District Court for the Northern District of California

June 28, 2010, Decided; June 28, 2010, Filed

No. M 07-1827 SI; MDL. No. 1827; No. C 09-5840 SI

Reporter

2010 U.S. Dist. LEXIS 65037 *; 2010-1 Trade Cas. (CCH) P77,086

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION; This Order Relates To: MOTOROLA, INC, Plaintiff, v. AU OPTRONICS CORPORATION, et al., Defendants.

Subsequent History: Motion granted by, Dismissed without prejudice by *Nokia Corp. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.), 2010 U.S. Dist. LEXIS 64930 (N.D. Cal., June 29, 2010)*

Motion granted by, in part *In re TFT-LCD (Flat Panel) Antitrust Litig., 2012 U.S. Dist. LEXIS 191258 (N.D. Cal., Feb. 15, 2012)*

Prior History: *In re TFT-LCD (Flat Panel) Antitrust Litig., 2010 U.S. Dist. LEXIS 65023 (N.D. Cal., June 28, 2010)*

Core Terms

import, panels, conspiracy, price-fixing, allegations, defendants', commerce, domestic, products, prices, Sherman Act, antitrust, purchases, abroad, motion to dismiss, effects, amended complaint, global, leave to amend, due process, give rise, anticompetitive, reasonably foreseeable, antitrust claim, injuries, argues, courts, pleas, factual allegations, proximately cause

Counsel: **[*1]** For Fern M Smith, Special Master: Fern M. Smith, JAMS, San Francisco, CA.

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For State of California, Amicus: Emilio Eugene Varanini, IV, State Attorney General's Office, San Francisco, CA.

For United States Antitrust Division, Department of Justice, Intervenor: Alexandra Jill Shepard, U.S. Department of Justice, Antitrust Division, San Francisco, CA; David J. Ward, U.S. Department of Justice, Antritrust Divsion, San Francisco Field Office, San Francisco, CA; Heather S. Tewksbury, United States Department of Justice, Antitrust Division, San Francisco, CA; Michael L. Scott, Antitrust Division, San Francisco, CA; Niall Edmund Lynch, U.S. Department of Justice, Antitrust Division, San Francisco, CA.

Judges: SUSAN ILLSTON, United States District Judge.

Opinion by: SUSAN ILLSTON

Opinion

ORDER GRANTING DEFENDANTS' JOINT MOTION TO DISMISS

On June 23, 2010, the Court held a hearing on defendants' motion to dismiss the complaint. For the reasons set forth below, the Court GRANTS defendants' joint motion to dismiss and GRANTS plaintiff leave to amend the complaint.

BACKGROUND

On October **[*6]** 20, 2009, plaintiff Motorola, Inc. ("Motorola") filed an individual complaint in the Northern District of Illinois against numerous domestic and foreign defendants for violations of state and federal antitrust laws. Pursuant to the Judicial Panel on Multidistrict Litigation's April 20, 2007 transfer order consolidating pretrial proceedings for a number of actions and this Court's July 3, 2007 related case pretrial order # 1, the case was designated as related to MDL No. 1827, M 07-1827, and transferred to this Court.

The amended complaint, filed on January 29, 2010, alleges a global price-fixing conspiracy by suppliers of liquid crystal display (LCD) panels. Motorola is a provider of mobile wireless telecommunications services and sells mobile wireless devices and two-way radios; both of these products incorporate LCD panels. Amended Compl. PP 23, 25. Motorola brings suit based on its own purchases of LCD panels and products, as well as purchases made abroad by a number of Motorola subsidiaries that have assigned their claims to Motorola. *Id*. P 24. [1] Motorola brings this action to recover its damages for purchases made during the conspiracy period (1996-2006). The amended complaint **[*7]** alleges that "[D]efendants' and their co-conspirators' conspiracy raised the price of LCD Panels above the price that would have prevailed in a competitive market." *Id*. P 6. Motorola alleges that during the conspiracy period, hundreds of millions of its products contained LCD panels. The complaint notes that a number of defendants have pled guilty to participating in an LCD panel price-fixing conspiracy, and that in their pleas, defendants Sharp and Epson specifically identified Motorola as a customer that was overcharged for LCD panels. *Id*. PP 4-5.

The amended complaint also alleges that during the conspiracy period,

> [T]he domestic U.S. and worldwide purchasing process at Motorola was managed and overseen by a supply chain organization, including procurement and manufacturing teams, based in Motorola's northern Illinois operations. From its Illinois headquarters, Motorola directed and **[*8]** approved the prices and quantities of LCD Panels purchased throughout the world and incorporated into Motorola mobile wireless devices and two-way radios. These procurement and manufacturing teams based in the United States were also responsible for all phases of procurement of LCD panels, including at various times, evaluating, qualifying, and selecting LCD Panel suppliers, drafting requests for quotes for LCD Panels, negotiating agreements with LCD Panel suppliers, coordinating purchases of LCD Panels to meet worldwide production goals, overseeing quality control, and managing stocks of LCD Panels.

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[1] The Motorola subsidiaries that have assigned their claims to Motorola Inc. are Motorola Asia Limited, Motorola (China) Investment Limited, Hangzhou Motorola Cellular Equipment Co. Ltd., Motorola (China) Electronics Limited, Motorola Electronics Pte. Ltd., and Motorola Trading Center Pte. Ltd. *Id*. PP, 24.

Id. P 25. "Motorola also negotiated LCD Panel prices with Defendants on behalf of its ODMs and EMS [2] providers who assembled mobile devices for delivery to Motorola. The price of those LCD Panels was likewise artificially-elevated, causing damage to Motorola." *Id*. P 26.

Motorola's first claim for relief seeks treble damages and injunctive relief under *Section 1* of the Sherman Act, and *Sections 4* **[*9]** and *16* of the Clayton Act. The second claim for relief seeks treble damages under California's Cartwright Act. "In the alternative," to the federal and Cartwright Act claims, the third claim for relief alleges violations of the Illinois Antitrust Act. *Id*. P 179. "In the further alternative" to the first three claims, the fourth claim for relief alleges claims under California's Unfair Competition Law, as well as the antitrust, consumer protection, unfair trade and deceptive practices laws of thirteen other states, the District of Columbia, and Puerto Rico. *Id*. P 187.

LEGAL STANDARDS

I. *Federal Rule of Civil Procedure 12(b)(1)*

Federal Rule of Civil Procedure 12(b)(1) allows a party to challenge a federal court's jurisdiction over the subject matter of the complaint. As the party invoking the jurisdiction of the federal court, the plaintiff bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 376-78, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (citation omitted). A complaint will be dismissed if, looking at the complaint as a whole, it appears to lack federal jurisdiction either "facially" **[*10]** or "factually." *Thornhill Publishing Co., Inc. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979)*. When the complaint is challenged for lack of subject matter jurisdiction on its face, all material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Indus. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*.

II. *Federal Rule of Civil Procedure 12(b)(6)*

Under *Federal Rule of Civil Procedure 12(b)(6)*, a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a *Rule 12(b)(6)* motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly, 550 U.S. at 544, 555*.

In deciding whether **[*11]** the plaintiff has stated a claim upon which relief can be granted, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)*.

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (citations and internal quotation marks omitted).

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[2] The amended complaint states that "ODM" means any original design manufacturer of an LCD Product, and "EMS provider" means any electronics manufacturing services provider of an LCD Product. *Id*. PP 21-22.

DISCUSSION

I. Foreign Trade Antitrust Improvements Act (FTAIA)

Defendants contend that the Court lacks subject matter jurisdiction over Motorola's claims to the extent they are based on foreign purchases of LCD panels and products. Motorola concedes that it cannot assert any claims **[*12]** based on the sale of LCD panels to Motorola subsidiaries abroad if the panels never entered the United States. What is in dispute is whether Motorola can seek to recover based on foreign-sold panels that were subsequently incorporated into Motorola products that Motorola and others -- but not defendants -- shipped to and sold in the United States.

The Foreign Trade Antitrust Improvements Act, *15 U.S.C. § 6a* ("FTAIA"), enacted in 1982, amends the Sherman Act and "excludes from [its] reach much anti-competitive conduct that causes only foreign injury." *F. Hoffman-LaRoche, Ltd. v. Empagran (Empagran I), 542 U.S. 155, 158 (2004)*. The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." *15 U.S.C. § 6a*. The FTAIA then "provides an exception to this general rule, making the Sherman Act applicable if foreign conduct '(1) has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (2) such effect gives rise to a [Sherman Act] claim.'" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 985 (9th Cir. 2008)* (quoting *Empagran* ***[*13]*** *I* and *15 U.S.C. § 6a*). This exception is known as the "domestic injury exception" of the FTAIA. *Id*. The Supreme Court has explained that the FTAIA,

> initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e*., it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, *and* (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e*., the "effect" must "giv[e] rise to a [Sherman Act] claim."

Empagran I, 542 U.S. at 162 (quoting *15 U.S.C. § 6a*, emphasis in original).

Empagran I involved vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. *Empagran I, 542 U.S. at 159*. The Supreme Court held that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim **[*14]** based on foreign harm." *Id*. "[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive injury has caused." *Id. at 165* (emphasis in original).

A. Imports

Motorola first asserts that the products at issue are "imports" that are not subject to the FTAIA. The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." *15 U.S.C. § 6a*. In other words, Sherman Act claims based on "imports" are not barred by the FTAIA. "The Foreign Trade Antitrust Improvements Act does not define the term' import,' but the term generally denotes a product (or perhaps a service) has been brought into the United States from abroad." *Turicentro, S.A. v. American Airlines Inc., 303 F.3d 293, 303 (3d Cir. 2002)*.

Motorola contends that the relevant inquiry to determine whether something is an "import" is not whether defendants directly imported price-fixed goods **[*15]** into the United States, but "whether Defendants' price-fixed goods were imported into the United States as they intended." Opposition at 12:15-16. Motorola primarily relies on

In re Air Cargo Shipping Services Antitrust Litigation, Case No. 06-cv-1775(JG) (VVP), 2008 U.S. Dist. LEXIS 107882, 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008) (Report and Recommendation). In that case, the plaintiffs alleged that domestic and foreign airlines conspired to price-fix airfreight shipping services. In analyzing whether the plaintiffs' price-fixing claims were permitted under the Sherman Act, the *Air Cargo* court first identified the relevant conduct. *2008 U.S. Dist. LEXIS 107882, [WL] at*12-13*. Noting that "'[t]he relevant inquiry is whether the conduct of the defendants -- not the plaintiffs -- involves import trade or commerce,'" the court found that the relevant conduct was "defendants' global conspiracy to fix the prices charged for the service of transporting air cargo from abroad into the United States." *2008 U.S. Dist. LEXIS 107882, [WL] at *13* (quoting *Kruman v. Christie's Intern. PLC, 284 F.3d 384, 395 (2d Cir. 2002))*. Second, the court concluded that the relevant conduct constituted "import commerce" because "the conspiracy alleged targeted the transportation of goods by airfreight, **[*16]** a primary vehicle of modern import commerce. . . . It follows that conduct directed at fixing the cost of airfreight necessarily affects the commerce in the goods transported by airfreight. The inseparable connection between airfreight and the commerce in imported goods is sufficient to draw the conclusion that the defendants' price-fixing conduct targeting such a primary channel of import trade and commerce 'involves import trade or import commerce' within the meaning of the FTAIA." *2008 U.S. Dist. LEXIS 107882, [WL] at *14*.

Here, the relevant conduct is defendants' alleged price-fixing of LCD panels, which were sold both in the United States and abroad. Unlike *Air Cargo*, however, there is no "inseparable connection" between foreign-purchased LCD panels or products containing LCD panels, and import commerce. A number of courts have held that the FTAIA's "import commerce" exclusion applies only where the defendants are directly involved in the importation of goods or services into the United States. In *Turicentro*, foreign travel agent plaintiffs sued an airline trade association and United States airline members, alleging that the defendants conspired to lower their sales commissions. The plaintiffs argued that the **[*17]** defendants "imported" their travel agent services for the purposes of selling airline tickets. *Turicentro, 303 F.3d at 303*. The Third Circuit held that the defendants' conduct did not involve "import commerce" because "Defendants did not directly bring items or services into the United States." *Id*.

The court reasoned:

> The alleged conspiracy in this case was directed at commission rates paid to foreign travel agents based outside the United States. That some of the services plaintiffs offered were purchased by United States customers is not dispositive under this inquiry. Defendants were allegedly involved only in unlawfully setting extra-territorial commission rates. Their actions did not directly increase or reduce imports into the United States.

Id.

Similarly, in *Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corporation, 702 F. Supp. 2d 320, No. CIV. 05-4376 (GEB), 2010 U.S. Dist. LEXIS 35243, 2010 WL 1324918 (D.N.J. Apr. 1, 2010)*, a third party intermediary purchased the defendants' goods overseas, resold them to the plaintiffs in the United States, and assigned its rights to the plaintiffs. *2010 U.S. Dist. LEXIS 35243, [WL] at *27-28*. In analyzing the plaintiffs' argument that the goods were "imports," the **[*18]** court stated that "the term 'importer' employed in the introductory language of the FTAIA would be best read as referring to the 'main force' behind the physical movement of goods to the United States; such inquiry is, by definition, unamenable to any hard-and-fast rule and must be resolved on a case-by-case basis." *2010 U.S. Dist. LEXIS 35243, [WL] at *33*. The court held that if the defendants were not the importers, and the actual importers were various intermediaries and end-consumers, the goods were not "imports" under the FTAIA. *2010 U.S. Dist. LEXIS 35243, [WL] at *36*. [3]

"The dispositive inquiry is whether the conduct of the defendants, not plaintiffs, involves 'import trade or commerce.'" *Turicentro, 303 F.3d at 303*. Motorola does not allege that the foreign-purchased products were imported into the United States by defendants; to the contrary, the complaint alleges that the foreign-purchased

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[3] *In Air Cargo*, there was a factual question as to whether some of the defendants were the actual importers of the goods, and thus the court granted the plaintiffs leave to amend the complaint. *2010 U.S. Dist. LEXIS 35243, [WL] at *42*.

products were brought to the United States by Motorola affiliates. Although Motorola argues that defendants "intended" for the foreign-purchased **[*19]** LCD panels and products to be brought to the United States, Motorola has not cited any authority adopting such an expansive definition of "import." In the Court's view, a definition that depends on intent would be difficult to apply. Moreover, given the global nature of the economy, defining "imports" as goods that foreign companies "intended" to ultimately make their way into the United States for resale would potentially sweep in much conduct excluded by the FTAIA.

Motorola also relies on the definition of "import trade" contained in the Tariff Act of 1930. That statute defines "import trade" as including "[t]he importation into the United States, the sale for importation [into the United States], or the sale within the United States after importation" of infringing products. *19 U.S.C. § 1337(a)(1)(B)-(E)*. In addition, Motorola argues that various defendants in this case have embraced abroad definition of "importation" in civil patent lawsuits brought in federal court. However, neither the Tariff Act's definition of "import trade" nor positions that defendants have taken in unrelated litigation arising under different statutes is relevant to evaluating whether a good is an "import" **[*20]** under the FTAIA.

Motorola has not made factual allegations sufficient to claim that its foreign purchases represent "imports" excepted from the FTAIA.

B. Domestic injury exception

Alternatively, Motorola argues that its foreign purchases fall under the "domestic injury" exception to the FTAIA. Under this exception, foreign conduct is actionable if it "(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.'" *Empagran I, 542 U.S. at 159* (quoting *§ 6a*) (alteration in *Empagran I*). In situations like this one, where a global price-fixing conspiracy is alleged to have affected prices both in the United States and abroad, courts have held that "the 'gives rise to' language of *§ 6a* . . . requires a plaintiff to establish a direct or proximate causal relationship" between the alleged anticompetitive effects in the United States and the plaintiff's alleged foreign injury. *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, 546 F.3d 981, 987-88 (9th Cir. 2008)* (relying on *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd. (Empagran II), 417 F.3d 1267, 1271 n.5, 368 U.S. App. D.C. 18 (D.C. Cir. 2005))*.

Motorola argues that defendants' **[*21]** conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce because defendants sold millions of price-fixed LCD panels to Motorola, knowing and intending that a significant portion of those panels would be incorporated into Motorola mobile wireless devices destined for import into, and sale and use in, the United States. Motorola relies on allegations such as the following: "The activities of defendants and their co-conspirators, as described herein, involved U.S. import trade or commerce and/or were within the flow of, were intended to, and did have a direct, substantial and reasonably foreseeable effect on U.S. domestic and import trade or commerce. In particular, defendants' and their co-conspirators' conspiracy directly and substantially affected the price of LCD Panels and products which contained LCD Panels ('LCD Products') purchased in the United States. These effects give rise to Motorola's antitrust claims." Amended Compl. P 15.

While defendants dispute whether Motorola's allegations meet the first prong of the "domestic injury" exception, they also argue that the Court need not even address that question because Motorola has failed to plead **[*22]** facts sufficient to show, under the second prong of the exception, that any such domestic effects "gave rise to" Motorola's Sherman Act claims based on foreign purchases. The Ninth Circuit has held that the "gives rise to" language of *§ 6a of the FTAIA* requires a plaintiff to establish proximate cause between the alleged anticompetitive effects in the United States and the plaintiff's foreign injury, where foreign purchases are alleged. *DRAM, 546 F.3d at 987-88*. In *DRAM*, a British computer manufacturer, Centerprise, sued American and foreign manufacturers and sellers of DRAM. Centerprise claimed that the domestic effect of the defendants' anti-competitive behavior -- higher DRAM prices in the United States -- gave rise to its foreign injury of having to pay higher DRAM prices abroad because the defendants could not have raised prices worldwide and maintained their global price-fixing arrangement without fixing the DRAM prices in the United States. *Id. at 984*. The district court held that Centerprise had sufficiently alleged that the defendants' conduct had a "direct, substantial and reasonably foreseeable" effect on U.S. domestic commerce, but had not sufficiently alleged that such **[*23]** domestic effect gave rise to Centerprise's foreign injury. The Ninth Circuit affirmed:

> The defendants' conspiracy may have fixed prices in the United States and abroad, and maintaining higher U.S. prices might have been necessary to sustain higher prices globally, but Centerprise has not shown that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad. Other actors or forces may have affected the foreign prices. In particular, that the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad.

Id. at 988. The Ninth Circuit also held that a "direct correlation between prices does not establish a sufficient causal relationship." *Id. at 989-90* (citing *Empagran II at 1271 n.5*, and *In re Monosodium Glutamate Antitrust Litig., 477 F.3d 535, 539-40 (8th Cir. 2007)*, for proposition that proximate cause is not met by allegations that "there was a single global price kept in equipoise by the maintenance of super-competitive prices in the U.S. market").

Defendants argue that Motorola has not alleged how any domestic **[*24]** effects caused its foreign injuries. Defendants also argue that the alleged effects on import commerce could not have proximately caused the alleged foreign injuries as a matter of law. Defendants contend that Motorola's foreign injuries occurred when the panels were purchased abroad, before Motorola imported those panels (as contained in finished products) into the United States. Defendants argue that no foreign injury could be caused by something that occurred after that injury was allegedly suffered. *See In re Hydrogen Peroxide Antitrust Litig., F. Supp. 2d , Civil Action No. 05-666, MDL Docket No. 1682, 702 F. Supp. 2d 548, 2010 U.S. Dist. LEXIS 32220, 2010 WL 1388183, at*3 (E.D.Pa.Mar. 31, 2010)* (the "FTAIA imposes a two-step dance, first with one foot (the domestic effects) and then with the other (the foreign antitrust injury). We hold that under the FTAIA the domestic effects must occur first and then proximately cause the foreign antitrust claim.").

The Court agrees with defendants that the amended complaint does not allege any facts showing how Motorola's foreign injuries were proximately caused by any domestic effects of defendants' conduct. [4] Similar to the complaint in DRAM, Motorola's complaint generally alleges **[*25]** that defendants engaged in a "global conspiracy" that impacted "global prices" and that Motorola's foreign affiliates "suffered injury as a result of defendants' antitrust violations." Amended Compl. PP 2, 24, 27. Under *DRAM*, these allegations fall far short of alleging that the domestic effect of defendants' conduct gave rise to Motorola's foreign injuries. Motorola also relies on defendants' criminal pleas; however, these criminal pleas, which admit to criminal antitrust violations in the Northern District, have no bearing on whether the domestic effects of defendants' conduct *caused* Motorola's foreign injuries. Accordingly, the Court GRANTS defendants' motion to dismiss Motorola's foreign injury claims, with leave to amend. [5]

II. Contacts with states/due process

Defendants move to dismiss all of Motorola's state law claims on the ground that the complaint does not allege sufficient contacts between the respective states and Motorola's claims to satisfy Due Process. In particular, defendants argue that Motorola's failure to allege that it bought the products at issue in California, or in any of the other states whose laws it seeks to invoke, requires dismissal of the state law claims. Defendants rely on several

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[4] The Court finds it unnecessary to resolve whether Motorola has sufficiently alleged a domestic effect. In addition, in light of the dismissal of the federal claims based on foreign-sold products, the Court does not address the parties' arguments about whether Motorola's claims based on foreign-sold panels contained in finished products that it purchased from intermediary non-party manufacturers should be dismissed because they are barred by the indirect purchaser **[*26]** standing doctrine.

[5] In light of the Court's dismissal of the federal claims based on foreign purchases, as well as the dismissal of the state claims for failure to plead contacts sufficient to meet Due Process, the Court does not separately address defendants' arguments that the Court lacks jurisdiction over Motorola's foreign injury claims under state law.

cases in which courts have dismissed state antitrust claims, either for lack of standing or on due process grounds, where the plaintiffs did not allege that they purchased price-fixed products in those states. *See, e.g., Pecover v. Electronics Arts Inc., 633 F. Supp. 2d 976, 984 (N.D. Cal. 2009)* (dismissing antitrust claims under laws of 18 states **[*27]** in which plaintiffs did not purchase products); *In re Graphics Processing Units Antitrust Litig. ("GPU"), 527 F. Supp. 2d 1011, 1027-29 (N.D. Cal. 2007)* (dismissing for lack of standing antitrust claims under laws of states in which plaintiffs did not purchase products, and striking all references to a nationwide class under California law because extraterritorial application of California law would violate due process). Defendants also argue that Motorola does not explain why or under what circumstances the Court would apply, "in the alternative" to federal law and the Cartwright Act, the Illinois statute, or "in the further alternative," the laws of the numerous other states.

To decide whether the application of a particular State's law comports with the *Due Process Clause*, the Court must examine "the contacts of the State, whose law [is to be] applied, with the parties and with the occurrence or transaction giving rise to the litigation." *Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)* (emphasis added); *see also Phillips Petroleum v. Shutts, 472 U.S. 797, 821-22, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)* (Due Process requires a "significant contact or significant aggregation of contacts" between the plaintiff's **[*28]** claims and the state at issue). In a price-fixing case, the relevant "occurrence or transaction" is the plaintiff's purchase of an allegedly price-fixed good. *See GPU, 527 F. Supp. 2d at 1028-29*.

With regard to California, Motorola contends [6] that the application of California law comports with Due Process because defendants did business in California, and certain defendants maintained offices and/or sales agents in California. However, these allegations do not provide a link between Motorola's claims that it purchased price-fixed products and California. Motorola also relies on various defendants' plea agreements, which state that "acts in furtherance of this conspiracy were carried out in the Northern District of California." The plea agreements state that the "acts in furtherance" of the conspiracy were sales of TFT-LCD panels and products to customers within the Northern District. *See, e.g*., Plea Agreement at 4, *United States v. LG Display Co*., (Docket No. 14 in CR 08-803). However, the fact that some defendants have admitted to selling price-fixed goods to customers in this District does not establish the requisite connection with California because those plea agreements do not **[*29]** state, nor has Motorola alleged, that any defendants sold products to *Motorola* in California.

In addition, Motorola argues that there is a sufficient nexus between its claims and all of the various state laws because it conducts a substantial amount of business in each of the states. Again, however, the fact that Motorola has a presence in the various states does not establish a link between Motorola's antitrust claims and the States. Motorola also argues that it expects that defendants will assert, as a defense under the various state laws, that Motorola passed-on the alleged overcharges when it sold the finished products to end consumers. Motorola does not cite any authority for the proposition that Due Process can be satisfied by the location of **[*30]** a plaintiff's resale of a product.

The Court agrees that in order to invoke the various state laws at issue, Motorola must be able to allege that" the occurrence or transaction giving rise to the litigation" -- which is Motorola's purchase of allegedly price-fixed goods -- occurred in the various states. *Allstate Ins. Co., 449 U.S. at 308*. The Court GRANTS defendants' motion to dismiss all of the state law claims and GRANTS Motorola leave to amend the complaint to allege contacts with each State -- here, purchases of price-fixed goods -- in order to satisfy Due Process. In addition, if Motorola decides to plead claims "in the alternative" or "further alternative" in the amended complaint, Motorola shall explain under what circumstances Motorola would pursue the alternative claims.

III. Allegations regarding non-TFT technology

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[6] Motorola incorporates by reference the arguments made by AT&T in opposition to defendants' motion to dismiss AT&T's state law claims on the same Due Process grounds. Accordingly, this order discusses AT&T's arguments as if they were advanced by Motorola in the first instance. However, as defendants' note, some of AT&T's arguments -- such as the fact that one of the AT&T plaintiffs is headquartered in California -- do not apply to Motorola.

The amended complaint alleges that the conspiracy had the effect of "raising, fixing, maintaining, and/or stabilizing the prices of" LCD panels that utilized three different technologies: TFT panels, color super-twist nematic ("CSTN") panels, and monochrome super-twist nematic ("MSTN") panels. Amended Compl. PP 19. The amended complaint's factual allegations regarding **[*31]** a price-fixing conspiracy all relate to TFT-LCD panels, and there are no allegations specifically regarding price-fixing CSTN-LCD or MSTN-LCD panels.

Defendants contend that Motorola has not alleged any facts to support its assertion that the alleged conspiracy encompassed LCD panels using CSTN or MSTN technology. These two super-twist nematic panel technologies (also referred to as "STN" or "passive matrix") are older technologies with slower response times than TFT-LCD panels (referred to as "active matrix"). Defendants contend that Motorola does not support its broader conspiracy claims with any factual allegations that are separately and specifically directed to STN panels. Defendants also note that neither the class cases nor the DOJ's investigation into the LCD industry have alleged any price-fixing conspiracy related to STN LCD panels.

In response, Motorola adopts the entire argument set forth by AT&T in its opposition to defendants' joint motion to dismiss the same allegations of a broader conspiracy in AT&T's amended complaint. Opposition at 22:6-9. As such, Motorola responds that the complaint satisfies *Twombly* because in light of the admitted conspiracy to fix the price of **[*32]** TFT-LCD panels, it is plausible that defendants also conspired to fix the prices of STN-LCD panels because these panels are close substitutes for TFT-LCD panels. Motorola also cites information, not contained in the complaint, in support of its assertion that STN-LCD panels are close substitutes for TFT-LCD panels. *See* Docket No. 51 in 09-4997 (Murray Decl. Ex. 7). In reviewing a motion to dismiss, however, the Court cannot consider information that is not contained in the complaint. *See* *Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993)*.

Motorola also relies on cases in which courts have held that an admitted conspiracy to fix the price of one product makes plausible the allegation that the same defendants also conspired to fix the price of a related product. *See, e.g.,* *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002)*; *In re SRAM Antitrust Litig., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008)*; *In re Chocolate Confectionary Antitrust Litig. 602 F. Supp. 2d 538, 576-77 (M.D. Pa. 2009)*. However, as defendants note, in these cases there were specific factual allegations to support the conspiracy claims with respect to the specific products or **[*33]** markets at issue, in addition to allegations concerning guilty pleas with respect to the other products or markets. For example, in *SRAM* the complaint contained allegations about the susceptibility of the SRAM market to collusion, as well as specific communications between the defendants about the price and demand for *SRAM. 580 F. Supp. 2d at 902*. Judge Wilken held that the plaintiffs could rely on the guilty pleas entered by numerous defendants in the DRAM litigation because "the same actors associated with certain Defendants were responsible for marketing both SRAM and DRAM." *Id. at 903*. However, Judge Wilken also noted that "[a]lthough the allegations regarding the DRAM guilty pleas are not sufficient to support Plaintiffs' claims standing on their own, they do support an inference of a conspiracy in the SRAM industry." *Id.; see also* *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d at 661* (reversing summary judgment in favor of defendants where plaintiffs adduced evidence of agreement to fix prices of high fructose corn syrup, as well as admission by one defendant that it fixed prices on two related products during overlapping time period); *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d at 551-52, 557* **[*34]** (allegations of price-fixing in Canadian chocolate market supported allegations of price-fixing in U.S. chocolate market where plaintiffs alleged specific anticompetitive conduct in U.S. as well as integration of the two markets).

"To state a claim under *Section 1* of the Sherman Act, . . . claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which if true, will prove" a conspiracy. *Kendall v. VISA U.S.A. Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*. Here, the amended complaint does not contain any specific factual allegations that defendants conspired to fix prices of STN-LCD panels, and the Court cannot infer the existence of such an expanded conspiracy based solely on allegations of price-fixing in the TFT-LCD market. The Court GRANTS defendants' motion to dismiss and GRANTS plaintiff leave to amend.

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS defendants' joint motion to dismiss and GRANTS Motorola leave to amend the complaint. (Docket No. 26 in C 09-5840 SI, and Docket No. 1560 in M 07-1827 SI). The amended complaint shall be filed no later than **July 23, 2010**.

IT IS SO ORDERED.

Dated: June 28, 2010

/s/ Susan Illston

SUSAN ILLSTON

United **[*35]** States District Judge

LexisNexis

Fox v. Good Samaritan L.P.

United States District Court for the Northern District of California, San Jose Division

June 30, 2010, Decided; June 30, 2010, Filed

No. C 04-0874 RS

Reporter

2010 U.S. Dist. LEXIS 70447 *; 2010 WL 2635663

RICHARD B. FOX, Plaintiff, v. GOOD SAMARITAN L.P., et al, Defendants.

Prior History: *Fox v. Good Samaritan L.P., 801 F. Supp. 2d 883, 2010 U.S. Dist. LEXIS 29768 (N.D. Cal., 2010)*

Core Terms

costs, immunity, attorney's fees, defendants', frivolous, motion to vacate, cost bill, antitrust

Counsel: **[*1]** For M.D. Richard B. Fox, Plaintiff: James A. Hennefer, LEAD ATTORNEY, Hennefer & Wood, San Francisco, CA; Joseph H. C. Wood, Attorney at Law, San Francisco, CA.

For Good Samaritan Hospital, Defendant: Ross E Campbell, LEAD ATTORNEY, Bingham McCutchen LLP, East Palo Alto, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, Hardy Erich Brown and Wilson, A Professional Law Corporation, Sacramento, CA; Eric Peter Schoonveld, Hall Prangle & Schoonvled, LLC, Chicago, IL; Jane Allison Stevens, East Palo Alto, CA; Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA.

For Good Samaritan Hospital Medical Staff, a California unincorporated association, Defendant: David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, Sacramento, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Amy E Craig, PRO HAC VICE, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL; Eric Peter Schoonveld, Hall Prangle & Schoonvled, LLC, Chicago, IL; Jane Allison Stevens, East Palo Alto, CA; Mary Kelly Persyn, PRO HAC VICE, Ropes & Gray, San Francisco, CA.

For Good Samaritan Hospital LP, a Delaware Limited Partnership, Defendant: **[*2]** David C. Hall, LEAD ATTORNEY, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, Sacramento, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Amy E Craig, PRO HAC VICE, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; Mary Kelly Persyn, PRO HAC VICE, Ropes & Gray, San Francisco, CA.

For Samaritan, LLC, a Delaware limited liability company, Defendant: David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, Sacramento, CA; Amy E Craig, PRO HAC VICE, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; Mary Kelly Persyn, PRO HAC VICE, Ropes & Gray, San Francisco, CA.

For HCA, Inc, a Delaware corporation, Defendant: David C. Hall, LEAD ATTORNEY, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, Sacramento, CA; Michael Li-Ming Wong, Thad Alan Davis, LEAD ATTORNEYS, Ropes & Gray LLP, San Francisco, CA; Adam C Kiehne, Shannon Martin Finkelstein & Alvarado, P.C., Houston, TX; Alicia M. Matsuhima, Shannon Martin Finkelstein & Alvarado, Houston, TX; Carlos A. Mattioli, Elizabeth D. Alvarado, Houston, TX; George Albert Shannon, Jr., Megan Dean Richardson, Shannon Martin **[*3]** Finkelstein & Alvarado, PC, Houston, TX.

For William Piche, Defendant: David C. Hall, LEAD ATTORNEY, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, Sacramento, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA.

For M.D. Paul N Beaupre, Defendant: David Lee Perrault, LEAD ATTORNEY, Hardy Erich Brown and Wilson, Sacramento, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL.

For M.D. Arthur W Douville, M.D. Kenneth I Tan, Defendants: Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, Hardy Erich Brown and Wilson, Sacramento, CA.

For Mark S McConnell, Defendant: Michael A. Hurwitz, LEAD ATTORNEY, Law Offices of Michael A. Hurwitz, San Jose, CA; Michael Li-Ming Wong, LEAD ATTORNEY, Thad Alan Davis, Ropes & Gray LLP, San Francisco, CA; David C. Hall, Hall Prangle & Schoonveld, LLC, Chicago, IL; David Lee Perrault, Hardy Erich Brown and Wilson, Sacramento, CA.

Judges: RICHARD **[*4]** SEEBORG, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD SEEBORG

Opinion

ORDER RE POST-JUDGMENT MOTIONS

I. INTRODUCTION

After years of litigation, and on the eve of trial, defendants brought a motion contending, among other things, that they were immune from damages in this action by virtue of certain provisions of the Health Care Quality Improvement Act of 1986, *42 U.S.C. §§ 11101, et seq.* ("HCQIA"). The Court agreed and entered judgment in defendants' favor. Plaintiff now seeks to vacate that judgment under *Rule 59(e) of the Federal Rules of Civil Procedure*. Plaintiff has also filed a motion challenging defendants' cost bill. Defendants, in turn, move for an award of attorney fees under HCQIA.

For the reasons set out below, the motion to vacate and the motion for attorney fees will be denied. In the unusual circumstances of this case, costs will not be allowed.

II. DISCUSSION [1]

A. Motion to vacate

"*Rule 59(e)* permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have **[*5]** been raised prior to the entry of judgment.'" *Exxon Shipping Co. v. Baker, 554 U.S. 471, 128 S.Ct. 2605, 2617 n.5, 171 L. Ed. 2d 570 (2008)* (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 127-128 (2d ed.1995)). Despite plaintiff's valiant effort to characterize his motion as being based on deposition testimony taken after the underlying motion was briefed, the points he attempts to make are, at most, refinements of arguments he advanced previously and/or are based on case law and legislative history that he could have presented previously. Thus, the motion to vacate can and will be denied on the grounds that plaintiff has not made the threshold showing that the circumstances warrant reconsidering the decision already reached. [2]

[1] The factual background of this action has been recounted in multiple prior orders and is well known to the parties. It will not be repeated here.

[2] Defendant HCA, Inc. correctly points out that plaintiff did not challenge the additional independent basis on which it was granted summary judgment. Thus, there would be no basis to vacate the judgment as to HCA in any event.

The motion also fails on the merits. Plaintiff lays heavy emphasis on a footnote in *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)*. In *Pinhas,* the question was whether a doctor's antitrust claim needed to include averments showing a "factual **[*6]** nexus between the alleged boycott and interstate commerce" to support jurisdiction under the Sherman Act. *Id.* at 325. At no time was the Court asked to construe HCQIA or to decide its effect. The case had been dismissed at the pleading stage. *Id.*

In explaining its conclusion that federal jurisdiction existed, the Court observed that the peer review process is "congressionally regulated." *Id at 332*. It was in *that* context that the Court inserted footnote 12, which states in full:

> See Health Care Quality Improvement Act of 1986, 100 Stat. 3784, *42 U.S.C. § 11101 et seq.* The statute provides for immunity from antitrust, and other, actions if the peer-review process proceeds in accordance with *§ 11112*. Respondent alleges that the process did not conform with the requirements set forth in *§ 11112*, such as adequate notice, representation by an attorney, access to a transcript of the proceedings, and the right to cross-examine witnesses. According to the House sponsor of the bill, "[t]he immunity provisions [were] restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions … that are really taken for anticompetitive purposes will **[*7]** not be protected under this bill." 132 Cong.Rec. 30766 (1986) (remarks of Rep. Waxman).

500 U.S. at 332 n.12.

Nothing in this footnote represents a holding that supports a different result here. The *Pinhas* plaintiff had *alleged* non-compliance with *§ 11112*--averments presumed true at the procedural juncture of that case. Here, in contrast, the Court has found on summary judgment that plaintiff failed to rebut the presumption of procedural compliance embodied in *§ 11112*. [3]

Plaintiff seizes on the *Pinhas* court's quotation of Representative Waxman's comments, and has also provided other excerpts of the legislative history that are to a similar effect. The most these materials show, however, is that members of Congress were attempting to strike a balance. However hopeful Representative Waxman may have been that "illegitimate actions" would not be protected, the statute as actually enacted created an *objective* standard rendering subjective motivations irrelevant. *Austin v. McNamara, 979 F.2d 728, 734 (9th Cir.1992)*. Here, plaintiff appears to be suggesting, in essence, that if a plaintiff has a colorable anti-trust claim, there can be no immunity under HCQIA. The stated purpose of the statute, however, was to address the concern that, "[t]he threat of private money damage liability under Federal laws, **[*9]** including treble damage liability under Federal ***antitrust law***, unreasonably discourages physicians from participating in effective professional peer review." *§ 11101(4)*. By suggesting that the potential presence of a viable antitrust claim strips defendants of immunity, plaintiff is asking the Court to rewrite the statute. Accordingly, the motion to vacate is denied.

B. Motion for attorney fees

Section 11113 of HCQIA provides, "[t]he court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was *frivolous, unreasonable, without foundation, or in bad faith.*" (Emphasis added.) The Ninth Circuit has explained that, "[t]he

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[3] To the extent plaintiff is suggesting that the Supreme Court's reference in footnote 12 to "adequate notice, representation by an attorney, access to a transcript of the proceedings, and the right to cross-examine witnesses," somehow means those particular items are always required, he is asking far too much from this dicta. It is apparent the Court was merely referring to the *Pinhas* plaintiff's particular complaints, and to the items set out in *§ 11112 (b)*. As explained in the order granting summary judgment, however, *§ 11112(b)*, only provides a "safe harbor"--it also expressly provides that a failure to comply with all of its provisions, "shall not, in itself, constitute failure to meet the standards of subsection (a)." **[*8]** *See Smith v. Ricks, 31 F.3d 1478, 1485 (9th Cir. 1994)* ("we reject as dicta any suggestion in *Austin* that a hospital [must] satisfy *§ 11112(b)* in order to receive immunity.") Nor is the footnote a sufficient basis for reading out of the statute the provision of *§ 11112 (a)* allowing for "such other procedures as are fair to the physician under the circumstances."

policy behind this provision is clear: Congress wanted to encourage professional peer review by limiting the threat of unreasonable litigation expenses." *Ricks, supra, 31 F.3d at 1487*.

Defendants' fee motion initially sought to recover all of the millions of dollars they had incurred over the years this litigation was pending. On its own motion, the **[*10]** Court issued an order advising that defendants at most might be entitled to recover fees reasonably attributable to litigating and prevailing on the HCQIA immunity defense, and requesting that defendants submit a revised claim limited to such fees. The Court authorized defendants to respond to the points made in that order as well. Defendants thereafter submitted a revised claim for approximately $ 160,000 in attorney fees. Defendants expressly reserved the right to appeal the Court's prior order limiting the potential fee recovery, but offered little argument that the limitation was not warranted.

At this juncture, the Court must decide the question it previously left open--whether plaintiff's claim, or conduct during litigation, was "frivolous, unreasonable, without foundation, or in bad faith" so as to support an award of attorney fees. Defendants argue, essentially, that the Court's order finding immunity under HCQIA plainly demonstrates that the action was frivolous from the outset--everything upon which immunity was based existed and was known to plaintiff before he first filed suit. Plaintiff, in turn, argues essentially that the action was not frivolous because, contrary to **[*11]** this Court's conclusion, there is no HCQIA immunity.

The issue of whether or not this action was frivolous or was pursued in bad faith does not turn, however, on the correctness of this Court's application of HCQIA immunity. The years of litigation in which defendants engaged before raising the HCQIA issue again undermines their arguments. If it had been clear and obvious from the outset that immunity applied, defendants, who were at all times represented by reputable and competent counsel, surely would have raised the issue sooner. Although the Court eventually ruled in defendants' favor, it does not appear to have been intuitive even to those practicing in this field that the statute would necessarily operate to bar the claims. Accordingly, the motion for attorney fees is denied in its entirety.

C. Bill of Costs

Under *Rule 54 of the Federal Rules of Civil Procedure*, ordinarily costs are taxed by the Clerk in the first instance, and only if a party seeks Court review of the Clerk's determination does he or she file a motion. *Fed. R. Civ. P. 54 (d) (1)*. Here, plaintiff began by filing a motion directly on the Court's calendar. Defendants noted the procedural impropriety, but elected to **[*12]** respond on the merits, and the Court heard the motion. Then, while the motion was under submission, the Clerk, acting in the ordinary course of business, taxed the cost bill, allowing only $ 49,326.33 of the $ 99,895.94 claimed. That effectively disposes of all of the particularized objections plaintiff raised to the cost bill, and those objections will not be considered further.

Remaining to be decided is whether costs should be completely disallowed under the particular circumstances of this case. In *Association of Mexican-American Educators v. State of California, 231 F.3d 572, 591-92 (9th Cir. 2000)*, the Ninth Circuit rejected any implication from prior cases that costs could only be disallowed to a prevailing party as punishment for misconduct. The court explained that *Rule 54* "creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs." *Id. at 591*. A district court disallowing costs must "explain why a case is not "ordinary" and why, in the circumstances, it would be inappropriate or inequitable to award costs." *Id. at 592*.

Here, even after the Clerk's rejection of approximately half the costs claimed, **[*13]** defendants are seeking to recover a substantial sum of money they spent over approximately six years of litigation. Virtually none of those costs would have been incurred in the first instance had defendants acted promptly to enforce their HCQIA immunity. Thus, for much the same reasons as set forth in the Court's April 19, 2010 order regarding the attorney fee claim, it would be inequitable for defendants to recover costs in this action. It was in defendants' power to avoid those costs in the first instance. Having failed to do so, for whatever reason of strategic choice or strategic error, they must now bear their own costs. [4]

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[4] At the hearing, defendants proposed submitting a revised cost bill claiming only those costs associated with presenting the HCQIA defense, much as they revised their attorney fee claim. Although defendants likely would have incurred some costs even

Extra Equipamentos E Exportacao Ltda. v. Case Corp., 541 F.3d 719 (7th Cir. 2008), **[*14]** cited by defendants, does not compel a different result. Although there the court rejected as "frivolous" an argument that costs should be denied based on a defendants' delay in raising a defense, the record in that case provided no clear indication as to when defendants could have successfully first raised the defense, how much discovery would have first been necessary, and the like. Declining to turn what is supposed to be a summary procedure for awarding costs "into an inquest on the winning party's litigation strategy," the court rejected the mere length of litigation as a basis to withhold costs.

This Court agrees that the cost bill procedure should not ordinarily include any second guessing into how much sooner the litigation might have ended had the defendants made other or different tactical choices along the way. The facts here, though, are highly unusual. Again, by defendants' own arguments, the defense was available from the outset and required virtually no discovery. Defendants actually made a summary judgment motion in 2007 without raising the defense. Under these circumstances no "inquest" is necessary to conclude that defendants should have presented the defense long **[*15]** before they did.

III. CONCLUSION

Plaintiffs' motion to vacate the judgment is denied. Defendants' motion for attorney fees is denied. Plaintiffs' objection to the cost bill is sustained on the grounds that it would be inequitable for defendants to recover costs, on the particular facts of this action. The parties shall bear all their own costs.

IT IS SO ORDERED.

Dated: 06/30/2010

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

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if they had presented the defense without delay, it is not persuasive that any significant costs are fairly attributable to presenting the HCQIA defense, on the particular factual record of this case. Accordingly, the request to submit a revised cost bill is denied.

In re Wholesale Grocery Prods. Antitrust Litig.

United States District Court for the District of Minnesota

July 7, 2010, Decided; July 7, 2010, Filed

Court File No. 09-MD-2090 ADM/AJB

Reporter

722 F. Supp. 2d 1079 *; 2010 U.S. Dist. LEXIS 82168 **; 2010-2 Trade Cas. (CCH) P77,095

In re Wholesale Grocery Products Antitrust Litigation; This Order Relates to All Actions

Subsequent History: Motion granted by, in part, Motion denied by, in part, Claim dismissed by *In re Wholesale Grocery Prods. Antitrust Litig. v. C&S Wholesale Grocers, 2010 U.S. Dist. LEXIS 111331 (D. Minn., Oct. 19, 2010)*

Prior History: *In re Wholesale Grocery Prods. Antitrust Litig., 2009 U.S. Dist. LEXIS 133511 (D. Minn., Dec. 15, 2009)*

Core Terms

customers, conspiracy, prices, non-compete, supra-competitive, provisions, statute of limitations, merger, fraudulent concealment, facilities, markets, high prices, territorial, soliciting, charging, summary judgment, antitrust claim, acquisition, competitors, antitrust, exchanged, wholesale, compete, horizontal, continuing violation doctrine, distribution facilities, alleged conspiracy, motion to dismiss, Sherman Act, anticompetitive

Counsel: **[**1]** W. Joseph Bruckner, Esq., Elizabeth R. Odette, Esq., Lockridge, Grindal, Nauen, PLLP, Minneapolis, MN; Kevin M. Magnuson, Esq., Kelley, Wolter & Scott, PA, Minneapolis, MN; Richard B. Drubel, Esq., Kimberly H. Schultz, Esq., Matthew J. Henken, Esq., Boies, Schiller & Flexner, LLP, Hanover, NH; Daniel A. Kotchen, Kotchen & Low, LLP, Washington, D.C.; Joel C. Meredith, Esq., Daniel B. Allanoff, Esq., Meredith, Cohen, Greenfogel & Skirnick, PC, Philadelphia, PA; and Edward T. Dangel, III, Esq., Dangel & Mattchen, LLP, Boston, MA, appeared for and on behalf of Plaintiffs.

Stephen P. Safranski, Esq., K. Craig Wildfang, Esq., E. Casey Beckett, Esq., Robins, Kaplan, Miller & Ciresi, LLP, Minneapolis, MN, appeared for and on behalf of Defendant SuperValu, Inc.

Charles A. Loughlin, Esq., Howrey LLP, Washington, D.C.; and Todd A. Wind, Esq., Fredrikson & Byron, PA, Minneapolis, MN, appeared for and on behalf of Defendant C&S Wholesale Grocers.

Judges: ANN D. MONTGOMERY, UNITED STATES DISTRICT JUDGE.

Opinion by: ANN D. MONTGOMERY

Opinion

[*1081] MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On April 22, 2010, the undersigned United States District Judge heard oral argument on Defendants SuperValu Inc. ("SuperValu") and C&S Wholesale Grocers, **[**2]** Inc.'s ("C&S") (collectively "Defendants") Motion to Dismiss [Docket No. 24]. Plaintiffs Blue Goose Super Market, Inc. ("Blue Goose"), Charles W. Prather Company, Inc. d/b/a Prather's IGA ("Prather's"), D&G, Inc. d/b/a Gary's Foods ("Gary's Foods"), DeLuca's Corporation ("DeLuca's"), and Robert Warren Wentworth Jr., Inc. d/b/a Rangeley IGA's ("Rangeley IGA") (collectively "Plaintiffs") Motion for Partial Summary Judgment [Docket No. 28] was argued at the same hearing. For the reasons set forth below, Defendants' Motion to Dismiss is denied and Plaintiffs' **[*1082]** Motion for Partial Summary Judgment is denied.

II. BACKGROUND

This is multidistrict litigation of four antitrust lawsuits against SuperValu and C&S, two of the largest wholesale grocers in the United States. Consol. Am. Class Action Compl. ("Compl.") [Docket No. 18] ¶ 1. SuperValu's business is largely concentrated in the Midwest while C&S's business is primarily in New England. Id. Plaintiffs operate retail grocery stores in those regions and purchased wholesale grocery products and related services directly from SuperValu and C&S. Id. ¶¶ 5-9.

Plaintiffs' antitrust claims against Defendants stem from events that transpired after Fleming **[**3]** Companies, also a wholesale grocer, filed for bankruptcy in 2003. Id. ¶ 25. In July of that year, C&S agreed to purchase Fleming's wholesale grocery operations, including its three distribution facilities in the Midwest. Id. ¶¶ 25-26. Shortly after the purchase, C&S and SuperValu began negotiating an asset transfer. See Beckett Decl. [Docket No. 26], Ex. C; Bruckner Aff. [Docket No. 30], Ex. B (Asset Exchange Agreement). On September 6, 2003, Defendants entered into an Asset Exchange Agreement ("AEA" or "Agreement"), under which C&S transferred to SuperValu the recently acquired Fleming Midwest operations, which included three operating distribution facilities, retail supply agreements, notes, leases, franchise agreements, and customer goodwill, and SuperValu transferred its New England operations, which included three operating distribution facilities, a distribution facility SuperValu had closed in 2001, retail supply agreements, notes, leases, franchise agreements, and customer goodwill, to C&S. Id. §§ 1.1, 1.3; Bruckner Aff., Exs. B-1, B-3. At the time of the asset transfer, SuperValu had been competing against C&S in New England for several years, but C&S had not been competing **[**4]** against SuperValu in the Midwest. Compl. ¶ 21; Pls.' Mem. in Supp. of Mot. for Partial Summ. J. [Docket No. 29] at 3.

The Agreement also included non-compete provisions. C&S agreed (1) not to enter into a supply agreement or other arrangement to supply product to any of the Fleming customers it was transferring to SuperValu for the two years following the closing date of the AEA and (2) not to solicit any of those Fleming customers for the five years following the closing of the AEA. Asset Exchange Agreement §§ 5.8(a), 3.11. SuperValu made reciprocal two and five-year commitments regarding the customers served by the New England operations it was transferring to C&S. Id. §§ 4.9, 6.2. The former Fleming facilities in the Midwest acquired by SuperValu were closed shortly after the closing of the Agreement, and C&S closed the New England facilities it had acquired from SuperValu in the spring of 2004. Compl. ¶¶ 1, 37; Beckett Decl., Ex. I; Bruckner Aff., Ex. G.

On December 31, 2008, the first of the four lawsuits that have been consolidated for this multidistrict litigation was filed. Plaintiffs claim that Defendants violated section 1 of the Sherman Act, *15 U.S.C. § 1*, by executing the **[**5]** AEA, which they allege "had no legitimate business purpose and was simply a sham transaction by Defendants to conceal their secret, illegal non-compete agreement allocating the New England market and customers to C&S and the Midwest market and customers to SuperValu." Compl. ¶ 37. Plaintiffs assert that Defendants' Agreement amounts to a "restraint of trade and commerce, the purpose and effect of which is to allocate customers and territories for full-line grocery wholesale goods and services, to suppress competition and allow **[*1083]** Defendants to charge supra-competitive prices in the Midwest and New England." Id. ¶ 76. Plaintiffs allege injury by paying supra-competitive prices for wholesale groceries and related services from Defendants.

III. DISCUSSION

A. Defendants' Motion to Dismiss

Defendants move to dismiss the sole count of Plaintiffs' Complaint, which asserts claims for treble damages under section 4 of the Clayton Act, *15 U.S.C. § 15*, for alleged violations of section 1 of the Sherman Act. *Rule 12 of the Federal Rules of Civil Procedure* provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. *Fed. R. Civ. P. 12(b)(6)*. In **[**6]** considering a motion to dismiss, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the complaint must be taken as true. *Hamm v. Groose, 15 F.3d 110, 112 (8th Cir. 1994)*; *Ossman v. Diana Corp., 825 F. Supp. 870, 879-80 (D. Minn. 1993)*. Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the nonmoving party. *Ossman, 825 F. Supp. at 880*.

Under *Rule 8(a) of the Federal Rules of Civil Procedure*, pleadings "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief." A pleading must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. "But where the well-pleaded facts **[**7]** do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but not 'shown'—that the pleader is entitled to relief.'" Id. (quoting *Fed. R. Civ. P. 8(a)(2)*).

1. Statute of Limitations

Defendants' first asserted ground for dismissal is that Plaintiffs' antitrust claims are time barred. "Actions seeking damages pursuant to section 4 of the Clayton Act are subject to the four-year statute of limitations provided in section 4B of the Clayton Act, *15 U.S.C. § 15b*." *Little Rock Cardiology Clinic, P.A. v. Baptist Health, 573 F. Supp. 2d 1125, 1132 (E.D. Ark. 2008)*. The earliest of the four lawsuits was filed on December 31, 2008, and, thus, Defendants argue Plaintiffs are time barred from asserting any antitrust claims that accrued prior to December 31, 2004. Because Defendants executed the AEA in September 2003 and completed their closures in the spring of 2004, Defendants conclude, Plaintiffs' antitrust claims accrued well before December 31, 2004. Plaintiffs respond that their claims are not time barred because (1) the fraudulent concealment doctrine tolled the limitations period and (2) the continuing violation doctrine restarted the limitations **[**8]** period with each overt act—i.e., each instance of Defendants charging supra-competitive prices.

a. Fraudulent Concealment

Plaintiffs allege that Defendants concealed the existence of their unlawful market and customer allocation agreement from its inception, thus tolling the entirety of the four-year statute of limitations until November 2008 when the alleged conspiracy was discovered by Plaintiffs' counsel. **[*1084]** Compl. ¶¶ 44-50. "The general doctrine that the statute of limitation does not run while the defendant's offense is 'fraudulently concealed' has been adopted in antitrust litigation." II Phillip Areeda & Herbert Hovencamp, ***Antitrust Law*** ¶ 320e (3d ed. 2007); *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1051 (8th Cir. 2000)* ("The statue can be tolled under certain circumstances, such as where a defendant has engaged in fraudulent concealment."). To toll the statute of limitations based on fraudulent concealment, Plaintiffs must prove that (1) Defendants concealed Plaintiffs' cause of action, (2) Plaintiffs failed to discover the cause of action, and (3) Plaintiffs exercised due diligence in attempting to discover the claim. *In re Milk Prods. Antitrust Litig., 84 F. Supp. 2d 1016, 1022 (D. Minn. 1997)*.

The **[**9]** parties disagree over the standard to be applied in determining whether Plaintiffs have satisfied the first requirement of fraudulent concealment. Defendants contend that there must be an affirmative act that is separate and apart from the acts creating the alleged cause of action and that Plaintiffs have failed to allege any such act. See *In re Monosodium Glutamate Antitrust Litigation, No. CIV. 00MDL1328PAM, 2003 U.S. Dist. LEXIS 1969, 2003 WL 297287, at *3 (D. Minn. Feb. 6, 2003)* (holding that "[f]raudulent concealment of a conspiracy encompasses something more than the acts involved in the conspiracy itself, which is by nature a crime of secrecy and cover-up" and that fraudulent concealment instead requires "acts, other than the acts constituting the conspiracy, that demonstrate fraudulent concealment of that conspiracy"). Plaintiffs respond that fraudulent concealment is not limited to affirmative acts separate and apart from the conspiracy itself but also is established if the violation was self-concealing in nature. See *United Power Ass'n, Inc. v. L.K. Comstock & Co., 1992 U.S. Dist. LEXIS 18874, 1992 WL 402906, at *6 (D. Minn. Oct. 27, 1992)* (citing cases).[1]

Deciding the correct standard for the first requirement is not necessary because, the Court concludes, Plaintiffs have failed to exercise due diligence in attempting to discover their claims and, therefore, fail to satisfy the third requirement of a fraudulent concealment claim. When Plaintiffs questioned Defendants about the price increases, material information underlying the antitrust claims was available. There was publicly available information that Defendants had agreed to an AEA to transfer all of SuperValu's New England facilities and customer accounts to C&S in exchange for C&S transferring all of its Midwest facilities and customer supply agreements. See, e.g., Becket Decl., Exs. D, E, F, J, L, O. The closure of the facilities following the **[**11]** execution of the AEA also was publicly known. See, e.g., id., Exs. J, K, L, M, N. Plaintiffs argue that "[t]he mere fact that both Defendants withdrew from each other's markets is not necessarily an illegal territorial allocation, because each Defendant may still be free to re-enter." Pls.' Mem. in Opp'n to Mot. to Dismiss [Docket No. 53] at 33. While that may be, the events that had transpired, culminating in the facility closures completed by the spring of 2004, certainly should have alerted Plaintiffs that Defendants' agreement could have the effect of allocating markets, territories, or customers, which might in turn lead to loss in competition. Indeed, when alleged price **[*1085]** increases were implemented shortly after Defendants' exit from each other's markets, a serious concern should have arisen that the price increases might be related to the asset exchange.

Plaintiffs insist they did not discover, nor could they have discovered, the antitrust causes of action until November 2008 when Plaintiffs' counsel learned from a former SuperValu executive the secret terms of the covenant not to compete included in the AEA. In further support of the claim that they could not have made the discovery **[**12]** earlier, Plaintiffs argue that when Gary's Foods contacted SuperValu as early as 2004 and 2005 to question the high prices, SuperValu did not disclose that it and C&S "had entered an agreement not to compete in the Midwest, which would have explained why C&S . . . was not a competitive alternative in the Midwest and how SuperValu could get away with charging the supra-competitive prices it did." Compl. ¶¶ 51-52. Similarly, in the same time period, DeLuca's questioned C&S about high prices, and C&S responded that the increased prices were caused by unavoidable business conditions rather than disclosing that it had entered into a non-compete agreement with SuperValu, "which would have explained why SuperValu . . . was not a competitive alternative in New England and how C&S could get away with charging the supra-competitive prices it did." Id. ¶¶ 53-54.

Plaintiffs' position is unrealistic and untenable. In essence, their argument is that Defendants' responses to customer inquiries about being charged higher prices—a relatively routine dialogue in the conduct of business—did not and could not put Plaintiffs on notice of their antitrust claims because Defendants did not explicitly admit **[**13]** the alleged anticompetitive foundation and motive behind the price increases. As one court aptly observed in responding to a similar argument, "[t]o permit a claim of fraudulent concealment to rest on no more than an alleged failure to own up to illegal conduct upon this sort of timid inquiry would effectively nullify the statute of limitations in these cases. It can hardly be imagined that illegal activities would ever be so gratuitously revealed." *Pocahontas Supreme Coal Co., Inc. v. Bethlehem Steel Corp., 828 F.2d 211, 218-19 (4th Cir. 1987)*.

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[1] A a third, intermediary standard exists in addition to the "separate and **[**10]** apart" standard urged by Defendants and the "self-concealing" standard urged by Plaintiffs. See *Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 122 (4th Cir. 1995)*. Under that "affirmative acts" standard, "a plaintiff must prove that the defendants affirmatively acted to conceal their antitrust violations, but the plaintiff's proof may include acts of concealment involved in the antitrust violation itself." Id.

The publicly available information coupled with the events that had transpired should have allowed Plaintiffs to "put two and two together." The AEA was executed, Defendants exited each others' markets and, according to the allegations of the Complaint, Plaintiffs then began almost immediately experiencing higher prices. In short, the necessary information suggesting Defendants' potential increased market power gained through the AEA and of their use of that power to "charge supra-competitive prices" was available to Plaintiffs. Cf. *Hamilton County Bd. of Comm'rs v. Nat'l Football League, 491 F.3d 310, 315 (6th Cir. 2007)* ("[T]he County well **[**14]** understood the material facts underlying its antitrust claim: evidence of the NFL's potential monopoly power and its use of that power . . . .").

Having knowledge of information and activities that "would create notice and 'excite attention'" required Plaintiffs to inquire, and "merely asserting that they have diligently pursued their claims is not a sufficient allegation." *Milk Prods., 84 F. Supp. 2d at 1024*. Plaintiffs must show that they were reasonably diligent in attempting to discover the existence of the underlying conspiracy. See *Monosodium Glutamate, 2003 U.S. Dist. LEXIS 1969, 2003 WL 297287, at *3* (citing *Klehr v. A.O. Smith Corp., 521 U.S. 179, 194-95, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997))*. Plaintiffs allege in non-specific, conclusory fashion that their inquiries about higher prices on several occasions **[*1086]** between 2003 and 2005 show that they were reasonably diligent. However, Plaintiffs fail to allege the specific questions posed in those inquiries or that Plaintiffs ever *pursued* their inquiries further after receiving SuperValu's response that "if [Gary's Foods] felt it could get lower prices from a supplier other than [SuperValu] it could and should have changed to that supplier" or C&S's response to DeLuca's that the prices were **[**15]** due to "unavoidable business conditions." Compl. ¶¶ 51-54. Nor is it alleged that any Plaintiff requested an explanation and supporting information from Defendants for the higher prices. See *Hinds County, Miss. v. Wachovia Bank N.A., 620 F. Supp. 2d 499, 521 (S.D.N.Y. 2009)* (holding that due diligence is not adequately pleaded when a plaintiff fails to make allegations of "'specific inquiries [or to] detail when such inquiries were made, to whom, regarding what, and with what response.'") (quoting *In re Merrill Lynch Ltd. P'ships Litig., 154 F.3d 56, 60 (2d Cir. 1998))*. Importantly, given the nature of the conspiracy alleged by Plaintiffs' antitrust claims, there are no allegations that any plaintiff ever contacted either SuperValu or C&S to ask them why the companies had withdrawn from the New England and Midwest markets, respectively; rather, they asked only about the increase in prices. Thus, the allegations here are in stark contrast to Heaven & Earth, Inc. v. Wyman Properties Limited Partnership, where the antitrust plaintiff went beyond merely questioning the defendant about higher prices and requested additional information supporting the defendant's claimed reasons for the **[**16]** higher prices. *2003 U.S. Dist. LEXIS 20348, 2003 WL 22680935, at *2, 6 (D. Minn. Oct. 21, 2003)*.

The Court concludes that the mere questioning of the higher prices on several occasions fails to show due diligence in attempting to discover the antitrust claims. Accordingly, the fraudulent concealment doctrine does not operate to toll the statute of limitations.

b. Continuing Violation

Plaintiffs next argue they have alleged facts to show a continuing violation by Defendants. In Klehr, the Supreme Court explained that under the continuing violation doctrine, "each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *521 U.S. at 189* (quotation omitted). In the context of an alleged conspiracy, each time a plaintiff is injured by an act of the defendants, a cause of action accrues and the statute of limitations runs from the commission of the act, allowing the plaintiff to recover for the damages from that act. *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 328, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*. "The typical antitrust continuing violation occurs in a price-fixing conspiracy, **[**17]** actionable under Section 1 of the Sherman Act . . . when conspirators continue to meet to fine-tune their cartel agreement." *Midwestern Mach. Co., Inc. v. Nw. Airlines, Inc., 392 F.3d 265, 269 (8th Cir. 2004)*. To trigger the continuing violations doctrine, a new overt act "must be more than the unabated inertial consequences of the initial violation." *Id. at 270*. Rather, the act must be a new and independent act that is not merely a reaffirmation of a previous act, and it must inflict new and accumulating injury on the plaintiff. *Varner v. Peterson Farms, 371 F.3d 1011, 1019 (8th Cir. 2004)*; see also *Concord Boat, 207 F.3d at*

1052 (holding that "acts that simply reflect or implement a prior refusal to deal or acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations.") (quotation omitted).

[*1087] Defendants argue that Plaintiffs have alleged no new, independent acts within the limitations period. Defendants reason that the higher prices claimed to be a result of a loss of competition are the effects of the allegedly unlawful market and customer allocation, not overt acts that restart the statute of limitations. Thus, they contend, the continuing **[**18]** violations doctrine does not apply. Plaintiffs respond that the overt acts they have alleged (charging supra-competitive prices) were not the natural consequence of the conspiracy to allocate and were not necessarily contemplated by the terms of Defendants' Agreement. Accordingly, Plaintiffs conclude that the continuing violation doctrine applies.

In Midwestern Machinery, implementing the anticompetitive policies at issue—a merger between airlines challenged as substantially lessening competition and having the tendency to create a monopoly, in violation of section 7 of the Clayton Act, *15 U.S.C. § 18*—required no new, independent actions to be taken to realize an anticompetitive benefit, and, thus, implementation amounted only to a reaffirmation of the adoption of the previous policies. *392 F.3d at 269-72*. The alleged anticompetitve conspiracy in this case to allocate the Midwest market and customers to SuperValu and the New England market and customers to C&S.[2] However, realizing an anticompetitive benefit from the alleged conspiracy required SuperValu and C&S to undertake new and independent acts of charging supra-competitive prices that were not expressly contemplated by the terms **[**19]** of the Agreement. *Contra In re Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 228-29 (E.D.N.Y. 2003)* (concluding that acts taken subsequent to the execution of an agreement were not continuing violations when the acts were "contemplated by, and needed to implement, the fixed terms of the challenged agreements"). Thus, the alleged charging of supra-competitive prices amounts to more than the mere reaffirmation of the prior market/customer allocation. Closing the exchanged facilities effectuated the alleged allocation conspiracy; charging supra-competitive prices, however, is not effectuated if and until Defendants raise their prices.

Defendants characterize the diminished competition caused by SuperValu's continued absence from New England and C&S's continued absence from the Midwest and the alleged price increases as the "unabated inertial consequences" or "detrimental effects" of the alleged allocation conspiracy. Defs.' Reply Mem. in Supp. of Mot. to Dismiss [Docket No. 56] at 3. While the failure or refusal to reenter the markets is appropriately characterized as an inertial consequence, the alleged charging of supra-competitive prices is not a mere detrimental effect. On the contrary, **[*1088]** price increases are new and independent acts.

Defendants attempt to equate their transaction **[**21]** to a merger or total acquisition for the purpose of then arguing that ongoing, post-acquisition sales are merely reaffirmations of the merger or acquisition rather than independent predicate acts. See Defs.' Mem. in Supp. of Mot. to Dismiss [Docket No. 25] at 19-21. The attempt is unavailing for several reasons. First, the allegations of the Complaint, if true, are that Defendants have taken on a use of their acquisition of each other's assets through the Agreement "in a way that is not inherent in the acquisition itself." Areeda, supra, ¶ 320c5. Professors Areeda and Hovencamp explain:

> [S]uppose that a merger gave a firm the structural power to engage in predatory pricing. A damages action challenging such a merger would fail as long as predation were merely possible or even likely. As a result, the statute of limitation would not run on such a damage claim. However, once unlawful predation began and the

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[2] As noted above, the typical continuing violation occurs in a price-fixing conspiracy. Conceptually, price-fixing conspiracies and market allocation conspiracies are similar: "The analogy between price-fixing and division of markets is compelling. It would be a strange interpretation of ***antitrust law*** that forbade competitors to agree on [prices], thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995)*. **[**20]** Given the similarities, the continuing violations doctrine can apply in a market allocation conspiracy. See *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1444 (9th Cir. 1996)* (holding, in an antitrust action alleging an agreement between two utility companies to a market allocation, that the utility company's refusal to allow a customer in its territory to have its power needs supplied by the other utility company was an overt act that restarted the statute of limitations under the continuing violations doctrine).

> plaintiff could show that the merger facilitated the predation, then the statute of limitation would not bar a challenge to the merger itself, in addition to the predatory pricing suit.

Id.[3] Similarly, the Agreement in this case resulted in an allegedly unlawful exchange of facilities. **[**22]** The exchange itself did not injure Plaintiffs; rather, any injury to Plaintiffs occurred when Defendants began to charge supra-competitive prices.

Second, the transaction at issue in cases such as *Midwestern Machinery* and *Concord Boats* were total acquisitions or mergers that resulted in a single remaining company after the acquisition or merger. Refusing to apply the continuing violation doctrine to an alleged conspiracy to enter into a transaction that results in only one remaining company is intuitively well founded given that more than one party is needed for a conspiracy to continue. The transaction between SuperValu and C&S is of a fundamentally different character, as both companies continued to conduct business after the transaction. That SuperValu and C&S exchanged assets as part of their alleged allocation conspiracy does not **[**23]** change the analysis. Had SuperValu and C&S agreed not to compete in their home markets without first exchanging assets, the subsequent charging of supra-competitive prices undoubtedly would constitute new and independent acts that restart the statute of limitations. No principled reason supports distinguishing the subsequent charging of supra-competitive prices merely because the parties exchanged facilities as part of the execution of the alleged allocation conspiracy.

Third, even if it were appropriate to consider the transaction between C&S and SuperValu as equivalent to a merger or total acquisition, Defendants' position regarding the statute of limitations and the continuing violation doctrine fails to recognize the distinction between a competitor lawsuit and a purchaser lawsuit. In the context of monopolization and predatory pricing, Professors Areeda and Hovencamp comment:

> Customers of the monopolist are not injured until after the monopolist causes them injury through higher prices, which may occur later than the exclusionary practices creating the monopoly. For example, competitors are injured immediately by predatory pricing, but customers would not be injured until much later, **[**24]** when the predation has done **[*1089]** its work and the monopolist raises its price. Once customers have reason to know of the violation and their damages are sufficiently ascertainable to justify an antitrust action, the statute begins to run against them.

Areeda, supra, ¶ 320c4. This rationale also is applicable to the transaction here. The competitors of SuperValu and C&S were injured (if at all and if of a nature to confer antitrust standing) as soon as the conspiracy was effectuated, and, thus, the statute of limitations on an action by such competitors began to run immediately. However, customers, including Plaintiffs, would not be injured until later, when Defendants used their newly-acquired market power to charge supra-competitive prices.

In sum, the acts alleged in support of Plaintiffs' claim of a continuing violation are appropriately characterized as new and independent acts that inflicted new and accumulating injury rather than unabated, inertial consequences or reaffirmations of a previous conspiracy. Therefore, Plaintiffs are not time barred from asserting claims for injuries caused by supra-competitive prices charged within the limitations period, i.e., in the four years immediately **[**25]** preceding the filing dates of the complaints in these four antitrust actions. See *Klehr, 521 U.S. at 189* (holding that the commission of a "separate new overt act" does not permit a plaintiff to recover for the injury caused by old overt acts that do not fall within the limitations period).

2. Injury

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[3] As Judge Gibson observed in Midwestern Machinery, whether the distinctive use—distinctive in the sense that it is not inherent in the acquisition itself—is viewed as a "continuing violation or a different holding and use, the idea is the same" in terms of the implications for statute of limitations issues. *392 F.3d at 281 n.15* (Gibson, J, dissenting).

Defendants next move to dismiss, arguing Plaintiffs have failed to sufficiently allege injury from the non-compete provisions in the AEA. Specifically, it is argued Plaintiffs have failed to allege facts showing that "but for the non-compete provisions, SuperValu would have re-entered New England and C&S would have entered the Midwest." Defs.' Mem. in Supp. of Mot. to Dismiss at 27. Defendants explain that the Complaint reveals that it was "barriers to entry," not the non-compete agreement, that prevented (1) C&S, after it acquired Fleming's Midwest facilities, from entering the Midwest; and (2) SuperValu, after it transferred its New England facilities, from re-entering New England. Id.

The Complaint alleges that (1) the AEA and the non-compete provisions amounted to a market and customer allocation conspiracy, (2) the purpose and effect of that conspiracy was to reduce competition in the **[**26]** Midwest and New England to enable Defendants to charge supra-competitive prices in those markets, and (3) the conspiracy injured Plaintiffs when Defendants took advantage of the ill-gotten increased market power realized through the loss in competition and began charging Plaintiffs supra-competitive prices for wholesale grocery goods and related services. Compl. ¶¶ 1-3, 34-35, 37-43, 63, 76, 79-82. Plaintiffs therefore allege an adequate causal connection between the alleged allocation conspiracy and the claimed injury.

Defendants seemingly argue that the Complaint is inadequate because it fails to rule out that there are "barriers to entry" that would have existed and prevented C&S from entering the Midwest and SuperValu from re-entering New England even if Defendants had never entered into the AEA and the non-compete provisions. This argument is doubly flawed. First, if Plaintiffs' allegations are true, it was Defendants' conspiracy, which included the exiting of the New England and Midwest markets, that erected barriers preventing C&S from entering the Midwest and SuperValu from re-entering New England. Second, Plaintiffs need not rule out, especially at this early stage of the litigation, **[**27]** other possible causes of their alleged injuries. See *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89* ***[*1090]*** *S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (holding that "a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under [section 4 of the Clayton Act]").

3. Plausibility

Lastly, Defendants argue that Plaintiffs have failed to allege plausible grounds, as required by Twombly, to support their claim that the AEA "was a 'sham' designed to disguise a 'secret' market allocation." Defs.' Mem. in Supp. of Mot. to Dismiss at 28. The Twombly "plausibility" standard requires a complaint to plead allegations establishing the elements of the underlying theory of relief. See *550 U.S. at 554-56*. Plaintiffs' characterization of the AEA as a "sham" transaction is not their pleaded *claim for relief* but rather an *evidentiary explanation* of the alleged purpose of the AEA—to disguise, hide, or make the non-compete provision look less suspicious from an antitrust perspective. The claim for relief pleaded in the Complaint is predicated on an unlawful market and customer allocation conspiracy that resulted in injury to Plaintiffs, namely, being charged **[**28]** supra-competitive prices. Plaintiffs have pleaded facts that, if proven, show a causal connection between the allegedly unlawful conspiracy and their alleged injuries. See *Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009)* (holding that the dismissal standard established by the Supreme Court in Twombly and Iqbal requires that "the complaint . . . be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible"); *In re Pressure Sensitive Labelstock Antitrust Litig., 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008)* ("Nothing in Twombly . . . contemplates [a] 'dismemberment' approach to assessing the sufficiency of a complaint. Rather, a district court must consider a complaint in its entirety without isolating each allegation for individualized review."). Dismissal on the ground that Plaintiffs failed to state a claim for relief that is plausible on its face is denied.

B. Plaintiffs' Motion for Partial Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall issue "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material **[**29]** fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; see *Matsushita Elec. Indus.*

Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party. Ludwig v. Anderson, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995).

Plaintiffs move for summary judgment on one issue: whether the non-compete provisions in the AEA constitute a per se violation of section 1 of the Sherman Act.[4] Section 1 of the Sherman Act **[*1091]** proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. "Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without **[**30]** inquiry into what harm it has actually caused." Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984); see also United States v. Topco Assocs., Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972) (holding that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition" and are "per se violations of the Sherman Act") (quotation omitted) (alterations in original). As the Supreme Court has explained, however, "[o]ther combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively" and, as such, "are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect." Copperweld, 467 U.S. at 768.

"Resort to per se rules is confined to restraints . . . that would always or almost always tend to restrict competition and decrease output." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). Only when the challenged conduct is "manifestly anticompetitive," Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977), and "lack[s] . . . any redeeming virtue" should it be subjected to per se treatment, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985).

Plaintiffs argue restraints on competition in Defendants' transaction constitute a horizontal[5] allocation of customers and markets or territories subject to the per se rule.[6] Defendants respond that the transaction is not a market/customer allocation but rather some other combination, such as a merger or acquisition, that has the potential for procompetitive efficiencies and is therefore subject to the rule of reason. This dispute presents **[**32]** a question of law for the Court. See In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 682, 693 (E.D. Mich. 2000) ("[W]hether to apply a per se or rule or reason mode of analysis in determining the reasonableness of the challenged restraint of trade, is a question of law for the Court.").

In arguing for the applicability of the per se rule, Plaintiffs rely heavily on the Supreme Court's decision in Palmer v. BRG of Georgia, Inc. 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990) (per curiam). In Palmer, two providers of bar review courses—BRG of Georgia, which provided courses exclusively in Georgia, and HBJ, the Nation's largest provider of bar review courses—entered into an agreement giving BRG an exclusive license **[*1092]** to

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[4] If successful on their motion, Plaintiffs will have established the first element of their claims. See Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883-84 (8th Cir. 1978) (stating that the three elements of a claim under section 1 of the Sherman Act are (1) an agreement, conspiracy, or combination among the defendants in restraint of trade; (2) as a **[**31]** direct and proximate result thereof plaintiffs have been injured in their business and property; and (3) the damages that the plaintiffs sustained are capable of reasonable ascertainment and are not speculative or conjectural).

[5] There appears to be no dispute that Defendants compete at the same level of the market, and, thus, any agreement between them would qualify as horizontal. See Bus. Elecs. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988) ("[R]estraints imposed by . . . competitors have traditionally been denominated as horizontal restraints . . . .").

[6] The Court's understanding is that Plaintiffs allege the conspiracy to be both a customer allocation conspiracy and a market or territory allocation conspiracy.

market **[**33]** HBJ's material in Georgia. *Id. at 47*. The agreement included non-compete provisions that prohibited HBJ from competing with BRG in Georgia and prohibited BRG from competing with HBJ in any state outside of Georgia. Id. The Supreme Court held that the arrangement was a per se violation of section 1 of the Sherman Act, being "anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Id. at 49-50*. Plaintiffs argue that the same rationale applies here because Defendants' non-compete provisions effectively reserve the Midwest for SuperValu and New England for C&S.

Any restraint on competition that resulted from the transaction between C&S and SuperValu is different from the market/territorial allocations found per se unlawful in Palmer and many other cases cited by Plaintiffs. Particularly problematic to characterizing the alleged conspiracy in this case as a market or territorial allocation is that the non-compete provisions did not entirely prohibit SuperValu from serving and soliciting *all* customers in the New England region or C&S from serving and soliciting *all* customers **[**34]** in the Midwest region. Rather, they prohibited Defendants from serving and soliciting only the customers in those regions whose supply contracts were exchanged as part of the AEA. Assuming arguendo, as Plaintiffs contend, the exchanged contracts comprised the entirety of SuperValu's New England customers and the entirety of C&S's would-be Midwest customers, nothing in the non-compete provisions prohibited either party from serving or soliciting customers who were being served by other wholesale grocers. Nor did the non-compete provisions prohibit SuperValu from serving or soliciting New England customers who, at the time of the AEA, were being served by C&S. Similarly, the non-compete provisions did not prohibit C&S from serving or soliciting Midwest Customers who, at the time of the AEA, were being served by SuperValu. Finally, the non-compete provisions did not prohibit Defendants from competing over new customers in either market. The transaction between Defendants is not a true allocation of entire markets or territories. See, e.g., *Cardizem CD, 105 F. Supp. 2d at 701* (noting, in characterizing an alleged conspiracy as a market/territorial allocation, that the conspiracy "allocate[d] **[**35]** the *entire* U.S. market . . . to [one competitor]") (emphasis added). To the contrary, SuperValu was free to re-enter the New England market to serve or solicit any customer there who was not being served by SuperValu at the time of the AEA, and C&S was free to serve or solicit any customer in the Midwest market who was not being served by Fleming at the time of the AEA.

Plaintiffs argue the harm posed by Defendants' transaction is exacerbated because, unlike the fact pattern in which one company buys all or part of the business of another company and the seller agrees not to compete with the buyer, the transaction here also involved "mutual agreements between competitors not to compete for customers or territories." Pls.' Reply Mem. in Supp. of Mot. for Partial Summ. J. [Docket No. 59] at 7. But "the fact that a market restriction is unilateral rather than bilateral does not determine whether it is naked or ancillary, and unilateral promises can come in both varieties, *just as bilateral promises can*." Areeda, supra, ¶2134d (emphasis added).

The alleged conspiracy is probably more appropriately described as a customer allocation. See *United States v. Cooperative Theatres of Ohio, Inc., 845 F.2d 1367, 1372 (6th Cir. 1988)* **[**36]** (explaining that "a horizontal agreement between two competitors to refrain from seeking business from each **[*1093]** other's existing accounts . . . is plainly a form of customer allocation"). Unlike a market allocation, which, as explained above, requires a restraint on competition affecting the entire market to be thought of as a true "market allocation," it matters not in a customer allocation that the non-compete provisions forbid competition only over the customers who were exchanged and preserves the ability of the conspirators to compete over all other customers in the affected regions. See *id. at 1371* (rejecting the argument that an alleged customer allocation conspiracy should not be subjected to per se treatment because it was limited in scope in that it prohibited the conspirators from actively soliciting only certain customers and preserved competition over other customers); *Augusta News Co. v. Hudson News Co., 269 F.3d 41, 48 (1st Cir. 2001)* ("[T]wo competitors may not agree not to compete for customers whether identified individually or by class—for example, that one will serve only customers in Massachusetts while the other will serve only those in Maine.").

Even if the transaction **[**37]** at issue here qualifies as a customer allocation, questions remain as to whether the transaction can avoid per se treatment because the non-compete provisions—the restraint on trade that is the genesis of Plaintiffs' attack on Defendants' transaction—qualify as ancillary restraints. Under the ancillary restraint doctrine, "some agreements [that] restrain competition may be valid if they are subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984) (quotation omitted).

> All horizontal restraints are alike in that they eliminate some degree of rivalry between persons or firms who are actual or potential competitors. . . . At one time, . . . the Supreme Court stated . . . that the rule for all horizontal restraints was one of per se illegality. . . . The alternative formulation was that . . . a naked horizontal restraint, one that does not accompany a contract integration, can have no purpose other than restricting output and raising prices, and so is illegal per se; an ancillary horizontal restraint, one that is part of an integration of **[**38]** the economic activities of the parties and appears capable of enhancing the group's efficiency, is to be judged according to its purpose and effect.

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229, 253 U.S. App. D.C. 142 (D.C. Cir. 1986). Thus, "the effect of a finding of ancillarity is to remove the per se label from restraints otherwise falling within that category." Coliseum Comm'n, 726 F.2d at 1395 (quotation omitted).

"Ancillary agreements . . . are agreements that, while horizontal, have the potential to promote competition." Woman's Clinic, Inc. v. St. John's Health Sys., Inc., 252 F. Supp. 2d 857, (W.D. Mo. 2002) (citing Polk Bros. Inc. v. Forest City Entm't, 776 F.2d 185, 189 (7th Cir. 1985)). Such agreements are usually between (1) "the seller of property or business and the buyer not to compete with the buyer in such a way as to detract from the value of the property just sold;" or (2) "the buyer and seller of property or a business not to use the purchased property in competition with the business retained by the seller." Id. (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898), aff'd as modified by Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899)). **[**39]** Determining whether an agreement is ancillary requires a court to consider whether, at the time the agreement was made, it was necessary to promote the enterprise **[*1094]** and productivity of an underlying arrangement. Id.

Defendants argue that there are "some plausible procompetitive benefits" resulting from their transaction and that the non-compete provisions in the AEA are reasonably necessary to make that transaction effective. Specifically, Defendants cite as procompetitive benefits that the exchange allowed them to integrate the assets and businesses acquired from each other into their existing operations, consolidate customer volume into existing distribution facilities, and realize a benefit from customer goodwill and the ability to use certain trade names, all which allowed them to achieve "economies of scale and lowering costs" through "increases in throughput, capacity utilization, and overall efficiency." Defs.' Mem. in Opp'n to Mot. for Partial Summ. J. [Docket No. 48] at 17-25.

Although not conceding the procompetitive benefits claimed by Defendants as plausible results from the transaction, Plaintiffs respond that the non-compete provisions were unnecessary and unrelated to the **[**40]** claimed benefits. Plaintiffs argue that the restraint on competing over customers is not necessary to achieve the efficiency-enhancing benefits claimed by Defendants in the exchange of the warehouses, inventory, and related assets. With regard to the exchanged customers, Plaintiffs argue that Defendants cannot justify the restraint on competing over customers by invoking the value of those customer accounts as assets and insisting that the restraint is necessary to ensure that value is realized.

On the current record, whether the transaction between SuperValu and C&S plausibly achieved procompetitive benefits and whether the non-compete agreements were ancillary to AEA in the sense that they were necessary to protect the value of the assets being exchanged and realize economic integration cannot be resolved on summary judgment. In the context of a transfer of business assets accompanied by a non-compete agreement, "a per se approach does not seem warranted unless the restriction has no integrative prospects whatsoever." Areeda, supra, ¶2134e. Here, if Defendants show, for example, that the acquisition of the distribution facilities and the customer contracts allowed them to serve more **[**41]** retail grocers through fewer, more efficient distribution facilities, there would be a procompetitive benefit to the transaction. And ensuring that the additional customers would continue to be served through those facilities by executing the non-compete provisions seems reasonably necessary to realize the procompetitive benefit of increased efficiency.

The Supreme Court has cautioned:

> [T]he per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that we have expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

Leegin, 551 U.S. at 886-87 (citations and quotation omitted). With these cautionary words in mind, "a departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing." *Continental T. V., 433 U.S. at 58-59*. The Court is unaware of any cases that have **[**42]** involved circumstances closely resembling the circumstances surrounding the transaction in this case. Accordingly, "there is no long experience with . . . [this type of] practice [to conclude] **[*1095]** that the practice produces many pernicious results and almost no beneficial ones." *S. Volkswagen, Inc. v. Centrix Fin., LLC, 357 F. Supp. 2d 837, 850 (D. Md. 2005)*.

Plaintiffs' motion for summary judgment on the issue of whether the non-compete provisions should be subjected to per se unlawful treatment is denied. The outstanding issues regarding the per se rule and ancillarity discussed above also extinguish Defendants' position that the Court should instead grant them, the non-moving party, a summary judgment ruling that the rule of reason applies.

IV. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** Defendants' Motion to Dismiss [Docket No. 24] is **DENIED** and Plaintiffs' Motion for Partial Summary Judgment [Docket No. 28] is **DENIED**.

BY THE COURT:

/s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: July 7, 2010

End of Document

Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.

United States Court of Appeals for the Ninth Circuit

December 8, 2008, Argued and Submitted, San Francisco, California; July 9, 2010, Amended

No. 07-16151

Reporter
611 F.3d 495 *; 2010 U.S. App. LEXIS 14563 **; 2010-2 Trade Cas. (CCH) P77,091

COALITION FOR ICANN TRANSPARENCY, INC., a Delaware corporation, Plaintiff-Appellant, v. VERISIGN, INC., a Delaware corporation, Defendant-Appellee.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of California. D.C. No. CV-05-04826-RMW. Ronald M. Whyte, District Judge, Presiding.

Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 567 F.3d 1084, 2009 U.S. App. LEXIS 12514 (9th Cir. Cal., 2009)

Core Terms

VeriSign, domain name, ICANN, expiring, pricing, allegations, restraint of trade, district court, registry, renewal, monopolization, antitrust, registration, terms, contracts, monopoly, competitive bidding, Sherman Act, predatory, predatory conduct, anticompetitive, provisions, conspiracy, Commerce, cap, antitrust liability, registered, purposes, entity, competitive bidding process

LexisNexis® Headnotes

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

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

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

HN1[ ] **Regulated Practices, Private Actions**

An appellate court reviews de novo a dismissal for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. All allegations of material fact are taken as true and are construed in the light most favorable to the nonmoving party. On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is "plausible" in light of basic economic principles. The plaintiff must plead enough facts to state a claim to relief that is plausible on its face.

Antitrust & Trade Law > Sherman Act > Claims

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

HN2[] Sherman Act, Claims

Section 1 of the Sherman Act prohibits contracts, combinations in the form of trust or otherwise, or conspiracies, in restraint of trade or commerce. 15 U.S.C.S. § 1. To state a claim under § 1, a plaintiff must allege facts that, if true, will prove: (1) the existence of a conspiracy, (2) intention on the part of the co-conspirators to restrain trade, and (3) actual injury to competition.

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] Sherman Act, Claims

In the Sherman Act context, concerted action between co-conspirators to eliminate competitive bidding for a contract is an actionable harm to competition.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN4[] Sherman Act, Claims

In the Sherman Act context, to state injury to competition, a plaintiff must allege conduct that actually causes injury to competition, beyond the impact on the claimant.

Antitrust & Trade Law > Sherman Act > Claims

HN5[] Sherman Act, Claims

Restraint of trade claims under Sherman Act § 1, 15 U.S.C.S. § 1, do require the showing of a conspiracy whose members intended to restrain trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

HN6[] Exclusive & Reciprocal Dealing, Exclusive Dealing

Competitive bidding is not required before entering into an exclusive licensing agreement, but its presence or absence is a factor to be considered in determining the applicability of the antitrust laws. So long as the agreement is the result of independent business judgment, is not the result of an intention to restrain trade, or does not actually injure competition, it is immaterial whether it was secured through a competitive bidding process.

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

HN7[] Sherman Act, Scope

While concerted conduct is subject to sanction under Sherman Act *§ 1*, *15 U.S.C.S. § 1*, if it merely restrains trade, unilateral conduct is subject to sanction under Sherman Act *§ 2*, *15 U.S.C.S. § 2*, only if it either actually monopolizes or threatens monopolization. In other words, an entity cannot be held liable for antitrust violations if it simply unilaterally increases its prices, absent a showing that it either conspired with another entity in order to restrain trade, or acted in a market in which it holds or is attempting to hold a monopoly. Congress treated concerted behavior more strictly than unilateral behavior because concerted activity inherently is fraught with anticompetitive risk.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN8[] Sherman Act, Claims

Harm to consumers in the form of higher prices resulting from competitive restraints has long been held to constitute an actual injury to competition in the Sherman Act *§ 1*, *15 U.S.C.S. § 1*, context. It is difficult to image a more typical example of anti-competitive effect than higher prices.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN9[] Noerr-Pennington Doctrine, Sham Exception

Litigation activity is immune from antitrust liability unless it is "a mere sham."

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN10[] Exemptions & Immunities, Noerr-Pennington Doctrine

Noerr-Pennington immunizes only litigation activity, not other forms of threats or harassment.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN11[] Sherman Act, Claims

Sherman Act *§ 2*, *15 U.S.C.S. § 2*, claims may be premised upon predatory conduct that is aimed at achieving or maintaining a monopoly in a given market. A claim for monopolization of trade has two elements: the possession of monopoly power in the relevant market and the acquisition or perpetuation of this power by illegitimate "predatory" practices. Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.

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

HN12[] **Sherman Act, Scope**

An entity may be prosecuted for an antitrust violation on the basis of improper coercion of a standards-setting body.

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

HN13[] **Sherman Act, Scope**

Even "unethical and deceptive practices" are protected from antitrust liability where they are either directly aimed at or "incidental" to a valid effort to influence government action. However, predatory activities aimed at private standards-setting bodies do not enjoy such categorical protection from liability. The Supreme Court has pointed to the "procompetitive advantages" of private standards-setting organizations whose decisions are insulated from being biased by members with interests in stifling product competition.

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

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

A relevant market, for antitrust purposes, can be broadly characterized in terms of the "cross-elasticity of demand" for or "reasonable interchangeability" of a given set of products or services. A court considers whether the product and its substitutes are reasonably interchangeable by consumers for the same purpose, as well as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

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

HN15[] **Regulated Practices, Market Definition**

In the antitrust context, regarding Internet domain names, a market should not be defined in terms of a single domain name.

Counsel: Bret A. Fausett, Los Angeles, California, for the plaintiff-appellant.

Ronald L. Johnston, Los Angeles, California, for defendant-appellee.

Dennis M. Hart, Washington, DC, for amicus curiae Internet Commerce Association.

Judges: Before: Mary M. Schroeder, A. Wallace Tashima and William A. Fletcher, Circuit Judges. Opinion by Judge Schroeder.

Opinion by: Mary M. Schroeder

Opinion

[*498] AMENDED OPINION

SCHROEDER, Circuit Judge:

This appeal is about whether the plaintiff, Coalition for ICANN Transparency, Inc., using antitrust statutes drafted in the late 19th century, has successfully stated claims in connection with the administration of the Internet domain name system, so essential to the operation of our sophisticated 21st century communications network. **[*499]** The district court ruled that the plaintiff failed. With the benefit of extensive briefing, collegial discussions and amicus participation on appeal from other players in the domain name system, we hold that the plaintiff has stated claims under both Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1-2*. We reverse and **[**2]** remand for further proceedings.

I. Overview

Plaintiff Coalition for ICANN Transparency ("CFIT") is an organization composed of participants in the Internet domain name system ("DNS"), including website owners. The heart of the IT industry is located in the Silicon Valley, which lies within the Northern District of California. CFIT filed its complaint in 2005 in the Northern District against defendant Verisign, the corporation that acts as the sole operator of the ".com" and ".net" domain name registries.

VeriSign operates each registry pursuant to a contract with the Internet Corporation for Assigned Names and Numbers ("ICANN"), a non-profit oversight body that coordinates the DNS on behalf of the United States Department of Commerce. Pursuant to these contracts, VeriSign receives a certain price for registering each domain name. It is not disputed that there can only be one operator for each domain name registry at any one time. Therefore, the only viable competition can take place in connection with obtaining a new contract after expiration of the old one. The .com agreement entered into by ICANN and VeriSign in 2006, after no competitive bidding, provides that the price of domain names **[**3]** can increase by seven percent over four of the six succeeding years. The .net agreement, which was entered into as a result of competitive bidding, contained price caps that were set to expire on December 31, 2006, leaving no limitation on the price that could be charged for .net names. Each contract has a presumptive renewal provision.

CFIT's complaint endeavored to state claims against Verisign under Section 1 of the Sherman Act and under California's counterpart, the Cartwright Act, for conspiracy in restraint of trade in connection with the terms of the .com and .net contracts' pricing and renewal provisions. In essence, CFIT sought to show that the prices were artificially high and that the renewal provisions wrongfully restrained competition for successor contracts.

The complaint also endeavored to state claims under Section 2 of the Sherman Act, alleging that Verisign's conduct in obtaining the anti-competitive provisions constituted monopolization or attempted monopolization of the .com and .net registration markets. In addition, the complaint sought an injunction against Verisign's proposed service for registration of expiring domain names, on the ground it constituted an attempted **[**4]** monopolization of that allegedly separate market.

The district court, after some discovery and several opportunities for CFIT to amend the complaint, dismissed the action with prejudice for failure to state claims under state or federal law in connection with either the .com or the .net contract. It held that CFIT had not sufficiently alleged that either the terms of the contracts or Verisign's conduct in obtaining the contracts amounted to antitrust violations. The court also held that CFIT failed sufficiently to allege that a market for expiring domain names existed separate and apart from the market for newly registered domain names.

In this appeal, CFIT contends that the district court failed to appreciate the seriousness of the allegations of anticompetitive conduct and that, in rejecting the existence of a separate market for expiring **[*500]** domain names, the district court improperly relied on already outdated authority from earlier in this young century. We now agree with CFIT, at least with respect to the claims challenging the terms and award of the .com contract and asserting the existence of a separate market for expiring domain names. We therefore reverse.

II. The Players

Plaintiff **[**5]** CFIT is a non-profit corporation composed of DNS stakeholders, including domain name registrars and owners of domain names (registrants). CFIT alleges that its members, including both registrars and registrants, have an interest in ensuring that conditions in the domain name registration market remain fair and competitive.

ICANN is a nonprofit corporation that was created in 1998, in response to a policy directive of the Department of Commerce, to administer the domain name system on the Department's behalf. ICANN is charged by the Department of Commerce with selecting and entering into agreements with registry operators such as VeriSign. ICANN was named as a defendant in CFIT's original complaint and in its First Amended Complaint, but CFIT dropped ICANN as a defendant in the Second Amended Complaint, from which this appeal arises. It seeks to maintain claims only against VeriSign.

Defendant VeriSign is a corporation that, through its contractual relationship with ICANN, acts as the sole operator of the .com and .net domain name registries. This means that VeriSign manages the definitive databases of registered .com and .net domain names. VeriSign has held this position since 2001, **[**6]** prior to which its predecessor-in-interest, Network Solutions, Inc. ("NSI"), managed the databases.

III. Nature and Terms of the Agreements

VeriSign has been the sole operator of the .com and .net registries since 2001, when it entered into two separate agreements with ICANN (the "2001 .com Agreement" and the "2001 .net Agreement," respectively). Those agreements supercede ICANN's previous agreements with NSI. The 2001 Agreements imposed on VeriSign a price cap of $ 6 per year for registration, renewal, or extension of any domain name. Each of the 2001 Agreements contained a renewal provision that allowed ICANN to place the contract up for competitive bidding upon its expiration.

When the 2001 .net Agreement expired in 2005, there was a competitive bidding process that resulted in the selection of VeriSign's bid. VeriSign entered into a new agreement with ICANN (the "2005 .net Agreement"). Before the 2001 .com Agreement was due to expire in 2007, however, VeriSign and ICANN agreed to extend it with a new contract (the "2006 .com Agreement"). Both the 2006 .com Agreement and the 2005 .net Agreement provide for automatic renewal upon expiration unless a court or arbitrator issues a final **[**7]** order finding VeriSign to be in breach of the Agreement, and VeriSign fails to cure the breach. The 2006 .com Agreement also increases the maximum price VeriSign can charge for domain name registrations. The previous contract's $ 6 cap was maintained until December 31, 2006, but the new contract provides that cap may be increased seven percent per year in four of the following six years. The 2005 .net Agreement does not contain an express price increase provision. Its price cap of $ 4.25 per domain name expired on December 31, 2006, leaving no cap in its place.

[*501] IV. CFIT's Claims

CFIT's complaint included claims under Sections 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1* & *2*. CFIT sought to state a Section 1 claim, for conspiracy in restraint of trade, in connection with the pricing and renewal provisions of both the 2005 .net Agreement and the 2006 .com Agreement. CFIT claimed that VeriSign and ICANN conspired to restrain trade by setting prices for VeriSign's registry services that were substantially above the prices that would result from a competitive market. Moreover, CFIT alleged that VeriSign and ICANN violated Section 1 by imposing a presumptive renewal provision in both the 2006 **[**8]** .com and 2005 .net Agreements, all but ensuring Verisign's continued market dominance by reducing or eliminating competition for successor contracts.

CFIT's first claim under Section 2 was for monopolization and attempted monopolization of the .com and .net markets. CFIT alleged that VeriSign engaged in improper and predatory conduct, including financial pressure, vexatious litigation, and negative press coverage, in order to induce ICANN to enter into agreements with terms that unlawfully favored VeriSign. CFIT claimed that VeriSign eventually settled its allegedly vexatious suit against ICANN by offering to pay ICANN a multi-million dollar fee in exchange for favorable terms in the 2006 .com and 2005 .net Agreements, thus doing away with any competition for the next contract.

CFIT's second claim under Section 2 concerned the existence of a separate market for expiring domain names. Expiring domain names are names that have fallen back, or are about to fall back into the registry database as a result of non-renewal by their current owners. CFIT alleged that expiring domain names are sufficiently distinct from other types of domain names as to constitute a separate market for antitrust **[**9]** purposes.

CFIT further alleged that VeriSign planned to "leverage" its monopoly in the .com and .net markets into the market for expiring names. According to CFIT's complaint, pursuant to a term in the 2006 .com Agreement permitting VeriSign to launch new registry-related services, VeriSign planned to launch a Central Listing Service ("CLS") to replace the current system for registration of expiring domain names. CFIT alleged that Verisign's proposed CLS system will allow it to leverage its existing monopoly in the .com and .net registration markets to achieve a monopoly of the market for expiring domain names.

V. Legal Analysis

HN1[] We review de novo a dismissal for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*. *William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 662 (9th Cir. 2009)* (per curiam). All allegations of material fact are taken as true and are construed in the light most favorable to CFIT. *Id*. "On a motion to dismiss in an antitrust case, a court must determine whether an antitrust claim is 'plausible' in light of basic economic principles." *Id*. (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. CFIT must plead "enough facts **[**10]** to state a claim to relief that is plausible on its face." *Twombly, 550 U.S. at 570*.

A. CFIT's Claims Under Section 1 of the Sherman Act

HN2[] Section 1 of the Sherman Act prohibits "contracts, combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade or commerce." *15 U.S.C. § 1*. To state a claim under Section 1, a plaintiff must allege **[*502]** facts that, if true, will prove: (1) the existence of a conspiracy, (2) intention on the part of the co-conspirators to restrain trade, and (3) actual injury to competition. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)* (citing *Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507 (9th Cir. 1989))*.

CFIT sought to state a Section 1 claim in connection with the pricing and renewal provisions of the 2006 .com Agreement and the 2005 .net Agreement. CFIT alleged that ICANN and VeriSign conspired to set artificially high prices for Verisign's services and to ensure that VeriSign would receive successor contracts with ICANN without having to go through a competitive bidding process. We conclude that CFIT adequately alleged a Section 1 violation with respect to the 2006 .com Agreement.

1. Renewal

CFIT challenged **[**11]** the renewal term in both the .com and .net contracts providing that VeriSign will receive automatic renewal upon expiration of each contract unless a court or arbitrator issues a final order finding VeriSign to be in breach of the Agreement, and VeriSign fails to cure the breach. CFIT alleged the renewal term unlawfully restrains competition because the provision that would trigger a competitive re-bid for the contract is "illusory," and that "at the time they executed the Agreement[s], both ICANN and VeriSign understood that [the provision] never would be triggered." CFIT alleged that the threat of losing each contract in a competitive re-bid is essential to protect competition in that it "benefits consumers by keeping prices in check, … by maintaining solid and reliable performance of the registry, and by preventing the registry from undertaking abusive practices that would financially benefit the registry at the expense of the end-user's experience." The district court found that CFIT's complaint was insufficient to state a challenge to the renewal provision, concluding that CFIT's allegation regarding the illusory nature of the re-bid provision was "conclusory and speculative," **[**12]** and insufficient to allege a violation of ***antitrust law***.

We have expressly held, however, that ***HN3***[] concerted action between co-conspirators to eliminate competitive bidding for a contract is an actionable harm to competition. *Harkins Amusement Enters., Inc. v. Gen. Cinema Corp., 850 F.2d 477, 487 (9th Cir. 1988)*. In *Harkins*, the defendants were distributors and exhibitors of films who "rigged" a bidding process in order to ensure that the exhibitors would obtain licenses to display films released by the distributors, thus excluding from competition the plaintiff, a rival film exhibitor. *Id. at 487-88*. We found a Section 1 violation for injury to competition even though the only entity harmed, in the particular circumstances of that case, was the plaintiff. *Id. at 488*. The allegation in this case regarding the elimination of competitive bidding at the expiration of each successive registry agreement means that any other potential registry operator is excluded from competition, making the alleged harm to competition in this case even more severe than that at issue in *Harkins*.

CFIT's complaint is not limited to alleging that the renewal provision harms individual competitors in the DNS. Rather, **[**13]** CFIT alleged that competition itself has been eliminated as a result of VeriSign and ICANN's conspiratorial conduct. This is precisely the type of allegation required to state an injury to competition. *Austin v. McNamara, 979 F.2d 728, 738 (9th Cir. 1992)* (***HN4***[] to state injury to competition, plaintiff must allege conduct that "actually causes injury to competition, beyond the impact on the claimant"). CFIT has also **[*503]** alleged that consumers are harmed by this anti-competitive restraint, in the form of higher prices for registration of domain names, and potentially lower-quality services. In combination with the allegations regarding the existence of the conspiracy between VeriSign and ICANN as well as the intent to restrain competition, these allegations of harm to competition are sufficient to state a claim under Section 1. *Kendall, 518 F.3d at 1047*.

Because ***HN5***[] restraint of trade claims under Section 1 do require the showing of a conspiracy whose members intended to restrain trade, *see id.*, we conclude that CFIT's allegations regarding the renewal provision in the contracts is made out only with respect to the .com contract. CFIT has adequately pled the existence of a conspiracy between VeriSign **[**14]** and ICANN, and that VeriSign had the intent to restrain trade when it entered into the .com contract. Beyond ICANN's decision not to use competitive bidding to reach the .com agreement, CFIT has also alleged that ICANN was economically motivated to conspire with VeriSign because VeriSign agreed to share its monopoly profits with ICANN and to cease its predatory behavior, which had put ICANN in financial jeopardy. However, the .net contract was reached after a competitive bidding process. CFIT has not adequately alleged that conspiratorial conduct to restrain trade was involved in the making of the .net agreement. CFIT has not alleged, with sufficient specificity, that the bidding process used to reach the 2005 .net Agreement was in any way rigged. *Harkins, 850 F.2d at 484*. CFIT's allegations concerning ICANN and Verisign's adoption of the presumptive renewal provision are therefore sufficient to make out a Section 1 claim for restraint of trade with respect to the 2006 .com Agreement alone.

In so holding, we observe that ***HN6***[] competitive bidding is not required before entering into an exclusive licensing agreement, but its presence or absence is a factor to be considered in determining the **[**15]** applicability of the antitrust laws. *See Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692-96, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Harkins, 850 F.2d at 487*. So long as the agreement is the result of independent business judgment, is not the result of an intention to restrain trade, or does not actually injure competition, it is immaterial whether it was secured through a competitive bidding process. *See Kendall, 518 F.3d at 1047*.

2. Pricing

CFIT further alleged in its complaint that the seven-percent-per-year increase in the allowable fee under the 2006 .com Agreement exceeds the rate competitive market conditions would produce. CFIT's complaint stated that if the

.com Agreement had been put out for competitive bidding, "the costs of domain name registrations would have fallen to at least as low as $ 3.00 per domain name, with at least the same level and quality of services provided by VeriSign." Counsel for CFIT stated at oral argument before the district court that potential competitors of VeriSign had stated publicly that, if awarded the .com contract, they could and would offer registry services at or below $ 3 per domain name.

The district court held that CFIT had not stated a cognizable claim **[**16]** regarding the pricing provisions in the 2006 .com Agreement, finding that an increase in the price of services, standing alone, did not give rise to antitrust liability. The district court relied primarily on *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991)*, in which this court held that a high price alone is not an antitrust violation. **[*504]** We stated in *Alaska Airlines* that while "setting a high price may be a use of monopoly power, … it is not in itself anticompetitive." *Id. at 549*. (quoting *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 294 (2d Cir. 1979))*.

The district court's reliance on *Alaska Airlines* was misplaced, however, because the pricing claims at issue in that case were monopolization claims arising solely under Section 2 of the Sherman Act. *See id. at 541 n.8*. In this case, by contrast, CFIT's allegation is that the pricing provision in VeriSign and ICANN's 2006 .com Agreement unlawfully restrains trade, in violation of Section 1. *Alaska Airlines* itself distinguishes between the proper inquiries the court should undertake in the Section 1 and Section 2 contexts: ***HN7***[] "While concerted conduct is subject to sanction [under Section 1] if it merely **[**17]** restrains trade, unilateral conduct is subject to sanction [under Section 2] only if it either actually monopolizes or threatens monopolization." *Id. at 541* (citing *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 767-69, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*. In other words, an entity cannot be held liable for antitrust violations if it simply unilaterally increases its prices, absent a showing that it either conspired with another entity in order to restrain trade, or acted in a market in which it holds or is attempting to hold a monopoly. *See Copperweld, 467 U.S. at 768-69* ("Congress treated concerted behavior more strictly than unilateral behavior …. [because] [c]oncerted activity inherently is fraught with anticompetitive risk.").

In this case, CFIT's allegation is not that VeriSign took unilateral action to increase the price of its services, but that VeriSign and ICANN undertook concerted action to restrain trade by imposing prices higher than market rate and under conditions hostile to competition. Applying the correct inquiry for Section 1 violations, we conclude that CFIT has adequately alleged that the pricing provision in VeriSign and ICANN's 2006 .com Agreement unlawfully restrains trade. CFIT has **[**18]** alleged the existence of a conspiracy, and that VeriSign and ICANN had the intent to impose terms for pricing and price increases that restrained trade. CFIT's allegations concerning the prices alternative registry operators would offer, were they able to compete with VeriSign for successor contracts, are adequate to state a claim of actual injury to competition, in that potential competitors are allegedly unable to bid for operation of the .com registry, and that consumers are allegedly unable to benefit from the positive effects of that competition. ***HN8***[] Harm to consumers in the form of higher prices resulting from competitive restraints has long been held to constitute an actual injury to competition in the Section 1 context, *see Am. Ad Mgmt., Inc. v. GTE Corp., 92 F.3d 781, 791 (9th Cir. 1996)* ("[I]t is difficult to image a more typical example of anti-competitive effect than higher prices . . . ."), and CFIT's complaint adequately alleges that such injury has occurred and is still occurring. CFIT's complaint is therefore sufficient to state a claim under Section 1 in connection with the pricing provisions of the 2006 .com Agreement.

CFIT also attempted to allege a Section 1 violation **[**19]** in connection with the pricing terms in the 2005 .net Agreement. The .net contract imposed an initial price cap of $ 4.25 per domain name registration, but provided that this cap would expire on December 31, 2006, leaving no price limitation in place. Although this claim involved terms comparable to those in the .com contract, CFIT has not made out a Section 1 violation for the .net pricing agreement. The .net contract was reached as a result **[*505]** of competitive bidding, not conspiratorial action. CFIT's assertion that some terms of the agreement changed after Verisign's bid was accepted, without allegations of materiality, does not suffice to state a claim for existence of a conspiracy and the intent to restrain trade. *See id*.

B. CFIT's Claims Under Section 2 of the Sherman Act

CFIT also asserted claims under Section 2 of the Sherman Act, alleging first that Verisign's predatory conduct in obtaining the anti-competitive provisions described above constituted monopolization or attempted monopolization of the .com and .net registration markets. CFIT's second Section 2 claim alleged the existence of a separate market for expiring domain names, and attempted monopolization of that market. With **[**20]** respect to the latter claim, the district court held that CFIT failed to state a claim because it failed to allege that expiring names are sufficiently distinct from other types of names. With respect to the former, the district court held that CFIT also failed to state a claim for predatory conduct. The district court, apparently construing CFIT's claim as pertaining solely to VeriSign's initiation of litigation against ICANN, held that CFIT failed to state a claim because it alleged only that Verisign's allegedly vexatious litigation against ICANN was "oppressive and costly," not that it was "baseless." In making this determination, the court relied on the doctrine that ***HN9***[] litigation activity is immune from antitrust liability unless it is "a mere sham." *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (quoting *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961))*; *see also United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*.

1. Predatory Conduct

CFIT alleged that the 2006 .com Agreement and the 2005 .net Agreement were reached through improper conduct by VeriSign, including financial pressure and vexatious **[**21]** litigation against ICANN. CFIT alleged that in order to get ICANN to agree to the terms VeriSign desired, VeriSign paid lobbyists to support its position, "stacked" ICANN's public meetings with VeriSign supporters, hired purportedly independent organizations and individuals to advocate VeriSign's position, paid bloggers to attack ICANN's reputation, planted news stories critical of ICANN in mainstream media, threatened ICANN with litigation, arbitration, and government investigation, and indeed eventually brought suit against ICANN in federal and state court. VeriSign's suit against ICANN was settled, allegedly as a result of VeriSign's offer to pay ICANN a fee of between $ 6 and $ 12 million in exchange for the favorable terms in the agreements. VeriSign and ICANN's Settlement Agreement expressly provided that VeriSign "will not participate in, contribute monies for, encourage or provide other support for any activities by or for third parties that seek to undermine ICANN's role [as 'the appropriate technical coordination body for the DNS'], and it will immediately cease any such ongoing activities." *Settlement Agreement between ICANN and VeriSign*, *http://www.icann.org/en/tlds/agreements/verisign/ICANN-VRSN-settlement-agreement-2005.pdf*, **[**22]** at 1.

In concluding that CFIT failed to state a claim for predatory conduct, the district court erroneously construed the allegation in the complaint as pertaining solely to VeriSign's litigation against ICANN, rather than to the predatory and **[*506]** harassing activities that accompanied that litigation. The district court's reliance on the *Noerr-Pennington* immunity doctrine therefore was misplaced, because ***HN10***[] Noerr-Pennington immunizes only litigation activity, not other forms of threats or harassment.

We have long held that ***HN11***[] Section 2 claims may be premised upon predatory conduct that is aimed at achieving or maintaining a monopoly in a given market. We have explained that a claim for monopolization of trade has two elements: "the possession of monopoly power in the relevant market and .... the acquisition or perpetuation of this power by illegitimate 'predatory' practices." *Alaska Airlines, 948 F.2d at 541-42* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Co., 472 U.S. 585, 596 n.19, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; *Catlin v. Wash. Energy Co., 791 F.2d 1343, 1348 (9th Cir. 1986))*. Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: "(1) that the defendant **[**23]** has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008)* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

CFIT has alleged that Verisign's predatory litigation activity was aimed at coercing ICANN to perpetuate Verisign's role as exclusive regulator of the .com domain name market by awarding VeriSign the 2006 .com Agreement without any competitive bidding, and by agreeing to the terms that favored VeriSign. These allegations meet the requirements articulated in *Cascade Health Solutions* for stating an attempted monopolization claim. *515 F.3d at 893*.

Moreover, the Supreme Court has held that ***HN12***[] an entity may be prosecuted for an antitrust violation on the basis of improper coercion of a standards-setting body. In *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 495-97, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*, the Court imposed antitrust liability on the defendant, a manufacturer of steel electrical conduits. This liability was for predatory actions undertaken to coerce the National Fire Protection Association ("NFPA"), **[**24]** a body that published product standards and building codes, to publish standards barring the use of plastic conduits, a rival product which the plaintiff manufactured. The activities undertaken by the defendant in *Allied Tube* included such conduct as packing NFPA meetings with paid supporters of the defendant who would advocate for the banning of plastic pipes. *Id. at 496*. The Court noted that ***HN13***[] even such "unethical and deceptive practices" are protected from antitrust liability where they are either directly aimed at or "'incidental' to a valid effort to influence government action." *Id. at 499* (citing *Noerr, 365 U.S. at 140-41*). However, the Court explained that predatory activities aimed at private standards-setting bodies, like NFPA, do not enjoy such categorical protection from liability. The Court pointed to the "procompetitive advantages" of private standards-setting organizations whose decisions are insulated from "being biased by members with interests in stifling product competition." *Id. at 501*. In concluding that the defendant's predatory activities subjected it to liability, the Court emphasized the fact that the NFPA, the body the defendant sought to coerce, was a private **[**25]** organization without any accountability to the public. *Id. at 502*.

[*507] CFIT has essentially alleged that ICANN is a private standards-setting body akin to the NFPA. ICANN administers the DNS and is responsible for entering into agreements with registry operators like VeriSign. According to the complaint, ICANN's mission includes a commitment to promoting competition for the contracts. CFIT's allegations further state that ICANN, like the NFPA, is a private body with no public accountability. These allegations are consistent with the view held by commentators on the subject, who have, indeed, identified *Allied Tube* as providing the strongest argument in favor of imposing antitrust liability on those who seek to coerce ICANN. *See* Michael Froomkin & Mark A. Lemley, *ICANN and Antitrust*, *2003 U. Ill. L. Rev. 1, 72-73 (2003)* (noting that "given ICANN's private status, VeriSign will face antitrust liability for persuading a private company in a position of power to grant it control over a market," and naming *Allied Tube* as the "closest analogue"). We hold, therefore, that pursuant to The Supreme Court's holding in *Allied Tube*, CFIT has adequately alleged that Verisign's improper coercion of ICANN **[**26]** and attempts to control ICANN's operations in its own favor violated Section 2.

CFIT also attempted to state a claim of predatory conduct in the .net registration market. The complaint's allegations did not reflect any assertion that Verisign's predatory activities had any bearing on the competitive bidding process that resulted in the 2005 .net Agreement. Accordingly, we hold that CFIT's claim of predatory conduct is made out with respect to the 2006 .com Agreement only.

2. Expiring Domain Names Market

The issue presented with respect to the claim of attempted monopolization of expiring domain names is whether the existence of a separate market was adequately pled. CFIT alleged that expiring domain names are more valuable than other names because, in all likelihood, they have already been advertised by the previous owner and already have web traffic. CFIT alleged that expiring domain names are in higher demand and command higher prices due to their unique features. In other words, expiring names differ from, and are more valuable than, names not previously used.

HN14[] A relevant market, for antitrust purposes, "can be broadly characterized in terms of the 'cross-elasticity of demand' for or **[**27]** 'reasonable interchangeability' of a given set of products or services." *M.A.P. Oil Co., Inc. v. Texaco Inc., 691 F.2d 1303, 1306 (9th Cir. 1982)* (quoting *United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. We consider whether "the product and its substitutes are reasonably interchangeable by consumers for the same purpose," as well as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id*. (citations omitted).

The district court relied on two out-of-circuit, district court cases to conclude that the complaint failed adequately to allege that the market for expiring domain names is separate from the market for other types of domain names. *See* *Weber v. Nat'l Football League, 112 F. Supp. 2d 667 (N.D. Ohio 2000)*; *Smith v. Network Solutions, Inc., 135 F. Supp. 2d 1159 (N.D. Ala. 2001)*. In *Weber*, the plaintiff brought a Section 2 claim against two professional football teams, the New York Jets and the Miami Dolphins, who sought to prevent the plaintiff from registering **[**28]** the domain **[*508]** names "jets.com" and "dolphins.com." *112 F. Supp. 2d at 673*. The plaintiff alleged that the market "should be defined by the demand for the domain names 'jets.com' and 'dolphins.com.'" *Id*. The court rejected the plaintiff's claim that the relevant market for antitrust purposes should be circumscribed to the market for a particular name, holding instead that the market should be "defined very broadly, in terms of domain names in general." *Id. at 673-74*.

Weber is similar to this case only insofar as it also involved antitrust claims defining a market for domain names. We agree with that court that ***HN15***[] a market should not be defined in terms of a single domain name. CFIT's complaint, however, does not define the relevant market so narrowly. Rather, it alleges that expiring domain names, as a group, are sufficiently distinguishable from other domain names so as to constitute a separate market. *Weber* did not deal with an alleged market for expiring domain names.

The second case, *Smith v. Network Solutions*, did address the question of whether a separate market for expiring domain names was adequately alleged. In *Smith*, the court considered a claim that the defendant, VeriSign's predecessor-in-interest, **[**29]** maintained an unlawful monopoly by failing expeditiously to release newly expired domain names for re-registration. *135 F. Supp. 2d at 1166-67*. The plaintiff alleged that the particular expiring domain names it wished to acquire constituted a separate market for antitrust purposes. *Id. at 1168*. The court rejected this proposed market definition, finding no appreciable difference between those particular expiring names and other types of names.

The court broadly observed that "there is no inherent difference in character, for purposes of interchangeability and cross-elasticity of demand, between domain names that are 'expired' . . . and those that are not." *Id. at 1169*. It did so, however, because it viewed the proposed market of some particular expiring domain names as too small. Thus, the decision in *Smith*, like *Weber*, was premised upon the court's reluctance to approve an overly narrow market definition consisting of one or a few domain names. *See* *Smith, 135 F. Supp. 2d at 1169* ("Taken to its logical conclusion, Plaintiff's argument implies that each individual domain name is a relevant market unto itself for antitrust purposes, subject the entity 'controlling' the name at a particular **[**30]** time … to a charge of monopolization.").

CFIT's claims are not so narrowly drawn. Its complaint relates to all expiring domain names, not just those a particular plaintiff wishes to acquire. Moreover, to the extent that the *Smith* court may have viewed expiring domain names as interchangeable with other names, it may well be that expiring domain names did not have a significant enough presence in 2001 for the court to consider a possible claim that, in the aggregate, they amounted to a separate market. According to the complaint, that is no longer the case. Moreover, amicus in this case, the Internet Commerce Association ("ICA"), points out that when *Smith* and *Weber* were decided, "the present expired domain name market barely existed," and that today's conditions were "unanticipated only a few years ago."

Here CFIT's complaint alleges that every word in the English language is already registered as a domain name, and that desirable domain names can be difficult to come by. On appeal, our understanding of the distinct role and value of expiring domain names has also been significantly aided by the explanation provided by the ICA. As cogently explained by **[*509]** ICA, expiring domain names often **[**31]** carry with them a history of established web traffic and advertising support; when such names do expire, they "still maintain much of [their] prior inbound traffic," making them more valuable than domain names that have never before been registered. The district court, of course, did not have the benefit of briefing by amicus. With the benefit of this aid to our understanding, we are not prepared to affirm the district court's ruling that no separate market exists. We therefore reverse and remand for further proceedings.

C. Claims Concerning the .Net Market

Although we conclude that CFIT has adequately stated facts sufficient to nudge its Section 1 and 2 claims "across the line from conceivable to plausible" with regard to Verisign's activities in the .com registration market, *Twombly, 550 U.S. at 570*, we cannot reach the same conclusion for the allegations about the .net market. All of the specific allegations of the complaint concerning predatory conduct leading to the pricing and renewal provisions of a contract relate to the 2006 .com Agreement. The complaint, in its present form, contains no allegation that predatory or conspiratorial conduct was involved in the process of reaching **[**32]** the 2005 .net Agreement. CFIT may have viable claims with respect to the .net market, but the district court will be in a better position to determine whether it does if CFIT is given an opportunity to amend its conclusory allegations to allege more specific conduct or anticompetitive effect. We therefore remand the .net claims so that CFIT may be afforded that opportunity. In considering any possible amendments, the district court is directed to take into account the pleading requirements of the Supreme Court decisions in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and *Ashcroft v. Iqbal, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

Finally, we observe that our review in this appeal is limited to whether the facts alleged in the complaint state plausible causes of action for violations of the Sherman Act. Although the complaint alleges that the Department of Commerce approved the 2006 .com Agreement, the role of the Department in developing that agreement or overseeing its administration has not been developed. We therefore do not consider the effect that government supervision may have in displacing the utility of antitrust supervision. *See, e.g., Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)*. **[**33]** We acknowledge, however, that while CFIT stated plausible Section 1 and 2 claims with respect to the .com market, proving actual injury to competition under Section 1 or dangerous probability of achieving monopoly power under Section 2 may be difficult in light of the amendments made by the Department of Commerce to its Cooperative Agreement with VeriSign and the Department's asserted commitment to "fulfill its stewardship responsibilities in connection with Verisign's provision of .com registry services." *Amendment 30 to the Cooperative Agreement between the Department of Commerce and VeriSign* (Nov. 29, 2006), *http://www.ntia.doc.gov/ntiahome/domainname/agreements/amend30_11292006.pdf*, at 3.

VI. Conclusion

We REVERSE the district court's grant of VeriSign's motion to dismiss CFIT's complaint for failure to state a claim, and **[*510]** REMAND to the district court for further proceedings consistent with this opinion.

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Clayworth v. Pfizer, Inc.

Supreme Court of California

July 12, 2010, Filed

S166435

Reporter

49 Cal. 4th 758 *; 233 P.3d 1066 **; 111 Cal. Rptr. 3d 666 ***; 2010 Cal. LEXIS 6620 ****; 2010-2 Trade Cas. (CCH) P77,088

JAMES CLAYWORTH et al., Plaintiffs and Appellants, v. PFIZER, INC., et al., Defendants and Respondents.

Subsequent History: Reported at Clayworth (James) v. Pfizer, Inc., 2010 Cal. LEXIS 7262 (Cal., July 12, 2010)

Decision reached on appeal by Clayworth v. Pfizer, Inc., 2012 Cal. App. Unpub. LEXIS 6173 (Cal. App. 1st Dist., Aug. 22, 2012)

On remand at, Decision reached on appeal by Clayworth v. Abbott Labs., 2014 Cal. App. Unpub. LEXIS 3832 (Cal. App. 1st Dist., May 29, 2014)

Prior History: [**1]** Superior Court of Alameda County, No. RG04172428, Ronald M. Sabraw and Harry R. Sheppard, Judges. Court of Appeal, First Appellate District, Division Two, No. A116798.

Clayworth v. Pfizer, Inc., 165 Cal. App. 4th 209, 83 Cal. Rptr. 3d 45, 2008 Cal. App. LEXIS 1151 (Cal. App. 1st Dist., July 25, 2008)

Core Terms

damages, purchaser, Shoe, pass-on, overcharge, Cartwright Act, Pharmacies, Manufacturers, antitrust, indirect, prices, suits, consumers, anti trust law, measured, cases, antitrust violation, violators, injunctive relief, restitution, buyer, legislative history, price-fixing, duplicative, tertiary, drugs, summary judgment, lost profits, Hart-Scott-Rodino Act, wholesalers

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1[] **Legislation, Interpretation**

In construing a statute, a court begins with the language of the statute. If the text is sufficiently clear to offer conclusive evidence of the statute's meaning, the court need look no further. If it is susceptible of multiple interpretations, however, the court will divine the statute's meaning by turning to a variety of extrinsic sources, including the legislative history, the nature of the overall statutory scheme, and consideration of the sorts of problems the legislature was attempting to solve when it enacted the statute.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

HN2[] Regulated Practices, Price Fixing & Restraints of Trade

Bus. & Prof. Code, § 16750, subd. (a), of the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., authorizes anyone injured in his or her business or property by actions forbidden under the Cartwright Act to recover three times the damages sustained.

Governments > Legislation > Effect & Operation > Amendments

Governments > Legislation > Interpretation

HN3[] Effect & Operation, Amendments

In the absence of textual guidance, a court must turn elsewhere. The court thus looks to the legislature's subsequent amendments to related parts of an act, and the court considers as well the object which the act seeks to achieve and the evil which it seeks to prevent.

Governments > Legislation > Interpretation

HN4[] Legislation, Interpretation

A court may presume that when the legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that enactment.

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

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

HN5[] Private Actions, Purchasers

Under the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., a pass-on defense generally may not be asserted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff. While a pass-on defense is generally precluded, a few instances remain in which it will still be available.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Torts > Business Torts > Unfair Business Practices > General Overview

HN6[] Standing, Injury in Fact

Private standing under California's unfair competition law, *Bus. & Prof. Code, § 17200 et seq.*, is limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition. *Bus. & Prof. Code, § 17204*.

Civil Procedure > ... > Justiciability > Standing > General Overview

Contracts Law > Remedies > Restitution

Torts > Business Torts > Unfair Business Practices > Remedies

Civil Procedure > Remedies > Damages > General Overview

HN7**[]** **Justiciability, Standing**

That a party may ultimately be unable to prove a right to damages or restitution does not demonstrate that it lacks standing to argue for its entitlement to them. The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery. Nothing in the text of *Bus. & Prof. Code, § 17204*, which is part of California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, suggests the voters intended to provide otherwise when they remade the UCL's standing requirements.

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

Civil Procedure > Remedies > Injunctions > General Overview

HN8**[]** **Justiciability, Standing**

If a party has standing under *Bus. & Prof. Code, § 17204*, it may seek injunctive relief under *Bus. & Prof. Code, § 17203*.

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

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN9**[]** **Standards of Review, De Novo Review**

A pure issue of law is reviewed de novo.

Civil Procedure > Remedies > Injunctions > General Overview

Contracts Law > Remedies > Restitution

Torts > Business Torts > Unfair Business Practices > Remedies

HN10**[]** **Remedies, Injunctions**

Bus. & Prof. Code, § 17203, which is part of California's unfair competition law (UCL), *Bus. & Prof. Code, § 17200 et seq.*, makes injunctive relief the primary form of relief available under the UCL, while restitution is merely ancillary. Nothing in the statute's language conditions a court's authority to order injunctive relief on the need in a given case to also order restitution. Accordingly, the right to seek injunctive relief under *§ 17203* is not dependent on the right to seek restitution; the two are wholly independent remedies.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Retail pharmacies sued pharmaceutical manufacturers under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), alleging the manufacturers had unlawfully conspired to fix the prices of their brand-name pharmaceuticals. The pharmacies also alleged that they had been injured by the manufacturers' unfair business practices and were entitled to relief under the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*). The trial court granted the manufacturers' motion for summary judgment, concluding that a pass-on defense was available under the Cartwright Act. The trial court further concluded that the pharmacies lacked standing to pursue the UCL claim because, having recouped the overcharge, they had not lost money or property, as required under *Bus. & Prof. Code, § 17204*. (Superior Court of Alameda County, No. RG04172428, Ronald M. Sabraw and Harry R. Sheppard, Judges.) The Court of Appeal, First District, Division Two, No. A116798, affirmed the trial court's judgment.

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter for further proceedings. The court held that under the Cartwright Act, as under federal law, generally no pass-on defense is permitted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff. The court found that no exception to the general rule applied in this case. Accordingly, the trial court erred in granting summary judgment for the manufacturers on the basis of a pass-on defense. The pharmacies had standing to pursue their UCL claim. *Bus. & Prof. Code, § 17204*, requires only that a party have lost money or property, and the pharmacies indisputably lost money when they paid an allegedly illegal overcharge. The court declined the manufacturers' invitation to turn this facially simple threshold condition into a requirement that the pharmacies prove compensable loss at the outset. The pharmacies' claim for injunctive relief was sufficient to preclude summary judgment. The manufacturers identified no obstacle that would preclude the pharmacies from obtaining injunctive relief if they established the manufacturers were engaged **[*759]** in an unfair business practice. (Opinion by Werdegar, J., with George, C. J., Baxter, Moreno, JJ., Ruvolo, J.,[*] Robie, J., [†] and Miller, J., [‡] concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

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

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[*] Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[†] Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[‡] Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

Statutes § 29—Construction—Language—Legislative Intent.

In construing a statute, a court begins with the language of the statute. If the text is sufficiently clear to offer conclusive evidence of the statute's meaning, the court need look no further. If it is susceptible of multiple interpretations, however, the court will divine the statute's meaning by turning to a variety of extrinsic sources, including the legislative history, the nature of the overall statutory scheme, and consideration of the sorts of problems the Legislature was attempting to solve when it enacted the statute.

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

Monopolies and Restraints of Trade § 10—Cartwright Act—Remedies—Treble Damages.

Bus. & Prof. Code, § 16750, subd. (a), part of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), authorizes anyone injured in his or her business or property by actions forbidden under the Cartwright Act to recover three times the damages sustained.

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

Statutes § 29—Construction—Legislature's Objective.

In the absence of textual guidance, a court must turn elsewhere. The court thus looks to the Legislature's subsequent amendments to related parts of an act, and the court considers as well the object which the act seeks to achieve and the evil which it seeks to prevent.

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

Statutes § 28—Construction—Legislative History of Federal Statute.

A court may presume that when the Legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that federal enactment.

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

Monopolies and Restraints of Trade § 10—Cartwright Act—Pass-on Defense—Presumptive Measure of Damages—Amount of Overcharge.

Under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), a pass-on defense generally may not be asserted. Instead, in an **[*760]** antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff. While a pass-on defense is generally precluded, a few instances remain in which it will still be available.

CA(6)[] **(6)**

Monopolies and Restraints of Trade § 6—Cartwright Act—Price-fixing—Pass-on Defense.

In a case in which retail pharmacies alleged that pharmaceutical manufacturers had unlawfully conspired to fix the prices of their brand-name pharmaceuticals in violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), the trial court erred in granting summary judgment for the manufacturers on the basis of a pass-on defense, as such a defense is generally not permitted, and no exception to the general rule applied.

[Cal. Forms of Pleading and Practice (2010) ch. 565, Unfair Competition, § 565.71; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 554; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, §§ 124, 125.]

CA(7)[] **(7)**

Unfair Competition § 8—Actions—Standing—Injury in Fact—Loss of Money or Property.

Private standing under the unfair competition law (*Bus. & Prof. Code, § 17200 et seq.*) is limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition (*Bus. & Prof. Code, § 17204*).

CA(8)[] **(8)**

Unfair Competition § 8—Actions—Standing—Damages—Mitigation.

That a party may ultimately be unable to prove a right to damages or restitution does not demonstrate that it lacks standing to argue for its entitlement to them. The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery. Nothing in the text of *Bus. & Prof. Code, § 17204*, which is part of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), suggests the voters intended to provide otherwise when they remade the UCL's standing requirements.

CA(9)[] **(9)**

Unfair Competition § 10—Actions—Standing—Injunctive Relief.

If a party has standing under *Bus. & Prof. Code, § 17204*, it may seek injunctive relief under *Bus. & Prof. Code, § 17203*.

CA(10)[] **(10)**

Unfair Competition § 10—Actions—Injunctive Relief—Restitution.

Bus. & Prof. Code, § 17203, which is part of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), makes injunctive relief the primary form of relief available under the UCL, **[*761]** while restitution is merely ancillary. Nothing in the statute's language conditions a court's authority to order injunctive relief on the need in a given case to also order restitution. Accordingly, the right to seek injunctive relief under *§ 17203* is not dependent on the right to seek restitution; the two are wholly independent remedies.

Counsel: Alioto Law Firm, Joseph M. Alioto, Joseph M. Alioto, Jr., Theresa D. Moore, Angelina Alioto-Grace, Thomas P. Pier; Law Offices of John H. Boone, John H. Boone; Foreman & Brasso, Russell F. Brasso; Law Offices of James M. Dombroski, James M. Dombroski; Law Offices of Jeffrey K. Perkins, Jeffrey K. Perkins; Gary D. McCallister & Associates, Gary D. McCallister, Thomas A. Kelliher, Eric I. Unrein and Jaime Goldstein for Plaintiffs and Appellants.

Coughlin Stoia Geller Rudman & Robbins, Pamela M. Parker; Schubert Jonckheer Kolbe & Kralowec and Kimberly A. Kralowec for Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiffs and Appellants.

Zelle Hofmann Voelbel & Mason, Craig C. Corbitt and Henry A. Cirillo for Pharmacists Planning Service, Inc., as Amicus Curiae on behalf of Plaintiffs and Appellants.

Filice Brown Eassa & McLeod, Peter A. Strotz, Paul R. Johnson, William E. Steimle; Davis Polk & Wardwell, Ameila Starr, Arthur F. Golden, William J. Fenrich and Daniel J. Schwartz for Defendant and Respondent **[****2]** AstraZeneca LP.

Winston & Strawn, Tyler M. Paetkau, Nicole P. Dogwill, James F. Hurst, Susan A. Pipal, Matthew J. Sullivan; Eimer Stahl Klevorn & Solberg, David M. Stahl, J. Cunyon Gordon and Adam Oyenbanji for Defendant and Respondent Abbott Laboratories.

Gibson, Dunn & Crutcher, Jeffrey T. Thomas and James N. Knight for Defendant and Respondent Allergan, Inc.

Mayer, Brown, Rowe & Maw, Mayer Brown, Donald M. Falk, John Nadolenco, Mack Anderson; Sheppard Mullin Richter & Hampton, Steven O. Kramer, John P. Stigi III; Hogan & Hartson and Joseph H. Young for Defendant and Respondent Amgen, Inc. **[*762]**

Covington & Burling, Elizabeth Abigail Brown, Anita F. Stork, Theodore Voorhees, Jr., and Thomas J. Cosgrove for Defendant and Respondent Boehringer Ingelheim Pharmaceuticals, Inc.

Sedgwick, Detert, Moran & Arnold, Paul J. Riehle, Matthew A. Fischer; Cravath, Swaine & Moore, Evan R. Chesler, Elizabeth L. Grayer, Jessica Buturla and Jeffrey B. Korn for Defendant and Respondent Bristol-Myers Squibb Company.

Reed Smith, Michele Diane Floyd, Kirsten J. Handelman; Oppenheimer Wolff & Donnelly, Gary Hansen, David Graham and Aaron Mills Scott for Defendant and Respondent Eli Lilly & Company.

Irell & Manella, **[****3]** Alexander F. Wiles, John C. Keith; Cleary Gottlieb Steen & Hamilton, George S. Cary, Sara D. Schotland and David I. Gelfand for Defendant and Respondent GlaxoSmithKline PLC.

Drinker Biddle & Reath, H. Christian L'Orange, Paul H. Saint-Antoine, Mary E. Kohart, David J. Antczak and Joanne C. Lewers for Defendant and Respondent Hoffmann-La Roche Inc.

Folger Levin & Kahn, Crowell & Moring, Beatrice Bich-Dao Nguyen, Samuel Ray Miller, Tracy E. Reichmuth, Cecilia C. Ogbu, Steven E. Wilson; Patterson Belknap Webb & Tyler, William Cavanaugh, Jr., and Cecilia B. Loving for Defendants and Respondents Janssen Pharmaceutical Inc., Johnson & Johnson Health Care Systems, Inc., Ortho Biotech, Inc., and Ortho-McNeil Pharmaceutical, Inc.

Hughes Hubbard & Reed, Rita M. Haeusler, John M. Townsend, Scott H. Christensen, James A. Graffam; Orrick, Herrington & Sutcliffe, Robert P. Reznick and David Goldstein for Defendant and Respondent Merck Sharp & Dohme Corp. formerly known as Merck & Co., Inc.

Kaye Scholer, Aton Arbisser, Bryant S. Delgadillo, Saul P. Morgenstern, Karin E. Garvey; Faegre & Benson, James A. O'Neal and Kim J. Walker for Defendant and Respondent Novartis Pharmaceuticals Corporation.

Nossaman **[****4]** , Gunther, Knox & Elliott, Nossaman, Scott DeVries, Katrina June Lee; Dickstein Shapiro, Peter J. Kadzik, Bernard Nash, Maria Colsey Heard, Milton Marquis and Andres Colin for Defendant and Respondent Pfizer Inc.

Latham & Watkins, Charles H. Samel, Jennifer A. Carmassi, Margaret M. Zwisler, Steven H. Schulman and Belinda S. Lee for Defendant and Respondent Pharmaceutical Research and Manufacturers of America. **[*763]**

Arnold & Porter, Ronald C. Redcay, Douglas L. Wald, Mark R. Merley, Daniel R. Waldman, Anne P. Davis and Ryan Z. Watts for Defendant and Respondent Wyeth.

Judges: Opinion by Werdegar, J., with George, C. J., Baxter, Moreno, Ruvolo, Robie, and Miller, JJ., concurring.

Opinion by: Werdegar

Opinion

[1069] [***670] WERDEGAR, [****5] J.**—When a group of companies conspires to fix prices at higher than a competitive level, the resulting overcharge is paid in the first instance by the direct purchaser of the cartel's goods. In markets where the direct purchaser is not also the ultimate purchaser, but an intermediary between the cartel and the consumer (the indirect purchaser), several questions arise: First, who should be permitted to sue for price fixing, the direct purchaser, the indirect purchaser, or both? Second, how should damages be allocated? Should an antitrust conspirator be permitted to raise as a defense that the direct purchaser passed on some or all of the overcharge to indirect purchasers downstream in the chain of distribution?

Under federal ***antitrust law***, the answer to these questions is settled. In *Hanover Shoe v. United Shoe Mach. (1968) 392 U.S. 481 [20 L. Ed. 2d 1231, 88 S. Ct. 2224]* (*Hanover Shoe*), the United States Supreme Court held antitrust violators ordinarily could not assert as a defense that any illegal overcharges had been passed on by a plaintiff direct purchaser to indirect purchasers. Instead, the full measure of the overcharge is recoverable by the direct purchaser. In a related decision nine years later, the Supreme **[****6]** Court concluded only direct purchasers, not indirect purchasers, could sue for price fixing. (*Illinois **[**1070]** Brick Co. v. Illinois (1977) 431 U.S. 720 [52 L. Ed. 2d 707, 97 S. Ct. 2061]* (*Illinois Brick*).)

Under state ***antitrust law***, only the first question—who may sue—is settled. In 1978, in direct response to *Illinois Brick*, the Legislature amended the state's Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) [1] **[***671]** to provide that unlike federal law, state law permits indirect purchasers as well as direct purchasers to sue (*§ 16750, subd. (a)*). This left open the further question how damages should be allocated. Does the Cartwright Act permit a pass-on defense, or in this respect are state and federal law the same?

We conclude that under the Cartwright Act, as under federal law, generally no pass-on defense is permitted. While the text of the Cartwright Act does not answer the question, the Legislature's actions in response to *Illinois Brick* and related federal statutory amendments reveal a clear legislative preference for the *Hanover Shoe* rule. As well, that rule is the one most closely in accord **[*764]** with the Legislature's overarching goals **[****7]** of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds. Accordingly, we reverse the Court of Appeal, which held that a pass-on defense was available and that it entitled the alleged price-fixing defendants here to summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a grant of summary judgment, we review and recite the evidence in the light most favorable to the nonmoving party (here, plaintiffs). (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843 [107 Cal. Rptr. 2d 841, 24 P.3d 493]*.)

Plaintiffs (hereafter Pharmacies) are retail pharmacies located in California. [2] Defendants (hereafter Manufacturers) are, with two exceptions, companies that manufacture, market, and/or distribute brand-name pharmaceutical products throughout the United States. [3] Manufacturers also manufacture, market, and/or distribute similar brand-

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[1] All further unlabeled statutory references are to the Business and Professions Code.

[2] Plaintiffs are James Clayworth, R.Ph., an individual, doing business as Clayworth Pharmacy and Clayworth Healthcare; Marin Apothecaries, **[****8]** Inc., doing business as Ross Valley Pharmacy; Golden Gate Pharmacy Services, Inc., doing business as Golden Gate Pharmacy; Pediatric Care Pharmacy, Inc.; Chimes Pharmacy, Inc.; Mark Horne, R.Ph., an individual, doing business as Burton's Pharmacy; Meyers Pharmacy, Inc.; Benson Toy, R.Ph., an individual, doing business as Marin Medical Pharmacy; Seventeen Fifty Medical Center Pharmacy, Inc.; Tony Mavrantonis, R.Ph., an individual, doing business as Jack's Drug; Julian Potashnick, R.Ph., an individual, doing business as Leo's Pharmacies; Jerry Shapiro, R.Ph., an individual, doing business as Uptown Drug, Co.; Tilley Apothecaries, Inc., doing business as Zweber's Apothecary; RP Healthcare, Inc.; Rohnert Park Drugs, Inc.; and JGS Pharmacies, Inc., doing business as Dollar Drugs.

[3] Defendants are Abbott Laboratories; AstraZeneca LP; Novartis Pharmaceuticals Corporation; Allergan, Inc.; Boehringer Ingelheim Pharmaceuticals, Inc.; Eli Lilly & Company; Johnson & Johnson; Janssen Pharmaceutical PLC Inc.; Ortho-McNeil

name pharmaceutical products in Canada where, unlike in the United States, the products are subject to government pricing restrictions.

Pharmacies filed suit under section 1 of the Cartwright Act (Stats. 1907, ch. 530, § 1, pp. 984–985, as amended; *§§ 16720*, *16726*) and the unfair competition law (UCL) (*§ 17200 et seq.*), alleging Manufacturers had unlawfully conspired to fix the prices of their brand-name pharmaceuticals in the United States market, including in California. The complaint alleged **[*765]** Manufacturers **[***672]** had agreed to set artificially high prices for their products, and had acted in concert to restrain reimportation of their lower priced foreign drugs into the United States and to restrict price competition from generics. As a result, the complaint alleged, Manufacturers were able to maintain prices for their drugs in California, as elsewhere in the United States, at levels 50 to 400 percent higher than for the same drugs sold outside the United States. Pharmacies alleged they consequently had been **[**1071]** forced to pay an overcharge, the differential between the conspiracy-inflated prices set by Manufacturers and the prices Pharmacies would have paid in a competitive market. They sought **[****10]** treble damages, restitution, and injunctive relief.

Each Manufacturer answered, denying Pharmacies' allegations and asserting as an affirmative defense that Pharmacies' claims were barred on the ground Pharmacies passed on any alleged overcharge to third parties and therefore did not suffer a compensable injury.

Pharmacies filed a motion for summary adjudication of Manufacturers' pass-on defense, arguing that the defense was unavailable under the Cartwright Act in light of *Hanover Shoe, supra, 392 U.S. 481*, the subsequent legislative history of the Cartwright Act, and public policy. Manufacturers responded with a cross-motion for summary judgment, arguing that under the plain language of the Cartwright Act, a pass-on defense was available and defeated both the Cartwright Act and UCL claims. [4]

Evidence presented in connection with the cross-motions established the following essentially undisputed facts. Manufacturers sell their drugs to wholesalers at a price referred to as the wholesale acquisition cost. In turn, various independent entities use the wholesale acquisition **[****11]** cost to calculate and publish benchmark drug prices, termed the average wholesale price, for use in the industry. Wholesalers resell the drugs to Pharmacies at prices based on a percentage of the average wholesale price. Because the published average wholesale price is a fixed percentage above the price charged by Manufacturers to wholesalers, any price increases by Manufacturers will increase the average wholesale price proportionally. As a result, when Manufacturers increase their prices, the costs of drugs to Pharmacies increase by the same percentage amount.

In turn, Pharmacies sell the drugs to two groups of consumers: (1) those with third party insurance or a drug benefit plan offered by either a private entity or the government, which in turn pays customers' claims on their behalf, and (2) uninsured (or cash-paying) consumers. For the first group, **[*766]** those covered by third party payers, Pharmacies are reimbursed at a contractually or statutorily fixed amount, predetermined as a percentage of the average wholesale price, plus a dispensing fee; this reimbursement is greater than Pharmacies' acquisition costs. For the second group, the cash-paying consumers, Pharmacies establish the **[****12]** retail prices unilaterally. Though not required to be, these prices traditionally have been based on a set percentage of the average wholesale price as well, plus in some instances an additional dispensing fee.

Currently, consumers covered by third party payers comprise the bulk of Pharmacies' customers. It appears the percentage of cash-paying consumers has declined over time, with the consequence that the degree of price-setting discretion Pharmacies have has fallen as well.

Pharmaceutical, Inc.; Ortho Biotech, Inc.; GlaxoSmithKline PLC; Pfizer, Inc.; Hoffmann-La Roche Inc.; Aventis Pharmaceuticals, Inc.; Amgen, Inc.; Merck & Co., Inc.; Bristol-Myers Squibb Company; Wyeth; Johnson & Johnson Health Care Systems Inc., which apparently does not manufacture, market, or distribute **[****9]** pharmaceutical products; and Pharmaceutical Research and Manufacturers of America, a United States-based nonprofit trade association.

[4] This motion assumed arguendo that Manufacturers had engaged in price fixing. For purposes of this appeal, we do likewise.

[*673]** In light of this evidence, the trial court granted Manufacturers' summary judgment cross-motion and denied as moot Pharmacies' summary adjudication motion. It held a pass-on defense was available under the Cartwright Act: A defendant could reduce or eliminate its liability upon proof that the plaintiff had passed on the alleged price overcharge and thereby limited its damages or suffered no injury. The trial court interpreted the evidence before it as showing that Pharmacies had passed on all of Manufacturers' overcharges to consumers and had thus sustained no damages under the Cartwright Act. The pass-on defense similarly defeated Pharmacies' UCL claim; the trial court concluded Pharmacies lacked standing to pursue **[****13]** the claim because, having recouped the overcharge, they had not "lost money or property," as required under *section 17204*.

The Court of Appeal affirmed. It rejected the argument that the Legislature had approved application to the Cartwright Act of *Hanover Shoe, supra, 392 U.S. 481*, and its bar against pass-on defenses. **[**1072]** Relying instead on its reading of the plain meaning of the Cartwright Act's damages provision (*§ 16750, subd. (a)*), the Court of Appeal concluded a pass-on defense was available and was fatal to Pharmacies' claims because they could show no "damages sustained" (*ibid.*). It likewise rejected Pharmacies' UCL claims on the grounds that Pharmacies were not entitled to restitution and lacked standing to challenge Manufacturers' alleged unfair business practices.

We granted review to address a significant issue of first impression: whether under the Cartwright Act an antitrust defendant can defeat liability by asserting a pass-on defense. (See *Global Minerals & Metals Corp. v. Superior Court (2003) 113 Cal.App.4th 836, 852, fn. 10 [7 Cal. Rptr. 3d 28]* ["[T]his issue of the availability of a 'pass-on defense' in ***antitrust law*** still remains an open question in California … ."]; *J. P. Morgan & Co., Inc. v. Superior Court (2003) 113 Cal.App.4th 195, 213, fn. 10 [6 Cal. Rptr. 3d 214]* **[****14]** **[*767]** [same]; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1353 [235 Cal. Rptr. 228]* [same].)

DISCUSSION

I. Hanover Shoe *and Its Antecedents*

In *Hanover Shoe, supra, 392 U.S. 481*, the United States Supreme Court considered whether the pass-on defense should be available to defendants found to have charged excess prices under federal ***antitrust law***. The United States had obtained a judgment against United Shoe Machinery Corporation (United Shoe) under section 4 of the Sherman Act (*15 U.S.C. § 4*) for monopolizing the market for shoe manufacturing machinery. Relying on this judgment, shoe manufacturer Hanover Shoe, Inc. (Hanover Shoe), sought to recover the "damages by him sustained" under *section 4* of the Clayton Act (*15 U.S.C. § 15*); United Shoe argued in response that Hanover Shoe had likely incorporated any overcharge it paid United Shoe into the prices it charged its customers for shoes, and accordingly had sustained no damage.

In a seven-to-one decision authored by Justice White, the United States Supreme Court rejected United Shoe's assertion of a pass-on defense. [5] It held that "when a buyer shows that the price paid by him for **[***674]** materials purchased for use in his business is illegally **[****15]** high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of *§ 4*" of the Clayton Act (*15 U.S.C. § 15*). (*Hanover Shoe, supra, 392 U.S. at p. 489*.)

Explaining this conclusion, the Supreme Court pointed out that however a buyer responds to illegal overcharges, he inevitably will be damaged. First, if the buyer does nothing and absorbs the loss, he suffers lost profits because, while revenue is static, his costs have been increased by the amount of the overcharge. (*Hanover Shoe, supra, 392 U.S. at p. 489*.) Second, "if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to

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[5] Justice Stewart dissented on the threshold question whether United Shoe had been shown to violate the antitrust laws and accordingly did not reach the issue of how to determine damages. (See *Hanover Shoe, supra, 392 U.S. at p. 513* (dis. opn. of Stewart, J.).) The seven members of the Supreme Court to consider the pass-on defense thus were unanimous in rejecting it.

maintain his profit level, he would have made **[****16]** more if his purchases from the defendant had cost him less." (*Ibid.*) Third, "the buyer is equally entitled to damages if he raises the price for his own product." (*Ibid.*) In this last scenario, to the extent the higher price costs the buyer sales, he is injured by his loss of sales; to the extent it does not cost **[*768]** him sales, because demand for his product is inelastic, his marginal profit would have been higher had his costs, illegally enhanced, been lower. In sum: "As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower." (*Ibid.*)

[1073]** The Supreme Court offered two additional reasons why acceptance of the pass-on defense would be problematic. First, it would require a fact finder to decide a host of imponderables: whether in the absence of the illegal overcharge the plaintiff would have priced his product differently, what impact such a different price would have had on total sales "in the real economic world rather than an economist's hypothetical model" (*Hanover Shoe, supra, 392 U.S. at p. 493*), **[****17]** and whether the price change might have been pursued anyway even in the absence of the initial overcharge. "Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable." (*Ibid.*) Proof of such factors would depend on massive and complex showings and rebuttals, potentially sidetracking every antitrust trial in a host of issues collateral to the central claim—whether the defendant had engaged in illegal anticompetitive conduct. (*Ibid*.)

Second, broad acceptance of the defense would create a risk that no one would be left with a sufficiently significant injury to be motivated to seek relief; individual end consumers, each harmed to the tune of a few pennies or dollars only, might have insufficient motivation even to pursue a class action. Consequently, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them" (*Hanover Shoe, supra, 392 U.S. at p. 494*), and enforcement of the antitrust laws would be compromised.

Hanover Shoe's view of how **[****18]** properly to measure damages was not novel; as Justice White pointed out, a long line of Holmes and Brandeis opinions had adopted the same understanding. (See *Hanover Shoe, supra, 392 U.S. at pp. 489–490*.) Writing for the court in *Chattanooga Foundry v. Atlanta (1906) 203 U.S. 390 [51 L. Ed. 241, 27 S. Ct. 65]*, Justice Holmes explained why a pass-on defense was inconsistent with the law's **[***675]** general take on damages: "A man is injured in his property when his property is diminished. … [W]hen a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there." (*Id. at p. 399*.) Several years later, he explained again why a pass-on defense **[*769]** should not stand as a bar to allegations of excessive rate charges under federal transportation law: "The only question before us is … whether the fact that the plaintiffs were able to pass on the damage … prevents their recovering the overpayment … . The answer is not difficult. The general tendency of the law, in regard to damages at **[****19]** least, is not to go beyond the first step. … The plaintiffs suffered losses … when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events." (*Southern Pac. Co. v. Darnell-Taenzer Co. (1918) 245 U.S. 531, 533–534 [62 L. Ed. 451, 38 S. Ct. 186]*.) To similar effect in rejecting a pass-on defense in the context of an illegal overcharge by railroad yards, Justice Brandeis wrote for the court: "Neither the fact of subsequent reimbursement … , nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers." (*Adams v. Mills (1932) 286 U.S. 397, 407 [76 L. Ed. 1184, 52 S. Ct. 589]*.) To allow a pass-on defense would undermine the enforcement of the statutory scheme (there, the Interstate Commerce Act (49 U.S.C. former § 8)): "[T]he purpose of that section would be defeated if the tortfeasors were permitted to escape reparation by a plea that the ultimate incidence of the injury was not upon those who were compelled in the first instance to pay the unlawful charge." (*Adams v. Mills, at p. 408*.)

This rejection of using overcharge pass-ons as a defense occurs not because the law is blind to their existence, but rather because its eyes are open to their **[****20]** ubiquity. Justice Holmes, again: The disregard of pass-ons is in part a recognition of "the endlessness and futility of the effort to follow every transaction to its ultimate result. [Citation.] Probably in the end the public pays the damages **[**1074]** in most cases of compensated torts." (*Southern Pac. Co. v. Darnell-Taenzer Co., supra, 245 U.S. at p. 534*.) The *Hanover Shoe* court certainly acknowledged that a buyer faced with an overcharge might seek to pass on that overcharge. (*Hanover Shoe, supra, 392 U.S. at pp. 489, 493*.) What the court also recognized, however, was how much deeper down the rabbit hole one could go. Price fixing has primary consequences: the overcharge to direct purchasers. It may have secondary consequences: the pass-on to indirect purchasers. It may have tertiary consequences: the price increase may result in lost sales or profits, or lost market share for a buyer forced to compete with sellers not subject to the overcharge. (*Id. at pp. 489–493*.) [6] To trace every consequence of a monopoly or a price-fixing conspiracy is to encounter Holmes's “futility of the effort to follow every transaction to its ultimate result.” (*Southern Pac. Co., at p. 534*.) *Hanover Shoe* recognized **[****21]** fully the difficulties inherent in tracing an antitrust violation to its ultimate **[*770]** consequences. (See *Hanover Shoe, at p. 493*.) The rule it **[***676]** adopted, which accounts only for the primary consequence (the overcharge), recognizes that to stop after consideration of primary and secondary consequences (the overcharge and any pass-on) would fail to properly account for a host of tertiary consequences and thus underestimate the impact of the overcharge, but that attempting to actually account for those tertiary consequences would often be both impractical, given the difficulties of proving “in the real economic world” (*ibid.*) the ultimate impacts of a price change, and a severe impairment to deterrence (*id. at p. 494*).

With this background, we turn to the issue in this case. Does the rule of *Hanover Shoe*, that a defensive pass-on theory may not be used to defeat an antitrust damages **[****22]** claim, apply under the Cartwright Act?

II. *The Cartwright Act and the Pass-on Defense*

A. *The Cartwright Act's Text and Early History*

HN1[] ***CA(1)***[] **(1)** We begin with the language of the statute. If the text is sufficiently clear to offer conclusive evidence of the statute's meaning, we need look no further. (*Microsoft Corp. v. Franchise Tax Bd. (2006) 39 Cal.4th 750, 758 [47 Cal. Rptr. 3d 216, 139 P.3d 1169]*.) If it is susceptible of multiple interpretations, however, we will divine the statute's meaning by turning to a variety of extrinsic sources, including the legislative history (e.g., *Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1080–1081 [103 Cal. Rptr. 3d 767, 222 P.3d 214]*), the nature of the overall statutory scheme (e.g., *Tonya M. v. Superior Court (2007) 42 Cal.4th 836, 844–845 [69 Cal. Rptr. 3d 96, 172 P.3d 402]*), and consideration of the sorts of problems the Legislature was attempting to solve when it enacted the statute (e.g., *Burris v. Superior Court (2005) 34 Cal.4th 1012, 1018 [22 Cal. Rptr. 3d 876, 103 P.3d 276]*).

HN2[] ***CA(2)***[] **(2)** *Section 16750, subdivision (a)* authorizes anyone “injured in his or her business or property” by actions forbidden under the Cartwright Act (*§ 16700 et seq.*) to recover three times the “damages sustained.” Aside from an increase in the multiplier, to treble damages from the original double damages, this language has been **[****23]** carried forward essentially without change from the original version of the act. [7]
[*771]

We reject at the outset Manufacturers' contention that the choice of the words “damages sustained” (*§ 16750, subd. (a)*) or “damages by him sustained” (Stats. 1907, ch. 530, § 11, p. 987) establishes a particular legislative intent on the question whether a **[**1075]** pass-on defense should be available. The express text says only that a party must have been “injured” by a Cartwright Act violation and may recover the resulting “damages sustained”; it says nothing about how the injury or damages are to be quantified. In the antitrust context, one might measure the damages from a violation any number of ways: e.g., the excess amount a party paid the **[****24]** violator (the overcharge) (see *Hanover Shoe, supra, 392 U.S. at pp. 487–490*); the sales a party lost as a result of the overcharge (lost sales) (see *Hanover Shoe, at p. 493*; *Kansas v. UtiliCorp United Inc. (1990) 497 U.S. 199, 224 [111 L. Ed. 2d 169, 110 S. Ct. 2807]* (dis. opn. of White, J.); *B.W.I. Custom Kitchen* **[***677]** *v. Owens-Illinois, Inc.,*

[6] One can imagine still more remote consequences as well, such as changes in the value of a business as a going concern, or changes in buying patterns by consumers who substitute purchases of other products, with consequent positive and negative effects on the various distributors in the market. And so on, and so on.

[7] As originally enacted, the Cartwright Act's private damages provision read: “In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor … to recover twofold the damages by him sustained, and the costs of suit.” (Stats. 1907, ch. 530, § 11, p. 987.)

supra, 191 Cal. App. 3d at p. 1353); the lost profit opportunity a party suffered due to increased costs (lost profits) (see *Hanover Shoe, at p. 493* & fn. 9); or the impact on the value of a business as a going concern due to lost market share (see *B.W.I. Custom Kitchen, at p. 1353*). Put another way, one could in theory measure injury by considering only the primary consequences of a price conspiracy (the overcharge), as *Hanover Shoe* did; by considering only the primary and secondary consequences (the overcharge and pass-on), as Manufacturers argue; or by considering the primary, secondary, and tertiary consequences (as, for instance, *B.W.I. Custom Kitchen, at p. 1353*, theorized one might have to). The words of the statute themselves dictate no particular choice among these options, nor any particular conclusion as to whether a pass-on defense should be available.

That the text of the **[****25]** Cartwright Act is ambiguous on this point is further illustrated by the fact the United States Supreme Court, interpreting the essentially identical language of the federal Clayton Act (*15 U.S.C. § 12 et seq.*), reached a conclusion diametrically opposite to that of the Court of Appeal in this case. Construing the Clayton Act's damages provision ("damages by him sustained"), [8] the Supreme Court concluded defensive use of a pass-on theory was prohibited (*Hanover Shoe, supra, 392 U.S. at pp. 489–494*); construing the Cartwright Act's damages provision ("damages sustained"), [9] the Court of Appeal here concluded such use of a pass-on theory was permitted, indeed compelled. Nor is *Hanover Shoe* an anomaly; addressing a federal damages provision mirroring that of the Cartwright Act, the Supreme Court in *Adams v. Mills, supra, 286 U.S. at pages 406–408*, likewise rejected the defendants' pass-on theory. [10] This divergence illustrates not that **[*772]** either conclusion must be wrong, only that reasonable jurists may—from a text as opaque as "damages sustained"—arrive at widely differing conclusions, and that that text is thus susceptible of being read as supporting more than one rule for measuring damages. **[****26]** [11] The question we face is how to *measure* "damages sustained," and nothing in the Cartwright Act's language, **[**1076]** as enacted in 1907 or thereafter amended, resolves that question. Insofar as the text of the Cartwright **[***678]** Act is concerned, the question is an open one.

We reject as well a second interpretive argument pressed by Manufacturers and adopted by the Court of Appeal: that at the beginning of the 20th century there was an existing, generally understood meaning for "damages by him sustained," and we therefore should presume the Legislature intended that meaning when it used the phrase in the Cartwright Act.

The general principle that we should assume the Legislature uses words in accordance with their commonly understood meaning is sound. In *State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal.3d 1147 [252 Cal. Rptr. 221, 762 P.2d 385]*, for example, we interpreted ambiguous **[****28]** provisions of the Cartwright Act by considering whether extant law established an accepted meaning for the chosen terms. Because our research disclosed an accepted understanding that a prohibition against a "combination" did not extend to mergers, we

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[8] *Title 15 United States Code section 15(a)*.

[9] *Section 16750, subdivision (a)*.

[10] At issue was a claim under section 8 of the Interstate Commerce Act (49 U.S.C. former § 8), which created liability for "the full amount of damages sustained" because of overcharges and other violations.

[11] Manufacturers argue that *Hanover Shoe, supra, 392 U.S. 481*, is not evidence of textual ambiguity because it was not a statutory interpretation case. We disagree. The United States Supreme Court itself has indicated *Hanover Shoe* resolved "a question of statutory interpretation," namely, the "proper construction of § 4 of the Clayton Act [*15 U.S.C. § 15*]." (*California v. ARC America Corp. (1989) 490 U.S. 93, 103 [104 L. Ed. 2d 86, 109 S. Ct. 1661]*.) More fundamentally, while it is true *Hanover Shoe* did not discuss how best to interpret the phrase "damages by him sustained," that omission implicitly acknowledges that an exegesis of those few words would have yielded no answers. Tasked **[****27]** with interpreting a statute, courts resort to all manner of tools to divine intent. Where in one case the text or legislative history may produce a clear answer, in another it may lead only to a dead end. Courts do not often catalogue every blind alley; that *Hanover Shoe* did not address the statutory text's opacity is of no significance. That the Supreme Court relied on nontextual tools to construe the Clayton Act *is* significant; it demonstrates the court's conclusion that the text itself was not restrictive enough to specify a unique measure of damages—that it was, in short, ambiguous.

concluded the Legislature surely knew of and adopted that understanding when it passed the Cartwright Act. (*State of California ex rel. Van de Kamp v. Texaco, Inc., at pp. 1160–1163*.)

That principle has no similar application here. We can discern no contemporaneous consensus with respect to the phrase "damages by him sustained." The Cartwright Act was passed in 1907 as part of a wave of turn-of-the-century state and federal legislation intended to stem the power of monopolies and cartels. (Landry & Hornbeck, *One Hundred Years in the Making: The Cartwright Act in Broad Outline* (2008) 17, No. 2, J. Antitrust and Unfair Competition Section of State Bar 7, 7–8; *State of California ex rel. Van de* **[*773]** *Kamp v. Texaco, Inc., supra, 46 Cal.3d at pp. 1154–1156*; see generally Limbaugh, *Historic Origins of Anti-trust Legislation* (1953) 18 Mo. L.Rev. 215.) It was based in part on other recently enacted state laws aimed at the same problems. (*State of California ex rel. Van de Kamp v. Texaco, Inc., at pp. 1160–1162* **[****29]** & fn. 14; Hibner & Cooper, *The Cartwright Act at 100—A History of Complementary Antitrust Enforcement—A Celebration* (2008) 17, No. 2, J. Antitrust and Unfair Competition Section of State Bar 81, 91–92.) The phrase "damages sustained" or "damages by him sustained" was routinely employed in the remedial provisions of the antitrust statutes of the time. [12] However, our review of out-of-state and federal decisions in the years preceding the Cartwright Act's 1907 adoption discloses nothing (never mind a consensus) speaking to how the "damages by him sustained" should be measured or allocated between direct and indirect purchasers who seek to sue for antitrust loss.

Certainly the California cases relied on by Manufacturers and the Court of Appeal do not establish any consensus as to how damages were to be measured. In *De Costa v. Mass. Mining Co. (1861) 17 Cal. 613, 617*, a nuisance case, we explained that the damages for creating an unwanted ditch on another's property were confined to the injury sustained, the diminution in the value of the property in its **[***679]** present condition, rather than the full cost of remediation (filling in the ditch). In *Utter v. Chapman (1869) 38 Cal. 659, 664–666*, a breach of contract case, we explained that the plaintiff steamship operator could not automatically recover the full contract price for shipping grain the defendant failed to provide. The plaintiff had a duty to mitigate by finding substitute employment for his steamer, such as transporting grain for other parties, and, to the extent he was able to do so, his damages were thereby diminished. In *Hicks* **[**1077]** *v. Drew (1897) 117 Cal. 305, 314–315 [49 P. 189]*, a tort action for injury to real property, we indicated damages should be measured based **[****31]** on the net impact of the defendant's actions, offsetting any benefit to the plaintiff against any loss.

These contract and tort cases are unhelpful on the question of how to measure the "damages sustained" in an antitrust case. They express in a variety of contexts the truism that damages are to compensate for actual loss, but this, again, begs the question before us: *how* to measure actual loss in the context of an intermediary-purchaser antitrust action for price fixing.

[*774]

Notably as well, in 1907 an antitrust claim for civil money damages was a wholly new kind of claim, part of the "dramatically enhanced sanctions imposed by the [Cartwright] Act." (*State of California ex rel. Van de Kamp v. Texaco, Inc., supra, 46 Cal.3d at p. 1167*.) At common law, no such private claim existed; remedies for illegal agreements and restraints on trade were confined to proceedings to hold the agreements void and unenforceable and to revoke corporate privileges. (*Ibid.*) Thus, no reason exists to assume the Legislature intended to incorporate

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[12] E.g., *Sherman Antitrust Act of 1890* (Act of July 2, 1890, ch. 647, § 7, 26 Stat. 209, 210) ("damages by him sustained"); 1899 Michigan Public Acts, No. 255, section 11, page 412 ("damages by him sustained"); 1907 Missouri Laws, page 380 (Mo. Rev. Stat., former § 8972) ("damages by him sustained"); 1905 Nebraska Laws, chapter 162, section 18, page 644 ("damages by him sustained"); *1898 Ohio Laws, section 11*, page 146 (former Ohio Gen. Code, § 6397) ("damages by him sustained"); 1893 Oklahoma Revised Statutes, chapter 83, **[****30]** section 4, page 1163 ("damages sustained"); 1898 Utah Revised Statutes, title 54, section 1761, page 424 ("damages sustained").

any particular existing method of measuring damages derived from statutory or common law precedent, including the common law contract and tort damage measures on which **[****32]** Manufacturers rely. [13]

More generally, we consider it implausible that the Legislature had any specific intent on the question we face. Certainly nothing in what minimal legislative history has survived from the Cartwright Act's 1907 enactment sheds any direct light on the question. The economic theories that underlie an antitrust claim are sufficiently complex that we may safely surmise the fine points of whether enforcement by direct and indirect purchasers should be permitted or preferred, and what precise proof of passed-on costs, lost sales, and lost profits should become the grist of an antitrust trial, were not at the forefront of the Legislature's mind when enacting what was then a pioneering law. Certainly by its choice of the generic phrases “damages by him sustained” and “injured in his business or property,” **[****33]** the Legislature did not presume to resolve these complex questions.

Two early Court of Appeal Cartwright Act cases relied on by Manufacturers do not lead us to a different conclusion. *Krigbaum v. Sbarbaro (1913) 23 Cal.App. 427 [138 P. 364]* is a case about antitrust causation, i.e., the notion that to have an antitrust claim one must establish a causal nexus between one's injury and the alleged unlawful restraint of trade. (See *Associated General Contractors v. Carpenters (1983) 459 U.S. 519, 540–542 [74 L. Ed. 2d 723, 103 S. Ct. 897]*; *Vinci v. Waste Management, Inc. (1995) 36 Cal.App.4th 1811, 1814 [43 Cal. Rptr. 2d 337]*.) In *Krigbaum*, the plaintiff alleged the defendants had **[***680]** conspired to monopolize the market for vineyard-quality land, but his injury arose not from any restraints on trade accomplished by the alleged trust; rather, it arose from specific actions the defendants took to interfere with a particular real estate transaction he had brokered. (*Krigbaum,* ***[*775]*** *at pp. 433–434*.) Because the plaintiff had not alleged causation, a demurrer to his Cartwright Act claim was properly sustained. (*Ibid.*) *Krigbaum* has nothing to say on the general topic that concerns us: when (as here) causation *has* **[****34]** been properly alleged, how are antitrust damages to be measured?

Equally unilluminating is *Overland P. Co. v. Union L. Co. (1922) 57 Cal.App. 366 [207 P. 412]*, another antitrust causation case. The plaintiff, a printing and publishing company, alleged the defendant printing trade association had agreed to limit bidding for certain printing jobs, thereby driving up prices. As the Court of Appeal there correctly explained, nothing about this arrangement caused the plaintiff injury; instead, the decision of the plaintiff's competitors not to bid for work reduced the competition for the plaintiff and likely benefited it. (*Id. at pp. 374–375*.) Here, in contrast, Pharmacies are not Manufacturers' competitors but their indirect customers, and they **[**1078]** have properly alleged that Manufacturers' price-fixing conspiracy caused them injury in the form of higher prices. As with *Krigbaum v. Sbarbaro, supra, 23 Cal.App. 427*, nothing in the *Overland P.* court's discussion speaks to how we should measure the damages of those plaintiffs who have alleged causation.

HN3[] ***CA(3)***[] **(3)** In the absence of textual guidance, we must turn elsewhere. We thus look to the Legislature's subsequent amendments to related parts of the Cartwright Act, and **[****35]** we consider as well “the object which [the Cartwright Act] seeks to achieve and the evil which it seeks to prevent … .” (*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal.3d 658, 669 [150 Cal. Rptr. 250, 586 P.2d 564]*; see also *Burris v. Superior Court, supra, 34 Cal.4th at p. 1018* [“we must consider the human problems the Legislature sought to address in adopting [the statute]”].)

Consideration of these sources leads us to conclude the federal *Hanover Shoe* rule (*Hanover Shoe, supra, 392 U.S. at p. 494*) is most consistent with legislative intent and applies equally to state claims under the Cartwright Act. Every indication available from the Legislature demonstrates that, given a choice, it would prefer an enforcement regime in which *Hanover Shoe* is the law. In particular, the Legislature's actions at two closely related points in time are telling: (1) in 1977, following Congress's passage of the Hart-Scott-Rodino amendments to the federal Clayton Act (*15 U.S.C. § 12 et seq.*); and (2) in 1978, in the immediate aftermath of the United States Supreme Court's decision in *Illinois Brick, supra, 431 U.S. 720*.
[*776]

[13] Nor do generic contract and tort damage cases address the significant antitrust-only policy concerns that have motivated the United States Supreme Court in its reading of the Sherman and Clayton Acts (*15 U.S.C. § 1 et seq.*; *id.*, *§ 12 et seq.*) and that must influence our reading of the Cartwright Act.

B. *The Cartwright Act's Amendment History*

1. *Cartwright Act amendment in response to federal legislation* **[****36]**

a. *The Hart-Scott-Rodino Act*

Congress amended the Clayton Act (*15 U.S.C. § 12 et seq.*) by passing the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the Hart-Scott-Rodino Act). The Hart-Scott-Rodino Act authorized state attorneys general to file *parens patriae* suits [14] on behalf of injured **[***681]** consumers for violations of the Sherman Act (*15 U.S.C. § 1 et seq.*). (*15 U.S.C. § 15c(a)(1)*.) Congress created the remedy out of concern that consumers, the indirect purchasers who typically bear the brunt of antitrust violations in the form of higher prices, had no existing effective redress because the small amounts of their injuries made individual suits impracticable, and consumer class actions had proven a disappointing vehicle for antitrust enforcement. (H.R.Rep. No. 94-499, 2d Sess. (1976), reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 2573–2577.) The Hart-Scott-Rodino Act was designed to fill the remedial gap that "sometimes result[ed] in the unjust enrichment of antitrust violators and undermine[d] the deterrent effect of the treble damage action." (*Id.* at pp. 2573–2574.) The remedial provisions of the Hart-Scott-Rodino Act focused on achieving full disgorgement of all illegal **[****37]** antitrust profits, using fluid recovery and the *cy près* doctrine if necessary, because "[t]he only alternative—retention of the profits by the adjudicated wrongdoer—is unconscionable and unacceptable." (*Id.* at pp. 2585–2586; see also *id.* at p. 2585 ["[T]he premise of § 4D [codified at *15 U.S.C. § 15d*] is that defendants should be made to disgorge all measurable profits from an antitrust violation … ."].)

Notably, the Hart-Scott-Rodino Act originally contained no language to address the possibility that indirect purchasers might recover damages (through their respective attorneys general) when in some instances those same damages might already have been recovered by direct purchasers under the *Hanover Shoe* rule prohibiting a pass-on defense (see *Hanover Shoe, supra, 392 U.S. at p. 494*). **[****38]** The problem of **[**1079]** potential double recovery under *Hanover Shoe* was solved by a Senate amendment excluding from *parens patriae* damage awards any amount that "duplicates amounts which have been awarded for the same injury." (*15 U.S.C. § 15c(a)(1)*; see Sen.Rep. **[*777]** No. 94-803, 2d Sess., p. 44 (1976).) As the Senate Report accompanying the amendment explained, the proviso was inserted to "assure that defendants are not subjected to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorbed all or part of the illegal overcharge," and to thereby eliminate any perceived tension between authorizing indirect purchaser suits and following *Hanover Shoe*. (Sen.Rep. No. 94-803, *supra*, at p. 44.) [15] Specifically, the amendment was intended to codify *In re Western Liquid Asphalt Cases (9th Cir. 1973) 487 F.2d 191*, a case that relied on the sufficiency of consolidation, interpleader, compulsory joinder, and the like, rather than a bar on indirect purchaser suits, to eliminate double recovery problems. (*Id. at p. 201*.) "Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed." (Sen.Rep. No. **[****39]** 94-803, *supra*, at p. 44, citing *Hanover Shoe, supra, 392 U.S. at p. 494*.)

[*682]** The Hart-Scott-Rodino Act was thus of a piece with *Hanover Shoe*. First, consistent with the policies spelled out by the United States Supreme Court, it reflected Congress's belief that it was better to overdeter antitrust violations than to underdeter them, as well as Congress's desire to create a remedial framework that maximized the likelihood violators would be required to fully disgorge price-fixing profits. (See H.R.Rep. No. 94-499,

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[14] " ' "Parens patriae," literally "parent of the country," refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability [¶] … [¶] State attorney generals [*sic*] have *parens patriae* authority to bring actions on behalf of state residents for anti-trust offenses and to recover on their behalf.' " (*Pacific Gas & Electric Co. v. County of Stanislaus (1997) 16 Cal.4th 1143, 1148, fn. 6 [69 Cal. Rptr. 2d 329, 947 P.2d 291]*.)

[15] Bill author Representative Peter Rodino made the same point, explaining on the House floor that the Hart-Scott-Rodino Act had been specifically tailored, through Senate amendments to the bill that became new section 4C(a)(1) of the Clayton Act (*15 U.S.C. § 15c(a)(1)*), to allow the *Hanover Shoe* no pass-on defense rule to coexist hand in hand with the bill's new *parens patriae* suits on behalf of indirect purchasers. (Remarks of Rep. Rodino, Debate on H.R. No. 8532, 94th Cong., 2d Sess., 122 Cong. Rec. H30878–H30879 (daily ed. Sept. 16, 1976).)

supra, reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 2573–2586.) Second, the Hart-Scott-Rodino Act expressly contemplated that antitrust **[****40]** violators might be sued by both direct and indirect purchasers, and that rather than limiting direct purchaser recoveries—by repudiating *Hanover Shoe*—or limiting indirect purchaser suits, the problem of duplicative recoveries could be addressed by allowing damages already paid to be offset against subsequent damages claims. (See *15 U.S.C. § 15c(a)(1)*.)

b. *The legislative response to the Hart-Scott-Rodino Act*

The Legislature moved quickly to incorporate the remedial framework of the Hart-Scott-Rodino Act into the Cartwright Act, enacting a statute that precisely tracked the federal act and authorized the Attorney General to sue for Cartwright Act violations on behalf of consumers. (*§ 16760*, added by **[*778]** Stats. 1977, ch. 543, § 1, p. 1747.) [16] Notably for our purposes, the Legislature adopted as well the Hart-Scott-Rodino Act's damages provision. (Compare *§ 16760, subd. (a)(1)* [any award must exclude damages "which duplicate[] amounts which have been awarded for the same injury"] with *15 U.S.C. § 15c(a)(1)* [same].) As we have discussed, that provision was specifically designed to account for duplicative damage awards resulting from allowing indirect purchasers to recover damages when, under **[****41]** the *Hanover Shoe* no pass-on defense rule (*Hanover Shoe, supra, 392 U.S. at p. 494*), direct purchasers might already have been **[**1080]** awarded those same damages. *Section 16760, subdivision (a)(1)*, in parallel with the corresponding provision in the Hart-Scott-Rodino Act, thus took as its premise that under the Cartwright Act direct purchasers could themselves recover overcharges that might in theory have been passed on to indirect purchasers, that is, the *Hanover Shoe* rule. Evidently, then, the Legislature presumed that such a rule would apply to the Cartwright Act as well.

CA(4)[] **(4)** Two additional factors suggest the Legislature took as a given the application of *Hanover Shoe*'s no pass-on defense rule to the Cartwright Act. First, ***HN4***[] we may presume that when the Legislature borrows a federal statute and enacts it into state law, it has considered and is aware of the legislative history behind that enactment. (*People v. Butler (1996) 43 Cal.App.4th 1224, 1244 [51 Cal. Rptr. 2d 150]*; see also *American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal.3d 440, 447 [186 Cal. Rptr. 235, 651 P.2d 822]* [the **[***683]** legislative history of a federal statute may be used to interpret a state statute based on it].) Second, Assembly Bill No. 1162's legislative history indicates members of the Legislature were in fact aware of the legislative history behind, and the import of, the various portions of the Hart-Scott-Rodino Act they incorporated into state law. The Assembly Judiciary Committee's materials for Assembly Bill No. 1162 include by way of **[****43]** explanation for the bill and its purpose excerpts from the Hart-Scott-Rodino Act's legislative history, including remarks from Representative Rodino describing at length how the no-duplicative-recovery provision of title *15 United States Code section 15c(a)(1)* was adopted to accommodate the effects of applying the *Hanover Shoe* rule. (See Assem. **[*779]** Com. on Judiciary, Worksheet on Assem. Bill No. 1162 (1977–1978 Reg. Sess.) as introduced Mar. 29, 1977 [attachments excerpting Sept. 16, 1976 remarks of Rep. Rodino].)

Manufacturers argue it would be absurd to conclude the Legislature that passed Assembly Bill No. 1162 (1977–1978 Reg. Sess.), strengthening consumer antitrust protections, also approved the *Hanover Shoe* rule, which might in a hypothetical case impair consumer recoveries. Manufacturers posit a scenario in which an intermediary purchaser (such as Pharmacies here) sues first, recovers the full measure of any overcharge under *Hanover Shoe*, and leaves nothing for the ultimate consumers (because *§ 16760*'s duplicative-liability language would exclude the previous recovery from an antitrust defendant's future liability).

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[16] See Assembly Office of Research, third reading analysis of Assembly Bill No. 1162 (1977–1978 Reg. Sess.) as amended May 17, 1977, page 1 ("The bill is modeled directly on federal law"); Senate Committee on Judiciary, Analysis of Assembly Bill No. 1162 (1977–1978 Reg. Sess.) as amended May 17, 1977, page 2 ("This bill would enact into California law essentially the same provisions which were enacted last year by Congress and put into Federal law"). Notably, the text of *section 16760* shows the Legislature shared Congress's preference for maximizing deterrence and ensuring full disgorgement of profits generated by antitrust **[****42]** violations: *section 16760* expressly authorizes the use of *cy près* and fluid recovery to maximize distribution to those harmed, with any excess to go to the Attorney General as costs or to the state as unclaimed property, rather than reverting to the wrongdoer. (*§ 16760, subd. (e)(1)–(3)*.)

We have no difficulty reconciling Assembly Bill No. 1162's consumer-protecting **[****44]** provisions with tacit approval of the *Hanover Shoe* rule. In the abstract, both rules are intended to achieve the same goal: maximum deterrence and disgorgement. If the *Hanover Shoe* rule enhances enforcement and deters to some degree future antitrust violations, consumers benefit. As for the specific hypothetical, it posits a scenario in which an antitrust suit is filed, a full award is made against the defendants, and the case becomes final, all before the four-year statute of limitations expires and before the Attorney General has any opportunity to file suit. The Legislature could easily have assumed that this would be a rare scenario indeed, and that the short statute of limitations (at least in comparison with the time it takes to resolve an antitrust case), combined with the availability of devices such as joinder, interpleader, and case consolidation, would make such a scenario the exception rather than the rule. (See *Union Carbide Corp. v. Superior Court (1984) 36 Cal.3d 15, 24 [201 Cal. Rptr. 580, 679 P.2d 14]* [noting that where suits are pending at the same time, consolidation can be employed, and the practical likelihood of sequential suits is " 'remote' " because " '[t]he extended nature of antitrust actions, **[****45]** often involving years of discovery, combines with the short four-year statute of limitations to make it impractical for potential plaintiffs to sit on their rights until after entry of judgment in the earlier suit' "].) [17]

[1081]** In short, the Legislature decided to include in its new *parens patriae* statute a protection against the occasional potential for double recovery that arises when indirect purchasers can sue but direct purchasers are not subject **[*780]** to a pass-on **[***684]** defense, a provision created under the specific belief that *Hanover Shoe* would apply. From this, we may infer the Legislature approved application of *Hanover Shoe* to the Cartwright Act.

2. *Cartwright Act amendment in response to* Illinois Brick

a. *The sequel to* Hanover Shoe: Illinois Brick

Nine years after *Hanover Shoe, supra, 392 U.S. 481*, **[****46]** the United States Supreme Court was pressed to decide whether the bar on defensive use of a pass-on theory (the claim a direct purchaser could not sue because it had passed on any overcharge) should be extended to the offensive use of a pass-on theory (the claim by an indirect purchaser that it, too, had suffered antitrust injury because overcharges had been passed on to it by the direct purchaser and perhaps additional intermediary indirect purchasers). In *Illinois Brick, supra, 431 U.S. 720*, a sharply divided court concluded that just as defendants could not raise a pass-on theory as a defense, so indirect purchasers could not use a pass-on theory to sue for overcharges arising from antitrust violations.

Plaintiff the State of Illinois sued concrete block manufacturers for price fixing in violation of the Sherman Act (*15 U.S.C. § 1 et seq.*), alleging that the manufacturers had illegally increased prices and those increases were passed on to masonry contractors, who passed them on to general contractors, who charged more in their bids to build buildings for the State of Illinois and other government entities. (*Illinois Brick, supra, 431 U.S. at pp. 726–727*.) Again writing for the majority, **[****47]** Justice White explained that the availability of a pass-on defense should be symmetric. First, allowing offensive but not defensive pass-on claims would create a risk of double recovery in those cases where both direct and indirect purchasers sued, with a defendant paying the entirety of any overcharge to the direct purchaser and some additional amount to the indirect purchaser. (*Id. at pp. 730–731*.) Second, the uncertainties involved in tracing overcharges and the risk of overcomplicating antitrust trials extended equally to offensive pass-on cases as to defensive pass-on cases. (*Id. at pp. 731–732*.) Third, *Hanover Shoe* "rest[ed] on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." (*Illinois Brick, at p. 735*.) Because no exception applied that would have allowed defensive use of a pass-on theory—and because *Hanover Shoe* was still sound law and should not be overruled—Illinois could not use a pass-on theory offensively and, as an indirect purchaser, **[****48]** could recover nothing.
[*781]

[17] This case is perhaps far more typical. Pharmacies, intermediary purchasers, filed suit in 2004; had any consumers sought recovery of the same amounts Pharmacies seek (i.e., recovery for the years 2000–2004), they would have had to file suit long before now, and their actions could have been consolidated or coordinated without any risk of an award in this case impairing relief in any such hypothetical other case.

The dissenters agreed fully that *Hanover Shoe* was good law, but concluded the same considerations that animated it dictated a rule *allowing* indirect purchaser suits. (See *Illinois Brick, supra, 431 U.S. at pp. 749–750* (dis. opn. of Brennan, J.).) In *Hanover Shoe*, the court had chosen to run the risk of overcompensating a plaintiff rather than underdeterring antitrust violations and allowing antitrust violators to retain their ill-gotten gains. In an offensive pass-on case, there was no danger that recognizing pass-on charges would allow a defendant to escape liability; rather, allowing a pass-on claim would advance the goal of preventing wrongdoers from escaping punishment. (*Illinois Brick, at pp. 752–753*.) The dissenters asserted that " '[t]he attempt to transform a rejection of a defense because it unduly hampers antitrust **[***685]** enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in *Hanover Shoe*] and its underlying rationale on its head.' " (*Id. at pp. 753–754*.) The majority's **[**1082]** concerns about double recovery, the dissenters argued, could be addressed fully through **[****49]** procedural devices (joinder, interpleader, and the like) in instances where double recovery was a risk, without resort to the majority's blanket ban on indirect purchaser suits. (*Id. at pp. 761–764*.)

b. *The legislative response to* Illinois Brick

Illinois Brick, supra, 431 U.S. 720, evoked an immediate legislative response. Within months of the decision, Assembly Bill No. 3222 (1977–1978 Reg. Sess.) was introduced to prevent *Illinois Brick* from having any effect on judicial interpretation of the Cartwright Act. [18] This "*Illinois Brick* repealer" bill passed both houses unanimously and wrote into the Cartwright Act a repudiation of *Illinois Brick*'s ban on indirect purchaser suits, allowing suit by any injured person "regardless of whether such injured person dealt directly or indirectly with the defendant." (*§ 16750, subd. (a)*, added by Stats. 1978, ch. 536, § 1, p. 1693; see *Union Carbide Corp. v. Superior Court, supra, 36 Cal.3d at pp. 19–20* [explaining that *§ 16750* was **[*782]** amended to repudiate the *Illinois Brick* bar against indirect purchaser recovery].) [19] Reviewing the legislative history behind this enactment, we find indications the Legislature fully embraced the *Illinois Brick* dissent, **[****50]** including—critically for our purposes—its view that *Hanover Shoe, supra, 392 U.S. 481*, was a sound rule of law.

Passage of the *Illinois Brick* repealer statute was driven by the fear that indirect purchasers might be stripped of their standing to sue under the Cartwright Act because, under the reasoning of the *Illinois Brick* majority, application of the *Hanover Shoe* rule under the Cartwright Act could be interpreted as dictating that outcome. Rejecting that reasoning, the Assembly Judiciary Committee's summary of Assembly Bill No. 3222 (1977–1978 Reg. Sess.) cited with approval *Illinois Brick*'s "vigorous dissent." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, p. 1.) It spelled out the dissent's critique of the **[***686]** majority's bar on indirect purchaser suits and indicated that as the "dissent noted … the implementation problems cited **[****52]** by the majority[20] could be addressed by the application of existing procedural requirements, e.g.,

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[18] At the time, federal antitrust cases were treated as "applicable" (*Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315 [70 Cal. Rptr. 849, 444 P.2d 481]*) and "authoritative" (*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 625 [28 Cal. Rptr. 190]*) on Cartwright Act questions. Consequently, the Legislature feared *Illinois Brick*'s rule would be applied equally to the Cartwright Act. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, p. 1 [bill introduced to "prevent a federal case interpretation of the Sherman Act precluding an indirect purchaser's standing to sue in antitrust actions [i.e., *Illinois Brick*] being applied to actions under the Cartwright Act"]; *id.* at p. 2 [explaining the bill was needed because federal antitrust decisions like *Illinois Brick* were "considered 'persuasive' in interpreting the provisions of the Cartwright Act"].)

[19] California was not alone in this. To date, 25 states and the District of Columbia have passed *Illinois Brick* repealer statutes; numerous others have interpreted existing state law to **[****51]** allow indirect purchaser suits. (Karon, "*Your Honor, Tear Down that Illinois Brick Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice* (2004) *30 Wm. Mitchell L.Rev. 1351, 1361–1362*.) The Cartwright Act amendment and other like *Illinois Brick* repealer statutes have subsequently been upheld against preemption challenges. (*California v. ARC America Corp., supra, 490 U.S. at pp. 105–106*.)

[20] These implementation problems were those that would arise if indirect purchaser suits were permitted at the same time that *Hanover Shoe*'s bar on a pass-on defense remained in place. (See *Illinois Brick, supra, 431 U.S. at pp. 737?747* (maj. opn.); *id. at pp. 761–764* (dis. opn.).)

mandatory joinder of the direct purchaser, interpleader, parens patriae." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, pp. 1–2.) The Judiciary Committee's analysis thus accepted that allowing indirect purchaser suits would require courts to reconcile the existence of such suits with the *Hanover Shoe* no pass-on defense rule, and cited with approval the *Illinois Brick* dissent's proposed methods for reconciliation.

[1083]** Nowhere in this or any other committee report did the Legislature suggest reconciliation could or should instead occur by repudiating *Hanover Shoe* under the Cartwright Act. Rather, the existence of the *Hanover Shoe* rule was taken as a given; the relevant debate was whether indirect purchaser suits could be accommodated in a world where **[****53]** *Hanover Shoe* was the law. The Legislature, like the *Illinois Brick* dissent, apparently preferred procedural devices to a blanket ban on indirect purchaser suits and passed Assembly Bill No. 3222 (1977–1978 Reg. Sess.) to clarify that that preference was part of **[*783]** existing Cartwright Act law. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977–1978 Reg. Sess.) as introduced Mar. 27, 1978, p. 2 [measure is "declarative of existing law"].) As with the passage of Assembly Bill No. 1162 (1977–1978 Reg. Sess.) the previous year, the Legislature's adoption of this amendment indicates acceptance of *Hanover Shoe, supra, 392 U.S. 481*.

C. *Broader Legislative Policy Considerations*

In divining the Legislature's intent, we consider as well overarching legislative goals evident from the Legislature's adoption and amendment of the Cartwright Act over the years.

From its inception, the Cartwright Act has always been focused on the punishment of violators for the larger purpose of promoting free competition. (See Stats. 1907, ch. 530, p. 984 [the Cartwright Act is "An act to define trust and to provide for criminal penalties and civil damages, and punishment of [entities connected with trusts], and to promote **[****54]** free competition in commerce and all classes of business in this state"].) It is, like antitrust laws generally, about " ' " 'the protection of *competition*, not *competitors*.' " ' " (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 186 [83 Cal. Rptr. 2d 548, 973 P.2d 527]*.) Private damage awards are just a tool by which these procompetitive purposes are carried out: " 'The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose.' " (*Milton v. Hudson Sales Corp. (1957) 152 Cal. App. 2d 418, 443 [313 P.2d 936]*; see also *Bruce's Juices v. Amer. Can Co. (1947) 330 U.S. 743, 751 [91 L. Ed. 1219, 67 S. Ct. 1015]* [private damage remedies provide "a strong and reliable motive for enforcement"]; *Cianci v. Superior Court (1985) 40 Cal.3d 903, 913 [221 Cal. Rptr. 575, 710 P.2d 375]* [private treble damages are designed " 'to serve as well the high purpose of enforcing the antitrust laws' "].)

[*687]** As the Cartwright Act's primary concern is with the elimination of restraints of trade and impairments of the free market, we can and should select the damages rule most consistent with that focus. The goal of deterring antitrust violations **[****55]** and concerns that a given private party may receive a windfall are not of equal weight. The Legislature's adoption of a double damages remedy (Stats. 1907, ch. 530, § 11, p. 987), later amended to treble damages (*§ 16750, subd. (a)*), demonstrates as much: double and treble damages may overcompensate injured plaintiffs, but they do so in order to maximize deterrence.

These relative priorities offer useful guidance. In cases where no consumers have come forward and the choice is between allowing an antitrust **[*784]** violator to retain the full measure of profits from its violation or requiring their disgorgement to an innocent direct or intermediary purchaser who paid those monies and was forced to cope with the violation, the Legislature surely would prefer the latter, thereby maximizing deterrence and the probability of full disgorgement. [21] To allow defendants universally to assert a **[**1084]** pass-on defense, even in cases such as this

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[21] In a closely related vein, we previously have approved the use of fluid recovery funds under the Cartwright Act precisely because they **[****56]** might be the only way to "ensure that the policies of disgorgement or deterrence are realized" and because Cartwright Act defendants should not be "permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts." (*State of California v. Levi Strauss &*

that present no risk of duplicative recovery, would hamper enforcement by reducing incentives to sue and police antitrust violations.

As *Hanover Shoe* itself recognized, a universal pass-on defense would hamper enforcement in a second way. Allowing a pass-on defense would plunge parties and courts into minitrials attempting to trace every penny of an initial overcharge, as well as seeking to measure the further ramifications that an overcharge might have in the form of lost sales and other tertiary consequences. (*Hanover Shoe, supra, 392 U.S. at pp. 492–493*.) " '[T]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.' " (*Kansas v. UtiliCorp United Inc., supra, 497 U.S. at p. 211*.) While the Legislature **[****57]** when it enacted the *Illinois Brick* repealer statute imposed that task for the small universe of cases in which multiple levels of purchasers might sue, rejection of the *Hanover Shoe* rule would extend that burden to nearly every case. Accepting the rule, in contrast, streamlines antitrust trials, renders the process of proving antitrust damages less daunting, and ultimately enhances enforcement.

Manufacturers raise one overarching policy concern of their own. They object that Pharmacies simply were not damaged by the alleged price-fixing conspiracy and the law should not countenance a rule that permits a windfall to undamaged plaintiffs.

This objection misconceives both the nature of the *Hanover Shoe* rule in general and its potential application here. The *Hanover Shoe* court recognized that a purchaser forced by a monopoly or price-fixing cartel to pay higher prices might well be injured by that antitrust violation *even in instances where it appeared the purchaser could pass on some or all of that overcharge downstream to others*. (*Hanover Shoe, supra, 392 U.S. at p. 493, fn. 9* ["The mere fact that a **[***688]** price rise followed an unlawful cost increase does not show **[*785]** that the sufferer of the cost **[****58]** increase was undamaged."]; see also *Kansas v. UtiliCorp United Inc., supra, 497 U.S. at pp. 208–211*.) A purchaser might lose profits or sales, and perhaps market share as well, vis-à-vis another purchaser/distributor not subject to the same overcharge. Recognizing the difficulty of proving the precise amount of other forms of injury, the *Hanover Shoe* court selected the amount of the initial overcharge as the measure of damages, not because the initial overpayment was the only injury, but because it was the most readily measured, and because measuring damages in this way would, in the long run, best serve the various goals of ***antitrust law***. (See *Hanover Shoe, at pp. 492–494*; cf. 2A Areeda et al., ***Antitrust Law*** (3d ed. 2007) ¶ 395, p. 377 ["[T]he most commonly used measure of damages, *viz.*, the overcharge, is an ambiguous proxy for the actual damages suffered."].)

Some or all of the injuries identified in *Hanover Shoe, supra, 392 U.S. 481*, and *Kansas v. UtiliCorp United Inc., supra, 497 U.S. 199*, are in play here. Evidence in the record indicates Pharmacies' contracts with third party payers were sometimes negotiable, and rates changed over time. Given an opportunity to do so, Pharmacies **[****59]** might have been able to prove lost profits on third party payer sales, that is, that in the absence of overcharges they could have negotiated reimbursement rates that would have increased the gap between their acquisition costs and reimbursement rates. Evidence in the record also indicated Pharmacies had seen fewer and fewer cash-paying customers over time and thus had unilateral pricing discretion for a smaller percentage of their sales. Given an opportunity to do so, Pharmacies might have been able to prove lost profits (because they could have maintained the same retail prices for cash-paying customers, while obtaining their drugs from wholesalers at a lower acquisition cost (see *Kansas v. UtiliCorp United Inc., at p. 209*; *Hanover Shoe, at p. 493, fn. 9*)) or lost sales (due to cash-paying customers, who are sensitive to higher prices, filling fewer prescriptions than they would have if both acquisition costs and corresponding retail prices **[**1085]** were lower). [22] Finally, Pharmacies alleged the value of their businesses as going concerns had declined due to lost sales, lost profits, and competition from foreign distributors not subject to Manufacturers' overcharges. As the cross-motions **[****60]** below focused on the pass-on defense, Pharmacies were not called on to bring forward evidence in support of this allegation. Of course, the rule of *Hanover Shoe* obviates the need for the parties and the trial court to develop and consider proof of these other

Co. (1986) 41 Cal.3d 460, 472 [224 Cal. Rptr. 605, 715 P.2d 564].) The same considerations are in play here, where rejection of the *Hanover Shoe* rule would allow alleged antitrust violators to escape without sanction.

[22] Indeed, the possibility that in this latter scenario Pharmacies did *not* lose sales as a result of the alleged price-fixing conspiracy rests on the rather unlikely proposition that cash-paying customers' demand for drugs is wholly inelastic to price.

forms of injury, not because they do not exist, but because, as noted, enforcement of the antitrust laws works better if the initial amount of the overcharge is **[*786]** chosen as a default measure of all the injuries a price-fixing conspiracy may engender for a given purchaser. [23]

[*689]** At its core, Manufacturers' argument is that the Cartwright Act should be read to go beyond the primary consequence of the price conspiracy (the overcharge) to consider the secondary consequence of the conspiracy (the pass-on), but that it should blind itself to the tertiary consequences (lost sales, lost profits, and so on). The Court of Appeal as well implicitly accepted *Hanover Shoe*'s focus on overcharges as the measure of damages and its corresponding disregard for tertiary consequences, but rejected that case insofar as it disregarded secondary consequences (the pass-on). But these two aspects of *Hanover Shoe* go hand in hand: *Hanover Shoe* found it acceptable to ignore tertiary consequences only because it *also* disregarded secondary consequences. **[****62]** Put differently, *Hanover Shoe* is not a case about what constitutes injury, but about how to measure damages. That a purchaser passes on an overcharge does *not* mean it lacks for injury or damages. The *Hanover Shoe* court disregarded all tertiary damages for measurement purposes because, and only because, it also disregarded the secondary pass-on for measurement purposes. Conversely, one cannot rationally admit evidence of a pass-on, under a theory of mitigation, while also excluding evidence that the pass-on in fact failed to mitigate fully the loss occasioned by the original overcharge. (See *Hanover Shoe, supra, 392 U.S. at pp. 491–494*; *B.W.I. Custom Kitchen v. Owens-Illinois, Inc., supra, 191 Cal. App. 3d at p. 1353*.) [24] Instead, the choice in **[**1086]** measuring damages is between a rule that for policy reasons considers only the overcharge (the *Hanover Shoe* rule) and one that considers *all* the consequences of the overcharge.
[*787]

D. *Conclusion*

CA(5)[] **(5)** The inferences we draw from the Legislature's actions and responses to developments in federal ***antitrust law***, as well as its actions in enacting and amending the Cartwright Act over the years, all point in the same direction: For state antitrust purposes, the *Hanover Shoe* rule **[***690]** should apply even as indirect purchasers are allowed to sue. We therefore conclude, ***HN5***[] under the Cartwright Act as under federal law, that

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[23] Manufacturers argue, and the Court of Appeal agreed, that Pharmacies waived these other forms of injury. The record does not support this claim. Pharmacies expressly did not concede that they had suffered no other injuries as a result of the alleged price-fixing conspiracy. Rather, they waived any attempt to prove other injuries because those injuries' existence and measure were legally irrelevant under *Hanover* ***[****61]*** *Shoe*, the rule Pharmacies contended applied under the Cartwright Act. As we agree that *Hanover Shoe* applies, we need not consider whether, had we concluded it did not, Pharmacies should have been permitted to prove injuries other than the overcharge in this case. (Cf. *B.W.I. Custom Kitchen v. Owens-Illinois, Inc., supra, 191 Cal. App. 3d at p. 1353* [if the pass-on defense applies, plaintiffs should have the opportunity to prove other injuries].)

[24] We are aware of no statute or case that adopts such an in-between rule, and Manufacturers have cited none. The irrationality of such a rule is inferable as well from the United States Supreme Court's own precedents. To prevail on a pass-on defense in those rare instances **[****63]** where it has been permitted under federal law, a defendant must show the plaintiff could not have raised rates otherwise (*Kansas v. UtiliCorp United Inc., supra, 497 U.S. at p. 209*; *Hanover Shoe, supra, 392 U.S. at p. 493, fn. 9*) and did not lose sales, because the quantity to be purchased was controlled by a preexisting "cost-plus" contract (*Kansas v. UtiliCorp United Inc., at p. 218*; *Illinois Brick, supra, 431 U.S. at p. 736*; *Hanover Shoe, at p. 494*; see also Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales* (1990) *103 Harv. L.Rev. 1717, 1720* [cost-plus contracts involve both a fixed markup and a fixed quantity to be delivered]). In essence, Supreme Court precedent recognizes that a pass-on defense (based on evidence of secondary consequences) is only presentable in circumstances that foreclose the possibility of tertiary consequences (lost sales and profits). Only then can one fairly say in defense that the plaintiff has suffered no injury as the result of an illegal overcharge.

In contrast, in stable markup cases such as this one, where a purchaser's resale price is fixed as a direct function of its acquisition price so as to pass on any overcharge, the resale market's *response* **[****64]** to that overcharge-inflated resale price is *not* fixed and may be different than it would have been in the absence of the overcharge—and that different response (e.g., lower sales) may injure the plaintiff.

a pass-on defense generally may not be asserted. Instead, in an antitrust price-fixing case, the presumptive measure of damages is the amount of the overcharge paid by the plaintiff.

While a pass-on defense is generally precluded, a few instances remain in which it will still be available. First, *Hanover Shoe* recognized an exception for "cost-plus" contracts (*Hanover Shoe, supra, 392 U.S. at p. 494*) and, given the Legislature's endorsement of *Hanover Shoe*, that exception would apply to the Cartwright Act as well. Second, in light of the *Illinois Brick* repealer **[****65]** statute (*§ 16750, subd. (a)*), cases may arise where application of the *Hanover Shoe* rule raises the prospect of duplicative recovery. In instances where multiple levels of purchasers have sued, or where a risk remains they may sue, trial courts and parties have at their disposal and may employ joinder, interpleader, consolidation, and like procedural devices to bring all claimants before the court. In such cases, if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted; the defendants may assert a pass-on defense as needed to avoid duplication in the recovery of damages.

CA(6)[] **(6)** We need not address in detail the scope of these two exceptions, for neither applies here. Manufacturers have not sought to establish that any cost-plus contract exception would apply. Nor does it appear any wholesaler, consumer, or *parens patriae* suits have been filed that might pose a risk of duplicative recovery, and the statute of limitations for the period at issue has long since expired. Accordingly, the trial court erred in granting summary judgment for Manufacturers on the basis of a pass-on defense.

III. *The Unfair Competition* ***[****66]*** *Law*

In a claim closely related to their Cartwright Act claims, Pharmacies also alleged they had been injured by Manufacturers' unfair business practices and **[*788]** were entitled to relief under the UCL (*§ 17200 et seq.*). The Court of Appeal affirmed the trial court's grant of summary judgment to Manufacturers on the UCL claims, concluding Pharmacies lacked standing and, additionally, were ineligible for any relief. We consider each ground in turn.

A. *Standing*

CA(7)[] **(7)** "The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties with a sufficient interest in the subject matter of the dispute to press their case with vigor." (*Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 439 [261 Cal. Rptr. 574, 777 P.2d 610]*.) In 2004, the electorate substantially revised the UCL's standing requirement; where once private suits could be brought by "any person acting for the interests of itself, its members or the general public" (former § 17204, as amended by Stats. 1993, ch. 926, § 2, p. 5198), now ***HN6***[] private standing is limited to any "person who has suffered injury in fact and has lost money or property" as a result of unfair competition (*§ 17204*, as amended by Prop. 64, as approved **[****67]** by voters, Gen. Elec. (Nov. 2, 2004) § 3; see *Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal.4th 223, 227–228 [46 Cal. Rptr. 3d 57, 138 P.3d 207]*). The intent of this change was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of " 'clients who have not used the defendant's **[**1087]** product or service, viewed the defendant's advertising, or had any other business dealing with the defendant … .' " **[***691]** (*Californians for Disability Rights, at p. 228*, quoting Prop. 64, § 1, subd. (b)(3).)

While the voters clearly intended to restrict UCL standing, they just as plainly preserved standing for those who *had* had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices. (Prop. 64, § 1, subds. (b), (d); see *§ 17204*.) Under that standard, Pharmacies have established standing. To distribute their pharmaceuticals, Manufacturers depend on a network of wholesalers and retailers. Pharmacies acted as retailers for Manufacturers' drugs and thus had indirect business dealings with Manufacturers. (See *Shersher v. Superior Court (2007) 154 Cal.App.4th 1491, 1499–1500 [65 Cal. Rptr. 3d 634]* [indirect **[****68]** purchases may support UCL standing].) They lost money: the overcharges they paid. (See *Hall v. Time Inc. (2008) 158 Cal.App.4th 847, 854 [70 Cal. Rptr. 3d 466]* [*§ 17204* standard is satisfied when the plaintiff has "expended money due to the defendant's acts of unfair competition"].) Finally, that loss was the result of an unfair business practice: Pharmacies paid more than they otherwise would have because of a price-fixing conspiracy in violation of state law. The voters' intent that under Proposition 64 suits be limited to those who suffer injury in fact is satisfied here. (See *Chattanooga Foundry v. Atlanta, supra,* ***[*789]*** *203 U.S. at p. 396* ["A person whose property is diminished by a payment of money wrongfully induced is injured in his property."].)

CA(8)[] **(8)** While Manufacturers argue that ultimately Pharmacies suffered no compensable loss because they were able to mitigate fully any injury by passing on the overcharges, this argument conflates the issue of standing with the issue of the remedies to which a party may be entitled. ***HN7***[] That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them. (See *Southern Pac. Co. v. Darnell-Taenzer Co., supra, 245 U.S. at p. 534* **[****69]** ["The plaintiffs suffered losses … when they [over]paid. Their claim accrued at once in the theory of the law and it does not inquire into later events."]; *Adams v. Mills, supra, 286 U.S. at p. 407* ["In contemplation of law the claim for damages arose at the time the extra charge was paid," notwithstanding any subsequent reimbursement].) The doctrine of mitigation, where it applies, is a limitation on liability for damages, not a basis for extinguishing standing. (See *Pool v. City of Oakland (1986) 42 Cal.3d 1051, 1066 [232 Cal. Rptr. 528, 728 P.2d 1163]* [" 'The rule of [mitigation of damages] comes into play after a legal wrong has occurred, but while some damages may still be averted … .' " (quoting Prosser & Keeton, Torts (5th ed. 1984) § 65, p. 458)].) This is so because mitigation, while it might diminish a party's recovery, does not diminish the party's interest in proving it is entitled to recovery.

Nothing in the text of *section 17204* or Proposition 64 suggests the voters intended to provide otherwise when they remade the UCL's standing requirements. Rather, *section 17204* requires only that a party have "lost money or property," and Pharmacies indisputably lost money when they paid an allegedly illegal overcharge. **[****70]** We decline Manufacturers' invitation to turn this facially simple threshold condition into a requirement that plaintiffs prove compensable loss at the outset. [25]

[*692]** B. *Remedies*

CA(9)[] **(9)** The Court of Appeal affirmed summary judgment on a second, overlapping ground: Pharmacies were not entitled to any remedy. Pharmacies' complaint seeks two forms of relief: restitution and an injunction. We need consider only the latter. ***HN8***[] If a party has standing under *section 17204* (as Pharmacies **[**1088]** do here), it may seek injunctive relief under *section 17203*. (See **[*790]** *§ 17204* [authorizing without limitation "[a]ctions for relief pursuant to this chapter" to be brought by parties who satisfy the provision's standing requirement].) Manufacturers' papers identify no obstacle that would preclude Pharmacies from obtaining injunctive relief if they establish Manufacturers were engaged in an unfair business practice. **[****71]** [26]

CA(10)[] **(10)** The Court of Appeal held Pharmacies were barred from seeking injunctive relief because, it concluded, they had suffered no monetary loss. To the extent this holding rests on the conclusion Pharmacies lacked standing under *section 17204*, it is erroneous; **[****72]** as discussed *ante*, Pharmacies have standing. To the extent the holding rests on the conclusion that even if Pharmacies had standing, they could not seek injunctive

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[25] Doing so would render the UCL's standing requirement substantially *more* stringent than other state unfair competition statutes such as the Cartwright Act, under which Pharmacies' standing is undisputed. Again, we see nothing in the text or history of Proposition 64 that suggests the voters intended such a result.

[26] In this court, Manufacturers argue that Pharmacies have waived reliance on their complaint's request for injunctive relief to defeat summary adjudication. This argument misplaces the relevant burden. If Manufacturers sought summary judgment on the ground Pharmacies could obtain no relief on their UCL claim, it was incumbent on Manufacturers, as the moving party, to show that each form of relief sought by Pharmacies was unavailable. While Manufacturers attempted that showing with respect to the request for restitution, their moving papers simply ignored Pharmacies' request for injunctive relief.

In any event, the issue whether the availability of injunctive relief bars summary adjudication was decided by the Court of Appeal and fully briefed before us by the parties. It involves ***HN9***[] a pure issue of law, reviewable de novo. We may exercise our discretion to consider it. (See *People v. Superior Court (Laff) (2001) 25 Cal.4th 703, 712, fn. 3 [107 Cal. Rptr. 2d 323, 23 P.3d 563]*.)

relief unless they could also seek restitution, it similarly is erroneous.***HN10***[] *Section 17203* makes injunctive relief "the primary form of relief available under the UCL," while restitution is merely "ancillary." (*In re Tobacco II Cases (2009) 46 Cal.4th 298, 319 [93 Cal. Rptr. 3d 559, 207 P.3d 20]*.) Nothing in the statute's language conditions a court's authority to order injunctive relief on the need in a given case to also order restitution. Accordingly, the right to seek injunctive relief under *section 17203* is not dependent on the right to seek restitution; the two are wholly independent remedies. (See *ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal.4th 1247, 1268 [61 Cal. Rptr. 2d 112, 931 P.2d 290]* [*§ 17203* "contains … no language of condition linking injunctive and restitutionary relief"]; *Prata v. Superior Court (2001) 91 Cal.App.4th 1128, 1139 [111 Cal. Rptr. 2d 296]* [plaintiff could pursue injunctive relief even though restitution was unavailable].)

As the claim for injunctive relief is sufficient to preclude summary judgment, we need not decide, and express no opinion on, the further **[****73]** question whether Pharmacies may eventually be entitled to restitution.
[*791]

DISPOSITION

For the foregoing reasons, we reverse the Court of Appeal's judgment and remand for further proceedings not inconsistent with this opinion.

George, C. J., Baxter, J., Moreno, J., Ruvolo, J.,[*] Robie, J.,[†] and Miller, J.,[‡] concurred.

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[*] Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[†] Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[‡] Associate Justice of the Court of Appeal, Fourth Appellate District, Division Two, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

In re Puerto Rican Cabotage Antitrust Litig.

United States District Court for the District of Puerto Rico

July 12, 2010, Decided; July 12, 2010, Filed

MDL Docket No. 3:08-md-1960 (DRD) ALL CASE

Reporter

269 F.R.D. 125 *; 2010 U.S. Dist. LEXIS 90338 **

IN RE PUERTO RICAN CABOTAGE ANTITRUST LITIGATION

Subsequent History: Request denied by, Costs and fees proceeding at *In re Puerto Rican Cabotage Antitrust Litig., 2010 U.S. Dist. LEXIS 159843 (D.P.R., Dec. 7, 2010)*

Settled by, Costs and fees proceeding at, Request granted, in part, Request denied by, in part, Request granted *In re Puerto Rican Cabotage Antitrust Litig., 815 F. Supp. 2d 448, 2011 U.S. Dist. LEXIS 113980 (D.P.R., Sept. 13, 2011)*

Core Terms

cabotage, class member, settlement agreement, settlement, predominance, prices, instant case, antitrust, preliminary approval, class certification, commonality, assertions, conspiracy, notice, proposed class, adequacy, alleged conspiracy, parties, shipping, class action, base rate, price-fixing, class-wide, freeze, certification, concentrated, Plaintiffs', damages, cases, terms of the settlement

LexisNexis® Headnotes

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

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

Evidence > Burdens of Proof > Allocation

HN1[] **Regulated Practices, Private Actions**

Fed. R. Civ. P. 23 governs antitrust class action suits. Under both *Rule 23(a)* and *Rule 23(b)*, the plaintiffs bear the burden of establishing the prerequisites for class certification. Under *Rule 23(a)*, the plaintiffs must establish numerosity, commonality, typicality and adequacy of representation. Further, under *Rule 23(b)(3)*, the plaintiffs must establish that the questions of law or fact common to class members predominate over any questions affecting only individual members and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Those two requirements are commonly known as predominance and superiority.

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

Evidence > Burdens of Proof > Preponderance of Evidence

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

HN2[] **Class Actions, Certification of Classes**

Although, in the past, courts typically determined whether the requirements of *Fed. R. Civ. P. 23(a)* and *(b)* were met via a reading of the pleadings, recently, the First Circuit has expressed a strong preference that the district court move beyond the pleadings when certifying a class. Taking into consideration the latest mandates from the First Circuit, the court has allowed parties to the instant case to present evidence, such as affidavits and expert reports, to support their arguments in favor of or against certification of a settlement class in the instant case. When considering the evidence proffered by parties, the court has also been cognizant that its duty is to evaluate the plaintiff's evidence critically without allowing the defendant to turn the class-certification proceeding into an unwieldy trial on the merits. Even in the context of certifying a settlement class, the district court must conduct a rigorous analysis of the prerequisites established by *Rule 23* before certifying a class. However, despite that heightened scrutiny, the law favors class action settlements. When evaluating the evidence proffered by the parties in favor of or against certification of a settlement class, the court has employed the preponderance of the evidence standard.

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

HN3[] **Prerequisites for Class Action, Numerosity**

The numerosity requirement of *Fed. R. Civ. P. 23(a)* specifically mandates that the class be so numerous that joinder of all members is impracticable. *Rule 23(a)(1)*.

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

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

HN4[] **Regulated Practices, Private Actions**

The second requirement of *Fed. R. Civ. P. 23(a)(2)* is that there are questions of law or fact common to the class. Only a single common question of fact or law is necessary to meet that requirement. Typically, in antitrust cases, courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy the commonality requirement.

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

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

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

HN5[] **Prerequisites for Class Action, Commonality**

There is considerable overlap between this requirement of commonality and the criteria of typicality and predominance as questions, such as common impact and proof of damages, are relevant to all three under *Fed. R. Civ. P. 23*. The predominance criterion is far more demanding than the commonality criterion. However, the requirement of commonality has been described as a low bar as courts typically provide that criteria with a permissive application. Thus, the commonality requirement is relatively toothless in comparison with the related requirements of typicality and predominance.

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

HN6[] Prerequisites for Class Action, Typicality

The third requirement of *Fed. R. Civ. P. 23(a)(3)*, typicality, is satisfied where the claims or defenses of the representative parties are typical of the claims or defenses of the class. In assessing this requirement, the court is directed to focus less on the relative strengths of the named and unnamed plaintiffs' case than on the similarity of the legal and remedial theories behind their claims. The requirement of typicality, like commonality, does not require that all putative class members share identical claims. Rather, typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, where such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to the class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN7[] Prerequisites for Class Action, Adequacy of Representation

The fourth and final requirement of *fed. R. Civ. P. 23(a)(4)* is adequacy of representation, under which the court must determine that the representative parties will fairly and adequately protect the interests of the class. That requirement aims to uncover conflicts of interest between named parties and the class they seek to represent. Along that vein, it is well established that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. The United States Supreme Court has noted that the adequacy-of-representation requirement tends to merge with the commonality and typicality criteria which serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. That requirement also addresses the adequacy of class counsel, factoring in their competency and conflicts.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

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

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

HN8[] Prerequisites for Class Action, Adequacy of Representation

The adequacy of representation criterium of *Fed. R. Civ. P. 23(a)* should be read in tandem with the commonality and typicality criteria.

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

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

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

HN9[] Regulated Practices, Private Actions

Fed. R. Civ. P. 23(b)(3) mandates that, in order to certify a class under that section of the Rule, the court must find that the questions of law or fact common to class members predominate over any questions affecting only individual members. That predominance criterion is far more demanding than the commonality requirement. In antitrust actions, common issues do not predominate if the fact of antitrust violation and the fact of antitrust impact cannot be established through common proof. However, the United States Supreme Court has noted that predominance is a test readily met in certain cases alleging violations of the antitrust laws. Accordingly, even where there are some individualized damage issues in a proposed antitrust class action, common issues may predominate when liability can be determined on a class-wide basis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN10[] Per Se Rule & Rule of Reason, Sherman Act

The Sherman Act, *15 U.S.C.S. § 1*, forbids agreements in restraint of trade or commerce among the several states; *15 U.S.C.S. § 3* forbids agreements in restraint of trade or commerce in any territory of the United States. Thus, in order to prevail upon their claims, the plaintiffs must show that a conspiracy existed that unreasonably restrained trade and that affected interstate or interterritory commerce. For the purposes of a Sherman Act claim, price fixing is usually considered to be per se unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN11[] Per Se Rule & Rule of Reason, Sherman Act

With respect to the per se illegal nature of a price-fixing conspiracy under the Sherman Act, *15 U.S.C.S. § 1, et seq.*, the First Circuit has stated: few agreements are deemed so pernicious that they are condemned per se and without regard to the power of the parties to accomplish their aims, regardless of justification, and without any need to show an actual or potential adverse affect on consumer welfare. The classic cases are agreements to set prices, fix output or engage in horizontal market division. The categorical descriptions of per se offenses are quite misleading for anyone not well versed in antitrust. For example, price-fixing in its literal sense is not considered per se: virtually every sale is an agreement on price. The only price-fixing agreements that are condemned per se are agreements (1) between competitors; (2) as to competing products or services; (3) where, in addition, the agreement is not part of a larger, legitimate economic venture.

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

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

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

HN12[] Class Actions, Certification of Classes

A court may not shirk its duties under *Fed. R. Civ. P. 23* by citing the necessity of making determinations based upon the credibility of competing experts. Rather, the court must act as finder of fact, making such credibility determinations in order to grant or deny class certification under *Rule 23* That preliminary credibility determination does not preclude a different view at the merits stage of the case.

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

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

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

HN13[] **Class Actions, Certification of Classes**

It is within a court's wide discretion to conduct hearings to resolve credibility disputes prior to making its *Fed. R. Civ. P. 23* ruling. Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court, even where a credibility determination must be made.

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

HN14[] **Prerequisites for Class Action, Superiority**

Fed. R. Civ. P. 23(b)(3) sets forth a requirement that a class action be superior to other available methods for fairly and efficiently adjudicating the controversy. That superiority requirement is designed to ensure that the class action will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. In that manner, the Rule aims to provide for the vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court. Further, the Rule itself provides a non-exhaustive list of factors which the court may consider in determining whether the requirement of superiority is fulfilled: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. *Rule 23(b)(3)*.

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

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN15[] **Class Actions, Compromise & Settlement**

The fundamental duty of the court when it reviews a settlement agreement for approval is to determine whether the proposed settlement is fair, reasonable and adequate. *Fed. R. Civ. P. 23(e)(2)*. At the preliminary approval stage, the court need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather, the court need only determine whether it falls within the range of possible approval. An illegal or collusive settlement agreement will not fall within the range of possible approval.

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

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN16[] Class Actions, Compromise & Settlement

For the purposes of assessing the appropriateness of preliminary approval of the settlement agreements in class actions, the United States Court for the District of Puerto Rico has adopted the standard set forth by the Third Circuit in In Re General Motors Corp. Pick-Up Truck Fuel Tanks Prod. Liab. Litig. Under the standard, the court makes four findings, a presumption of fairness attaches to the court's determination, and preliminary approval is appropriate. Those four findings are that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN17[] Per Se Rule Tests, Manifestly Anticompetitive Effects

The United States District Court for the District of Puerto Rico finds that In Re Microsoft does not forbid approval of any settlement agreement which might affect competition, but, rather, cautions against approval of an agreement which allows the settling defendant to use the agreement to its advantage in entering a market in which it was previously not a strong competitor. The Court believes to find otherwise would run afoul of the basic principle that antitrust laws in the United States exist not to protect competitors, but, rather, to protect competition itself as it would serve to protect the market shares of individual competitors rather than ensuring the maintenance of healthy, robust competition in the marketplace.

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

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

HN18[] Class Actions, Compromise & Settlement

The Federal Rules of Civil Procedure dictate that the Court must direct notice in a reasonable manner to all class members who would be bound by the proposal. *Fed. R. Civ. P. 23(e)(1)*.

Counsel: [1]** For Century Packing Corp., Individually and on Behalf of all Others Similarly Situated, Plaintiff: H. Laddie Montague, Jr., Ruthanne Gordon, LEAD ATTORNEYS, PRO HAC VICE, Berger & Montague, PC, Philadelphia, PA; Maria D. Bertolez-Elvira, Nestor Mendez-Gomez, LEAD ATTORNEYS, Pietrantoni Mendez & Alvarez, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Horizon Lines, LLC, Plaintiff: Jose F. Sarraga-Venegas, LEAD ATTORNEY, Jose F. Sarraga Law Office, San Juan, PR; Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR; Tiffany Rider-Rohrbaugh, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP Washington, DC.

For Horizon Lines, LLC, Civ. 08-2095, Plaintiff: Jose F. Sarraga-Venegas, LEAD ATTORNEY, Jose F. Sarraga Law Office, San Juan, PR; Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR; Tiffany Rider-Rohrbaugh, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP Washington, DC.

For All Plaintiffs, Plaintiff: John F. Nevares, LEAD ATTORNEY, John **[**2]** F. Nevares & Assoc. PSC, San Juan, PR; Maria D. Bertolez-Elvira, Pietrantoni Mendez & Alvarez, San Juan, PR; PHV Richard P Rouco, Whatley Drake & Kallas, LLC, Birmingham, AL; Pedro Quinones-Suarez, John F. Nevares & Assoc. PSC, Santurce, PR.

For Rona Distributors, Civ. 08-1531, Consol Plaintiff: Barbara J. Felt, PHV Scott W. Carlson, PHV Vincent J. Esades, LEAD ATTORNEYS, PRO HAC VICE, Heins Mills & Olson, PLC, Minneapolis, MN; David C. Indiano-Vicic, Jaime A. Torrens-Davila, Jeffrey M. Williams-English, LEAD ATTORNEYS, Indiano & Williams, PSC, San Juan, PR; Dwayne L. Clark, Kristen Z. Watson, LEAD ATTORNEYS, PRO HAC VICE, Clark & Watson, P.A., Jacksonville, FL; John F. Nevares, Pedro Quinones-Suarez, LEAD ATTORNEYS, John F. Nevares & Assoc. PSC, San Juan, PR.

For La Esperanza Bus Line, Civ. 08-1525, Marina Electric Inc., Civ. 08-1555, Metro Plumbing, Inc., Civ. 08-1626, Consol Plaintiffs: Eric M. Quetglas-Jordan, LEAD ATTORNEY, Quetglas Law Office, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR; PHV Richard P Rouco, PRO HAC VICE, Whatley Drake & Kallas, LLC, Birmingham, AL.

For Flexible Packaging Group, Civ. 08-1553, Consol Plaintiff: Eric **[**3]** M. Quetglas-Jordan, LEAD ATTORNEY, Quetglas Law Office, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR; PHV Joe R Whatley Jr, PRO HAC VICE, Whatley, Drake & Kallas, LLC, New York, NY; PHV Richard P Rouco, PRO HAC VICE, Whatley Drake & Kallas, LLC, Birmingham, AL.

For La Rosa del Monte Express Inc., Civ. 08-1617, Consol Plaintiff: Eric M. Quetglas-Jordan, LEAD ATTORNEY, Quetglas Law Office, San Juan, PR; John F. Nevares, Pedro Quinones-Suarez, LEAD ATTORNEYS, John F. Nevares & Assoc. PSC, San Juan, PR; PHV Richard P Rouco, PRO HAC VICE, Whatley Drake & Kallas, LLC, Birmingham, AL.

For CV Joints Specialties, Inc., Civ. 08-1618, Magic Transport, Inc., Civ. 08-2244, Consol Plaintiffs: Eric M. Quetglas-Jordan, LEAD ATTORNEY, Quetglas Law Office, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Linde Gas Puerto Rico, Inc., Civ. 08-1665, Consol Plaintiff: David C. Indiano-Vicic, Jaime A. Torrens-Davila, Jeffrey M. Williams-English, LEAD ATTORNEYS, Indiano & Williams, PSC, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Vineland Fireworks Company, **[**4]** Inc., Civ. 08-2029, Consol Plaintiff: Don P. Foster, Lynette Santiago-Rivera, Sally Miller, LEAD ATTORNEYS, Klerh Harrison Harvey Branzburg & Ellers LLP, Philadelphia, PA; Eric Perez-Ochoa, LEAD ATTORNEY, Adsuar Muniz Goyco Seda & Perez Ochoa PSC, San Juan, PR; Mindee J. Reuben, Steven A. Asher, LEAD ATTORNEYS, PRO HAC VICE, Weinstein Kitchenoff & Asher LLC, Philadelphia, PA; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Alaska Air & Sound Center, Inc., Civ. 08-1569, Fermax, Inc, Civ. 08-2260, Consol Plaintiffs: John F. Nevares, Pedro Quinones-Suarez, LEAD ATTORNEYS, John F. Nevares & Assoc. PSC, San Juan, PR.

For CC 1 Limited Partnership, Civ. 08-1901, Consol Plaintiff: John F. Nevares, Pedro Quinones-Suarez, LEAD ATTORNEYS, John F. Nevares & Assoc. PSC, San Juan, PR; Michael A. Hanzman, LEAD ATTORNEY, Hanzman Gilbert LLP, Coral Gables, FL; Kevin Bruce Love, Criden & Love, South Miami, FL.

For Bacplas, Inc., Civ. 08-1902, Consol Plaintiff: John D. Radice, LEAD ATTORNEY, PRO HAC VICE, Nussbaum LLP, New York, NY; Kevin Bruce Love, LEAD ATTORNEY, Criden & Love, South Miami, FL; Linda P. Nussbaum, LEAD ATTORNEY, Nussbaum LLP, New York, NY; Pedro Quinones-Suarez, **[**5]** LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Isaac Industries, Inc., Civ. 8-1903, Consol Plaintiff: Joseph W. Cotchett, Steven Williams, Stuart G. Gross, LEAD ATTORNEYS, PRO HAC VICE, Cotchett Pitre & McCarthy, Burlingame, CA; Michael Elliot Criden, LEAD ATTORNEY, Hanzman Criden & Love PA, South Miami, FL; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Horizon International Shipping, Inc., Civ. 08-1908, Consol Plaintiff: Andres W. Lopez, LEAD ATTORNEY, Andres W. Lopez Law Office, San Juan, PR; John F. Nevares, Pedro Quinones-Suarez, LEAD ATTORNEYS, John F. Nevares & Assoc. PSC, San Juan, PR.

For Kamino International Transport, Inc., Civ. 08-1989, Consol Plaintiff: Jay Brian Shapiro, Zachary Scott Bower, LEAD ATTORNEYS, Stearns Weaver Miller Weissler Alhadeff & Sitterson, Miami, FL; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR; Seth Rich Gassman, LEAD ATTORNEY, Cohen Milstein Sellers & Toll PLLC, New York, NY.

For Yoly Industrial Supply, Inc, Civ. 08-1900, Consol Plaintiff: Andres W. Lopez, LEAD ATTORNEY, Andres W. Lopez Law Office, San Juan, PR; Hollis L. Salzman, Kellie Lerner, Morissa R. Falk, **[**6]** LEAD ATTORNEYS, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Mayda Rodriguez, Civ. 08-2028, Consol Plaintiff: Archie C. Lamb, Jr., LEAD ATTORNEY, Law Offices of Archie Lamb, LLC, Birmingham, AL; Joseph S. Silver, LEAD ATTORNEY, Silver & Agacinski, PA, Tampa, FL; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR; PHV Richard P Rouco, PRO HAC VICE, Whatley Drake & Kallas, LLC, Birmingham, AL.

For Magazine Auto, Inc., Civ. 08-2026, Consol Plaintiff: Andres W. Lopez, LEAD ATTORNEY, Andres W. Lopez Law Office, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For X-Press Freight Forwarders, Inc., Civ. 08-2027 and Civ. 08-2095, Consol Plaintiff: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, Counsel for Co-defendant Pipeliners, San Juan, PR; John F. Nevares, Pedro Quinones-Suarez, LEAD ATTORNEYS, John F. Nevares & Assoc. PSC, San Juan, PR.

For Mayrsohn International Trading, Co., Civ. 08-1936, Consol Plaintiff: Benjamin D. Brown, LEAD ATTORNEY, PRO HAC VICE, Cohen Milstein Seooers & Toll TOOC, Washington, **[**7]** DC; Douglas A. Millen, Steven A. Kanner, LEAD ATTORNEYS, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL; Luis A. Oliver-Fraticelli, LEAD ATTORNEY, Fiddler, Gonzalez & Rodriguez, San Juan, PR; PHV Michael D. Hausfeld, Patrick A. Tillou, LEAD ATTORNEYS, PRO HAC VICE, Milstein Hausfeld & Toll, PLLC, Washington, DC; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Marie Francis Kent, Civ. 08-2030, Consol Plaintiff: Kevin Bruce Love, LEAD ATTORNEY, Criden & Love, South Miami, FL; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Luis Freire, Div. of KMA Associates of Puerto Rico, Inc., Civ. 08-1926, Foam Pack, Inc., Civ. 08-1925, Combe Products, Inc., Civ. 08-2003, Consol Plaintiffs: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, Counsel for Co-defendant Pipeliners, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For The Aaron Group, Civ. 08-1904, Consol Plaintiff: David C. Indiano-Vicic, Jaime A. Torrens-Davila, LEAD ATTORNEYS, Indiano & Williams, PSC, San Juan, PR; PHV Gerald J. Rodos, PHV Jeffrey B. Gittleman, PHV Mark A. Rosen, LEAD **[**8]** ATTORNEYS, PRO HAC VICE, Barrack, Rodos & Bacine, Philadelphia, PA; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Sedeco Servicios de Descuentos en Compra, Inc., Civ. 08-2001, Consol Plaintiff: Eric M. Quetglas-Jordan, LEAD ATTORNEY, Quetglas Law Office, San Juan, PR; Monique Guillemard-Noble, LEAD ATTORNEY, Nachman & Guillemard, San Juan, PR; PHV Bryan L. Clobes, LEAD ATTORNEY, PRO HAC VICE, Cafferty Faucher LLP, Philadelphia, PA.

For Pedro Luciano, Civ. 08-1795, Consol Plaintiff: Hector E. Pedrosa-Luna, LEAD ATTORNEY, The Law Offices of Hector E. Pedrosa-Luna, San Juan, PR; Luis E. Minana, LEAD ATTORNEY, Luis E. Minana & Associates, San Juan, PR; PHV Amanda F. Lawrence, PHV David R. Scott, LEAD ATTORNEYS, PRO HAC VICE, Scott & Scott LLP - CT, Colchester, CT; PHV Christopher Burke, PHV Kristen M Anderson, LEAD ATTORNEYS, PRO HAC VICE, Scott & Scott LLP - CA, San Diego, CA; PHV Walter W. Noss, LEAD ATTORNEY, PRO HAC VICE, Scott &

Scott LLP - OH, Cleveland Heights, OH; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Cliffstar Corporation, Civ. 08-2123, Consol Plaintiff: Alejandro Alvarez, LEAD ATTORNEY, Coral **[**9]** Gables, FL; Daniel E. Gustafson, LEAD ATTORNEY, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR; Elizabeth R. Odette, Joseph W. Bruckner, Richard A. Lockridge, Robert K. Shelquist, PRO HAC VICE, Lockridge Grindal Nauen PLLP, Minneapolis, MN.

For Almacenes Arilope, Inc., Civ. 08-2260, Comercial Don Benja, Inc., Civ. 08-2260, Comercial Tortuguero, Inc., Civ. 08-2260, Comercial Berrios, Inc., Civ. 08-2260, Ferreteria Amador, Inc., Civ. 08-2260, Ferreteria Berrios, Inc., Civ. 08-2260, Ferreteria El Cerrillo, Inc., Civ. 08-2260, Ferreteria Solar El Almacigo, Inc., Civ. 08-2260, Financiadora Caguas Comercial, Inc., Civ. 08-2260, Consol Plaintiffs: John F. Nevares, Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Econocaribe, Inc., Civ. 08-2395, Consol Plaintiff: Edward M. Joffe, LEAD ATTORNEY, Sandler Travis & Rosenberg, Miami, FL; Kenneth N. Wolf, LEAD ATTORNEY, PRO HAC VICE, Sandler Travis & Rosenberg, New York, NY; Michelle Lynn Mejia, LEAD ATTORNEY, PRO HAC VICE, Sandler Travis & Rosenberg, P.A., Miami, FL; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. **[**10]** PSC, San Juan, PR; Robert J. Becerra, LEAD ATTORNEY, PRO HAC VICE, Sandler Travis & Rosenberg, Miami, FL.

For Central Produce El Jibarito, Inc., Civ. 09-1096, Empresas Berrios, Inc., Civ. 09-1822, Consol Plaintiffs: Adrian Sanchez-Pagan, Jaime Sifre-Rodriguez, LEAD ATTORNEYS, Sanchez-Betances, Sifre & Munoz-Noya Law Offices, PSC, San Juan, PR; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For SGS Logistic Services, Inc., Civ. 09-1852, Consol Plaintiff: Jayne Arnold Goldstein, LEAD ATTORNEY, PRO HAC VICE, Shepherd, Finkelman, Miller & Shah LLP, Weston, FL; Mark S. Fistos, LEAD ATTORNEY, PRO HAC VICE, Aronovitz Trial Lawyers PA, Tallahassee, FL; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR; Tod N. Aronovitz, LEAD ATTORNEY, PRO HAC VICE, Aronovitz Law, Miami, FL.

For Alpha Freight & Transport International, Inc., Civ. 09-1851, Consol Plaintiff: Edward L. Birk, Michael B. Bittner, LEAD ATTORNEYS, PRO HAC VICE, Marks Gray, PA, Jacksonville, FL; Eric Chase Roberson, LEAD ATTORNEY, PRO HAC VICE, McGuire Woods, LLP, Jacksonville, FL; Hollis L. Salzman, LEAD ATTORNEY, PRO HAC VICE, Labaton Sucharow LLP, New York, NY; Michael **[**11]** I. Fistel, Jr., LEAD ATTORNEY, PRO HAC VICE, Holzer, Holzer & Fistel, LLC, Atlanta, GA; Pedro Quinones-Suarez, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Francisco J Rivera-Muniz, Francisco J Rivera-Muniz, Consol Plaintiffs: Jose A. Andreu-Garcia, LEAD ATTORNEY, Andreu & Sagardia Law Office, San Juan, PR; Jorge M. Torres-Gomez, Torres Gomez Law Offices, San Juan, PR.

For Mrs. Valerie Dapena-Disdier, Mrs. Valerie Dapena-Disdier, Eduardo Ferrer-Bolivar, Eduardo Ferrer-Bolivar, Consol Plaintiffs: Jorge M. Torres-Gomez, LEAD ATTORNEY, Torres Gomez Law Offices, San Juan, PR; Jose A. Andreu-Garcia, LEAD ATTORNEY, Andreu & Sagardia Law Office, San Juan, PR.

For Caribbean Produce Exchange, Inc., Civ. 10-1556, Consol Plaintiff: Hiram Martinez-Lopez, Hiram Martinez Law Office, San Juan, PR; Orlando H. Martinez-Echevarria, Orlando H. Martinez Echevarria PSC, San Juan, PR; Salvador J. Antonetti-Stutts, O'Neill & Borges, San Juan, PR.

For Horizon Lines, Inc., Defendant: Angelo M. Russo, PHV Amy B. Manning, PHV Tammy L. Adkins, Richard J. Rappaport, LEAD ATTORNEYS, PRO HAC VICE, McGuire Woods LLP, Chicago, IL; Carlos E. George-Iguina, Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, **[**12]** LEAD ATTORNEYS, Carlos J. Sagardia-Abreu, O'Neill & Borges, San Juan, PR; PHV John M. Nannes, LEAD ATTORNEY, PRO HAC VICE, Skadden Arps Slate Meagher & Flom LLP, Washington, DC; Tiffany Rider-Rohrbaugh, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, DC; Francisco G. Bruno-Rovira, McConnell Valdes, San Juan, PR.

For Horizon Lines, LLC, Defendan: Angelo M. Russo, PHV Amy B. Manning, PHV Tammy L. Adkins, Richard J. Rappaport, LEAD ATTORNEYS, PRO HAC VICE, McGuire Woods LLP, Chicago, IL; Carlos E. George-Iguina, Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, Carlos J. Sagardia-Abreu, O'Neill & Borges, San Juan, PR; Tiffany Rider-Rohrbaugh, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, DC; Francisco G. Bruno-Rovira, McConnell Valdes, San Juan, PR.

For Sea Star Line, LLC, Defendant: Adam S. Paris, George E. Pence, LEAD ATTORNEYS, PRO HAC VICE, Sullivan & Cromwell, LLP, Los Angeles, CA; Carlos A. Rodriguez-Vidal, Mariana Negron-Vargas, Rossell Barrios-Amy, LEAD ATTORNEYS, Goldman Antonetti & Cordova, San Juan, PR; Emma Gilmore, PHV Nicolas Bourtin, LEAD ATTORNEYS, PRO HAC VICE, Sullivan & Cromwell LLP, New York, NY; Jennifer **[**13]** L. Murray, Steven L. Holley, LEAD ATTORNEYS, PRO HAC VICE, Sullivan & Cromwell, LLP, New York, NY; Timothy Joseph Armstrong, LEAD ATTORNEY, Armstrong & Mejer, Coral Gables, FL; Francisco G. Bruno-Rovira, McConnell Valdes, San Juan, PR.

For Trailer Bridge, Inc., Defendant: Alejandro J. Cepeda-Diaz, LEAD ATTORNEY, Francisco G. Bruno-Rovira, McConnell Valdes, San Juan, PR; Scott D Richburg, LEAD ATTORNEY, PRO HAC VICE, Foley & Lardner, LLP, Jacksonville, FL.

For Crowley Maritime Corporation, Crowley Liner Services, Inc., Defendants: Andrew Zimmitti, Samuel Rosenthal, LEAD ATTORNEYS, PRO HAC VICE, Patton Boggs LLP, Washington, DC; Jose Ramon Rivera-Morales, Manolo T. Rodriguez-Bird, LEAD ATTORNEYS, William A. Graffam, Jimenez, Graffam & Lausell, San Juan, PR; Francisco G. Bruno-Rovira, McConnell Valdes, San Juan, PR.

For Horizon Lines of Puerto Rico, Inc., Defendant: Angelo M. Russo, PHV Amy B. Manning, PHV Tammy L. Adkins, LEAD ATTORNEY, PRO HAC VICE, McGuire Woods LLP, Chicago, IL; Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, Carlos E. George-Iguina, O'Neill & Borges, San Juan, PR.

For Alexander G. Chisholm, Defendant: Celia A Howes, Ronald H Hoevet, LEAD ATTORNEYS, **[**14]** PRO HAC VICE, Hoevet Boise & Olson, PC, Portland, OR; Nilda M. Navarro-Cabrer, LEAD ATTORNEY, Nilda M. Navarro Law Office, San Juan, PR.

For Gabriel Serra, Defendant: Brian P. Roche, Richard L. Reinish, LEAD ATTORNEYS, PRO HAC VICE, Seyfarth Shaw LLP, Chicago, IL.

For Kevin Gill, Defendant: Lori R. Keeton, Richard S. Glaser, LEAD ATTORNEY, PRO HAC VICE, Parker Poe Adams & Bernstein LLP, Charlotte, NC.

For Gregory Glova, Defendant: PHV Jack M. Knight, Jr., LEAD ATTORNEY, PRO HAC VICE, Winston & Strawn LLP, Charlotte, NC.

For Horizon Lines of Puerto Rico, Inc., Defendant: Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR; Francisco G. Bruno-Rovira, McConnell Valdes, San Juan, PR.

For Xpress Fright Forwarders, Inc., Ernesto Vilanova-Velez, Defendants: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, San Juan, PR.

For Saltchuk Resources, Inc., Defendant: Harold D. Vicente-Gonzalez, LEAD ATTORNEY, Vicente & Cuebas, San Juan, PR; Harold D. Vicente-Colon, San Juan, PR.

For Leonard Shapiro, Defendant: Roberto Buso-Aboy, LEAD ATTORNEY, Buso Aboy Law Office, San Juan, PR.

For Horizon Lines of Puerto Rico, Inc., Consol Defendant: **[**15]** Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR.

For Horizon Logistics, LLC, Consol Defendant: Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR; Francisco G. Bruno-Rovira, McConnell Valdes, San Juan, PR.

For Ernesto Vilanova-Velez, Civ. 08-2095, also known as Ernesto Villalona, Consol Defendant: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, San Juan, PR.

For JBA Transport & Logistics, Inc., Civ. 08-1729, Consol Defendant: Artro Diaz-Angueira, LEAD ATTORNEY, Cancio, Nadal, Rivera & Diaz, San Juan, PR; Elizabeth Del Pilar Villagrasa-Flores, Cancio, Nadal, Rivera & Daz, PSC, San Juan, PR.

For Agustin Berastain, Consol Defendant: Arturo Diaz-Angueira, LEAD ATTORNEY, Cancio, Nadal, Rivera & Diaz, San Juan, PR.

For Call Rapido, LLC, Civ. 09-1849, Consol Defendant: Andrew Mitchell Schwartz, LEAD ATTORNEY, PRO HAC VICE, Andrew M. Schwartz, Boca Raton, FL; Matthew Fornaro, LEAD ATTORNEY, PRO HAC VICE, Boca Raton, FL.

For Suramya T. Atapattu, Civ. 09-1849, Consol Defendant: Andrew Mitchell Schwartz, LEAD ATTORNEY, PRO HAC VICE, Andrew M. Schwartz, Boca Raton, FL.

For **[**16]** United States, Intervenor: Finnuala M. Kelleher, John F. Terzaken, Michael L. Whitlock, LEAD ATTORNEYS, United States Department of Justice, Antitrust Division, National Criminal Enforcement Section, Washington, DC.

For Banco Popular de Puerto Rico, Intervenor: Edelmiro Antonio Salas-Gonzalez, LEAD ATTORNEY, Urb. Villa Nevarez, San Juan, PR; Pedro E. Ruiz-Melendez, LEAD ATTORNEY, Pedro E. Ruiz Law Office, PSC, San Juan, PR.

For Linde Gas Puerto Rico, Inc., Interested Party: David C. Indiano-Vicic, Jaime A. Torrens-Davila, LEAD ATTORNEYS, Indiano & Williams, PSC, San Juan, PR; John F. Nevares, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For X-Press Freight Forwarders, Inc., Civ. 08-2027 and Civ. 08-2095, Counter Claimant: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, San Juan, PR; John F. Nevares, LEAD ATTORNEY, John F. Nevares & Assoc. PSC, San Juan, PR.

For Ernesto Vilanova-Velez, Counter Claimant: Guillermo De-Guzman-Vendrell, LEAD ATTORNEY, De Guzman Law Offices, San Juan, PR.

For Horizon Lines, LLC, Counter Defendant: Angelo M. Russo, PHV Amy B. Manning, PHV Tammy L. Adkins, Richard J. Rappaport, LEAD ATTORNEYS, PRO HAC VICE, McGuire Woods LLP, Chicago, **[**17]** IL; Carlos E. George-Iguina, Mauricio O. Muniz-Luciano, Salvador J. Antonetti-Stutts, LEAD ATTORNEYS, O'Neill & Borges, San Juan, PR; Jose F. Sarraga-Venegas, LEAD ATTORNEY, Jose F. Sarraga Law Office, San Juan, PR; Tiffany Rider-Rohrbaugh, LEAD ATTORNEY, Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, DC.

Judges: DANIEL R. DOMINGUEZ, United States District Judge.

Opinion by: DANIEL R. DOMINGUEZ

Opinion

[*128] **OPINION AND ORDER**

I. PROCEDURAL HISTORY

The instant case is an antitrust action brought under the Sherman Act, *15 U.S.C. §§ 1* and *3*, and is comprised of a compilation of cases sent to this District Court to be handled as a multi-district litigation. The *Fourth Amended Complaint* (Docket No. 501) remains sealed to present day, so the Court shall only briefly outline the relevant facts, and shall restrict itself to those facts which appear in both the original unsealed *Complaint* (Docket No. 1) and the *Fourth Amended Complaint*, as well as information ascertainable from the public docket.

Plaintiffs in the instant case purport to represent a potential class comprised of direct purchasers of waterborne cabotage between Puerto Rico and the United States, its territories and possessions. Plaintiffs purchased the cabotage **[**18]** from Defendants, who are eight[1] companies that provide cabotage services and six individual officers of those companies. Plaintiffs allege that Defendants engaged in a conspiracy to illegally fix waterborne cabotage prices[2] between the U.S. and Puerto Rico which spanned several years. Plaintiffs buttress this allegation with assertions regarding finances of the companies and the market itself as well as assertions based upon the existence of an ongoing criminal investigation by the Department of Justice ("DOJ").

[*129] On July 8, 2009, Plaintiffs and Defendants Horizon Lines, Inc., Horizon Lines, LLC, Horizon Logistics Holdings, LLC, Horizon Logistics, LLC and Horizon Lines of Puerto Rico, Inc. (collectively "Horizon Defendants") filed a motion for preliminary approval of a settlement agreement reached between those parties (Docket No. 375). Under the terms of the proposed settlement agreement, Plaintiffs have three options: (1) they may opt out of the class to pursue individual remedies against the Horizon Defendants; (2) they may elect to receive a pro rata share of a $20,000,000 total settlement payment to be made by the Horizon Defendants to Plaintiffs; or (3) they may utilize a base rate freeze on future contracts with the Horizon Defendants. In exchange, Plaintiffs will request the dismissal with prejudice of claims against Horizon Defendants.

On December 11, 2009, Plaintiffs and Defendant Alexander Chisholm (hereinafter "Defendant Chisholm") filed a joint motion for preliminary approval of a settlement agreement reached between these parties (Docket No. 597). Under this agreement, Plaintiffs agree **[**20]** to dismiss the claims against Defendant Chisholm in exchange for his cooperation in the ongoing litigation.

Additionally, on February 5, 2010, Plaintiffs and Defendants Crowley Maritime Corporation and Crowley Liner Services (collectively "Crowley Defendants") filed a motion for preliminary approval of a settlement agreement reached between those parties (Docket No. 680). The terms of the settlement agreement reached between these parties is substantially identical to that reached between Plaintiffs and Horizon Defendants, except that the Crowley Defendants' liability for cash payments shall total $13,750,000 rather than the $20,000,000 figure named in the Horizon Settlement Agreement.

The only remaining party who has filed objections to the Court's preliminary approval of the aforementioned settlement agreements is Defendant Sea Star Lines (hereinafter "Sea Star").[3] Although several of the issues, particularly those related to the notice to be sent to potential members of the Settlement Class members or to discovery, have since been resolved via re-drafting or clarifications made in subsequent filings and in open court, Sea Star continues to emphasize two objections. Namely, Sea Star's **[**21]** objections at this stage are that Plaintiffs have failed to show that the proposed settlement class meets the requirements of *Federal Rule of Procedure 23* and that Plaintiffs have not provided evidence that the proposed base rate freeze is competitively neutral.

II. THE SETTLEMENT CLASS

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[1] At the outset of the case, an additional Defendant, Trailer Bridge, Inc., was named. However, the Court has recently granted a motion to dismiss (Docket No. 722) as to this Defendant. Accordingly, the Court shall not consider Trailer Bridge's filings in the instant *Opinion and Order*. Likewise, as Defendants Crowley Maritime Corporation and Crowley Liner Services have at this time filed a settlement agreement between themselves and Plaintiffs and have represented to the Court that they will no longer oppose the approval of other settlement agreements in the instant case (Docket No. 667), the Court shall not directly address their filings herein.

[2] "Prices" in this context include **[**19]** both the negotiated costs of shipping and the various surcharges imposed by cabotage providers.

[3] Early in the litigation, Defendant Leonard Shapiro moved to join Sea Star's motion in opposition to the motion for preliminary approval of the settlement agreement with Horizon Defendants (Docket No. 338).

Federal Rule of Civil Procedure 23 ***HN1***[] governs antitrust class action suits. *See* *Fed.R.Civ.P. 23*; *see also ABA Section of **Antitrust Law**, **Antitrust Law** Developments vol. I* 886 (6th ed.2007). Under both *Rule 23(a)* and *Rule 23(b)*, Plaintiffs bear the burden of establishing the prerequisites for class certification. *In Re Relafen Antitrust Litig., 231 F.R.D. 52, 67 (D.Mass.2005)*. Under *Rule 23(a)*, Plaintiffs must establish numerosity, commonality, typicality and adequacy of representation. *Fed.R.Civ.P. 23(a)*. Further, under *Rule 23(b)(3)*, Plaintiffs must establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action **[**22]** is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed.R.Civ.P. 23(b)(3)*. These two requirements are commonly known as "predominance" and "superiority." *In Re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 18 (1st Cir.2008)*.

HN2[] Although, in the past, courts typically determined whether the aforementioned requirements of *Rules 23(a)* and *(b)* were met via a reading of the pleadings, recently, the First Circuit has expressed a strong preference that the Court move beyond the pleadings when certifying a class. *See* *College of Dental Surgeons of Puerto Rico v. Connecticut General Life Ins. Co., 585 F.3d 33, 41 (1st Cir.2009)*; *see also* *In Re PolyMedica Corp.* ***[*130]*** *Sec. Litig., 432 F.3d 1, 6 (1st Cir.2005)*. Taking into consideration the latest mandates from the First Circuit, the Court has allowed parties to the instant case to present evidence, such as affidavits and expert reports, to support their arguments in favor of or against certification of a settlement class in the instant case. When considering the evidence[4] proffered by parties, the Court has also been cognizant that its duty is to "evaluate the plaintiff's evidence critically **[**23]** without allowing the defendant to turn the class-certification proceeding into an unwieldy trial on the merits." *In Re New Motor Vehicles, 522 F.3d at 17* (quoting *In Re PolyMedica, 432 F.3d at 17*). Even in the context of certifying a settlement class, the "district court must conduct a rigorous analysis of the prerequisites established by *Rule 23* before certifying a class." *Smilow v. Southwestern Bell Mobile Sys., 323 F.3d 32, 38 (1st Cir.2003)*. "[H]owever, despite this heightened scrutiny . . . the law favors class action settlements." *In Re Relafen, 231 F.R.D. at 68* (quoting *In Re Lupron Mktg. And Sales Practices Litig., 228 F.R.D. 75, 88 (D.Mass.2005)*) (internal quotations omitted).

In each of the settlement agreements, the Settlement Class is defined as follows:

> All persons (excluding governmental entities, Defendants, co-conspirators, and the present and former parents, predecessors, subsidiaries and affiliates of the foregoing) **[**24]** who purchased Puerto Rican Cabotage directly from any of the Defendants or their co-conspirators, or any present or former parent, subsidiary or affiliate thereof, at any time during the period from May 1, 2002, until April 17, 2008.

Thus, the Court shall analyze the certification of the Settlement Class as it pertains to all the proposed settlement agreements collectively rather than treating each settlement's Settlement Classes as distinct entities.

A. RULE 23(A) REQUIREMENTS

The Court therefore proceeds first to review the sufficiency of the material presented by Plaintiffs in favor of certification of a settlement class at this preliminary stage under the criteria set forth under *Federal Rule of Civil Procedure 23(a)*.

1. NUMEROSITY

HN3[] The numerosity requirement of *Rule 23(a)* specifically mandates that "the class [be] so numerous that joinder of all members is impracticable." *Fed.R.Civ.P. 23(a)(1)*. The Court finds that this numerosity requirement is easily met here. As noted by Plaintiffs' expert, Dr. Lamb, at least 3,000 customers were affected by Defendants'

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[4] When evaluating the evidence proffered by the parties in favor of or against certification of a settlement class, the Court has employed the preponderance of the evidence standard. *See* *In Re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir.2009)*.

alleged conspiracy. *See Affidavit of Dr. Russell Lamb*, ¶4. Joinder of such a multitudinous group of Plaintiffs would clearly be **[**25]** impracticable. Accordingly, the Court finds that the numerosity requirement is met in the instant case.

2. COMMONALITY

HN4[] The second requirement of *Rule 23(a)* is that "there are questions of law or fact common to the class." *Fed.R.Civ.P. 23(a)(2)*. Only a single common question of fact or law is necessary to meet this requirement. *See* Manual for Complex Litigation §21.132 (4th ed.2004); *see also* 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions §3.10 (4th ed.2002). Typically, in antitrust cases, "courts have held that the existence of an alleged conspiracy or monopoly is a common issue that will satisfy" the commonality requirement. 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions §3.10 (4th ed.2002); *see also* *Natchitoches Parish Hosp. Svc. Dist. v. Tyco Int'l, Ltd., 247 F.R.D. 253, 264 (D.Mass.2008)*.

HN5[] There is considerable overlap between this requirement of commonality and the criteria of typicality and predominance as questions, such as common impact and proof of damages, "are relevant to all three." *In Re New Motor Vehicles, 522 F.3d at 19* (internal citations omitted); *see also* *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (noting that "the **[**26]** predominance **[*131]** criterion is far more demanding" than the commonality criterion). However, the requirement of commonality has been described as a "low bar" as courts typically provide this criteria with "a permissive application." *In Re New Motor Vehicles, 522 F.3d at 19* (internal citations and quotations omitted). Thus, the commonality requirement is relatively toothless in comparison with the related requirements of typicality and predominance.

In the instant case, Plaintiffs have identified seven issues which they allege are common to all Plaintiffs. The first of these is whether Defendants engaged in a conspiracy to allocate customers, rig bids and fix prices.[5] The second issue is the precise identity of the participants in the alleged conspiracy. The third common issue cited by Plaintiffs includes the meetings, communications and other collusive acts allegedly performed by Defendants while perpetrating the conspiracy. The next common issue cited is the duration of the conspiracy. Additionally, Plaintiffs cite the effect of Defendants' conduct on the prices of cabotage and the appropriate measure of damages sustained by Plaintiffs as issues common to all Plaintiffs.

Sea Star makes no claim that Plaintiffs have failed to fulfil the commonality requirement of the class certification analysis. Plaintiffs in the instant case have provided preliminary evidence supporting their allegation that a price-fixing conspiracy existed between Defendants. Even without considering any of the other factors presented by Plaintiffs, the Court finds that the supported allegation regarding the antitrust conspiracy targeting local cabotage purchasers, standing alone, is sufficient to establish commonality. *See* 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions §3.10 (4th ed.2002); *see also* *Natchitoches, 247 F.R.D. at 264*; *see also* *In Re Compact Disk Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 204 (D.Maine 2003)*.

3. TYPICALITY

HN6[] The third requirement of *Rule 23(a)*, typicality, is satisfied where "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Fed.R.Civ.P. 23(a)(3)*. In assessing this requirement, the Court is directed to focus "less on the relative strengths of the named and unnamed plaintiffs' case than on the similarity of the legal and remedial **[**28]** theories behind their claims." *In Re Relafen, 231 F.R.D. at 69* (quoting *Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (5th Cir.1986)*). The requirement of typicality, like commonality, "does not require that all putative class members share identical claims." *Natchitoches, 247 F.R.D at 264* (quoting *In Re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 531 (3d Cir.2004)*). Rather,

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[5] *See supra* note **[**27]** 2 regarding the relevant definition of "prices."

> [t]ypicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, where such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to the class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.

Id. (quoting *In Re Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir.1996))*; *see also* 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* §3.13 (4th ed.2002).

Sea Star contests **[**29]** Plaintiffs assertion that they meet the typicality requirement for class certification. Specifically, their arguments rest upon an averment that Plaintiffs have not provided sufficient details regarding the negotiations held between Plaintiffs and Defendants, the volume of goods transported or the type of goods transported. Further, Sea Star notes that Defendants operated between different ports and using different vessels. On the other hand, Plaintiffs emphasize that they all suffered a common injury in the form of the allegedly anti-competitive pricing structures created by Defendants. Plaintiffs also assert that the allegedly collusive actions undertaken by Defendants mandate **[*132]** that a common set of facts apply to the claims of the entire class.

Both parties' arguments regarding the adequacy requirement rely on expert opinions submitted to the Court. Sea Star's arguments rest primarily upon affidavits and declarations submitted by now-settling Defendants Crowley Liner Services, Inc. and Crowley Maritime Corporation (Docket No. 593), which were subsequently withdrawn when those Defendants reached a settlement agreement with Plaintiffs (Docket No. 728). The Court, however, acting out **[**30]** of an abundance of caution, will continue to consider these submissions herein in order to avoid any unfairness to Sea Star, who originally objected alongside the Crowley Defendants, but who is the only non-settling business entity Defendant remaining at this time. Thus, the Court is faced with a battle of conflicting experts regarding the typicality and predominance requirements for class certification.

Although Sea Star urges the Court to deny certification for lack of typicality based upon dissimilarities between Plaintiffs, the Court disagrees with the propriety of such an outcome. After all, typicality is not tantamount to identicality, and the Court need not ascertain whether all Plaintiffs are situated in exactly the same manner as each other in order to find typicality. *See* *In Re Carbon Black Antitrust Litig., No. 03-10191, 2005 U.S. Dist. LEXIS 660, 2005 WL 102966 at *12 (Jan.18, 2005 D.Mass.)* (finding that the claims of representatives of a proposed class were sufficiently typical, even where they paid for diverse products under a variety of agreements involving varied terms or volumes).

Here, Plaintiffs are the purported representatives of a class of natural persons and business entities who purchased **[**31]** cabotage from Defendants during the time period when Defendants allegedly engaged in an illegal price-fixing scheme. Although Sea Star's assertion that the terms and events surrounding their individual contracts with Defendants, the type of vessel upon which their cabotage shipped, the port from which the cabotage shipped and the volume of cabotage shipped vary bears some weight, the Court reads this argument as improperly mandating identicality, rather than typicality. *See* *In Re Carbon Black Antitrust Litig., 2005 U.S. Dist. LEXIS 660, 2005 WL 102966 at *12* (finding typicality even where purchasers did not buy identical volumes of a product or under the same contractual terms).

All Plaintiffs and members of the proposed class are entities who purchased cabotage from Defendants at a price which was allegedly inflated to a supra-competitive level by Defendants' alleged anti-competitive price-fixing scheme. Although the exact details of the individual contracts and shipping terms vary between Plaintiffs and Defendants, the claims of Plaintiffs and members of the proposed class all involve the same illegally collusive behavior by Defendants which led to Plaintiffs and members of the proposed class paying supra-competitive **[**32]** prices for cabotage. Thus, Plaintiffs and members of the proposed class share the same legal theory as their claims arise out of the same conduct or practice by Defendants. *See* *In Re Insurance Brokerage Antitrust Litig., 579 F.3d 241, 265 (3d Cir.2009)*; *see also* *In Re Compact Disk Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 205 (D.Maine 2003)*. Specifically, "[t]he course of conduct pled in this case is the agreement to fix prices and the legal theory will be a[n antitrust] violation for all class members." *In Re Carbon Black Antitrust Litig., 2005 U.S. Dist. LEXIS 660, 2005 WL 102966 at *12*. Accordingly, the Court finds that Plaintiffs' claims are sufficiently typical of those of the Proposed Class to meet this requirement.

4. ADEQUACY OF REPRESENTATION

HN7[] The fourth and final requirement of *Rule 23(a)* is adequacy of representation, under which the Court must determine that "the representative parties will fairly and adequately protect the interests of the class." *Fed.R.Civ.P. 23(a)(4)*. This requirement aims to "uncover conflicts of interest between named parties and the class they seek to represent." *Amchem, 521 U.S. at 625*. Along this vein, it is well established that a class representative must **[**33]** be part of the class and possess the same interest and suffer the same injury as the class members." *Id. at 625-26* **[*133]** (quoting *East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L. Ed. 2d 453 (1977)*). The Supreme Court has noted that "[t]he adequacy-of-representation requirement tends to merge with the commonality and typicality criteria . . . which serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id. at 626 n.20*. This requirement also addresses the adequacy of class counsel, "factor[ing] in [their] competency and conflicts." Id.

As a preliminary matter, the Court finds that class counsel meet the adequacy requirement. Class counsel are properly experienced, have no known conflicts of interest and, in light of the vigorous nature in which they have already pursued the instant case on behalf of Plaintiffs, the Court harbors at this stage no doubt that they can competently pursue both Plaintiffs' claims and those of the entire proposed class. *See e.g.* **[**34]** *In Re Compact Disc, 216 F.R.D. at 205* (finding counsel adequate based, in part, upon "the quality of their pleadings, diligence in investigating and prosecuting the matter, and extensive experience").

Sea Star hotly contests Plaintiffs' adequacy as class representatives, however. Plaintiffs have supplemented their assertions regarding adequacy with affidavits of several named Plaintiffs. Sea Star attacks the sufficiency of these affidavits,[6] calling them overly "sweeping." Further, Sea Star asserts that Plaintiffs have failed to show adequacy as they proffer no evidence that members of the class know of the litigation or the terms of the settlement agreements, do not show that there is sufficient supervision of counsel by Plaintiffs and that they do not proffer evidence regarding the rates actually paid for cabotage. Plaintiffs, in turn, argue that they have all paid the same illegally inflated rates as members of the Proposed Class and, accordingly, share the common goal of maximizing recovery for the illegally inflated pricing on Puerto Rican cabotage.

As stated above, ***HN8***[] the adequacy criterium of *Rule 23(a)* should be read in tandem with the commonality and typicality criteria. As already discussed, the Court finds that Plaintiffs have met these two criteria, based upon the common injury suffered in the form of illegally inflated prices, and a common legal theory based upon Defendants' alleged violations of the Sherman Act. Plaintiffs, like other members of the proposed class, have the same

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[6] Sea Star attached to its *Motion Submitting Documents Pursuant to Court Orders of November 12 and November 13, 2009* (Docket No. 595) evidentiary **[**35]** objections to the affidavits proffered by Plaintiffs. First, Sea Star objects to the affidavit of Defendant Chisholm, asserting that it is unreliable because his settlement agreement with Plaintiffs was, at that time, undisclosed. As it has since been disclosed, the Court finds this argument MOOT. Sea Star then objects to the statements made by Defendant Chisholm in his affidavit as lacking foundation, lacking personal knowledge and unduly prejudicial. The Court OVERRULES these objections. *See e.g* Manual for Complex Litigation §21.21 (4th ed.2004) ("The judge need not decide at the certification stage whether such expert testimony satisfies standards for admissibility at trial."). Sea Star also objects to the affidavit of Carlos Trigueros, arguing that the affidavit should be stricken in its entirety as it is too vague, and arguing that portions of it should be stricken for lack of foundation and for providing inadmissible opinions on legal issues. The Court OVERRULES these objections. Sea Star also objects to the affidavit of Maria V. Arbelaez, Roberto Medina, Melba J. Jordan, David Klau and Rafael Gonzalez based upon the same grounds. The Court OVERRULES these objections as well for **[**36]** the reasons cited above.

incentives to maximize recovery for the wrongs allegedly perpetrated on them by Defendants. Accordingly, the Court finds that Plaintiffs have suffered the same injury and share the same interest as members of the proposed class.

Although Sea Star attacks the sufficiency of Plaintiffs' showing that they meet the adequacy requirement of 23(a), if the Court were to create precedent by denying the motion for class certification based upon these arguments, it would sanction an untenably heightened standard. In order to rebut Sea Star's assertions of insufficiency, Plaintiffs would have to present the Court with a near-unreachable level of detail as to the alignment of their interests with those of the members of the proposed class. **[**37]** In order to present **[*134]** the Court with evidence regarding the proposed class' knowledge of the terms of the settlement agreements and potential conflicts, Plaintiffs would likely need to poll members of the proposed class, other than themselves, who have, to date, not even received notice of the proposed settlements. In fact, such notice shall not be issued until the Court, if it deems fit, later orders that notice of the settlements be sent to potential class members. Even common sense, therefore, dictates that Plaintiffs' request for certification of a settlement class should not be denied due to failure to present such evidence as the possibility of gathering such evidence is stymied by the Court's decision whether or not to grant class certification. To deny class certification based upon an insufficient showing of adequacy for the reasons argued by Sea Star, therefore, might create precedent for cases that would ultimately preclude certification of any large class whose members were not easily identified and polled by their proposed representatives prior to moving for class certification. The Court shall not create such precedent herein. Accordingly, having found that Plaintiffs have **[**38]** the same interest in pursuing a remedy for injuries suffered as a result of Defendants' alleged antitrust price-fixing conspiracy as members of the potential class and that Plaintiffs have no readily ascertainable conflict of interest with members of the proposed class, the Court shall not deny their motion for class certification for lack of adequacy.

B. RULE 23(B) REQUIREMENTS

As the Court has determined that Plaintiffs meet the requirements for class certification that arise under *Rule 23(a)*, it shall now turn to discuss the predominance and superiority requirements of *Rule 23(b)*.

1. PREDOMINANCE

Rule 23(b)(3) ***HN9***[] mandates that, in order to certify a class under that section of the Rule, the Court must find "that the questions of law or fact common to class members predominate over any questions affecting only individual members." *Fed.R.Civ.P. 23(b)(3)*. This "predominance criterion is far more demanding . . . than the commonality requirement." *In Re New Motor Vehicles, 522 F.3d at 20* (quoting *Amchem, 521 U.S. at 624*) (internal quotations omitted). In antitrust actions, such as the instant action, "common issues do not predominate if the fact of antitrust violation and the fact of antitrust **[**39]** impact cannot be established through common proof." Id. However, the Supreme Court has noted that "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem, 521 U.S. at 625*. Ultimately, this requirement "does not require an entire universe of common issues, but does require a sufficient constellation of them." *In Re Relafen, 231 F.R.D. at 70* (quoting *Waste Mgt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 298 (1st Cir.2000)*) (internal quotations omitted). Accordingly, "[e]ven where there are some individualized damage issues [in a proposed antitrust class action], common issues may predominate when liability can be determined on a class-wide basis." *Natchitoches, 247 F.R.D. at 269* (quoting *In Re Visa Check/Master Money Antitrust Litig., 280 F.3d 124, 139 (2d Cir.2001)*) (internal quotations omitted).

"*Section 1* [of the Sherman Act] ***HN10***[] forbids agreements 'in restraint of trade or commerce among the several states'; [and] *section 3* forbids agreements 'in restraint of trade or commerce in any Territory of the United States.'" *Cordova & Simonpietri Insurance Agency, Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 36 (1st Cir.1981)* (quoting *15 U.S.C. §§ 1* **[**40]** & *3*). Thus, in order to prevail upon their claims, Plaintiffs must show that a conspiracy existed that unreasonably restrained trade and that affected interstate or interterritory commerce. *See*

Lee v. Life Ins. Co. of N. America, 829 F.Supp.529, 535 (D.R.I.1993), *aff'd* *23 F.3d 14 (1st Cir.1994)*. For the purposes of a Sherman Act claim, price fixing is usually considered to be *per se*[7] unlawful. *Eastern [*135] Food Svcs., Inc. v. Pontifical Catholic Univ. Svcs. Assoc., 357 F.3d 1, 4 (1st Cir.2004)*.

Here, Sea Star bases its arguments against class certification for lack of predominance upon several contentions. First, Sea Star argues that Plaintiff's expert, Dr. Lamb, did not establish a presumption of class-wide impact. Sea Star rests this argument upon the assertions of the Crowley Defendants' experts,[8] which, in turn, are based upon evidence that Defendants served the varying needs of their customers via different ports and with different types of vessels. Sea Star also asserts that the Court may not presume common impact simply because the instant case is a horizontal price-fixing conspiracy. Finally, Sea Star challenges the methodology for calculating damages proffered by Dr. Lamb as untested and unworkable. Plaintiffs, in turn, focus on the alleged conspiracy to price-fix and the market-wide effects of that alleged conspiracy, particularly **[**42]** as related to the issues outlined above during the Court's discussion of commonality.

Thus, as to this criterium, the controversy between Sea Star and Plaintiffs centers around the varying opinions of the experts. ***HN12***[] The Court may not shirk its duties under *Rule 23* by citing the necessity of making determinations based upon the credibility of competing experts at this stage. *See* *In Re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 324 (3d Cir.2009)*. Rather, the Court must act as finder of fact, making such credibility determinations in order to grant or deny class certification under *Rule 23*. Id. The Court notes that this preliminary credibility determination "does not preclude a different view at the merits stage of the case." Id.

HN13[] It is within the Court's wide discretion to conduct hearings to resolve credibility disputes prior to making its *Rule 23* **[**43]** ruling; however, in the instant case, the Court finds that such hearings are unnecessary. *See* id. The Court has received ample evidence from all parties in the form of "affidavits, documents [and] testimony" and bases its conclusions upon a combination thereof. *See* id. Accordingly, the Court's function in determining whether the predominance requirement is fulfilled in the instant case shall be to review the expert reports in order to resolve the disputes that underlie parties' respective positions regarding predominance. *See* *In Re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 324* (explaining that "[r]esolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court," even where a credibility determination must be made); *see also* *In Re New Motor Vehicles, 522 F.3d at 20*. In this manner, the Court shall predict "how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *In Re New Motor Vehicles, 522 F.3d at 20* (quoting *Mowbray, 208 F.3d at 298*).

a. DR. RUSSELL L. LAMB

In support of their petition for class certification, Plaintiffs offer the expert opinion **[**44]** of Dr. Russell L. Lamb. In Dr. Lamb's affidavit, he asserts that, due to the highly concentrated nature of the industry, the high barriers to entry

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[7] ***HN11***[] With respect to the *per se* illegal nature of a price-fixing conspiracy, the First Circuit has stated:

> few agreements are deemed so pernicious that they are condemned '*per se*' and without regard to the power of the parties to accomplish their aims, regardless of justification, and without any need to show an actual or potential adverse affect on consumer welfare. The classic cases are agreements to set prices, fix output or engage in horizontal market division. . . The categorical descriptions of *per se* offenses are quite misleading for anyone not well versed in antitrust. For example, price-fixing in its literal sense is not considered per se: virtually every sale is an agreement on price. **The only [**41] price-fixing agreements that are condemned *per se* . . . are agreements (1) between competitors (2) as to competing products or services (3) where, in addition, the agreement is not part of a larger, legitimate economic venture.**

Augusta News Co. v. Hudson News Co., 269 F.3d 41, 47 (1st Cir.2001) (internal citations omitted) (emphasis ours).

[8] As already stated above, although the Crowley Defendants later withdrew their experts' affidavits, due to fairness considerations and acting out of an abundance of caution, the Court has chosen to review these reports as they relate to Sea Star's arguments against class certification and preliminary approval of the settlement agreements.

into the market, the lack of economically viable substitutes for waterborne cabotage, the stable demand for Puerto Rican cabotage during the class period and the generally substitutable nature of Puerto Rican cabotage between Defendants, the impact on members of the proposed class **[*136]** may be shown by common proof. *Affidavit of Dr. Lamb*, ¶11.

Dr. Lamb rests his assertion regarding market concentration upon figures that show that, between 2002 and 2008, 99.9-100% of the Puerto Rican cabotage market share was held by the original Defendants[9] in the instant action. Id., Tables 1 & 2. These same figures show that the remaining Defendants controlled between 20.6% and 33.5% of the market individually. Id. Further, the Herfindahl-Hirschmann Index ("HHI"), which measures the degree of industry concentration, ranked the Puerto Rican Cabotage industry concentration as 2,702 in 2008, a figure that the Department of Justice ("DOJ") considers highly concentrated. Id. at ¶18. Citing Richard Posner, Dr. Lamb concluded that "the stable market shares here indicate **[**45]** a lack of competition between the defendants." Id. at ¶18.

In support of his assertion that there are high barriers to entry in the Puerto Rican cabotage market, Dr. Lamb notes that the Jones Act itself acts as a primary barrier. Id. at ¶¶20-21. Specifically, Dr. Lamb states that the entry barriers created by the Jones Act restrict the possibility of entry into the market by new players due to the necessity of high capital investment and substantial infrastructure investment, as well as long lead times associated with building new containerships. Id. at ¶21. Further, Dr. Lamb notes that federal regulation of the Puerto Rican cabotage industry also acts as a barrier to entry. Id. at ¶22.

Dr. Lamb next opines that "[d]emand for ocean freight shipping services is a derived demand, which depends on the demand for the final goods being purchased by the consumer." Id. at ¶23. Additionally, Dr. Lamb states that there is a large trade imbalance **[**46]** in the Puerto Rican cabotage industry, as imports from the U.S. to Puerto Rico greatly outweigh exports from Puerto Rico to the U.S. Id. at ¶25. Dr. Lamb also asserts that "[t]he demand for maritime freight shipping services is [generally] characterized by low price elasticity," where static elasticity "means that a price fixing conspiracy could profitably raise price above competition levels." Id. at ¶24. Further, Dr. Lamb notes that, during the relevant period, "demand for Puerto Rican shipping was static or declining." Id. at ¶26.

The last assertion upon which Dr. Lamb bases his conclusions is that Defendants' services are interchangeable, a proposition that Sea Star vehemently contests. Dr. Lamb rests this assertion upon several factors. First, Dr. Lamb notes that, because Defendants "generally serve the entire eastern seaboard of the United States," providing services along the "limited number of shipping routes between the U.S. and Puerto Rico," and because each port is served by at least two Defendants, "no single defendant has a monopoly on Cabotage to a geographic market in the U.S. mainland." Id. at ¶28. Additionally, based upon Defendants' own filings and statements, Dr. **[**47]** Lamb postulates that "[b]ecause defendants offer Cabotage for many different kinds of goods, no defendant has a monopoly in transport of a particular good, and competition occurs on the basis of price rather than some sort of specialized service." Id. at ¶29. Dr. Lamb also hypothesizes that, based upon the available evidence, "but for the alleged misconduct . . . more vigorous competition would have served to reduce prices." Id. at ¶29.

Based upon these assertions, Dr. Lamb reaches several conclusions as to matters which would be shown by common proof as to all class members. First, Dr. Lamb notes that, because the Puerto Rican cabotage industry is highly concentrated, it would have been "impossible for class members to" substitute other services for those provided by Defendants. Id. at ¶31. Dr. Lamb also states that the effect of a cartel would have been to raise prices to supra-competitive levels. Id. at ¶32. Whereas under other circumstances, this would lead to the entry of new competitors into the marketplace, the high entry barriers present in the Puerto Rican cabotage market prevented such an occurrence here and, accordingly, Defendants **[*137]** were able to raise prices to a supra-competitive **[**48]** level and maintain them at that level throughout the relevant time-period. Id. Further, Dr. Lamb postulates that "[b]ecause there are few economically viable substitutes, class members would have had no choice but to

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[9] The Court notes that Defendant Trailer Bridge, whose motion to dismiss the Court recently granted, held a market shares between 12.5-15.6%, leaving the remaining Defendants with an 84.3-87.5% market share during the relevant time-period. Id. at Tables 1 & 2.

purchase Cabotage services at the inflated prices which would have resulted from the alleged misconduct." Id. at ¶34. Further, Dr. Lamb states that, if not for the alleged conspiracy, because demand for cabotage was stable or even weak during the relevant time-period, Defendants would have competed with each other to gain new customers, which would have resulted in lower cabotage prices. Id. at ¶35. Thus, Dr. Lamb concludes that the class members were injured as a result of the alleged conspiracy as they had paid supra-competitive prices for Puerto Rican cabotage. Id. Dr. Lamb notes that in "industries characterized by static or declining demand," such as the Puerto Rican cabotage industry during the relevant time-period, collusion of the type alleged in the instant action should be relatively easy to detect. Id. at ¶36. Finally, because each port in the U.S. served by a Defendant was served by another Defendant, Dr. Lamb asserts that Puerto Rican cabotage was substitutable **[**49]** across Defendants, so, in a competitive market, they would have competed against each other, primarily upon the basis of price. Id. at ¶37. It follows, therefore, that, because price competition did not exist due to the alleged conspiracy, that class members were harmed because they paid a price for cabotage that was inflated in comparison with the price which they would have paid if not for the alleged conspiracy. Id. at ¶38.

In his affidavit, Dr. Lamb also presents the Court with a proposed methodology for measuring damages on a class-wide basis. This methodology encompasses a two-step process, which Dr. Lamb indicates is typical for cases involving price-fixing. Id. at ¶39. Under the first step, a model is developed in order to explain the prices to determine which prices were higher as the result of the alleged conspiracy. Id. at ¶39. In order to calculate this "overcharge," Dr. Lamb proposes to utilize a modified benchmark analysis informed by multiple regression analyses to account for other factors which affected prices of the cabotage during the relevant time-period. Id. at ¶40-57. Under the second step of the proposed method for measuring damages, the "overcharge" is applied **[**50]** to the dollar value of sales that occurred so that the Court may determine the class-wide overcharge paid by class members. Id. at ¶39.

b. DR. MARK A. ISRAEL

In response to Dr. Lamb's affidavit, Defendants offer the affidavits of two counter-experts. The first of those experts is Dr. Mark A. Israel. His affidavit serves primarily as an attempt to debunk the theories, assertions and opinions set forth by Dr. Lamb in his affidavit, particularly those as to class-wide impact of the alleged conspiracy. *See Affidavit of Dr. Mark A. Israel*, ¶8.

First, Dr. Israel notes that the existence of a cartel does not necessarily indicate that members of the cartel "were successful in raising prices to the entirety of the class." Id. at ¶10. Next, Dr. Israel alleges that Dr. Lamb's emphasis on the high concentration is, standing alone, insufficient to establish class-wide impact. Id. at ¶12. Further, Dr. Israel emphasizes that the differences between routes, vessels and container types are factors that he believes show that Defendants' services were, in fact, not interchangeable. Id. at ¶13.

Specifically, Dr. Israel breaks down the "eastern seaboard" described by Dr. Lamb into its component parts, showing **[**51]** that Defendants' businesses cater to varying regions. Id. at ¶15. Dr. Israel asserts that these variances will require the performance of route-specific analyses in order to determine class-wide impact. Id. at ¶16. Dr. Israel also argues that the difference in rates for cabotage imported to Puerto Rico from the U.S. and exported to the U.S. from Puerto Rico also weighs against easily determining class-wide impact. Id. at ¶¶ 18-19.

Next, Dr. Israel notes that, at least in some cases, travel time for the goods being shipped is a factor that informed customers' decisions when negotiating contracts for Puerto Rican cabotage. Id. at ¶¶ 20-21. Additionally, Dr. Israel emphasizes that the **[*138]** variety in types, sizes and permanency of containers utilized by Defendants played a role in the competition between Defendants for market share. Id. at ¶24. Therefore, Dr. Israel concludes that "demonstrating class-wide impact across all routes, carriers, and containers with common proof is unlikely" as factors other than price may have informed class members' decisions. Id. at ¶24.

Dr. Israel then utilizes shipment data provided by the Horizon Defendants to find that such data is "incompatible with class-wide **[**52]** impact." First, Dr. Israel states that this data shows a heterogeneity in price changes across customers, routes and container types which would preclude demonstration of class-wide impact. Id. at ¶26.

Further, upon analysis of the data, Dr. Israel finds that there is no commonality as to rate increases and decreases, either in direction or in magnitude. Id. at ¶¶26, 34. Dr. Israel then uses this data to rebuke a portion of the affidavit given by Defendant Chisholm, in which he claimed that the alleged price-fixing "impacted almost all pricing within each shipping category." Id. at ¶32.

Finally, Dr. Israel addresses Dr. Lamb's methodology for estimating damages in a price-fixing case. Id. at ¶35. Dr. Israel does not contest the properness of the method outlined by Dr. Lamb. Id. Rather, he emphasizes that Dr. Lamb did not actually perform the analysis in order to report on the results in his affidavit. Id.

c. DAVID ST. AMAND

Defendants second expert is David St. Amand.[10] Mr. St. Amand's first assertion is that cabotage carriers do not provide a fungible service as they are "not purchased based on 'price alone.'" Affidavit of David St. Amand ¶4. Mr. St. Amand further states that a determination **[**53]** of whether cabotage is shipped pursuant to tariff rates "can only be determined through transaction data for each carrier in the trade." Id. at ¶5. Like Dr. Israel, Mr. St. Amand emphasizes the varied types of ships employed by Defendants, the various ports serviced by Defendants, and the range of equipment utilized by Defendants. Id. at ¶¶26-28. Mr. St. Amand also hypothesizes that, if Defendants had offered truly fungible services, "one would expect a much lower range of rates and standard deviation for similar containers moving on the same voyage" than that which is shown in data obtained from Horizon Lines. Id. at ¶29.

Mr. St. Amand proceeds to note that the impact of the alleged conspiracy would affect north-bound shippers differently than south-bound shippers. Id. at ¶30. Additionally, Mr. St. Amand notes that some purchasers of cabotage were Non Vessel Operating Common Carriers ("NVOCCs"), who act as brokers for other customers. Id. at ¶33. Finally, Mr. St. **[**54]** Amand opines that the use of filed tariffs for some shipments impacts pricing, as do surcharges, and claims that Dr. Lamb fails to address these issues in his affidavit. Id. at ¶¶34-42.

d. THE COURT'S ANALYSIS

As the Court was presented with a battle of the experts as to predominance in the instant case, it has resolved the disputes between the experts, making credibility determinations where necessary in order to determine whether the predominance criterium has been met. *See e.g.* *In Re Hydrogen Peroxide, 552 F.3d at 324*. As an initial matter, the Court notes that it is presented with a horizontal price-fixing claim, which is considered per se illegal if, as in the instant case, the conspiracy is between competitors for competing services and serves no legitimate goal. *Augusta News, 269 F.3d at 47*. Defendants in the instant case are providers of Puerto Rican cabotage who allegedly engaged in a price-fixing conspiracy related to the shipment of goods between the U.S. and Puerto Rico. Although Defendants arguably provide a number of distinct yet related services, utilizing several varieties of containers and vessels, under the umbrella of "Puerto Rican cabotage," the Court finds that, **[**55]** under the terms of the alleged conspiracy, the intent was to fix prices generally for Puerto **[*139]** Rican cabotage, a service provided by all Defendants. The Court must thus find that Defendants are competitors who provide the same service to class members. Thus, Plaintiffs have pled and supported, via their expert's affidavit, a *per se* antitrust violation. Consequently, through evidence as to the existence of the conspiracy itself, Plaintiffs could prove the fact of the violation through common proof.

In their affidavits, the experts disagreed as to class members' ability to prove antitrust impact through common proof. The primary disagreements as to impact arise in the affidavits of Dr. Israel and Dr. Lamb. Upon a careful review of the affidavits, the Court finds that Plaintiffs have sufficiently shown by the preponderance of the evidence that the predominance requirement is met here. The Court explains below.

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[10] The Court has already stricken portions of Mr. St. Amand's affidavit under *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, at Docket No. 735. Accordingly, those portions are not discussed herein.

First, it is apparent from the materials submitted that the Puerto Rican cabotage industry is highly concentrated, a state which results in a lack of true competition among market participants. Further, high entry barriers make it difficult for new participants to enter the market. **[**56]** Additionally, the static elasticity during the relevant time-period indicates that a conspiracy, such as that alleged here, could impose supra-competitive[11] prices on purchasers of Puerto Rican cabotage.

Additionally, Defendants service the eastern seaboard, and no Defendant holds a true monopoly in any one city. Thus, competition is based largely upon price for various cabotage services. Although there are some mixed variables, such as vessel type and container type, the Court will not hold that these variables are sufficient to defeat a finding of predominance here. Plaintiffs and other class members have alleged and shown through circumstantial evidence that, because they had no economically viable substitute for the various Puerto Rican cabotage services provided by Defendants, they paid supra-competitive prices for the services purchased.

At trial, Defendants might submit evidence that not every Plaintiff or class **[**57]** member suffered identically the impact of these supra-competitive prices, as those pertaining to various sub-groups of cabotage services may have borne a lesser or greater impact from the conspiracy. However, once again, the Court's inquiry here is not whether all potential class members are identically situated, but, rather, whether the issues, particularly those pertaining to the violation and to impact, which are common to all class members predominate over those which are not. *See e.g.* *Kohen v. Pacific Invest. Mgt. Co. LLC, 571 F.3d 672, 678 (7th Cir.2009)* (upholding the grant of class certification even where "some of the class members probably were net gainers"). Although class members may have purchased slightly varying forms of cabotage from Defendants, the Court holds that common issues predominate here. Although Sea Star appears to argue that the Court must find a galaxy, or even a universe, of common issues in order to find that the predominance requirement is satisfied, the Court need only find a constellation. *See* *In Re Relafen, 231 F.R.D. at 70*. Accordingly, the Court finds that both an antitrust violation and an antitrust impact may be shown through common proof as to **[**58]** the class; thus, the predominance requirement is met.

Further, Dr. Lamb has set forth a reputable and workable model for determining damages as to individual class members in his affidavit. The Court emphasizes that there is no requirement that Plaintiffs present the Court with a detailed accounting of the damages suffered by each class member at this phase. Thus, the Court finds that Plaintiffs have set forth a damages assessment model which takes into account the individualized damage issues that pertain to class members. Therefore, at this initial stage and despite Defendants' expert's assertions to the contrary, the Court will not find that Plaintiffs have failed to establish predominance based upon Dr. Lamb's damages model.

[*140] 2. SUPERIORITY

Rule 23(b) ***HN14***[] also sets forth a requirement that "a class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed.R.Civ.P. 23(b)(3)*. This superiority requirement is designed to ensure that the class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other **[**59]** undesirable results." *Amchem, 521 U.S. at 615*. In this manner, the Rule aims to provide for the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court." *Id. at 617* (internal quotation omitted). Further, the Rule itself provides a non-exhaustive list of factors which the Court may consider in determining whether the requirement of superiority is fulfilled:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

[11] This is not to say that prices might not have fluctuated both up and down during the relevant time-period. Rather, the Court simply notes that supra-competitive prices were possible during that time, whether those prices increased or decreased from one year to another.

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed.R.Civ.P. 23(b)(3).

Sea Star does not object to a finding that Plaintiffs have met the second prong of the Rule 23(b)(3) inquiry. The proposed settlements in the instant case will present a solution to the claims of a sizeable group of direct purchasers of Puerto Rican cabotage against the majority of the Defendants in the instant case. Because the case is being settled **[**60]** at an early phase, this will save class members large sums in litigation expenses and also represents an exercise in judicial economy. Further, the use of a class for settlement purposes here allows smaller purchasers to pursue complex antitrust claims which they otherwise might not have the resources to pursue. Accordingly, the Court finds that the superiority requirement of Rule 23(b)(3) is met. Thus, having determined that all the requirements for certification of a settlement class have been met, the Court hereby **GRANTS** Plaintiffs' motion to certify a settlement class as defined above.

III. PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENTS

HN15[] The fundamental duty of the Court when it reviews a settlement agreement for approval is to determine whether the proposed settlement is "fair, reasonable and adequate." *See* *Fed.R.Civ.P. 23(e)(2)*; *see also* *In Re Relafen Antitrust Litig., 360 F.Supp.2d 166, 192 (D.Mass.2005)*. At the preliminary approval stage, the Court need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather, the Court need only determine whether it falls within the range of possible approval. *Scott v. First Am. Title Ins. Co., No. 06-286, 2008 U.S. Dist. LEXIS 117205, 2008 WL 4820498 at *3 (D.N.H. 2008)*; **[**61]** *see* *In Re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 534-35 (3d Cir.2004)*; *see also* *Colella v. Univ. of Pittsburgh, 569 F.Supp.2d 525, 527 (W.D.Pa.2008)*. An illegal or collusive settlement agreement will not fall within the range of possible approval. *See* *Scott, 2008 U.S. Dist. LEXIS 117205, 2008 WL 4820498 at *3*.

HN16[] For the purposes of assessing the appropriateness of preliminary approval of the settlement agreements reached in the instant case, the Court has adopted the standard set forth by the Third Circuit in *In Re General Motors Corp. Pick-Up Truck Fuel Tanks Prod. Liab. Litig., 55 F.3d 768, 785 (3d Cir.1995)*, and applied by the District Court for the District of Massachusetts in *In Re Lupron Market. And Sales Prac. Litig., 345 F.Supp.2d 135, 137 (D.Mass.2004)*. Under the standard set forth in these cases, where the Court makes four findings, "a presumption of fairness attaches to the court's determination" and preliminary approval is appropriate. *In Re Lupron, 345 F.Supp.2d at 137* (quoting *In Re General Motors, 55 F.3d at 785*) (internal quotations omitted). Those four findings are that: "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement **[**62]** are experienced in similar litigation; and (4) only a small fraction of the class objected." Id.

[*141] The negotiations for settlement in the instant case were long and arduous, spanning a considerable time-period. Further, the settlement agreements were reached after a great deal of dispute between parties as to the terms of the agreements. Accordingly, the Court finds that the negotiation of the settlement agreements indeed occurred at arm's length. Further, the Court finds that parties were sufficiently informed by the limited discovery which has occurred in the instant case. Plaintiffs have received information pursuant to the criminal proceedings related to the instant case, as well as information given by Mr. Chisholm. Further, Plaintiffs have been able to probe into Settling Defendants' ability to make payments to fulfill the terms of the settlement agreements. Thus, the Court finds that sufficient discovery occurred to weigh towards finding the terms of the settlement agreements to be fair. Further, having reviewed the curricula vitae of Plaintiffs' counsel, the Court is sufficiently convinced that the proponents of the settlement are experienced in similar litigation.

The fourth factor, **[**63]** however, is not so easily assessed here. At this time, the Court cannot ascertain what percentage of the class objects to the terms of the settlement agreements. Nevertheless, the ability of class members to object rests upon the Court's certification of a settlement class, preliminary approval of the settlement agreements and approval of notice to be sent to class members. Thus, the Court does not find that the lack of information as to objectors within the class weighs against preliminary approval of the settlement agreements.

The primary disagreement between Sea Star and Plaintiffs at this stage relates to the so-called "base rate freeze" provision included in the Crowley and Horizon settlement agreements. Under the terms of those settlement agreements, class members would be given the choice of opting for either a base rate freeze on contracts with Settling Defendants or a cash payout. Sea Star asserts[12] that the "base rate freeze" is illegal and places the judicial imprimatur upon a deal which would act to "distort" competition in the cabotage industry.

Sea Star rests its argument against preliminary approval of the Crowley and Horizon settlement agreements upon the case of *In Re Microsoft Corp. Antitrust Litig., 185 F.Supp.2d 519(D.Md.2002)*. Specifically, in its most recent motion, Sea Star reads this case to require that Plaintiffs show that the settlement agreements do not have a "potential adverse impact upon competition." In that MDL, the District Court for the District of Maryland was asked to approve a settlement agreement under which Microsoft was released from the claims of a nationwide settlement class in return for making contributions to a foundation that, once established, would provide computer technology to impoverished schools. *Id. at 521*. Notably, in that case, class members had no right to personally receive any payments from the settlement; thus, class members' only options were to opt out or to agree to fund the foundation with the proceeds of the settlement agreement. Id. The Court denied preliminary approval, holding first that the record was insufficiently developed **[**65]** for the court to value the class claims to determine the adequacy of the settlement, then holding that the foundation which was to be created under the settlement agreement was critically underfunded. *Id. at 528*. The Court noted that it had concerns regarding the settlement's potential adverse impact upon competition, as, because of the foundation's underfunding, it could well serve to "provide a means for flooding a [market]. . .. in which Microsoft has not traditionally been the strongest player." Id.

Although Sea Star reads this case to generally forbid preliminary approval of a settlement offer where any negative impact upon competition might hypothetically occur, the Court reads it more narrowly. ***HN17***[] The Court finds that *In Re Microsoft* does not forbid approval of any settlement agreement which might affect competition, but, rather, cautions **[*142]** against approval of an agreement which allows the settling defendant to use the agreement to its advantage in entering a market in which it was previously not a strong competitor. The Court believes to find otherwise would run afoul of the basic principle that antitrust laws in the United States exist not to protect competitors, but, rather, to **[**66]** protect competition itself as it would serve to protect the market shares of individual competitors rather than ensuring the maintenance of healthy, robust competition in the marketplace. *See e.g. Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 488-89, 97 S.Ct. 690, 50 L. Ed. 2d 701 (1977)*. The In Re Microsoft court itself noted that, if the foundation were better funded, its concerns regarding competition might be alleviated as Microsoft would then be in a position of competing with other software manufacturers, rather than dominating the market supplied by the foundation. *In Re Microsoft, 185 F.Supp.2d at 529*. Thus, although, in some cases, such as in In Re Microsoft, the Court might find that the terms of a settlement agreement allow a settling defendant an unreasonable advantage, in cases where a settlement agreement still allows competitors to continue to compete with the settling defendant, the Court finds no convincing reason for refusal to approve the settlement agreement.

In the instant case, Sea Star retains the option of competing with the prices set by the two-year base rate freeze under the terms of the settlement agreements. Further, purchasers of Puerto Rican cabotage frequently **[**67]** utilize a number of carriers at any given time and are not required to sign exclusive contracts with Settling Defendants in order to opt for the base rate freeze. Further, class members will have the option of electing a cash payout from the funds established by the Crowley and Horizon Defendants' settlement agreements, entirely foresaking the base rate freeze option. Under these circumstances, the Court does not find that the settlement agreements are outside of the range of possible approval. Thus, the Court **GRANTS** preliminary approval to the Crowley and Horizon settlement agreements. Both parties, however, are invited to brief the base rate freeze issue

[12] The Court notes that Sea Star's assertions regarding the impact of the base-rate freeze were based upon opinions of Mr. David **[**64]** St. Amand which were stricken from the record at Docket No. 735 when the Court found him utterly unqualified to give testimony as to antitrust economics.

further prior to the final hearing regarding settlement approval pursuant to the deadlines set forth below. Further, the Court finds that the negotiation of the Chisholm settlement agreement falls within the range of possible approval, **GRANTS** preliminary approval and shall hear any further arguments for or against approval of this settlement agreement at the final fairness hearing.

IV. NOTICE

HN18[] The Federal Rules of Civil Procedure dictate that the Court "must direct notice in a reasonable manner to all class members who would be bound **[**68]** by the proposal." *Fed.R.Civ.P. 23(e)(1)*. Having reviewed the proposed notices to class members submitted by Plaintiffs and Settling Defendants (Docket Nos. 680, 743 & 746), the Court finds that the proposed notices are reasonable.

Thus, the Court adopts by reference the proposed orders submitted at Docket Nos. 680, 743 and 746 regarding the procedure for ensuring that class members receive notice of the settlement agreements, as well as the time and place of the **FINAL FAIRNESS HEARING** regarding approval of the settlement agreements, which is to be held on **OCTOBER 26, 2010 at 9:00 AM**.

Class members shall be mailed notice of each settlement agreement within twenty (20) days of entry of this order. Five (5) days after notice is mailed, notice shall be published in the newspapers listed in parties' proposed orders at Docket Nos. 680, 743 and 746. Thereafter, class members shall be provided sixty (60) days in which to submit notice that they will be opting out of the class, object to the terms of the settlement agreement or to submit a proof of claim form where applicable.

V. CONCLUSION

The Court hereby **GRANTS CERTIFICATION OF THE SETTLEMENT CLASS** (Docket Nos. 449, 597 & 680) and **GRANTS PRELIMINARY [**69] APPROVAL** to the Chisholm, Crowley and Horizon Settlement Agreements (Docket Nos. 375, 597 & 680). Notice shall be given to class members in the manner described above and in the proposed **[*143]** orders submitted at Docket Nos. 680, 743 and 746. The **FINAL FAIRNESS HEARING** is hereby set for **OCTOBER 26, 2010 at 9:00 AM**. Any further briefs regarding the base rate freeze to be submitted by Plaintiffs or Non-Settling Defendants are due on or before **October 1, 2010**. Any response brief regarding the base rate freeze is due on or before **October 15, 2010**.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 12th day of July, 2010.

/s/ DANIEL R. DOMINGUEZ

DANIEL R. DOMINGUEZ

U.S. District Judge

End of Document

Whelan v Toughman, Inc.

City Court of New York, Rye, Westchester County

July 12, 2010, Decided

SC09-392

Reporter
28 Misc. 3d 1207(A) *; 957 N.Y.S.2d 639 **; 2010 N.Y. Misc. LEXIS 2966 ***; 2010 NY Slip Op 51203(U) ****

[**1]** Charles Whelan, Plaintiff, against Toughman, Inc., Defendant.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

Core Terms

triathlon, parties, anti trust law, Sherman Act

Headnotes/Summary

Headnotes

[*1207A] **[**639]** Monopolies--Donnelly Act--Price Fixing. Contracts--Quantum Meruit.

Counsel: **[***1]** For Plaintiff: Donald Sandford, Esq.

For Defendant: Scott Forcino, Esq.

Judges: JOSEPH L. LATWIN, J.C.C.

Opinion by: JOSEPH L. LATWIN

Opinion

Joseph L. Latwin, J.

"Swim 2.4 miles! Bike 112 miles! Run 26.2 miles! Brag for the rest of your life!" [1] A triathlon is a multi-sport endurance event consisting of swimming, cycling, and running in immediate succession over various distances. Neither regular business relations nor litigation is customarily a component of a triathlon. Thus, this case. This is a small claims action brought against a triathlon organizer for services rendered by the plaintiff to the defendant. The defendant counterclaims claiming plaintiff misappropriated advertising space and apparel, a failure to perform and

[1] Attributed to Commander John Collins, USN (1978), father of the Ironman(R) triathlon.

unfair competition. The parties once shared a love of triathlon and worked together to promote the local event. Now they get their rush, not from adrenaline or endorphins [2], but from casting charges and aspersions **[****2]** against each other.

The arrangement between the parties is notable by the absence of any written agreement or any writing at all specifying what plaintiff was to do or how much he would be paid. The plaintiff and the principal officer of the defendant had known each other for about ten years through participation in triathlons and running. The defendant operated the Westchester triathlon in 2008 and 2009. At some point, plaintiff began providing design services and web site programming services for defendant. Defendant paid plaintiff on a series of invoices for the 2008 and 2009 events, but stopped payment on the last issued check in the amount of $ 2,000.00. The plaintiff claimed he had an agreement with the defendant to perform the work but never testified that there was any agreement as to the amount he would be paid. Instead, plaintiff said he set his price based upon **[***3]** a standard set by an industry association.

Recovery under the theory of quantum meruit is not appropriate where an express contract governed the subject matter involved. *Parker Realty Group, Inc. v. Petigny, 14 NY3d 864, 903 N.Y.S.2d 325, 929 N.E.2d 387, 2010 WL 1790975 [2010]*. Plaintiff has failed to prove an express agreement here.

To state a cause of action to recover in quantum meruit, a plaintiff must allege: (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and (4) the reasonable value of the services allegedly rendered. *Miranco Contracting, Inc. v. Perel, 57 AD3d 956, 871 NYS2d 310 [2nd Dept, 2008]*. Here, plaintiff performed services although the defendant claims the services were not performed properly and were not performed in good faith. While plaintiff claims an expectation of payment, the defendant claims the services were part of a continuing pattern of volunteered services. The reasonable value is disputed. There is no doubt that defendant accepted plaintiff's services and that the plaintiff expected to be paid therefor.

Performance and acceptance of services are held to give rise to a legal **[***4]** inference of a promise to pay the reasonable value of such services. This inference, however, does not arise where, because of the relationship of the parties it is natural that such service should be rendered without expectation of pay. *Moors v.* ***[****3]*** *Hall, 143 AD2d 336, 338, 532 NYS2d 412, 414 [2nd Dept, 1988]*. The question of whether a party had a reasonable expectation of compensation for services rendered is a matter for the trier of fact to determine based on the evidence before it. *In re Alu, 302 AD2d 520, 755 NYS2d 289 [2nd Dept, 2003]*.

The defendant claims that the services were not performed in good faith since (1) plaintiff was virtually the only person to be paid for working on the events as most of the workers at the triathlon were volunteers working for the not for profit event that raised funds for charities; (2) the plaintiff used his relationship to misappropriate goods and intellectual property from the defendant for his own use or the benefit of his brother's cycle shop; and (3) plaintiff's work was shoddy and involved use of publicly available materials.

Allegations are insufficient "to state a cause of action in quantum meruit where none of the services allegedly performed **[***5]** are so distinct from the duties of employment and of such nature that it would be unreasonable for the employer to assume that they were rendered without expectation of further pay" (*Freedman v. Pearlman, 271 AD2d 301, 304, 706 N.Y.S.2d 405 [1st Dept 2000]*; *LaJaunie v. DaGrossa, 159 AD2d 349, 349, 552 N.Y.S.2d 628 [1st Dept 1990]* [such a claim requires "that the allegedly uncompensated duties performed were distinct in character from those duties for which plaintiff was compensated"]). *Root v. Swig Equities, LLC, 27 Misc 3d 1222[A], 910 N.Y.S.2d 765, 2010 NY Slip Op 50843[U], 2010 WL 1945730 (Table)* [Sup Ct New York County,

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[2] Endorphins are endogenous opioid polypeptide compounds. A widely publicized effect of endorphin production is the so-called "runner's high", which is said to occur when strenuous **[***2]** exercise takes a person over a threshold that activates endorphin production. Endorphins are released during long, continuous workouts, when the level of intensity is between moderate and high, and breathing is difficult. "*The Reality of the "Runner's High*", *UPMC Sports Medicine*. University of Pittsburgh Schools of the Health Sciences.

2010]. Here, there was a mixture of admittedly volunteer services performed by plaintiff and services for which plaintiff seeks payment. Defendant relies on the assumption that the plaintiff's services were rendered without the expectation of further pay. This assumption is further bolstered by the not-for-profit nature of the defendant's events and the mixture of services offered by plaintiff. However, the defendant's issuance of the final $ 2,000.00 check to pay plaintiff the amount he billed strongly suggests that there was not only an expectation of payment on the plaintiff's part, but acquiescence on the defendant's part. The parties **[***6]** could have easily protected themselves by reducing their understanding to writing, thus leaving no doubt as to what was to be done and how much was to be paid for the work, if anything.

The plaintiff rests his value of his services on a published industry-suggested standard. Defendant claims that the industry standard rate is excessive and violates the Sherman Act, *15 USC § 1*, and the Donnelly Act, **[****4]** *General Business Law § 340*. Sherman Act and Donnelly Act prohibitions extend to instances of price fixing that occur in connection with a trade association published rate schedule, even when association members are not compelled to set prices accordingly. *United States v. Nationwide Trailer Rental Sys., Inc., 156 F Supp 800, 805 [D. Kans.]*, *aff'd per curiam*, *355 U.S. 10, 78 S. Ct. 11, 2 L. Ed. 2d 20 [1957]*. Publication alone is a per se violation of the antitrust laws, when the intent is to confer a particular benefit to members and thereby "have a definite effect on prices." *Plymouth Dealers' Association v. United States, 279 F2d 128, 133-134 [9th Cir. 1960]*.

In interpreting the Donnelly Act, New York courts generally follow federal case law analyzing the Sherman Act. *People v. Rattenni, 81 NY2d 166, 171, 613 N.E.2d 155, 597 NYS2d 280 [1993]*; **[***7]** *X.L.O. Concrete Corp. v. Rivergate Corp., 83 NY2d 513, 634 N.E.2d 158, 611 NYS2d 786 [1994]*(there is no difference in the language of the Sherman and Donnelly Acts, or the public policies sought to be protected therein, which suggest that Federal precedents should not govern); & *Anheuser-Busch, Inc. v. Abrams, 71 NY2d 327, 335, 520 N.E.2d 535, 525 NYS2d 816 [1988]*(State ***antitrust law*** "should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result). Indeed, the Donnelly Act has been called the "little Sherman Act". [3] *Id. at 333, 525 NYS2d at 818*. *See also* *State of New York v. Mobil Oil Corp., 38 NY2d 460, 463, 344 N.E.2d 357, 381 NYS2d 426 [1976]*.

Authority is not conclusive on whether setting a price according to a suggested range of fees subverts competition and thus, falls within the ambit of the Sherman and Donnelly Acts. *See* *U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S Ct 811, 84 L. Ed. 1129 (1940)* **[***8]** (expanding the meaning of price fixing to include establishment of a range of prices); *But see* *U.S. v. Trenton Potteries, Co., 273 U.S. 392, 47 S Ct 377, 71 L. Ed. 700 (1927)* (reaching only the question of reasonableness but not addressing the particular machinery by which an unlawful restraint is made) and *Nationwide Trailer Rental Sys., Inc., 156 F Supp 800at 805* (holding defendant organization liable for having a fixed rate, as opposed to a range of prices). *See also*, *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*.

[**5]** Defendant faces other hurdles in advancing federal and state antitrust violations as a defense in the present action. As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in the Supreme Court. This has been the case notably where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold. *Kelly v. Kosuga, 358 U.S. 516, 79 S Ct 429, 3 L. Ed. 2d 475 [1959]*. *See also*, *Viacom International Inc. v. Tandem Productions, Inc., 526 F2d 593 [2d Cir. 1975]*. Federal courts permit antitrust defenses to contract actions only when the enforcement of the contract itself would violate the **[***9]** antitrust laws. The defense has been narrowly construed and confined to circumstances where there is a violation of the antitrust laws inhering in the sale. *See e.g.,* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 81 S Ct 623, 5 L. Ed. 2d 580 [1961]*.

New York courts that have considered interposition of antitrust defenses in contract actions have followed the rule and rationale of *Kelly. Winters Bros. Recycling Corp. v. H.B. Millwork, Inc., 72 AD3d 942, 900 NYS2d 99 [2nd Dept, 2010]*. *See also,* *Dachowitz v. Bergman, 113 Misc 2d 236, 239, 448 NYS2d 381 [Sup Ct, New York County 1982]*;

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[3] According to former New York State Assistant Attorney General Francis J. Serbaroli, who was assigned to the Antitrust Bureau of the Department of Law, the Bureau charged with enforcement of the Donnelly Act, the Sherman Act is the big Donnelly Act.

Fleet-Wing Corp. v. Pease Oil Co., 29 Misc 2d 437, 441, 212 NYS2d 871 [Sup Ct, Erie County], *mod. on other grounds 14 AD2d 728, 218 NYS2d 533[4th Dept 1961]*; *Mobil Oil Corp. v. Rubenfeld, 48 AD2d 428, 370 NYS2d 943 [2nd Dept 1975]*; *New York Stock Exch. v. Goodbody & Co., 42 AD2d 556, 345 NYS2d 58 [1st Dept 1973]* ("where the antitrust violation is collateral to the main issue in the complaint, it cannot remain as a viable defense"); and *Columbia Broadcasting Sys. v. Roskin Distribs., 31 AD2d 22, 25, 294 NYS2d 804[1st Dept 1968]*, *aff'd in part, dismissed in part 28 NY2d 559, 268 N.E.2d 128, 319 NYS2d 449 [1971]*(Sherman and Clayton Acts **[***10]** "may not be pleaded in defense of an action for goods sold and delivered or services rendered").

This court rejects this defendant's invocation of federal and state antitrust laws in defense of this contract claim on the facts proved at trial. A source of controversy that seems to underlie this case is the ownership of the intellectual property created by plaintiff. While not a part of the direct claims of the parties, it was implied that the defendant had refused to pay the plaintiff unless he conveyed all intellectual property rights to the defendant. The defendant implies that plaintiff's retention of these rights operated as an offset or defense. **[****6]** Defendant obtains no support for its intellectual property claims over material created by Mr. Whelan, and finds no refuge in the "work for hire" doctrine. *17 USC § 101*. The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." *17 USC § 201(a)*. As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection. *17 USC § 102*. The Act carves out an important exception, **[***11]** however, for "works made for hire." [4] If the work is for hire, "the employer or other person for whom the work was prepared is considered the author" and owns the copyright, unless there is a written agreement to the contrary. *17 USC § 201(b)*.

Since the work was performed by plaintiff as an independent contractor, rather than employee, of defendant, it was not work for hire under *17 USC § 101*. *Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S Ct 2166, 104 L. Ed. 2d 811 [1989]*. Mr. Whelan exercised significant control over the details of the work -- details apparently subsumed by defendant's attempt to produce a comparable product after severing its professional relationship with plaintiff. The work performed was tangential to the defendant's business and proceeded without any assurance to the employer of future assignments. *Carter v. Helmsley-Spear, Inc., 71 F3d 77 [2nd Cir. 1995]*. In the absence of an agency relationship, the defendant must point to an agreement (express or implied) existing prior to the material's creation, that secures its right to assert ownership. *Playboy Enterprises, **[****7]** Inc. v. Dumas, 53 F3d 549, 559 [2d Cir., 1995]*.This it has not done.

On the balance of the defendant's counterclaim, the **[***13]** defendant has proved by a preponderance of the evidence that the website did not fully function properly, that the plaintiff misappropriated apparel, and that misappropriated the defendant's web site by "giving" advertising space to favored third parties without approval of the defendant and without payment to the defendant.

Providing the parties with substantial justice according to the rules and principles of substantive law (*UCCA 1804*, *1807*; *see Cosme v Bauer, 27 Misc. 3d 130[A], 910 N.Y.S.2d 404, 2010 NY Slip Op 50638[U] [App Term, 9th Jud Dist April 8, 2010]; Ross v Friedman, 269 AD2d 584, 707 N.Y.S.2d 114 [2000]*; & *Williams v Roper, 269 AD2d 125,*

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[4] Under *17 USC 101*, A "work made for hire" is--

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer **[***12]** material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

703 N.Y.S.2d 77 [2000]), the Court finds that plaintiff is entitled to a judgment of $ 2,000.00 on its claim and defendant is entitled to a judgment of $ 2,000.00 on its counterclaim.

IT IS ORDERED that plaintiff have judgment against defendant in the sum of $ 2,000.00, together with its costs, and it is further

ORDERED that defendant have judgment against plaintiff in the sum of $ 2,000.00, together with its costs.

July 12, 2010

JOSEPH L. LATWIN, J.C.C.

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Sullivan v. DB Invs., Inc.

United States Court of Appeals for the Third Circuit

January 28, 2010, Argued; January 28, 2010, Submitted Under Third Circuit L.A.R. 34.1(a); July 13, 2010, Filed

Nos. 08-2784/08-2785/08-2798/08-2799/08-2818/08-2819/08-2831/08-2881

Reporter
613 F.3d 134 *; 2010 U.S. App. LEXIS 14375 **; 2010-2 Trade Cas. (CCH) P77,090; 77 Fed. R. Serv. 3d (Callaghan) 92

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY; JAMES WALNUM, on behalf of themselves and all others similarly situated, v. DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G. DAVID T. MURRAY, Appellant in 08-2784 (Pursuant to Fed. R. App. P. 12(a)), SUSAN M. QUINN, Appellant in 08-2785 (Pursuant to Fed. R. App. P. 12(a)), MARVIN L. UNION; TIM HENNING; NEIL FREEDMAN; KYLIE LUKE; WILLIAM BENJAMIN COFFEY, Jr., Appellants in 08-2798 (Pursuant to Fed. R. App. P. 12(a)), AARON PETRUS, Appellant in 08-2799 (Pursuant to Fed. R. App. P. 12(a)), JANET GIDDINGS, Appellant in 08-2818 (Pursuant to Fed.R.App.P. 12(a)), FRANK ASCIONE; ROSAURA BAGOLIE; MATTHEW DELONG; SANDEEP GOPALAN; MANOJ KOLEL-VEETIL; MATTHEW METZ; ANITA PAL; DEB K PAL; JAY PAL; PETER PERERA; RANGESH K. SHAH; ED MCKENNA; THOMAS VAUGHAN, Appellants in 08-2819 (Pursuant to Fed.R.App.P. 12(a)), KRISTEN DISHMAN; MARGARET MARASCO, Appellants in 08-2831 (Pursuant to Fed.R.App.P. 12(a)), JAMES B. HICKS, Appellant in 08-2881 (Pursuant to Fed. R. App. P. 12(a))

Subsequent History: Vacated by, Rehearing granted by *Sullivan v. DB Invs., Inc., 619 F.3d 287, 2010 U.S. App. LEXIS 18088 (3d Cir., 2010)*

Prior History: [1]** On Appeal from the United States District Court for the New Jersey. (D.C. No. 04-cv-2819). District Judge: Honorable Stanley R. Chesler.

Sullivan v. DB Invs., Inc., 2008 U.S. Dist. LEXIS 81146 (D.N.J., May 22, 2008)

Core Terms

purchasers, indirect, predominance, district court, antitrust, settlement, diamonds, class member, certification, consumer protection, unjust enrichment, state law, certifying, class certification, injunctive relief, commonality, injunction, competitors, variations, objectors, Warfarin, anti trust law, nationwide class, price-fixing, prices, certification order, Sherman Act, rough, damages, defeat

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN1[] Sherman Act, Claims

15 U.S.C.S. §§ 1 and *2* of the Sherman Act do not themselves create private rights of action. *15 U.S.C.S. §§ 15* and *26* of the Clayton Act authorize plaintiffs harmed by activity that violates *§§ 1* and *2* to bring a suit for damages and injunctive relief.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN2[] Standing, Clayton Act

Illinois Brick does not preclude indirect purchasers from suing for injunctive relief for an antitrust violation, and they have standing to sue under *15 U.S.C.S. § 26* of the Clayton Act.

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

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

HN3[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(b)(2) allows a court to certify a class that seeks final injunctive relief respecting the class as a whole, *Fed. R. Civ. P. 23(b)(2)*, whereas *Rule 23(b)(3)* authorizes certification when questions of law or fact common to class members predominate over any questions affecting only individual members, *Fed. R. Civ. P. 23(b)(3)*.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN4[] Appellate Jurisdiction, Final Judgment Rule

A court of appeals has jurisdiction to review final orders of a district court pursuant to *28 U.S.C.S. § 1291*.

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

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

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

HN5[] Standards of Review, Abuse of Discretion

A court of appeals reviews an order granting class certification for abuse of discretion. A district court abuses its discretion when its class certification decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

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

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

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

HN6[] **Class Members, Absent Members**

An unnamed class member has standing to appeal a class certification order provided that the member objected to a resulting settlement and is bound by the court's judgment.

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

HN7[] **Class Actions, Prerequisites for Class Action**

A district court may certify a lawsuit as a class action if the suit meets the requirements of *Fed. R. Civ. P. 23(a)* and *(b)*. *Rule 23(a)* mandates first, that the class be so numerous that joinder of all members is impracticable, second, that the class share common questions of law or fact, third, that the class representatives possess claims or defenses that are typical of all class members, and fourth, that the class representatives be able to fairly and adequately represent the class interests. *Fed. R. Civ. P. 23(a)*. If those requirements are satisfied, a district court may certify the class for one of the purposes enumerated in *Rule 23(b)*.

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

HN8[] **Prerequisites for Class Action, Maintainability**

Fed. R. Civ. P. 23(b)(2) permits class certification if the defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief is appropriate respecting the class as a whole. *Fed. R. Civ. P. 23(b)(2)*.

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

HN9[] **Prerequisites for Class Action, Maintainability**

Fed. R. Civ. P. 23(b)(3) permits certification whenever questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*.

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

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

HN10[] Class Actions, Certification of Classes

A district court must specify which provision of *Fed. R. Civ. P. 23(b)* supports certification of a class.

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

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

HN11[] Prerequisites for Class Action, Commonality

Because *Fed. R. Civ. P. 23(b)(3)* allows a district court to certify a class only if, first, all class members share common questions of law or fact that predominate over other issues in the case, and, second, a class action is superior to other methods of adjudicating the members' claims, courts have come to refer to these twin prerequisites for certification as the "predominance" requirement and the "superiority" requirement. The predominance requirement is similar to the commonality requirement in *Rule 23(a)(2)*, which says that the class must share common questions of law or fact. However, the question of predominance imposes a more stringent obligation on the reviewing court to ensure that issues common to the class truly overshadow those pertinent to individuals or to subgroups of class members. It is therefore appropriate to analyze the commonality and predominance factors together, with particular focus on the predominance requirement.

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

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

HN12[] Class Actions, Compromise & Settlement

A district court must evaluate predominance and superiority by considering the following four factors enumerated in *Fed. R. Civ. P. 23(b)(3)*: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. *Fed. R. Civ. P. 23(b)(3)*. The court may also consider additional factors pertinent to class certification issues. The factors listed in *Rule 23(b)(3)* are described as nonexhaustive. When presented with a motion to certify a class for settlement purposes only, the court need not consider the likely difficulties associated with managing the class action through trial.

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

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

HN13[] Class Actions, Certification of Classes

Regardless of the purposes for which class certification is sought, a court is not required to rest its certification order solely upon the pleadings. The requirements set out in *Fed. R. Civ. P. 23* are not mere pleading rules. Instead, the court should perform a rigorous analysis that delves beyond the pleadings to determine whether the requirements for class certification are satisfied.

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

HN14[] Prerequisites for Class Action, Maintainability

For purposes of class certification, the predominance of an issue depends upon the value that addressing it will yield for all class members. The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The issue need not be dispositive of the case, but it must be significant to every class member's claim. Courts have described as predominant those issues which present a common nucleus of fact, an overriding question, or an essential common link among class members. Issues are not predominant if they are common to all class members but their resolution does little to bring the case to conclusion. Fed. R. Civ. P. 23(b)(3) advisory committee's note to the 1966 amendment indicates that common issues will not predominate if an individualized assessment of liability is necessary notwithstanding resolution of them. Thus, the predominance inquiry requires the court to identify class members' claims and to ask whether the class can support any of the elements of those claims through common proof.

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

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

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

HN15[] Prerequisites for Class Action, Commonality

There may be situations where variations in state laws are so significant so as to defeat commonality and predominance even in a settlement class certification.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN16[] Sherman Act, Claims

Under the Sherman Act, to establish antitrust liability for horizontal price-fixing, a plaintiff must show that (1) a defendant entered a contract, combination, or conspiracy with at least one other entity; (2) the agreement constitutes an unreasonable restraint of trade; (3) the agreement produced anticompetitive effects in the relevant market; and (4) the plaintiff was injured as a result.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

HN17[] Actual Monopolization, Claims

A claim for monopolization requires a plaintiff to prove that (1) the defendant possesses monopoly power in the relevant market and (2) the defendant acquired, maintained, or attempted to acquire or maintain that power through means other than growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN18[] **Antitrust & Trade Law, Sherman Act**

Many states have enacted antitrust statutes that proscribe the same conduct as the Sherman Act.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN19[] **Purchasers, Direct Purchasers**

While state antitrust statutes frequently track the Sherman Act in terms of their substantive elements of proof, they vary significantly with regard to the standing that they extend to indirect purchasers. The variance is mainly a function of whether a state has chosen to follow the Sherman Act principles regarding standing laid down by the United States Supreme Court in Illinois Brick Co. v. Illinois. In that case, the Court decided that only direct purchasers of a product or service may sue for an antitrust injury.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN20[] **Purchasers, Indirect Purchasers**

Some states have elected to follow the United States Supreme Court's lead in Illinois Brick. Other states, however, have diverged from Illinois Brick and have enacted statutes known as "Illinois Brick repealers." Those statutes reject the rule that antitrust recovery is limited to parties that dealt directly with the defendant and instead extend antitrust standing to indirect purchasers, including consumers. Finally, a third set of jurisdictions allow indirect purchasers to seek antitrust recovery, but only if the state joins the suit in a parens patriae capacity. *Idaho Code Ann. §§ 48-108(2)*, -113(1).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN21[] Regulated Practices, Price Fixing & Restraints of Trade

In some states with Illinois Brick repealers, indirect purchasers may personally advance a claim for antitrust recovery against a defendant that has fixed prices. In other states, however, they may do so only with the assent of the state attorney general. And in states without a repealer statute, recovery is usually foreclosed entirely. At least twenty-five states and the District of Columbia have implemented Illinois Brick repealers or extended antitrust standing to indirect purchasers through judicial decision; the remaining states have not.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN22[] Purchasers, Indirect Purchasers

Antitrust standing for indirect purchasers in states without an Illinois Brick repealer statute is ordinarily but not always foreclosed. The following states lack Illinois Brick repealers but have extended indirect purchaser standing through judicial decisions: Arizona, Iowa, North Carolina, and Tennessee.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN23[] Purchasers, Indirect Purchasers

The following states and territories have enacted Illinois Brick repealers that allow indirect purchasers to bring private antitrust suits for damages: Alabama, *Ala. Code § 6-5-60(a)*; California, *Cal. Bus. & Prof. Code § 16750(a)*; the District of Columbia, *D.C. Code § 28-4509(a)*; Guam, Guam Code Ann. tit. 9, § 69.30(a); Hawaii, *Haw. Rev. Stat. § 480-3*; Illinois, *740 ILCS 10/7(2)*; Kansas, *Kan. Stat. Ann. § 50-161(b)*; Maine, *Me. Rev. Stat. Ann. tit. 10, § 1104(1)*; Michigan, *Mich. Comp. Laws § 445.778(2)*; Minnesota, *Minn. Stat. § 325D.57*; Mississippi, *Miss. Code Ann. § 75-21-9*; Nevada, *Nev. Rev. Stat. § 598A.210(2)*; New Hampshire, *N.H. Rev. Stat. Ann. § 356:11(II)*; New Mexico, *N.M. Stat. § 57-1-3(A)*; New York, *N.Y. Gen. Bus. Law § 340(6)*; North Dakota, *N.D. Cent. Code § 51-08.1-08(3)*; Oregon, *Or. Rev. Stat. § 646.780(1)(a)*; South Dakota, *S.D. Codified Laws § 37-1-33*; Utah, Utah Code Ann. § 76-10-919(1)(a); Vermont, *Vt. Stat. Ann. tit. 9, § 2465*; and Wisconsin, *Wis. Stat. § 133.18(1)(a)*.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN24[] Purchasers, Indirect Purchasers

The following states allow indirect purchaser antitrust recovery, but only in parens patriae suits brought by the state attorney general: Alaska, *Alaska Stat. § 45.50.577(b)*; Arkansas, *Ark. Code Ann. § 4-75-315(b)*; Idaho, *Idaho Code Ann. § 48-108(2)*; Rhode Island, *R.I. Gen. Laws § 6-36-12(a)*, *(g)*; and Virginia, *Va. Code Ann. § 59.1-9.15(d)*.

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

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

HN25[] Class Actions, Certification of Classes

The United States Court of Appeals for the Third Circuit does not say that nuanced differences among state laws will prevent the certification of a class, nor is a state-by-state cataloguing of differences in state law necessary every time a multi-jurisdiction class is certified. The difference between having a claim under state law and having none is no mere nuance and cannot be solved by any reconfiguration of a nationwide class short of changing it from a nationwide class to one or more classes that exclude those who have no claim.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN26[] Actual Monopolization, Claims

An indirect purchaser located in a state that has an Illinois Brick repealer, such as New York, may sue and recover for a price-fixing or monopolization harm, *N.Y. Gen. Bus. Law § 340(6)*, but an identical indirect purchaser in a neighboring state without a repealer, such as New Jersey, may not. It is hard to imagine a greater disparity between two class members. Whereas the New York purchaser may recover for an antitrust violation if he can prove the existence of a price-fixing agreement or monopoly market power resulting in higher prices, the New Jersey purchaser has no legal right to recover--or even to bring a lawsuit--regardless of whether he can conclusively prove the existence of a restraint and antitrust impact. Thus, while both purchasers may have felt the effects of the same antitrust conduct, the purchasers do not share common legal or factual issues because the antitrust activity gives rise to a right of action for only one purchaser. *Fed. R. Civ. P. 23* requires that a class possess at least one issue of law or fact that affects all class members' claims. The natural result of those differences is that there can be no certification of a nationwide class of state indirect purchaser plaintiffs because there is no common question of law or material fact.

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

HN27[] Class Actions, Certification of Classes

It is improper to certify a nationwide class when the legal right shared by class members purportedly arises under the laws of multiple jurisdictions, but only some of those jurisdictions extend standing to class members to enforce that right.

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

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

HN28[] **Class Actions, Certification of Classes**

It is not suggested that a district court must conduct a state-by-state analysis every time there exists some difference in the state law underlying class members' claims. However, when the parties propose to use class certification mechanisms in a manner that materially changes substantive rights, the district court has a duty to ensure that such use does not create a right of recovery where none existed before. The obligation is imposed on district courts to ensure that the plaintiffs have satisfied their burden under *Fed. R. Civ. P. 23* before certifying a class. Hence, district courts must remain attuned to significant variations in state law and reject proposed classes that allow the plaintiffs to recover damages through the class certification procedure when they would be unable to do so in an individual action.

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

Evidence > Burdens of Proof > General Overview

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

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

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

HN29[] **Class Actions, Certification of Classes**

For purposes of class certification, a lack of substantive rights cannot be wished away by the promise of easier litigation management. Proponents of class certification for any purpose, including settlement, retain the burden of demonstrating that all class members share common legal or factual issues and that those issues predominate over matters requiring individual proof. Nothing in *Fed. R. Civ. P. 23* can be read to authorize separate, liberalized criteria for settlement classes. The test presupposes that everyone in the class at least has a cause of action.

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

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

HN30[] **Class Actions, Certification of Classes**

Certification of a nationwide class of state-law claims is appropriate if the plaintiffs possess similar rights under the laws of all states such that the court can readily control for differences among various jurisdictions.

Governments > Courts > Rule Application & Interpretation

HN31[] **Courts, Rule Application & Interpretation**

The Rules Enabling Act prohibits a court from interpreting procedural rules in a manner that creates new substantive rights. *28 U.S.C.S. § 2072(b)* states that federal courts may not interpret procedural rules in a manner that enlarges any substantive right.

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

Governments > Courts > Rule Application & Interpretation

HN32[] **Private Actions, Remedies**

Each plaintiff in a federal antitrust action must offer individual proof of damages, and the failure to require such proof contravenes the Rules Enabling Act by allowing a plaintiff to recover in the absence of individual harm.

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

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

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

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

HN33[] **Class Actions, Certification of Classes**

Independent of any stipulations, district courts are obligated to consider carefully all relevant evidence and make a definitive determination that the requirements of *Fed. R. Civ. P. 23* have been met before certifying a class. Courts are required to exercise undiluted, even heightened, attention to issues of commonality and predominance in the settlement context because those inquires are designed to protect absentees by blocking unwarranted or overbroad class definitions. Thus, parties cannot salvage an improper certification order by saying that the defendant has stipulated out of existence defects in the commonality and predominance of the class claims.

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

HN34[] **Class Actions, Prerequisites for Class Action**

A defendant's decision not to contest the requirements of *Fed. R. Civ. P. 23* does not relieve a district court of its independent obligation to ensure that those requirements are satisfied.

Antitrust & Trade Law > Consumer Protection > General Overview

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN35[] **Antitrust & Trade Law, Consumer Protection**

Consumer protection and unjust enrichment laws are no more uniform among the fifty states than are antitrust statutes. In fact, they are less so. Some states without Illinois Brick repealers allow indirect purchasers to invoke consumer protection statutes to gain antitrust relief. Other states preclude indirect purchasers from doing so because they have adopted Illinois Brick standing requirements and view any utilization of consumer protection statutes to recover for antitrust harm as circumventing that policy decision. A third group requires indirect purchaser consumer protection actions to proceed as parens patriae suits, while other statutes lack such requirements.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN36[] **Public Enforcement, State Civil Actions**

The common law of unjust enrichment varies among the states, with some jurisdictions mandating proof of elements not required by others. Evidence of antitrust activity may provide a basis for an unjust enrichment claim in some states. Other states preclude recovery for antitrust injuries on an unjust enrichment theory. With respect to the substantive elements of unjust enrichment, some states require plaintiffs to prove that the defendant's conduct rises to the level of fraud. Others do not. Some allow an unjust enrichment claim only if the plaintiff has no adequate remedy at law. Others lack that requirement. In short, a claim of unjust enrichment is packed with individual issues and therefore precludes a finding of predominance in a nationwide class action context.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Consumer Protection > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN37[] **Regulated Practices, Price Fixing & Restraints of Trade**

Evidence of price-fixing and monopolization does not give rise in every state to an unjust enrichment or consumer protection claim for indirect purchasers.

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

HN38[] **Prerequisites for Class Action, Maintainability**

In order to predominate for purposes of class certification, common issues must constitute a "significant part" of the individual cases.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN39[] **Federal & State Interrelationships, Erie Doctrine**

The mandate of Erie Railroad Co. prevents a district court from invoking federal procedural rules to extend recovery to a state law plaintiff when state courts would not recognize the plaintiff's harm as grounds for relief. In giving federal courts "cognizance" of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by state law or to create substantive rights denied by state law. Thus, a district court abuses its discretion when it approves a settlement based on a supposed state law violation that the plaintiff could not have asserted in state court.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Civil Procedure > Settlements > Settlement Agreements > Validity of Agreements

HN40[] **Regulated Practices, Price Fixing & Restraints of Trade**

Sacrificing the principles of federalism to obtain the benefits of a settlement is a poor trade. Certain states have categorically refused to allow indirect purchasers to bring a price-fixing claim as a matter of substantive law. The policy decisions of those states are fundamental aspects of the federal republic and must not be overridden in a quest to clear the queue in court.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN41[] **Class Actions, Certification of Classes**

The use of class litigation has been approved as a means of resolving state law claims, recognizing that in certain cases such certification may be entirely proper. District courts are not required to undertake rigorous state-by-state analyses in all cases. A district court abuses its discretion when it certifies a nationwide class of litigants whose claims implicate the laws of multiple jurisdictions, despite the fact that only some of those jurisdictions recognize the claims for which recovery is sought.

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

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

HN42[] **Prerequisites for Class Action, Commonality**

A class may include plaintiffs whose claims differ significantly if all members share at least one common issue. A plaintiff who has no right to relief cannot join in the same class as a plaintiff who does, and, if those two plaintiffs are included in a single proposed class, then the court may not certify that class because no common issue predominates with respect to both plaintiffs.

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN43[] **Prerequisites for Class Action, Commonality**

In many cases, it will be evident that all class members share common legal or factual questions, even if the precise elements of proof for their claims vary among jurisdictions. Under such circumstances, a district court need not conduct an extensive inquiry into substantive state law to formally establish commonalities that are apparent. District courts in their sound discretion will determine the level of analysis to undertake when deciding whether variations in state law warrant detailed examination and a description of similarities and differences. In a case where the class includes many people who could not pursue claims in an individual action, that more searching inquiry is needed, as the plaintiffs have tried to use class action procedures to create a bridge to recovery where otherwise none would exist.

Antitrust & Trade Law > Sherman Act > Claims

HN44[] **Sherman Act, Claims**

A *15 U.S.C.S. § 1* plaintiff must prove that the defendant joined a conspiracy to restrain trade.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN45[] **Private Actions, Remedies**

Plaintiffs are required to show that they have suffered an antitrust injury--i.e., an injury to competition--to obtain standing to bring an antitrust claim.

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

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

HN46[] **Private Actions, Remedies**

The task for antitrust plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN47[] **Purchasers, Indirect Purchasers**

To obtain certification of an indirect purchaser class, the plaintiffs have to show that all class members share a right to recover for antitrust harms, such that one or more common issues affect all members' claims. It would, however, be improper for a district court to include in an indirect purchaser class plaintiffs whose claims arise in states that foreclose indirect purchasers from recovering for price-fixing or monopolization.

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

HN48[] Class Actions, Certification of Classes

Under *Fed. R. Civ. P. 23(c)*, each class certification order must contain (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis. Under *Fed. R. Civ. P. 23(c)(1)(B)*, an order that certifies a class action must define the class and the class claims, issues, or defenses.

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

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

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

HN49[] Class Actions, Certification of Classes

A district court abuses its discretion when it articulates general issues of fact common to a class but fails to identify the particular claims that would be subject to class treatment.

Civil Procedure > Remedies > Injunctions > General Overview

Evidence > Burdens of Proof > General Overview

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

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN50[] Remedies, Injunctions

Fed. R. Civ. P. 23(b)(2) applies only when a class seeks injunctive relief. It has no application to cases in which the appropriate final relief relates exclusively or predominantly to money damages. The relief sought in a *Rule 23(b)(2)* action must benefit the entire class, and the class representatives bear the burden of demonstrating that the interests of the class members are so like those of the individual representatives that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata.

Civil Procedure > ... > Class Actions > Certification of Classes > Decertification

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN51[] Certification of Classes, Decertification

With any claim for injunctive relief, the plaintiffs may not base a demand for an injunction solely upon past harm that they have suffered. The plaintiffs must demonstrate that, regardless of their past harm, they are likely to suffer harm in the future. Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects. If the harm against which injunctive relief is sought dissipates during the course of class litigation, the basis for class certification likewise dissolves, and the class must be decertified.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN52 [] **Standing, Clayton Act**

Unlike in a claim for damages, indirect purchasers seeking injunctive relief for an antitrust harm under *15 U.S.C.S. § 26* of the Clayton Act do have standing. *Section 26*, however, creates no substantive rights. But to have standing under *§ 26*, a plaintiff must establish a prospective threat of loss or damage as a result of conduct prohibited elsewhere in ***antitrust law***.

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

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

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

HN53 [] **Class Actions, Certification of Classes**

A defendant's willingness to stipulate to liability for the purpose of effectuating a class action settlement does not relieve the court of its independent obligation to ensure that the facts of the underlying case adequately establish a basis for liability. Confronted with a request for settlement-only class certification, the specifications of *Fed. R. Civ. P. 23*, designed to protect absentees by blocking unwarranted or overbroad class definitions, demand undiluted, even heightened, attention.

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

HN54 [] **Prerequisites for Class Action, Commonality**

Two plaintiffs cannot be joined in a single class to adjudicate the same set of facts when those facts give only one of them a legally cognizable claim.

Counsel: For Susan M. Quinn, Objector-Appellant: Howard J. Bashman [ARGUED in No. 08-2785], Willow Grove, PA; George M. Plews, Christopher J. Braun, Plews Shadley Racher & Braun LLP, Indianapolis, IN.

For Arrigotti Fine Jewelry Shawn Sullivan and James Walnum, Plaintiffs-Appellees: Howard B. Becker, Steven A. Katz, Korein Tillery, St. Louis, MO; Craig C. Corbitt, Zelle, Hofmann, Voelbel & Mason, San Francisco, CA; Susan G. Kupfer, Glancy, Binkow & Goldberg, San Francisco, CA; John A. Maher, Summit, NJ; Joseph J. Tabacco, Jr. [ARGUED in No. 08-2785], Berman, DeValerio, Pease, Tabacco, Burt & Pucillo, San Francisco, CA; William Bernstein, Eric B. Fastiff, Lieff, Cabraser, Heimann & Bernstein, San Francisco, CA; Joseph D. Cooper, Tracy R. Kirkham, Cooper & Kirkham, San Francisco, CA.

For DeBeers SA, Defendant-Appellee: Jessica Biggio, Francis Ciani-Dausch, Tara S. Emory, Matthew P. Hendrickson, Skadden, Arps, Slate, Meagher & Flom, New York, NY; Mark J. Sagat, Steven C. Sunshine, Skadden, Arps, Slate, Meagher & Flom, Washington, DC.

Kristen Dishman, Pro se, Wareham, **[**2]** MA.

Margaret Marasco, Pro se, Lynn, MA.

James B. Hicks, Hicks Parks, Pro se, Los Angeles, CA.

Judges: Before: RENDELL and JORDAN, Circuit Judges, and AMBROSE [*], District Judge.

Opinion by: JORDAN

Opinion

[*138] OPINION OF THE COURT

JORDAN, *Circuit Judge*.

For more than one hundred years, De Beers S.A. and other entities within the De Beers family of companies (hereinafter collectively "De Beers") have fixed prices in the wholesale market for gem-quality diamonds through a web of pricing and output-purchase agreements with competitors. In the late 1990s, however, De Beers's market power began to wane as new suppliers entered the market and competitors refused to cooperate with De Beers's pricing efforts. Amidst these structural changes to the market, plaintiffs brought the present claims under §§ 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1-2*, and under the antitrust, consumer protection, and unjust enrichment laws of all fifty states and the District of Columbia. Plaintiffs then entered into settlement negotiations with De Beers, which ultimately resulted in a proposed settlement that divided the **[**3]** plaintiffs into two putative classes and created a settlement fund of $ 295 million. Although several plaintiffs objected to the settlement, the United States District Court for the District of New Jersey overruled the objections, certified the two classes, and approved the settlement agreement. The objectors then filed these appeals. For the reasons that follow, we will vacate the judgment of the District Court and remand for further proceedings.

I. Factual Background

Throughout the twentieth century, De Beers fixed prices in the market for rough gem-quality diamonds by, among other things, executing output-purchase agreements with competitors, establishing a market-wide cartel to set production limits, and restricting wholesalers from reselling diamonds outside of certain geographic territories. Wholesalers, known as "sightholders," were, and continue to be, screened by De Beers based on various criteria and are required to purchase diamonds at ten annual distribution events called "sights." Sightholders constitute De Beers's exclusive channel for distribution of its diamonds, and they resell those diamonds to jewelry manufacturers and retailers as rough diamonds, or as cut-and-polished **[**4]** stones, or as components of finished jewelry products.

A. *Deterioration Of De Beers's Market Power*

De Beers carried out its cartel activities -- including distribution to sightholders -- through the Central Selling Organization ("CSO"), [1] an entity established by De Beers for the purpose of coordinating its actions with those of its competitors. Historically, the CSO was responsible for purchasing diamonds from De Beers's competitors, establishing pricing formulas, and setting output restrictions. The **[*139]** CSO's network of agreements and De Beers's status as founder of the CSO had for many years given De Beers nearly complete control over the market for rough gem diamonds.

That hold on the diamond industry began to slip, however, during the latter part of the twentieth century, and, by the mid-1990s, it was weakening fast. In 1993, Russia's state-controlled diamond company, ALROSA, flooded the

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[*] Honorable Donetta W. Ambrose, United States District Court Judge for the Western District of Pennsylvania, sitting by designation.

[1] The CSO was originally formed in the mid-1920s and changed its name to the Diamond Trading Company ("DTC") in 2000.

market with low-quality gems to earn cash in the face of financial pressures on the government. In response, De Beers dropped the price of low-grade stones. That action prompted cartel-member **[**5]** Rio Tinto, which operates Argyle Diamond Mines of Australia ("Argyle"), to cease dealing with the CSO in 1996. Rio Tinto's Argyle mine, like ALROSA, began selling larger numbers of low-quality diamonds than De Beers had previously sold through the CSO.

With the low-end of the market moving beyond its control, De Beers turned its attention to higher-quality gems. It initially attempted to retain control over the production and sale of high-grade diamonds by purchasing its competitors' output, as it had done for many decades before. For example, in 1999, it entered into an output purchase agreement with competitor BHP Billiton ("BHP") under which it acquired 35% of BHP's total diamond production. That agreement ended in 2002, and again De Beers's efforts to maintain dominance began to fade, as the market for high-quality stones saw the entrance of new competitors and as old competitors brought new mines into production. By 2006, in the overall market for rough gem diamonds, state-owned companies in Angola and the Democratic Republic of Congo collectively controlled 19% of global production; ALROSA controlled 17%, and De Beers controlled approximately 45%. Other competitors, including **[**6]** Rio Tinto, controlled the remaining share of the market. [2]

B. *Present Litigation*

The present case dates from 2001, when two price-fixing lawsuits were filed in the United States District Courts for the District of New Jersey and the Southern District of New York. Between 2002 and 2005, five additional lawsuits were filed in state and federal courts across the country, bringing the total number of suits against De Beers to seven. Three of the cases were initiated in state court in Arizona, California, and Illinois. The Illinois case was removed to federal court and was later consolidated with the remaining four lawsuits -- all of which had been filed in various federal district courts -- in the United States District Court for the District of New Jersey. **[**7]** [3] While only the five federal cases are presently before us, all seven cases are pertinent to this set of appeals because the settlement agreement that the parties ultimately reached applied to all actions, including the ones in state court.

1. *Identity of the Plaintiffs*

The plaintiffs in the seven cases can be divided into two categories, based on the claims that they assert. The first category **[*140]** consists of direct purchasers that acquired rough gem diamonds directly from De Beers or one of its competitors. The direct purchasers advanced claims of price-fixing and monopolization, citing §§ 1 and 2 of the Sherman Act, *15 U.S.C. §§ 1-2*, for which they sought damages and injunctive relief under §§ 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26*. [4]

The second category of plaintiffs consists of indirect purchasers, which are entities or individuals that acquired either rough or cut-and-polished gem diamonds but did not do so directly from De Beers or its competitors. Consumers and jewelry retailers fall into this category, as do middlemen who acquired diamonds from sightholders or from another indirect purchaser. The indirect purchasers sought recovery for the same antitrust injury as did the direct purchasers but brought their claims under state antitrust, consumer protection, and unjust enrichment law. These plaintiffs could only rely on state law as a route to monetary relief because they lack standing to bring a

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[2] These statistics represent shares of the market for all rough gem diamonds, without regard to their quality. The parties have not indicated whether that market can be further segmented based on stone quality or whether suppliers of rough gem diamonds exercise similar measures of control in the market for cut-and-polished stones. A separate market also exists for industrial-grade diamonds, but that market is not pertinent to this appeal.

[3] All references to the "District Court" are to the United States District Court for the District of New Jersey.

[4] ***HN1***[] Sections 1 and 2 of the Sherman Act do not themselves create private rights of action. Sections 4 and 16 of the Clayton Act authorize plaintiffs harmed by activity that violates §§ 1 and 2 to bring a suit for damages and injunctive relief. *See* *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007)* ("Although **[**8]** [plaintiff's] substantive claims arise under *section 2* of the Sherman Act … the private right of action is provided by section 4 of the Clayton Act, *15 U.S.C. § 15*.").

federal antitrust claim for damages under § 4 of the Clayton Act. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735-36, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). They did, however, seek injunctive relief for those antitrust violations under § 16 of the Clayton Act. *See* Mid-W. Paper Prods. Co. v. Cont'l Group, 596 F.2d 573, 594 (3d Cir. 1979) (**HN2**[ ] "*Illinois Brick* does not preclude indirect **[**9]** purchasers from suing for injunctive relief[,] and … they have standing to sue under § 16 … .").

Thus, these two categories of plaintiffs assert claims that overlap but are also distinct. The direct purchasers' claims for damages arise only under §§ 1 and 2 of the Sherman Act and § 4 of the Clayton Act. The indirect purchasers' damages claims implicate only state antitrust, consumer protection, and unjust enrichment law. Both categories of plaintiffs also assert claims under § 16 of the Clayton Act for injunctive relief against continued price-fixing and monopolization by De Beers.

2. *De Beers's Participation in These Actions*

De Beers initially refused to appear in the lawsuits because it asserted that courts in the United States lacked personal jurisdiction over it and that any judgment entered by those courts would be a legal nullity. By September 2004, defaults or default judgments had been entered against De Beers in six of the seven actions. In May 2005, counsel for De Beers approached plaintiffs' counsel to discuss settlement of the indirect purchasers' claims. Those discussions produced a settlement of the indirect purchasers' claims in four of the cases (the "indirect purchaser **[**10]** settlement"). Under the indirect purchaser settlement, De Beers agreed not to contest certification of a settlement class of indirect purchasers, and further agreed to establish a settlement fund of $ 250 million to be paid to class members. De Beers also agreed to a stipulated injunction that restrained it from violating U.S. ***antitrust law***, and it consented to the District Court's jurisdiction for the purpose of enforcing the injunction.

On November 30, 2005, the District Court entered an order (the "November 30 **[*141]** order") that preliminarily approved the settlement agreement and conditionally certified a settlement class of indirect purchasers under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. [5] **HN3**[ ] Rule 23(b)(2) allows a court to certify a class that seeks "final injunctive relief … respecting the class as a whole," FED. R. CIV. P. 23(b)(2), whereas Rule 23(b)(3) authorizes certification when "questions of law or fact common to class members predominate over any questions affecting only individual members," FED. R. CIV. P. 23(b)(3). Hence, the Court preliminarily approved the class under Rule 23(b)(2) for the purpose of entering the stipulated injunction and likewise **[**11]** approved the same class under Rule 23(b)(3) in order to distribute the proceeds of the settlement fund.

De Beers then entered into settlement negotiations with the direct purchasers and ultimately reached a settlement agreement with them in March 2006. That agreement mirrored the indirect purchaser settlement: De Beers agreed not to contest certification of a direct purchaser settlement class and to create a fund of $ 22.5 million to satisfy class members' Sherman Act claims. De Beers also **[**12]** agreed to increase the indirect purchaser class settlement fund by $ 22.5 million because the lawsuits filed by the direct purchasers included as plaintiffs some indirect purchasers who had not participated in the earlier settlement. Finally, De Beers agreed to injunctive relief that was substantively identical to that imposed under the indirect purchaser settlement.

On March 31, 2006, the District Court amended its November 30 order to conditionally certify both the direct and indirect purchaser settlement classes under Rules 23(b)(2) and 23(b)(3), and to preliminarily approve a combined settlement for both classes. The proposed combined settlement agreement provided for a fund of $ 295 million to be paid to both the direct and indirect purchaser classes. The direct purchasers were to receive $ 22.5 million of the fund, while $ 272.5 million was allotted to the indirect purchaser claims. The combined settlement also provided for

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[5] Prior to 2003, Rule 23 expressly authorized district courts to conditionally certify a class. *See* FED. R. CIV. P. 23(c)(1) (2002) (providing that a class certification order "may be conditional, and may be altered or amended before the decision on the merits.") In 2003, however, the provision allowing for conditional certification was removed because "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." FED. R. CIV. P. 23 (2010) advisory committee's note to the 2003 amendments. However, as none of the parties challenge the District Court's certification order on the basis of that change, we will not discuss it further.

entry of a stipulated injunction that, among other things, required De Beers to comply with all federal and state antitrust laws, limited De Beers's ability to purchase diamonds from third-party producers, and prohibited De Beers from restricting the geographic **[**13]** territory within which sightholders could resell De Beers diamonds. De Beers also agreed to subject itself to personal jurisdiction in the United States for enforcement of the combined settlement agreement. The parties stipulated that the injunction would take effect in April 2006 even though, at that time, the Court had not yet entered a final order certifying the class and approving the settlement agreement.

C. *Class Certification And Settlement Proceedings*

After preliminarily approving the new settlement agreement, the District Court allowed class members to lodge objections to the class certification and the settlement. [6] **[*142]** Class objectors filed a total of thirty-four objections. All objections pertained to the proposed certification of, and recovery by, the indirect purchaser class; none of the direct purchasers objected to the settlement.

The objectors raised two challenges to the propriety of certifying the two settlement classes. First, they argued that a nationwide class of indirect purchasers should not have been certified for the purpose of administering a monetary settlement of state law claims because antitrust, consumer protection, and unjust enrichment laws vary widely from state to state. [7] According to the objectors, those differences are of such magnitude that common questions of law or fact do not predominate with regard to the indirect purchaser class, thus making certification inappropriate under *Rule 23(b)(3)*. Second, the objectors asserted that a nationwide class of both direct and indirect purchasers should not have been certified for the purpose of implementing injunctive relief because the market for rough gem diamonds became competitive during the pendency of this litigation. That competitive increase, they say, rendered an injunction to enforce compliance with antitrust statutes unnecessary and accordingly divested the indirect purchasers of antitrust standing to seek relief under *Rule 23(b)(2)*.

The District Court overruled both objections. Regarding *Rule 23(b)(3)* certification, the Court concluded that, while antitrust and consumer protection statutes vary from state to state, those differences are not so significant that they override class commonalities. Specifically, the Court held that class members share common issues of fact regarding whether De Beers actually fixed the price of rough gem diamonds and whether such price-fixing caused the plaintiffs to suffer an antitrust injury. The Court further noted that "De Beers … demanded a release of potential damage claims in all 50 states" as a condition of the settlement and that certification of a nationwide class was therefore appropriate, even though the law of many jurisdictions limits or denies the right of indirect purchasers to recover for antitrust injuries. (App. at 279.) The Court also observed that the alleged harm was national in scope and that resolving all federal and state antitrust claims simultaneously "benefit[ed] all class members by spreading litigation costs among Plaintiffs." (App. at 284.)

With **[**16]** respect to the *Rule 23(b)(2)* injunctive relief, the Court held, without addressing objectors' description of competitive advances in the market, that "all class members will continue to suffer … harm." (App. at 285.) The Court rejected the objectors' argument that the class lacked antitrust standing, concluding that De Beers had stipulated as a factual matter that its conduct caused antitrust injury to all members of the direct and indirect purchaser classes. Thus, according to the Court, De Beers's concession provided a factual basis upon which to predicate class members' antitrust standing because "De Beers has waived the right to demand proof of the substantive elements of the [antitrust] claims." (*Id.*)

[*143] Accordingly, on May 22, 2008, the Court entered a final order certifying the direct and indirect purchaser classes under *Rules 23(b)(2)* and *23(b)(3)*. As ultimately certified, the direct purchaser class includes all

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[6] The District Court referred the case to a special master for the purpose of recommending a distribution plan for the indirect purchaser settlement award and for evaluating a fee request filed by plaintiffs' counsel. As we conclude that the Court improperly certified the indirect purchaser class, *see infra* Part III.A, the objections to the distribution **[**14]** plan and fee award are moot, and we need not recount the special master's recommendation on those matters.

[7] The **[**15]** objectors did not oppose certification of the direct purchaser class for the purpose of adjudicating Sherman Act claims.

sightholders who acquired rough gem diamonds directly from De Beers between September 20, 1997 and March 31, 2006. The indirect purchaser class includes all indirect purchasers who acquired gem diamonds between January 1, 1994 and March 31, 2006, regardless of whether their **[**17]** stones were supplied by De Beers or by one of its competitors. [8] Also on May 22, 2008, the Court entered a previously agreed-upon injunction. The injunction is framed to remain in effect for five years from its date of issuance, thus expiring on May 22, 2013. The objectors then filed the present appeals.

II. Jurisdiction And Standard Of Review

The District Court possessed federal question jurisdiction over the direct purchasers' Sherman Act antitrust claim for damages pursuant to § 4(a) of the Clayton Act, *15 U.S.C. § 15(a)*, and over both the direct and indirect purchasers' claims for injunctive relief under *§ 16* of that Act, *15 U.S.C. § 26*. Original jurisdiction over the federal claims also arose under *28 U.S.C. §§ 1331* and *1337(a)*. The District Court had supplemental jurisdiction over the indirect purchasers' state-law antitrust, consumer protection, and unjust enrichment claims under *28 U.S.C. § 1367*. **[**18]** ***HN4***[] We have jurisdiction to review final orders of the District Court pursuant to *28 U.S.C. § 1291*.

HN5[] We review an order granting class certification for abuse of discretion. *In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 595 (3d Cir. 2009)*. A district court abuses its discretion when its class certification decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Id*. (quoting *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008))*.

III. Discussion

The appellants are objectors who challenged the District Court's order certifying the indirect purchaser class under *Rule 23(b)(3)* and both classes under *Rule 23(b)(2)*. The appellees are the named representatives of the indirect purchaser class, who of course support the District Court's order. [9]

HN7[] A district court may certify a lawsuit as a class action if the suit meets the requirements of *Rules 23(a)* and *23(b)*. *Rule 23(a)* mandates first, that the class be so numerous that joinder of all members is impracticable, **[*144]** second, that the class share common questions of law or fact, third, that the class representatives possess claims or defenses that are typical of all class members, and fourth, that the class representatives be able to fairly and adequately represent the class interests. *FED. R. CIV. P. 23(a)*. If those requirements are satisfied, a district court may certify the class for one of the purposes enumerated in *Rule 23(b)*. As previously noted, ***HN8***[] *Rule 23(b)(2)* **[**20]** permits class certification if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole." *FED. R. CIV. P. 23(b)(2)*. Again, as already noted, ***HN9***[] *Rule 23(b)(3)* permits certification whenever "questions of law or fact common to class members predominate over any questions affecting only individual members, and … a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *FED. R. CIV. P. 23(b)(3)*. ***HN10***[]

[8] The parties have not explained, nor does the record reveal, why the indirect purchaser class reaches back to 1994, but the direct purchaser class dates only from 1997. Whatever the reasons may be for this disparity, no one has suggested that they are pertinent to the present appeals.

[9] On June 11, 2009, plaintiffs filed a motion to dismiss the appeal on the grounds that the objectors lack standing to appeal the *Rule 23(b)(2)* certification order because the injunction restrains only De Beers, not the objectors. We reject that argument. ***HN6***[] An unnamed class member has standing to appeal a class certification order provided that the member objected **[**19]** to the settlement and is bound by the court's judgment. *Devlin v. Scardelletti, 536 U.S. 1, 7-10, 122 S. Ct. 2005, 153 L. Ed. 2d 27 (2002)*; *accord Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1307-10 (3d Cir. 1993)*. In this case, the objectors contested certification before the District Court. As class members, they are bound by the Court's judgment and by the terms of the settlement agreement, which release De Beers from antitrust liability. The objectors therefore have standing to pursue appeals, and we will enter a separate order denying the motion to dismiss.

The District Court must specify which provision of *Rule 23(b)* supports certification of the class. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 309 (3d Cir. 1998)*.

In this case, the objectors challenge the propriety of certification under either *Rule 23(b)(2)* or *23(b)(3)*. Because the Court's *Rule 23(b)(3)* certification order presents a broader range of issues than its *Rule 23(b)(2)* counterpart, we address the certification of the damages class before turning to the class claims for injunctive relief.

A. *Certification Under Rule 23(b)(3)*

HN11[] Because *Rule 23(b)(3)* allows a district court to certify a class **[**21]** only if, first, all class members share common questions of law or fact that predominate over other issues in the case, and, second, a class action is superior to other methods of adjudicating the members' claims, courts have come to refer to these twin prerequisites for certification as the "predominance" requirement and the "superiority" requirement. The predominance requirement is similar to the commonality requirement in *Rule 23(a)(2)*, which says that the class must share common questions of law or fact. However, the question of predominance imposes a more stringent obligation on the reviewing court to ensure that issues common to the class truly overshadow those pertinent to individuals or to subgroups of class members. *In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 266 (3d Cir. 2009)*. It is therefore "appropriate to analyze the [commonality and predominance] factors together, with particular focus on the predominance requirement." *Id*. (internal quotation omitted).

HN12[] A district court must evaluate predominance and superiority by considering the following four factors enumerated in *Rule 23(b)(3)*:

> (A) the class members' interests in individually controlling the prosecution or **[**22]** defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

FED. R. CIV. P. 23(b)(3). The court may also consider additional factors pertinent to class certification issues. *See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615-16, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (describing factors listed in *Rule 23(b)(3)* as "nonexhaustive"). When presented with a motion to certify a class for settlement purposes only, as in this case, the court need not consider the likely difficulties **[*145]** associated with managing the class action through trial. *Id. at 620*. ***HN13***[] Regardless of the purposes for which class certification is sought, though, the court is not required to rest its certification order solely upon the pleadings. *See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008)* ("[T]he requirements set out in *Rule 23* are not mere pleading rules."). Instead, the court should perform a "rigorous analysis" that "delve[s] beyond the pleadings to determine whether the requirements **[**23]** for class certification are satisfied." *Id*. (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167 (3d Cir. 2001))*.

The only issue under *Rule 23(b)(3)* that the objectors challenge on appeal is the District Court's finding of predominance with regard to the state law claims against De Beers. ***HN14***[] The predominance of an issue depends upon the value that addressing it will yield for all class members. *Amchem, 521 U.S. at 623* (indicating that the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation"). The issue need not be dispositive of the case, *In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 29 (D.D.C. 2001)*, but it must be significant to every class member's claim. *See* 2 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS, § 4:25, at 173 (4th ed. 2002) (recounting that courts have described as predominant those issues which present a "common nucleus of fact," an "overriding question," or an "essential common link among class members"). Issues are not predominant if they are common to all class members but their resolution does little to bring the case to conclusion. *Cf*. *Fed. R. Civ. P. 23(b)(3)* **[**24]** advisory committee's note to the 1966 amendment (indicating that common issues will not predominate if an individualized assessment of liability is necessary notwithstanding resolution of them). Thus, the predominance inquiry requires the court to identify class members' claims and to ask whether the class can support any of the elements of those claims through common proof. *Simer v. Rios, 661 F.2d 655, 672 (7th Cir. 1981)*; *cf.* *Ins. Brokerage, 579 F.3d at 269* (affirming class certification because plaintiffs possessed class-wide proof of antitrust injury, even though the amount of each members' damages required individualized proof).

The District Court found that the shared antitrust harm sustained by all indirect purchasers predominated over other issues in the case, making those claims appropriate for class treatment. Thus, the District Court's certification order grouped antitrust claims under the laws of all fifty states and the District of Columbia into a single class. The objectors challenge the District Court's finding of predominance, arguing that differences in state law prevent the allegedly common harm associated with De Beers's price fixing from gaining predominance over **[**25]** legal issues shared by only limited segments of the class. More specifically, the objectors say that different states have very different laws governing whether indirect purchasers even have an antitrust claim and that those substantive differences in state law prevent common issues of law and fact from predominating in this case. They likewise argue that differences among state consumer protection and unjust enrichment laws prevent a finding of predominance. Finally, they argue that the District Court's certification order is procedurally improper because the order fails to identify the state law claims that will receive class treatment. We take up each of those contentions in turn.

1. Predominance of Common Legal and Factual Questions

The objectors' primary attack on the class certification and settlement order asserts **[*146]** that variations in state antitrust statutes prevent common class issues from gaining predominance over individual legal issues. We have recognized that ***HN15***[] "there may be situations where variations in state laws are so significant so as to defeat commonality and predominance even in a settlement class certification." *In re Warfarin Sodium Antitrust Litig. (Warfarin Sodium II), 391 F.3d 516, 524, 529-30 (3d Cir. 2004)* **[**26]** (certifying a class of consumer deception claims under the law of all fifty states while recognizing that the entire class also shared a single, common deception claim under the law of Delaware, where the allegedly deceptive communications had originated). However, neither we nor our sister courts of appeals have considered whether variations among state antitrust statutes are so far-reaching that those differences overshadow commonalities when a class of indirect purchasers seeks certification on a nationwide basis. We must therefore consider for the first time whether a national class of indirect purchaser claimants under state law is "sufficiently cohesive to warrant adjudication by representation." *Amchem, 521 U.S. at 623*.

a. *State Antitrust Statutes*

HN16[] Under the Sherman Act, to establish antitrust liability for horizontal price-fixing, a plaintiff must show that (1) a defendant entered a contract, combination, or conspiracy with at least one other entity; (2) the agreement constitutes an unreasonable restraint of trade; (3) the agreement produced anticompetitive effects in the relevant market; and (4) the plaintiff was injured as a result. *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 442 (3d Cir. 1997)* **[**27]** (reiterating elements of proof under *§ 1* of the Sherman Act). ***HN17***[] A claim for monopolization requires the plaintiff to prove that (1) the defendant possesses "monopoly power in the relevant market" and (2) the defendant acquired, maintained, or attempted to acquire or maintain that power through means other than "growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (setting forth the elements of proof under *§ 2* of the Sherman Act). ***HN18***[] Many states have enacted antitrust statutes that proscribe the same conduct as the Sherman Act. 14 HERBERT HOVENKAMP, ***ANTITRUST LAW*** P 2401a, at 314 (2d ed. 2006).

HN19[] While state antitrust statutes frequently track the Sherman Act in terms of their substantive elements of proof, they vary significantly with regard to the standing that they extend to indirect purchasers. The variance is mainly a function of whether a state has chosen to follow the Sherman Act principles regarding standing laid down by the Supreme Court in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. In that case, the Court decided that only direct purchasers of a product or service **[**28]** may sue for an antitrust injury. *Id. at 734-36*. The Supreme Court's theory for denying standing to indirect purchasers was that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it." *Id. at 735*. Hence, the Court viewed direct purchaser standing as the most efficient way to ensure that companies or individuals engaging in anticompetitive conduct were called to account for their actions. *Id. at 741*.

HN20[] Some states have elected to follow the Supreme Court's lead in *Illinois Brick.* ***[*147]*** *See, e.g., Wilson v. Gen. Motors Corp., 190 N.J. 336, 921 A.2d 414, 416-17 (N.J. 2007)*; *Johnson v. Microsoft Corp., 106 Ohio St. 3d 278, 2005 Ohio 4985, 834 N.E.2d 791, 798 (Ohio 2005)*; *Major v. Microsoft Corp., 2002 OK CIV APP 120, 60 P.3d 511, 513 (Okla. Civ. App. 2002)*. Other states, however, have diverged from *Illinois Brick* and have enacted statutes known as "*Illinois Brick* repealers." Those statutes reject the rule that antitrust recovery is limited to parties that dealt directly with the defendant and instead extend antitrust standing to indirect purchasers, including **[**29]** consumers. *See, e.g.*, *CAL. BUS. & PROF. CODE § 16750(a)*; *MICH. COMP. LAWS § 445.778(2)*; *N.Y. GEN. BUS. LAW § 340(6)*. Finally, a third set of jurisdictions allow indirect purchasers to seek antitrust recovery, but only if the state joins the suit in a *parens patriae* capacity. *See IDAHO CODE §§ 48-108(2)*, *-113(1)*; *Siena v. Microsoft Corp., 796 A.2d 461, 464-65 (R.I. 2002)*.

Thus, ***HN21***[] in some states with *Illinois Brick* repealers, indirect purchasers may personally advance a claim for antitrust recovery against a defendant, such as De Beers, that has fixed prices. In other states, however, they may do so only with the assent of the state attorney general. And in states without a repealer statute, recovery is usually foreclosed entirely. [10] At least twenty-five states and the District of Columbia have implemented *Illinois Brick* repealers or extended antitrust standing to indirect purchasers through judicial decision; the remaining states have not. [11]

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[10] ***HN22***[] Standing in those states is ordinarily but not always foreclosed. The following states lack *Illinois Brick* repealers but have extended indirect purchaser standing through judicial decisions:

Arizona (*Bunker's Glass Co. v. Pilkington PLC, 206 Ariz. 9, 75 P.3d 99, 109 (Ariz. 2003)* **[**30]** (en banc))

Iowa (*Comes v. Microsoft Corp., 646 N.W.2d 440, 449-50 (Iowa 2002))*

North Carolina (*Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680, 687 (N.C. Ct. App. 1996))*

Tennessee (*Sherwood v. Microsoft Corp., No. M2000-01850-COA-R9-CV, 2003 Tenn. App. LEXIS 539, 2003 WL 21780975, *16 (Tenn. Ct. App. July 31, 2003))*.

[11] ***HN23***[] The following states and territories have enacted *Illinois Brick* repealers that allow indirect purchasers to bring private suits for damages:

Alabama (*ALA. CODE § 6-5-60(a)*)

California (*CAL. BUS. & PROF. CODE § 16750(a)*)

District of Columbia (*D.C. CODE § 28-4509(a)*)

Guam (*Guam Code Ann. tit. 9, § 69.30(a)*)

Hawaii (*HAW. REV. STAT. § 480-3*)

Illinois (*740 ILL. COMP. STAT. 10/7(2)*)

Kansas (*KAN. STAT. § 50-161(b)*)

Maine (*ME. REV. STAT. tit. 10, § 1104(1)*)

In short, this is not a case in which a class of plaintiffs possesses numerous disparate claims but shares an overriding common cause of action under a common body of law. Instead, all parties agree that the claims within the indirect purchaser class implicate the law in every jurisdiction in the nation and that no jurisdiction provides a claim shared by all, or even by **[*148]** a majority, of the class members. These variations in state ***antitrust law*** are not trivial. [12] They represent fundamental policy differences among the several states, and they are in consequence as different as it is possible to be, with some states giving substantive antitrust rights to indirect purchasers, other states giving more limited rights, and others denying such rights altogether.

Michigan (*MICH. COMP. LAWS § 445.778(2)*)

Minnesota (*MINN. STAT. § 325D.57*)

Mississippi (*MISS. CODE § 75-21-9*)

Nevada (*NEV. REV. STAT § 598A.210(2)*)

New Hampshire (*N.H. REV. STAT. § 356:11(II)*).

New Mexico (*N.M. STAT. § 57-1-3(A)*)

New York (*N.Y. GEN. BUS. LAW § 340(6)*)

North Dakota (*N.D. CENT. CODE § 51-08.1-08(3)*)

Oregon (*OR. REV. STAT. § 646.780(1)(a)*)

South Dakota (*S.D. CODIFIED LAWS § 37-1-33*)

Utah (UTAH CODE ANN. § 76-10-919(1)(a))

Vermont (*VT. STAT. tit. 9, § 2465*)

Wisconsin **[**31]** (*WIS. STAT. § 133.18(1)(a)*).

HN24[] The following states allow indirect purchaser recovery, but only in *parens patriae* suits brought by the state attorney general:

Alaska (*ALASKA STAT. § 45.50.577(b)*)

Arkansas (*ARK. CODE ANN. § 4-75-315(b)*)

Idaho (*IDAHO CODE § 48-108(2)*)

Rhode Island (*R.I. GEN. LAWS § 6-36-12(a)*, *(g)*)

Virginia (*VA. CODE ANN. § 59.1-9.15(d)*).

[12] Our concurring colleague says we have "attempted to address the specific nuances of the **[**32]** substantive laws of the fifty states." (Concurring at 12 (internal quotation marks omitted).) That is a misapprehension. ***HN25***[] We are certainly not saying that nuanced differences among state laws will prevent the certification of a class, nor are we suggesting that a state-by-state cataloguing of differences in state law is necessary every time a multi-jurisdiction class is certified. We are saying that the difference between having an antitrust claim under state law and having none is no mere nuance and cannot be solved by any reconfiguration of the nationwide class short of changing it from a nationwide class to one or more classes that exclude those who have no claim. The concurrence acknowledges this necessity by saying that, "[i]f … neither state nor federal law provides a New Jersey resident with a right to relief, then the class should be redefined so that it does not include persons whose right to relief is governed by New Jersey law." (*Id.*)

For example, ***HN26***[] an indirect purchaser located in a state that has an *Illinois Brick* repealer, such as New York, may sue and recover for a price-fixing or monopolization harm, *see* *N.Y. GEN. BUS. LAW § 340(6)*, but an identical indirect purchaser in **[**33]** a neighboring state without a repealer, such as New Jersey, may not, *see* *Sickles v. Cabot Corp., 379 N.J. Super. 100, 877 A.2d 267, 276 (N.J. Super. Ct. App. Div. 2005)* (refusing to extend antitrust liability under the New Jersey Antitrust Act to indirect purchasers). It is hard to imagine a greater disparity between two class members. Whereas the New York purchaser may recover for an antitrust violation if he can prove the existence of a price-fixing agreement or monopoly market power resulting in higher prices, the New Jersey purchaser has no legal right to recover -- or even to bring a lawsuit -- regardless of whether he can conclusively prove the existence of a restraint and antitrust impact. Thus, while both purchasers may have felt the effects of the same antitrust conduct, the purchasers do not share common legal or factual issues because the antitrust activity gives rise to a right of action for only one purchaser. *See* *Ins. Brokerage, 579 F.3d at 266* (noting that *Rule 23* requires that a class possess at least one issue of law or fact that affects all class members' claims). The natural result of those differences is that there can be no certification of a nationwide class of state indirect purchaser **[**34]** plaintiffs because there is no common question of law or material fact. ***HN27***[] It is improper to certify a nationwide class when the legal right shared by class members purportedly arises under the laws of multiple jurisdictions, but only some of those jurisdictions extend standing to class members to enforce that right. [13]

Plaintiffs seek to minimize these legal disparities by characterizing them as little **[*149]** more than impediments to litigation that would make trial management difficult but that may safely be ignored for settlement purposes. That argument places management issues above the more basic question of substantive law. It is akin to suggesting that a really good cook, by means of superior kitchen management, can make a cake out of nothing. ***HN29***[] The lack of substantive rights cannot be wished away by the promise of easier litigation management. Proponents of class certification for any purpose, including settlement, retain the burden of demonstrating that all class members share common legal or factual issues and that those issues predominate over matters requiring individual proof. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 799 (3d Cir. 1995)* (holding that nothing in *Rule 23* "can be read to authorize separate, liberalized criteria for settlement classes"). That test presupposes that everyone in the class at least has a cause of action. The variations in state law identified by the objectors preclude the requisite finding of predominance under *Rule 23(b)(3)* **[**36]** because indirect purchasers do not have a right to recover in all states, and, therefore, no question of law or fact regarding their legal rights is uniform throughout the class. *Cf.* *Prudential, 148 F.3d at 315* (stating that ***HN30***[] certification of a nationwide class of state-law claims is appropriate if the plaintiffs possess similar rights under the laws of all states such that the court can readily control for differences among various jurisdictions).

The predominance requirement of *Rule 23* is not the only statutory provision to stand as an obstacle to certification. As just discussed, the District Court's certification order extends antitrust remedies that, in many instances, have no root in state substantive law. As such, the order contravenes ***HN31***[] the Rules Enabling Act, which prohibits a court from interpreting procedural rules in a manner that creates new substantive rights. *See* *28 U.S.C. § 2072(b)* (stating that federal courts may not interpret procedural rules in a manner that "enlarge[s]… any substantive right"); *see also* *Windham v. Am. Brands, Inc., 565 F.2d 59, 65-66 (4th Cir. 1977)* (cautioning that ***HN32***[] each plaintiff in a federal antitrust action must offer individual proof of damages **[**37]** and that the failure to require such proof contravenes the Rules Enabling Act by allowing a plaintiff to recover in the absence of individual harm). By certifying a class, the District Court ran afoul of the Act because its order effectively granted relief to individuals to whom De Beers had no antitrust liability.

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[13] Again, ***HN28***[] we are not suggesting that a district court must conduct a state-by-state analysis every time there exists some difference in the state law underlying class members' claims. However, when the parties propose to use class certification mechanisms in a manner that materially changes substantive rights, the district court has a duty to ensure that such use does not create a right of recovery where none existed before. *See* *Hydrogen Peroxide, 552 F.3d at 320* (imposing on district courts the obligation to ensure that the plaintiffs have satisfied their burden under *Rule 23* before certifying a class). Hence, district courts must remain attuned to the kind of significant variations in state law at issue here and reject proposed classes that allow plaintiffs to recover damages through the class certification procedure when they would be unable to do so in an individual **[**35]** action.

Nor can these foundational problems be overcome, as plaintiffs suggest, by relying upon De Beers's willingness to stipulate to liability in all fifty states. Plaintiffs argue that "[w]hen a settlement is reached, the defendant elects not to contest the allegations of the complaint, and district courts are entitled to rely on those allegations to demonstrate commonality." (Plaintiff-Appellees' Ans. Br. at 46.) That is simply incorrect. ***HN33***[] Independent of any stipulations, district courts are obligated "to consider carefully all relevant evidence and make a definitive determination that the requirements of *Rule 23* have been met before certifying a class." *Hydrogen Peroxide, 552 F.3d at 320*. Were it otherwise, the door would swing wide to collusive settlements. *Amchem, 521 U.S. at 620* (requiring courts to exercise "undiluted, even heightened, attention" to issues of commonality **[**38]** and predominance in the settlement context because those inquires are designed "to protect absentees by blocking unwarranted or overbroad class definitions"). Thus, plaintiffs and De Beers cannot salvage an improper certification order by **[*150]** saying that De Beers has stipulated out of existence defects in the commonality and predominance of the class claims.

The objections in this case pertain to the predominance of class claims and to the standing of individual class members to bring claims under state law. The District Court had to consider both of those issues, apart from the pleadings and stipulations, when evaluating the motion to certify a class. *Hydrogen Peroxide, 552 F.3d at 316*. ***HN34***[] A defendant's decision not to contest the requirements of *Rule 23* does not relieve a district court of its independent obligation to ensure that those requirements are satisfied. The District Court did not adequately satisfy that obligation and abused its discretion in finding that common issues of law or fact predominate so as to warrant certification of a nationwide class of state antitrust claims.

b. *State Consumer Protection and Unjust Enrichment Law*

A similar problem exists with regard to the District **[**39]** Court's certification of consumer protection and unjust enrichment claims for class-wide treatment. ***HN35***[] Consumer protection and unjust enrichment laws are no more uniform among the fifty states than are antitrust statutes. In fact, they are less so. Some states without *Illinois Brick* repealers allow indirect purchasers to invoke consumer protection statutes to gain antitrust relief. *See, e.g., Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 107 (Fla. Dist. Ct. App. 1996)*; *Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 762 N.E.2d 303, 312 (Mass. 2002)*; *Arthur v. Microsoft Corp., 267 Neb. 586, 676 N.W.2d 29, 37-38 (Neb. 2004)*. Other states preclude indirect purchasers from doing so because they have adopted *Illinois Brick* standing requirements and view any utilization of consumer protection statutes to recover for antitrust harm as circumventing that policy decision. *See, e.g.*, *Sickles, 877 A.2d at 277*; *Major, 60 P.3d at 517*; *Vacco v. Microsoft, 260 Conn. 59, 793 A.2d 1048, 1064-66 (Conn. 2002)*; *Blewett v. Abbott Labs., 86 Wn. App. 782, 938 P.2d 842, 844 (Wash. Ct. App. 1997)*. A third group requires indirect purchaser consumer protection actions to proceed as *parens patriae* suits. *Blewett, 938 P.2d at 847*, while other statutes lack such requirements, **[**40]** *see, e.g.*, *D.C. CODE § 28-4509(a)*; *MICH. COMP. LAWS § 445.778(2)*; *N.D. CENT. CODE § 51-08.1-08(3)*.

HN36[] The common law of unjust enrichment likewise varies among the states, with some jurisdictions mandating proof of elements not required by others. Evidence of antitrust activity may provide a basis for an unjust enrichment claim in some states. *See* *Freeman Indus. LLC v. Eastman Chem. Co., 172 S.W.3d 512, 524-26 (Tenn. 2005)* (allowing an indirect purchaser price-fixing claim to proceed under an unjust enrichment theory); *see also* *D.R. Ward Constr. Co. v. Rohm & Haas Co., 470 F. Supp. 2d 485, 507-08 (E.D. Pa. 2006)* (same with respect to Arizona law). Other states preclude recovery for antitrust injuries on an unjust enrichment theory. *Sperry v. Crompton Corp., 8 N.Y.3d 204, 863 N.E.2d 1012, 1018, 831 N.Y.S.2d 760 (N.Y. 2007)*; *cf.* *Coastal Envt'l. Specialists, Inc. v. Chem-Lig Int'l, Inc., 818 So. 2d 12, 19 (La. Ct. App. 2001)* (holding that a plaintiff may not invoke unjust enrichment principles to obtain a remedy for a harm that is adequately redressed by other areas of law). With respect to the substantive elements of unjust enrichment, some states require plaintiffs to prove that the defendant's conduct rises to the level **[**41]** of fraud. *See Mantiply v. Mantiply, 951 So.2d 638, 655 (Ala. 2006)*; *Heldenfels Bros., Inc. v. City of Corpus Christi, 832 S.W.2d 39, 41 (Tex. 1992)*. Others do not. *See* *Rhue v. Rhue, 189 N.C. App. 299, 658* ***[*151]*** *S.E.2d 52, 59 (N.C. Ct. App. 2008)*; *Anderson v. DeLisle, 352 N.W.2d 794, 796 (Minn. Ct. App. 1984)*. Some allow an unjust enrichment claim only if the plaintiff has no adequate remedy at law. *Harris Group, Inc. v. Robinson, 209 P.3d 1188, 1205 (Colo. Ct. App. 2009)*; *Harvell v. Goodyear Tire & Rubber Co., 2006 OK 24, 164 P.3d 1028, 1035 (Okla. 2006)*. Others lack that requirement. *Jones v. Sparks, 297 S.W.3d 73, 78*

(Ky. Ct. App. 2009); Williams Twp. Bd. of Supervisors v. Williams Twp. Emerg. Co., Inc., 986 A.2d 914, 923 (Pa. Commw. Ct. 2009). In short, "the claim of unjust enrichment is packed with individual issues" and therefore precludes a finding of predominance in this nationwide class action context. Clay v. Am. Tobacco Co., 188 F.R.D. 483, 501 (S.D. Ill. 1999).

Amidst the welter of differing statutes and decisions across the country on these issues, at least one thing emerges clearly: ***HN37***[] evidence of price-fixing and monopolization does not give rise in every state to an unjust enrichment or consumer protection **[**42]** claim for indirect purchasers. Thus, while De Beers's price-control activity, as a practical matter, may have harmed all indirect purchasers, that injury cannot provide a basis for the certification granted here because it does not give rise to a legal right to recovery in all of the jurisdictions implicated by a nationwide class. *See* Chiang v. Veneman, 385 F.3d 256, 273, 46 V.I. 679 (3d Cir. 2004) (***HN38***[] "In order to predominate, the common issues must constitute a 'significant part' of the individual cases." (quoting Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472 (3d Cir. 1986))). The District Court therefore abused its discretion when it found that consumer protection and unjust enrichment laws were sufficiently similar to warrant certification as a class. [14] *Cf.* Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 746-48 (7th Cir. 2008) (reversing class certification order in a consumer deception case because, while all consumers had purchased the alleged deceptively marketed product, differences among state law precluded a finding of common legal issues).

c. Federalism Concerns

It is no mere afterthought to note that, even ignoring the obstacles posed by Rule 23, principles of federalism counsel against certifying a class in this matter. ***HN39***[] The mandate of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), prevents a district court from invoking federal procedural rules to extend recovery to a state law plaintiff when state courts would not recognize the plaintiff's harm as grounds for relief. Montgomery Ward & Co., Inc. v. Pac. Indem. Co., 557 F.2d 51, 56 n.8 (3d Cir. 1977) ("In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, **[**44]** Congress never gave, nor did the federal courts ever claim[,] the power to deny substantive rights created by State law or to create substantive rights denied by State law."). Thus, a district court abuses its discretion when, as happened here, it approves a settlement based on a supposed state law antitrust violation that the plaintiff could not have asserted in state court.

[*152] ***HN40***[] Sacrificing the principles of federalism to obtain the benefits of a settlement is a poor trade. Certain states have categorically refused to allow indirect purchasers to bring a price-fixing claim as a matter of substantive law. *E.g.,* Wilson, 921 A.2d at 416-17; Johnson, 834 N.E.2d at 798; Major, 60 P.3d at 513; Abbott Labs., Inc. (Ross Labs. Div.) v. Segura, 907 S.W.2d 503, 507 (Tex. 1995). The policy decisions of those states are "fundamental aspect[s] of our federal republic and must not be overridden in a quest to clear the queue in court." In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002). By allowing the indirect purchasers to effectuate a settlement without regard to those policy decisions, the District Court wrongly allowed the sovereignty of the states to be subordinated to De Beer's **[**45]** desire to resolve all indirect purchaser claims simultaneously.

Our holding today is not a repudiation of all nationwide class actions based upon state law. In fact, ***HN41***[] we have previously approved the use of class litigation as a means of resolving state law claims, recognizing that in certain cases such certification may be entirely proper. *See* Warfarin Sodium II, 391 F.3d at 529-30 (certifying a nationwide class under state consumer protection statutes on the basis that class members had uniformly been overcharged for the defendant's product and had a right to recover under the law of all fifty states). [15] Nor are we

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[14] It is inapposite to say, as does our concurring colleague, that every plaintiff "might have *some* valid claim" in addition to an antitrust or **[**43]** consumer protection action and that such claims might be susceptible to common elements of proof. (Concurrence at 13 (emphasis in original).) That is pure speculation, for, if such claims exist, the plaintiffs did not bring them. Every claim alleged in the complaints seeks recovery for price-fixing and monopolization by De Beers. The claims themselves are brought under a variety of statutory labels, but at their core they all seek damages flowing from De Beers's antitrust conduct, which is categorically foreclosed to indirect purchasers in many states without *Illinois Brick* repealers.

requiring **[*153]** district courts to undertake rigorous state-by-state analyses in all cases. [16] We hold only that a district court abuses its discretion when, as in this case, it certifies a nationwide class of litigants whose claims

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[15] Plaintiffs argue that *Warfarin Sodium II* compels us to uphold the District Court's certification order, and our concurring colleague believes that we "dismiss[] out of hand" the controlling effect of that decision. (Concurring Op. at 1.) Not so, though we evidently do view that case differently. In *Warfarin Sodium II*, a nationwide class of plaintiffs sued DuPont Pharmaceuticals Company for deceptive advertising after DuPont claimed that Coumadin, an anticoagulation drug, produced certain benefits not associated with the generic form marketed by its competitors. *391 F.3d at 522-24*. Plaintiffs, including indirect purchasers of Coumadin, brought claims for monopolization under *§ 2* of the Sherman Act, the consumer protection laws of all fifty **[**47]** states and the District of Columbia, and the state antitrust statutes in states with *Illinois Brick* repealers. *Id. at 524* & n.8. All class members also advanced a claim under the Delaware Consumer Fraud Act, *DEL. CODE tit. 6, § 2513*, on the ground that the allegedly deceptive communications originated from DuPont's Delaware-based headquarters. *Warfarin Sodium II, 391 F.3d at 528*. The District Court approved a settlement class, which we upheld on appeal over the protests of an objector who argued that variations among state consumer protection statutes defeated predominance. *Id. at 529-30*.

Warfarin Sodium II is not controlling because the plaintiffs in that case shared a common claim under the Delaware Consumer Fraud Act. *Id. at 528*. Evidence pertaining to DuPont's distribution of deceptive marketing materials was common to all class members, and all class members suffered a similar harm by purchasing Coumadin under false pretenses. *Id*. Thus, unlike the plaintiffs in this case, the plaintiffs in *Warfarin Sodium II* shared a single, common claim that gave rise to an identical right to recovery under a single state statute for every member of the class. The same evidence used to support **[**48]** this class-wide claim was also relevant to the consumer protection claims under the laws of other states, making class issues predominant over individual ones.

The nationwide consumer protection claims certified in *Warfarin Sodium II* are critically different than the antitrust claims in this case because they were founded upon deceptive marketing practices, which were properly cognizable under the laws of all fifty states. *See id. at 529-30* (implying that certification was proper for settlement purposes because the law in all fifty states provided some form of relief for DuPont's deceptive marketing practices). In contrast, many states do not permit plaintiffs to invoke consumer protection remedies for the antitrust harms that the indirect purchasers have suffered.

Warfarin Sodium II's certification of a class for the purpose of settling indirect purchasers' antitrust claims is also distinguishable from this case. Unlike in *Warfarin Sodium II*, the District Court here included indirect purchasers from all states in a single class, even though indirect purchasers in many states lack standing to bring antitrust claims. Those members share no common question with the rest of the class because **[**49]** no amount of factual similarity with other class members will confer a right to recover upon them. They are categorically precluded from obtaining antitrust recovery regardless of whether De Beers's price-fixing and monopolization activity disadvantaged them. Thus, the certification of this class, unlike in *Warfarin Sodium II*, has created a remedy for class members who have no substantive right to receive it.

Warfarin Sodium II's certification under state antitrust statutes is unpersuasive in this context because the class at issue in that case did not include claims under the laws of states without *Illinois Brick* repealers. Thus, we never considered whether an indirect purchaser in a state without a repealer could use a class settlement as a means of obtaining recovery that the purchaser could not receive had he brought the suit in his individual capacity. We do not construe *Warfarin Sodium II* as approving such a result. In fact, we noted in *Warfarin Sodium II* that "there may be situations where variations in state laws are so significant as to defeat commonality and predominance, even in a settlement class." *Id. at 529*.

There can be no greater variation in state law than exists in **[**50]** the present case, where a plaintiff in one state has access to a remedy that is foreclosed to an identical plaintiff situated across state lines. Thus, we have not, as the concurrence suggests, departed from our holding in *Warfarin Sodium II* that ***HN42***[] a class may include plaintiffs whose claims differ significantly if all members share at least one common issue. We have instead recognized that a plaintiff who has no right to relief cannot join in the same class as a plaintiff who does, and that, if those two plaintiffs are included in a single proposed class, then the court may not certify that class because no common issue predominates with respect to both plaintiffs.

[16] ***HN43***[] In many cases, it will be evident that all class members share common legal or factual questions, even if the precise elements of proof for their claims vary among jurisdictions. Under such circumstances, a district court need not conduct an extensive inquiry into substantive state law to formally establish commonalities that are apparent. District courts in their sound discretion will determine the level of analysis to undertake when deciding whether variations in state law warrant detailed examination and a description **[**51]** of similarities and differences. In a case like this -- where the class includes many people

implicate the laws of multiple jurisdictions, despite the fact that only some of those jurisdictions recognize the claims for which recovery is sought. [17] It may be **[*154]** that the antitrust and consumer protection statutes in a more limited number of states are sufficiently similar that common issues of law or fact would predominate with respect to plaintiffs **[**46]** in those jurisdictions. However, it was improper for the District Court to certify a nationwide class of plaintiffs based on state law when many states withhold antitrust standing from indirect purchasers and where the variability in consumer protection and unjust enrichment law in a context like this is extreme. Accordingly, we will vacate the District Court's certification order under *Rule 23(b)(3)* and remand this case for further proceedings.

On remand, the District Court should entertain renewed motions to certify classes that, at least as to state law claims, are not nationwide **[**54]** in scope, if such motions are made. For example, ***HN47***[] to obtain certification of an indirect purchaser class, plaintiffs would have to show that all class members share a right to recover for antitrust harms, such that one or more common issues affect all members' claims. We express no opinion regarding whether such a class can be formed or, if it can, which states' laws are sufficiently similar that plaintiffs in those states could be joined as class members. It would, however, be improper for the District Court to include in an indirect purchaser class plaintiffs whose claims arise in states that foreclose indirect purchasers from recovering for price-fixing or monopolization. Of course, the plaintiffs are not required to file new class certification motions, and nothing prevents them from prosecuting their claims in an individual capacity.

***2**. Failure to Identify Class Claims*

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who could not pursue claims in an individual action -- that more searching inquiry was needed, as the plaintiffs have tried to use class action procedures to create a bridge to recovery where otherwise none would exist.

[17] We briefly note that the indirect purchasers face factual obstacles to class certification notwithstanding the legal defects discussed above because competition in the market for rough gem diamonds waxed and waned during the class period. The class includes all indirect purchasers who acquired diamonds between January 1, 1994 and March 31, 2006, regardless of whether they obtained stones from De Beers or from a competitor. The record, however, reflects that many of De Beers's competitors did not participate in the alleged price-fixing conspiracy throughout that period.

As a result, some class members purchased diamonds in a market that was heavily influenced by De Beers while others did not. Gary French, an expert retained by plaintiffs to calculate damages and show class-wide antitrust impact, explained that

> during 1999 there was a substantial drop in the price of imported diamonds. **[**52]** This drop in price corresponds to a period of time when it is known that De Beers … [was] selling off part of the stockpile of diamonds held in reserve. Thus, the per-unit value of rough diamonds fell closer to what may be considered "competitive" levels during the sell off.

(App. at 435.) French later testified that, in 2001, "De Beers temporarily allowed the market to set prices which led to a subsequent drop in polished diamond prices." (App. at 5020.)

Plaintiffs who purchased diamonds before 2001 may have different rights to recovery depending on whether their supplier was actively cooperating with De Beers price-setting efforts. *See Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)* (indicating that ***HN44***[] a *§ 1* plaintiff must prove that the defendant joined a conspiracy to restrain trade). Similarly, those who acquired diamonds in 2001, when De Beers allowed market forces to dictate pricing, likely have no antitrust claim because they made their purchases in a competitive market. *See Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 273-74 (3d Cir. 1999)* (***HN45***[] requiring plaintiffs to show that they have suffered an antitrust injury -- i.e., an injury to competition -- to obtain **[**53]** standing to bring an antitrust claim).

Thus, the class, as currently defined, includes members that acquired diamonds in a market controlled by the CSO, members that purchased diamonds from competitors that were not participating in the CSO's price-fixing activities, and members that have no antitrust injury whatsoever. Hence, class members have not sustained a uniform injury as the result of De Beers's antitrust conduct. Instead, their injuries depend upon when they purchased their diamonds and from whom they purchased them, and those injuries can be established only through individual proof. The class is therefore unworkable as these factual differences would defeat class certification notwithstanding the legal defects in the District Court's certification order that we have discussed above. *See Hydrogen Peroxide, 552 F.3d at 311-12* (***HN46***[] "[T]he task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.").

If the District Court ultimately determines that certification of a more limited class of indirect purchasers is appropriate under *Rule 23*, any certification order that the Court issues must contain greater detail than the one currently on appeal. ***HN48***[] Under *Rule 23(c)*, each class certification order must contain "(1) a **[**55]** readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *In re Constar Int'l Inc. Sec. Litig., 585 F.3d 774, 782 (3d Cir. 2009)* **[*155]** (quotations omitted); *see also* FED. R. CIV. P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses … .").

As the objectors correctly note, the District Court's class certification order does not comport with the second requirement. The final order of certification adequately delineates the parameters of the indirect purchaser class, defining class membership to include purchasers in the United States who acquired any gem diamond from an entity other than De Beers or another rough diamond mining or production company, such as ALROSA, Rio Tinto, or BHP. It also identifies five legal issues supposedly common to the class. [18] But the order does not identify what state law claims or defenses will receive class treatment.

The District Court recognized that the indirect purchasers were advancing state antitrust, consumer protection, and unjust enrichment claims, and that "variations exist between the antitrust and consumer protection laws of different states." (App. at 279.) However, the Court never identified pertinent state antitrust or consumer protection statutes, explained the relevant state common law of unjust enrichment, or described how those statutes and the common law affect class-wide rights. Nor did the Court indicate whether the class antitrust issues that it **[**57]** actually identified would affect the consumer protection and unjust enrichment claims. The failure to do so constitutes an abuse of discretion. *Cf. Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 185 (3d Cir. 2006)* (concluding that ***HN49***[] a district court abuses its discretion when it articulates general issues of fact common to the class but fails to identify the particular claims that would be subject to class treatment).

Thus, the District Court's class certification order is deficient because the precise claims subject to class treatment are not "readily discernible from the text" of the order and the accompanying opinion. *Id*. On remand, any certification order [19] must identify with particularity both the prerequisites for membership in the class and the issues or claims that will be resolved on a class-wide basis. This means that the order should identify class issues and explicitly state whether those issues apply to the indirect purchasers' antitrust, consumer protection, or unjust enrichment claims, or to some combination of the three. While the District Court need not follow a particular formula when setting forth class-wide issues, we have recommended that the **[**58]** format of an enumerated list can bring clarity to matters subject to class adjudication and facilitates appellate review of a certification order. *Id. at 188 n.10*. Accordingly, we will remand this case both because the indirect purchaser class as currently defined **[*156]** is

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[18] The five issues are as follows:

> (a) Whether [D]efendants combined or conspired with others to fix, raise, **[**56]** stabilize and maintain the prices of polished diamonds;
>
> (b) Whether [D]efendants monopolized or combined or conspired with others to monopolize the supply of polished diamonds;
>
> (c) Whether [D]efendants' conduct caused the prices of polished diamonds to be maintained at higher levels than would exist in a competitive market;
>
> (d) Whether [P]laintiffs and the Class[es] are entitled to injunctive relief; and
>
> (e) Whether [D]efendants' conduct caused injury to the business or property of [P]laintiffs and the other [Class and] Subclass Members and, if so, the appropriate class-wide measure of damages.

(App. at 1:276 (alterations in original).)

[19] We express no opinion regarding whether a class could properly be certified following remand and provide guidance regarding the content of a certification order only to aid the District Court in disposing of a class certification motion, should the parties choose to file one.

overbroad and because the District Court's certification order did not sufficiently identify those claims and issues subject to the class treatment.

B. *Certification Under Rule 23(b)(2)*

HN50[] Rule 23(b)(2) applies only when a class seeks injunctive relief. It has no application "to cases in which the appropriate final relief relates exclusively or predominantly to money damages." *Beck v. Maximus, Inc., 457 F.3d 291, 301 (3d Cir. 2006)*. The relief sought in a Rule 23(b)(2) action must benefit the entire class, and the class representatives bear the burden of demonstrating that "the interests of the class members are so like those of the individual representatives **[**59]** that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata." *Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 59 (3d Cir. 1994)*.

As **HN51**[] with any claim for injunctive relief, the plaintiffs may not base a demand for an injunction solely upon past harm that they have suffered. The plaintiffs must demonstrate that, regardless of their past harm, they are likely to suffer harm in the future. *See In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 14 (1st Cir. 2008)* ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." (alteration in original) (quoting *O'Shea v. Littleton, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)*)). If the harm against which injunctive relief is sought dissipates during the course of the litigation, the basis for class certification likewise dissolves, and the class must be decertified. *Id. at 14-16* (vacating certification of a Rule 23(b)(2) class to enjoin cross-border arbitrage in the market for new automobiles, because, following commencement of the action, the exchange **[**60]** rate between the U.S. dollar and the Canadian dollar fell, undercutting the economic viability of future anticompetitive arbitrage opportunities).

The District Court certified the direct and indirect purchaser classes under Rule 23(b)(2) for the purpose of awarding injunctive relief under § 16 of the Clayton Act, *15 U.S.C. § 26*. **HN52**[] Unlike in a claim for damages, indirect purchasers seeking injunctive relief for an antitrust harm under § 16 do have standing. *In re Warfarin Sodium Antitrust Litig. (Warfarin Sodium I), 214 F.3d 395, 399-400 (3d Cir. 2000)*. Section 16, however, creates no substantive rights. *Mid-W. Paper Prods. Co. v. Cont'l Group, Inc., 596 F.2d 573, 589-90 (3d Cir. 1979)*. But to have standing under § 16, a plaintiff must establish a prospective threat of loss or damage as a result of conduct prohibited elsewhere in ***antitrust law***. *Warfarin Sodium I, 214 F.3d at 400*. Here, the proponents of class certification relied upon De Beers's alleged price-fixing and monopolization in violation of §§ 1 and 2 of the Sherman Act to substantiate their right to injunctive relief.

The objectors argue that all class members lack standing to seek injunctive relief under § 16 of the Clayton **[**61]** Act because they have not shown an imminent threat of prospective antitrust injury. They aver that De Beers's price-fixing conduct ended in mid-2006, causing competition within the diamond industry to increase and rendering the injunction unnecessary.

Plaintiffs offer a two-fold response. They first rely on the District Court, which held that "the injunction … is part of a compromise that De Beers entered into willfully" and that, "as such, De Beers has waived the right to demand proof of substantive elements of the claims." (App. at 285.) They say, in other words, **[*157]** that De Beers's willingness to stipulate to liability is sufficient in and of itself to establish a prospective threat of antitrust harm. That logic is unpersuasive, however, because, again, **HN53**[] a defendant's willingness to stipulate to liability for the purpose of effectuating a class action settlement does not relieve the Court of its independent obligation to ensure that the facts of the underlying case adequately establish a basis for liability. *Ins. Brokerage, 579 F.3d at 257* ("Confronted with a request for settlement-only class certification, … [the] specifications of [Rule 23]… designed to protect absentees by blocking **[**62]** unwarranted or overbroad class definitions … demand undiluted, even heightened, attention … ." (quoting *Amchem, 521 U.S. at 620* (second alteration in original) (internal quotations omitted))). Thus, De Beers's decision not to contest the propriety of the injunction does not provide a basis for affirming the District Court's Rule 23(b)(2) certification order.

Plaintiffs and De Beers alternatively argue that the injunction, which took effect in mid-2006, was itself responsible for producing the pro-competitive trends in the diamond industry, and that the injunction is necessary to maintain those competitive advances. However, such a conclusion is not supported by the record. Experts retained by both the plaintiffs and De Beers identified numerous causes of increased competition in the diamond industry, including:

. The opening of Rio Tinto's Argyle mine in Australia in the mid-1980s, which ultimately became the largest production mine in the world in terms of carats.

. Argyle's severance of ties with the CSO in 1996, after which Rio Tinto began marketing diamonds independently of De Beers.

. The opening of new mines by competitors in Canada, beginning in the late 1990s and running through **[**63]** 2003.

. The exploration and opening of new mines in Angola in the late 1990s.

. The 2002 cessation of the purchase agreement between De Beers and BHP, which marked the end of De Beers's ability or willingness to purchase large quantities of competitors' diamonds.

. Limitations imposed by the European Commission in early 2006 on the amount of ALROSA diamonds that De Beers was permitted to purchase.

. Increases in global diamond production by De Beers's competitors, which caused De Beers to lose market share.

According to the plaintiffs' and De Beers's experts, these factors appear to have caused De Beers's market share to fall from approximately 65% in 2000 to 45% by 2006. Plaintiffs' own experts indicated that, following mid-2006, market forces controlled diamond pricing so pervasively that the price from that point to the present provides a competitive benchmark against which to determine the amount of plaintiffs' damages as a result of price-fixing during the class period. At no point did any of the plaintiffs' or De Beers's experts mention the injunction in their damage calculations or conclude that it had any effect whatsoever on diamond prices. Moreover, neither the plaintiffs nor **[**64]** De Beers cite any place in the record reflecting such an effect.

Thus, while mid-2006 increases in competition may have roughly coincided with the District Court's issuance of the injunction, the record cannot support the conclusion that the injunction played a meaningful role in producing those competitive gains. Plaintiffs face no significant threat of future antitrust harm in the **[*158]** absence of the injunction because, according to their experts, the market has become increasingly competitive from 2006 onward, and "there is no longer any guarantee that the prices De Beers sets will hold in the marketplace." [20] (App. at 4323.) Plaintiffs therefore lack antitrust standing under *§ 16* of the Clayton Act, and we will vacate the District Court's order certifying the injunctive class under *Rule 23(b)(2)*. *See* *New Motor Vehicles, 522 F.3d at 14-16* (vacating a district court's *Rule 23(b)(2)* certification order because changes in market conditions caused the threat of future antitrust injury to disappear). [21]

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[20] Our concurring colleague says that we have mischaracterized the expert testimony by concluding that plaintiffs face no significant threat of future antitrust harm. (Concurring Op. at 18.) **[**65]** However, the plaintiffs' own expert opined that "De Beers is no longer able to control the quantities [of diamonds] available to the market as it had been in the past," and that it has therefore lost the ability to set the price of rough diamonds. (App. at 4321, 4323.) An industry commentator cited by that expert concluded that, by July 2007, "De Beers [was] no longer providing the steady hand that controlled supply and kept prices stable. Prices might now be volatile, subject to the normal ups and downs of the marketplace." (*Id*. at 4318.) Further, the European Commission has closed an antitrust investigation against De Beers on the ground that the entry of new diamond producers "means that there is now more competition on the rough diamonds market." (App. at 4319.) Thus, we have noted only what the experts, including the plaintiffs' experts, have said: that the market has grown competitive to the point that De Beers cannot control the market price.

[21] The objectors alternatively challenge the substantive provisions of the injunction as inadequate to ensure that competitive forces continue to prevail in the market for rough gem diamonds. As we conclude that plaintiffs lack standing to **[**66]** pursue injunctive relief, we need not decide whether the terms of the injunction are sufficient to safeguard competitive market forces.

IV. Conclusion

Though the District Court brought skill, experience, and much labor to its handling of this matter, [22] we are compelled to conclude, for the reasons stated, that it abused its discretion in certifying the settlement classes under Rules 23(b)(2) and 23(b)(3). Accordingly, we will vacate its judgment and remand the case for further proceedings consistent with this opinion. [23]

Concur by: RENDELL

Concur

[*159] RENDELL, Circuit Judge, concurring in the judgment.

I agree with the disposition chosen by the majority, namely remand, because the District Court **[**68]** failed to analyze the issues of commonality and predominance. However, I believe that the majority's opinion suffers from two overarching flaws. First, the majority dismisses out of hand our previous precedential opinion, *In re Warfarin Sodium Antitrust Litigation, 391 F.3d 516 (3d Cir. 2004)* ("*Warfarin II*"), a case that concerned remarkably similar claims and issues. Second, the majority undertakes its own analyses of predominance and plaintiffs' entitlement to injunctive relief, rather than allowing the District Court on remand to evaluate these issues in the first instance. The majority's approach is thus inconsistent with both our precedent and our role as a reviewing court.

I.

The majority opinion conflates two distinct inquiries: "Do common questions predominate?" and "Who should be included in the class?" Our court addressed each of these issues in *Warfarin II*. Curiously, the majority attempts to distinguish *Warfarin II* in a footnote. To my mind, *Warfarin II* binds us and should control our mode of analysis, if not the ultimate ruling on the issue of predominance as well. If we were to follow *Warfarin II*, I suggest that the District Court on remand could revisit the two inquiries **[**69]** noted above and "tweak" the class and its definition rather than "gut" it as the majority suggests. [1]

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[22] The concurrence observes that, after years of proceedings, hundreds of pages of recommendations by the special master, and a lengthy opinion by the District Court considering over thirty timely objections, the objection of one person has become the undoing of a class certification. In our colleague's eyes, we have wielded "a sword rather than a scapel." (Concurring Op. at 2 n.1.) The concurrence thus seems to imply that our decision is an overreaction to a minor problem and evidences a lack of appreciation for the labor involved in achieving a settlement. That is not the case. We acknowledge with gratitude, as does the concurrence, the intense effort invested by the **[**67]** District Court in addressing this litigation. Nonetheless, the objection regarding the lack of predominance of class issues in this case raises an insurmountable hurdle to certification of the indirect purchaser class, as already described. As we have said, ***HN54***[] two plaintiffs cannot be joined in a single class to adjudicate the same set of facts when those facts give only one of them a legally cognizable claim. That a single objector raised this problem makes it no less salient than if all of the remaining class members had pointed it out.

[23] The objectors have also appealed two orders that awarded attorney's fees and approved payment of certain expenses to the settlement administrator. Those challenges are necessarily vacated in light of our conclusion that the class as currently defined was not amenable to certification. We express no opinion regarding the reasonableness of the fee award or the expenses incurred by the settlement administrator, and those issues are subject to reconsideration by the District Court at an appropriate time.

[1] The proceedings leading up to the approval of the class and the proposed settlement required considerable judicial time and attention. The litigation began nine years ago and involved seven class actions that were ultimately consolidated before the District Court. The parties reached a preliminary settlement in 2005, and the District Court conditionally certified the class and appointed retired District Judge Alfred Wolin as a Special Master to review issues related to the settlement agreement. After two years of proceedings, Judge Wolin wrote a 175-page Report and Recommendation regarding notice to class members and the

In *Warfarin II* we were called upon to determine whether the certification of a settlement class was proper in a case arising out of DuPont Pharmaceuticals' alleged dissemination of misleading information about a competitor's product. *391 F.3d at 522*. The *Warfarin* plaintiffs alleged that DuPont had engaged in conduct that allowed it to maintain a 67% **[**71]** market share and charge "supracompetitive" prices. *Id. at 523*. The specific claims asserted were remarkably similar to the claims asserted here. The plaintiffs alleged **[*160]** that DuPont had violated federal ***antitrust law***, the antitrust statutes of the so-called "indirect purchaser" states, the consumer fraud and deceptive practices statutes of all fifty states and the District of Columbia, and the prohibitions on tortious interference and unjust enrichment contained in the common law of every state. *Id. at 524-25*. Here, plaintiffs allege that De Beers controlled most of the world's supply of diamonds, and imposed rigid constraints on the purchase and resale of those diamonds. According to plaintiffs, De Beers has artificially limited the supply of rough diamonds, controlled who can purchase them and when they can be purchased, and influenced the prices at which the diamonds can be resold. These activities allowed De Beers to inflate diamond prices and achieve a market share of 65% by 2000. Plaintiffs claim that De Beers's conduct violated federal ***antitrust law*** and the antitrust, consumer protection, or unjust enrichment laws of every state and the District of Columbia.

Moreover, the threshold **[**72]** issue in *Warfarin II* was the same as it is here: did common issues predominate? In addressing the predominance issue, we engaged in an extensive discussion as to commonality and predominance:

> As the Supreme Court noted in [*Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)]*, "[p]redominance is a test readily met in certain cases alleging consumer[] fraud or violations of the antitrust laws." This case falls squarely into that category: plaintiffs have alleged that DuPont engaged in a broad-based campaign, in violation of federal and state consumer fraud and antitrust laws, to deceive consumers, [third-party payors], health care professionals, and regulatory bodies into believing that generic warfarin sodium was not an equivalent alternative to Coumadin. These allegations naturally raise several questions of law and fact common to the entire class and which predominate over any issues related to individual class members, including the unlawfulness of DuPont's conduct under federal antitrust laws as well as state law, the causal linkage between DuPont's conduct and the injury suffered by the class members, and the nature of the relief to which class members are entitled.
>
> Moreover, proof **[**73]** of liability for DuPont's conduct under *§ 2* of the Sherman Act and the Delaware Consumer Fraud statute depends on evidence which is common to the class members, such as evidence that DuPont made misrepresentations about Coumadin and generic warfarin sodium permitting DuPont to monopolize the market for warfarin sodium and charge supracompetitive prices for Coumadin, while discouraging class members to purchase the lower-priced generic competitor. In other words, while liability depends on the conduct of DuPont, and whether it conducted a nationwide campaign of misrepresentation and deception, it does not depend on the conduct of individual class members. Similarly, proof of liability does not depend on evidence that DuPont made deceptive communications to individual class members or of class members' reliance on those communications; to the contrary, DuPont's alleged deceptive conduct arose from a broad-based, national campaign conducted by and directed from corporate headquarters, and individual reliance on the misrepresentations was irrelevant to liability. Finally, the fact that plaintiffs allege purely an economic injury as a result of DuPont's conduct (i.e., overpayment for warfarin **[**74]** sodium), and not any

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distribution of settlement funds, an 87-page Report and Recommendation regarding the award of attorneys' fees and reimbursement of costs, and two supplemental reports. Of the tens of millions of class members, thirty-four filed timely objections. The District Court considered these objections in a lengthy opinion, and ultimately decided to grant final class certification and approval of the settlement. Only one of these objections is the subject of the majority's **[**70]** opinion.

Although the fact that the District Court conducted such intricate proceedings is not controlling, it is clear that the settlement was welcomed by nearly all affected, and that the alleged flaws form the basis for only a few complaints. As noted in an amicus brief filed by a trade association of jewelry manufacturers and retailers urging affirmance, "a small number of consumers with modest claims and little financial interest in the outcome of the appeal" are being allowed to prevent "[a]n industry in financial straits" from recovering some of what it lost as a result of De Beers's conduct. Amicus Br. at 4. I submit that the wholesale rejection of what the District Court accomplished, based on the concerns raised by just one objector among tens of millions of class members, uses a sword rather than a scalpel and is uncalled for.

> physical injury, further supports a finding of **[*161]** commonality and predominance because there are little or no individual proof problems in this case otherwise commonly associated with physical injury claims.

Id. at 527-29 (citations and footnote omitted).

We then considered the objection that "variations in and inconsistencies between the state consumer fraud and antitrust laws of the fifty states defeat the commonality and predominance requirements of *Rule 23*." *Id. at 529*. We described concerns as to manageability that may arise in class certifications for purposes of litigation, but commented that these concerns did not apply to the *Warfarin* class, which was certified "solely for purposes of settlement." *Id*. We noted that this was "key." *Id*. We then stated that, leaving case management issues aside, "there may be situations where variations in state laws are so significant so as to defeat commonality and predominance even in a settlement class certification," but concluded that "this is not such a case." *Id. at 529-30*. [2] On this issue, we said:

> We agree with the District Court that the fact that there may be variations in the rights and remedies available to injured **[**75]** class members under the various laws of the fifty states in this matter does not defeat commonality and predominance. In [*In re Prudential Insurance Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283 (3d Cir. 1998)]*, we noted that a "finding of commonality does not require that all class members share identical claims," and we rejected an objector's contention that predominance was defeated because claims were subject to the laws of fifty states. . . . In certifying a nationwide settlement class, the District Court was well within its discretion in determining that variations between the laws of different states were insufficient to defeat the requirements of *Rule 23*.

Id. at 530 (citations omitted).

Accordingly, we affirmed the District Court's ruling that common questions predominated. *Id. at 528*. [3]

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[2] In *Amchem*, the Supreme Court cautioned that the requirements of *Rule 23* (other than manageability) "demand undiluted, even heightened, attention in the settlement context," in part because settlements deprive courts of "the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *521 U.S. at 620*. However, the *Amchem* Court also recognized that "[p]redominance is a test readily met in certain cases alleging consumer or **[**76]** securities fraud or violations of the antitrust laws." *Id. at 625*. We determined that *Warfarin II* fell "squarely into that category." *391 F.3d at 528*.

[3] The majority distinguishes this case from *Warfarin II* on the basis that the *Warfarin* plaintiffs "shared a common claim under the Delaware Consumer Fraud Act." Maj. Op. at 42 n.15. However, we did not even address the Delaware statute in analyzing predominance; indeed, we acknowledged that "that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states." *391 F.3d at 530*. Our discussion of the Delaware statute was limited to the issue of commonality; we referred to it as one of several reasons why commonality existed in the class. *Id. at 528-29*.

The majority also distinguishes *Warfarin II* on the basis that its "nationwide consumer protection claims . . . were founded upon deceptive marketing practices, which were properly cognizable under the laws of all fifty states." Maj. Op. at 43 n.15. Yet our analysis in *Warfarin* was much broader than the majority suggests. Rather **[**77]** than engaging in an independent analysis of whether every state's consumer protection law permits claims based on deceptive marketing practices, we considered the "consumer fraud *and* antitrust laws of the fifty states" as a whole, and concluded that "the fact that there may be variations in the rights and remedies available to injured class members under the *various* laws of the fifty states in this matter does not defeat commonality and predominance." *391 F.3d at 529-30* (emphases added).

Finally, the majority appears to distinguish *Warfarin II* as not having "included indirect purchasers from all states in a single class." Maj. Op. at 43 n.15. However, *Warfarin II* made no such distinction; to the contrary, we specifically noted that indirect purchasers were included in the class, and the class was defined as "[a]ll consumers or Third Party Payors in the United States who purchased and/or paid all or part of the purchase price of Coumadin dispensed during the period March 1, 1997 through and including August 1, 2001." *391 F.3d at 525*. Although it may be true, as the majority contends, that there are potential class

[*162] While the claims here, and the state laws implicated, are similar to those in *Warfarin II*, the District Court did not engage in a meaningful analysis or discussion of the issue of predominance. The Court acknowledged that "variations exist between the antitrust and consumer protection laws of different states." App. 279. However, the Court then indicated that it would be inappropriate to "weigh" claims for a variety of reasons, [4] and concluded, without any analysis whatsoever, that, as in *Warfarin II*, the variations were insufficient to defeat commonality and predominance. App. 280.

I agree with the majority that more should have been done by the District Court than merely citing *Warfarin II*. The concern with "weighing" claims does not do away with the need to address "predominance" in the process of class certification, and the District Court has an obligation to satisfy itself that it is not presented with a case where the "variations in state laws are so significant so as to defeat commonality and predominance even in a settlement class certification." *Warfarin II, 391 F.3d at 529-30*. Although the Court is free to conclude that the predominance requirement is "readily met" here, *see* *Amchem, 521 U.S. at 625*, because any differences in state law are "relatively minor" or can be addressed "by grouping similar state **[**80]** laws together and applying them as a unit," *see* *Prudential, 148 F.3d at 315*, its analysis must demonstrate that it has actually considered the scope and effect of any such differences, as well as the effect of any choice-of-law considerations, *see* *In re Life USA Holding Inc., 242 F.3d 136, 147 (3d Cir. 2001)*. The District Court's opinion does not assure us that the Court considered these issues, and it does not provide us with any reasoning that would allow us to review the Court's conclusion that none of the differences in state law "are sufficient to defeat commonality and predominance." App. 280.

[*163] Nonetheless, it is for the District Court on remand to review the claims, the relevant state laws, and the choice-of-law issues in reaching the conclusion as to predominance. I submit that all we must do is to tell the District Court to perform this analysis. It is for that Court, not our court, *see* Maj. Op. at 27-40, to conduct this analysis in the first instance. [5]

In conducting that analysis, the District Court need not survey state law on a claim-by-claim basis. While purporting to "review" the District Court's analysis, the majority engages in such a survey. This is not only a departure from our role as an appellate court, it is inconsistent with our analyses in both *Warfarin II* and *Prudential*. In *Warfarin II*, we never attempted to address the specific nuances of "the substantive laws of the fifty states" ourselves. *See* *391*

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members who do not have a right to recover against De Beers, the District **[**78]** Court should be allowed to make that determination on remand, and then adjust the class definition if necessary.

[4] The District Court determined that

> [w]eighing claims, particularly Consumer claims, by different state laws would not be appropriate in this case for the following reasons:
>
>> a) De Beers, in the pursuit of a global settlement, demanded a release of potential damage claims in all 50 states; without class member releases from all 50 states, the settlement amount likely would have been less.
>>
>> b) A nationwide class of consumers had been certified in the *Null* case.
>>
>> c) All class members benefit from the additional **[**79]** value of the injunctive relief obtained.
>>
>> d) Weighting class member claims based on the relative strength of different state law claims would be imprecise at best, would greatly add to the cost and complexity of processing claims, and would diminish the funds available for claimant recovery.
>>
>> e) A nationwide antitrust class action is an expedient vehicle to resolve the disparate claims of the Direct Purchasers and the Indirect Purchaser Subclasses.

App. 279.

[5] It could be that the claims and laws here are sufficiently similar to those set forth and implicated in *Warfarin II*, thereby making the analysis fairly simple. There are, for instance, overlapping issues regarding "indirect **[**81]** purchasers" in both cases. *See* Maj. Op. at 14; *Warfarin II, 391 F.3d at 525*. But the District Court must analyze these issues to provide us with a basis for review.

F.3d at 529-30. Nor did we require the district court to explore the "variations among state antitrust statutes" without regard to whether such variations were mitigated by the other causes of action asserted by plaintiffs, as the majority does here, *see* Maj. Op. at 27. Rather, we reached the straightforward conclusion that "the fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance." Warfarin II, 391 F.3d at 530. Similarly, **[**82]** in *Prudential*, the plaintiffs alleged violations of federal securities law, "common law fraud, breach of contract, bad faith, negligent misrepresentation, negligence, unjust enrichment, and breach of state consumer fraud statutes." 148 F.3d at 292. Although we acknowledged that "the class claims are subject to the laws of the fifty states," we approved the district court's approach of finding predominance "by grouping similar state laws together and applying them as a unit" in order to overcome "relatively minor differences in state law." Id. at 315. We did not require the district court to determine whether consumer protection or unjust enrichment laws, for instance, were "uniform among the fifty states," as the majority attempts to do here. Maj. Op. at 33.

Moreover, the majority sets forth discrete surveys of state ***antitrust law***, unjust enrichment law, and consumer protection law, without ever addressing the salient issue of whether every class member might have *some* valid claim under state or federal law. [6] If every class member does have a valid claim of some kind, then the next question is whether those claims can be grouped in such a way that common issues predominate. Thus, the **[**83]** majority misstates the focus of our inquiry when it proclaims that we must decide, as a matter of first impression, "whether variations among state antitrust statutes" defeat predominance, Maj. Op. at 27, and whether there is an "overriding common cause of action under a common body of law," Maj. Op. at 32. Rather, the question is whether the liability of De Beers is "capable of proof on a class-wide basis." In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 269 **[*164]** (3d Cir. 2009). The salient issue, therefore, is whether the common issues of fact and law presented by plaintiffs' claims, when examined together, outweigh any individual issues, such that a nationwide class of indirect purchasers can be certified. Although I agree with the majority that Rule 23 "presupposes that everyone in the class at least has a cause of action," Maj. Op. at 35, nothing in Rule 23, nothing in Amchem, and nothing in our decisions requires that everyone in the class have precisely the *same* cause of action. [7] If De Beers's conduct gave rise to different types of claims, predominance can be satisfied as long as those claims can be grouped together in a way that allows them to be proven on a class-wide basis. **[**84]** [8]

The majority also concludes that predominance is not satisfied if the class includes certain members who may have no claim at all under the applicable state or federal law. But that fact should not affect predominance; rather, these people simply should not be included in the class that is certified. If, for instance (as the majority suggests), neither state nor federal law provides a New Jersey resident with a right to relief, then the class should be redefined so that it does not include persons whose right to relief is governed by New Jersey law. Issues regarding what the applicable law would be, including choice of law, can be decided on briefs.

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[6] I agree with the majority's statement that De Beers's price-fixing and monopolization *conduct* is at the core of plaintiffs' claims. *See* Majority Op. at 36 n.14. However, plaintiffs challenge that conduct under a variety of laws, not just antitrust laws, and it is for the District Court to determine, in the first instance, whether those other laws provide the plaintiffs with valid causes of action.

[7] For the same reason, I disagree with the majority's claim that its approach serves the interests of federalism and ensures compliance with the Rules Enabling Act by preventing class actions from "extend[ing] recovery to a state law plaintiff when state courts would not recognize the plaintiff's harm as grounds for relief." Maj. Op. at 40. Our approach in *Warfarin II* and *Prudential* is premised upon the understanding that if a defendant's conduct gives rise to one cause of action in one state, and a different cause of action in another state, then it can be appropriate to hear both claims in a single class action. This approach respects the states' recognition of different causes of action, and does not "enlarge . . . any substantive right" in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b).

[8] At **[**85]** the same time, however, we have never required district courts, as part of the class certification process, to evaluate every nuance of each potential class member's claims. That type of inquiry would only mire district courts in endless class certification proceedings while failing to address the actual requirements of Rule 23. To the extent that there is a question about whether a specific class member is entitled to recover from the defendant, it should be addressed as part of the claims process, not the certification proceeding.

Warfarin ***[**86]*** *II* is instructive on this point as well, for, after concluding that the District Court did not abuse its discretion in determining that variations in state law did not affect predominance, we addressed arguments that certain persons--fixed co-pay consumers and third-party payors--should be "excluded" from the class because they, respectively, lacked "viable" claims or "standing." *Id. at 530-31*. However, we concluded that each group suffered direct, cognizable injury and was properly included. *Id*. Here, if the District Court determines that there are persons without any "viable" claims, the class simply should not include them. The issue is not one of predominance. Rather, it is one of an entitlement, or a right, to be in the class in the first place, and the resulting definition of the class can be tailored accordingly. The District Court has the duty to ensure that the class includes only those with real "claims." *Id*.

Thus, *Warfarin II* provides a road map, if not controlling reasoning, that should be our guide. The majority fails to afford it the respect it is due, and embarks on its own analysis. I suggest that it errs on both counts.

[*165] II.

The majority also vacates the certification **[**87]** of a class for injunctive relief based on a belief that the diamond market has become competitive. I suggest that this issue should be addressed on remand as well.

In *Warfarin I*, we laid out three straightforward requirements for plaintiffs to show that they are entitled to injunctive relief under *section 16* of the Clayton Act. They must show "a threat of loss"; "that the injury in question is injury of the type the antitrust laws were intended to prevent"; and that "there is a significant threat of injury from a violation of the antitrust laws." *In re Warfarin Sodium Antitrust Litig. ("Warfarin I"), 214 F.3d 395, 399 (3d Cir. 2000)* (internal quotation marks, alterations, and citations omitted).

The majority opines that De Beers's market share of 45% (as of 2008) is so small as to preclude any significant threat of future injury from its conduct. Yet the District Court never addressed this argument, *see* App. 284-86, and the majority relies for its independent analysis on expert reports written in 2008 for a very different purpose: the parties' attempt to identify a valid methodology for calculating damages. Although the opinions do indicate that the experts believed that "De Beers has **[**88]** lost its dominant share" of the market, App. 4321, and that "the market for rough diamonds has become much more competitive since mid-2006," App. 4323, the experts did not opine, as the majority suggests, that "[p]laintiffs face no significant threat of future antitrust harm." Maj. Op. at 54. The District Court should have the opportunity to consider on remand whether De Beers continues to possess enough market power to pose a significant threat of harm to plaintiffs, rather than having that inquiry foreclosed by the majority's reliance on expert reports that addressed a different issue. [9]

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[9] I am also unpersuaded by the majority's disagreement with the propriety of accepting De Beers's stipulation to a risk of future harm. On this issue, the majority invokes *Amchem's* caution that the "specifications of [*Rule 23*]--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." *521 U.S. at 620*. But De Beers is not stipulating that *Rule 23(b)(2)* is satisfied; indeed, the majority does not even address whether this case satisfies the Rule's requirement that "the party opposing the class **[**89]** has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Fed. R. Civ. P. 23(b)(2)*. Rather, De Beers's stipulation addresses the question of whether plaintiffs face "threatened loss or damage by a violation of the antitrust laws," as they must in order to satisfy section 16 of the Clayton Act, *15 U.S.C. § 26*. Nothing in *Amchem*, *Warfarin I*, or the Clayton Act itself prevents De Beers from stipulating that such a threat exists.

Xcaliber Int'l v. AG La.

United States Court of Appeals for the Fifth Circuit

July 15, 2010, Filed

No. 09-30492

Reporter

612 F.3d 368 *; 2010 U.S. App. LEXIS 14513 **; 2010-2 Trade Cas. (CCH) P77,099

XCALIBER INTERNATIONAL LIMITED LLC, Plaintiff - Appellant v. ATTORNEY GENERAL STATE OF LOUISIANA, James "Buddy" Caldwell, Defendant - Appellee

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

Xcaliber Int'l Ltd., LLC v. Caldwell, 2009 U.S. Dist. LEXIS 39081 (E.D. La., May 7, 2009)

Core Terms

escrow, manufacturers, cigarette, anti trust law, violates, Sherman Act, tobacco, private party, prices, summary judgment, allocable share, deposits, cases, costs, sales, contends, preempted, motorist, alleges, hybrid, funds, violation of antitrust laws, rational-basis, conspiracy, non-price, lobbying, products, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

HN1[] Tobacco Products, State Regulation

La. Rev. Stat. Ann. § 13:5063, requires every Non-Participating Manufacturer (NPM) selling cigarettes in Louisiana to either (1) become a Participating Manufacturer (PM) under the major tobacco manufacturers' Master Settlement Agreement's terms, or (2) deposit money annually into an escrow account. *La. Rev. Stat. Ann. § 13:5063*. The amount to be deposited is calculated by multiplying the numbers of cigarettes sold in the state by a fixed charge listed in the amended statute that increases over time. *La. Rev. Stat. Ann. § 13:5063(C)(1)*. The amount is roughly the same as that paid by PMs. The interest accrued on the escrowed funds is paid out to the NPM, and the principal is either paid to Louisiana to satisfy a future judgment entered against such NPM, or returned to the NPM if twenty-five years pass without such a judgment. *La. Rev. Stat. Ann. § 13:5063(C)(2)*.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

HN2[] Tobacco Products, State Regulation

See *La. Rev. Stat. Ann. § 13:5063(C)(2)(b)*.

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

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

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN3[] **Standards of Review, De Novo Review**

An appellate court reviews a district court's grant of summary judgment de novo. The appellate court views all facts in the light most favorable to the nonmovant, and affirms only when the evidence shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. A genuine issue of material fact exists if the summary judgment evidence is such that a reasonable jury could return a verdict for the nonmovant.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

HN4[] **Antitrust & Trade Law, Sherman Act**

To determine whether a state statute is preempted by the Sherman Act, courts apply a two-step analysis. First, a court inquires whether the state legislation mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. That is, the court asks whether the conduct contemplated by the statute is in all cases a per se violation. Second, the court considers whether the state statute is saved from preemption by the state action immunity doctrine.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > Preemption

HN5[] **Antitrust & Trade Law, Sherman Act**

Because states are permitted to enact legislation that impacts competition without necessarily running afoul of the Sherman Act, the preemption analysis under the Sherman Act is different than the preemption analysis under other statutes.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN6[] **Scope, Monopolization Offenses**

Section 1 of the Sherman Act outlaws every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 1*. *Section 1* addresses joint action by private parties that restrains trade. While the Act is not specific as to which types of conduct it prohibits, courts have found illegal a broad range of actions including monopolization, price fixing, territorial divisions, output restrictions, group boycotts, and refusals to deal. These activities are considered pernicious to competition and, with the exception of monopolization, are generally considered per se violations of the antitrust laws.

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

HN7[] **Sherman Act, Scope**

A hybrid violation of the Sherman Act arises when what appears to be a state-administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a gauzy cloak of state involvement. Although governmental intrusions into the market are generally acceptable, not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of *15 U.S.C.S. § 1*. When the government's action grants private actors a degree of private regulatory power, it is a nonmarket mechanism merely enforcing private marketing decisions and thus not immunized from the antitrust laws.

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

HN8[] **Sherman Act, Scope**

The hybrid restraint cases under the Sherman Act have hinged on a state's decision to let producers dictate market conditions to others, for example, by posting prices that then become legally binding on buyers and other producers. Where the state establishes a state regulatory scheme that does not require or allow any input from private parties, it cannot be classified as a hybrid restraint.

Antitrust & Trade Law > Consumer Protection > Tobacco Products > State Regulation

HN9[] **Tobacco Products, State Regulation**

See *La. Rev. Stat. Ann. § 13:5061(6)*.

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

HN10[] **Sherman Act, Scope**

A state statute is not preempted merely because the state scheme might have an anticompetitive effect. If any conflict between a state law and the Sherman Act meant that the state law were preempted, the States' power to engage in economic regulation would be effectively destroyed. This cannot be the case, for the function of government may often be to tamper with free markets, correcting their failures and aiding their victims. State police powers and regulatory authority extend legitimately to a range of anticompetitive schemes.

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

HN11[] **Sherman Act, Scope**

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Sherman Act applies to "persons" rather than states and aims to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations. However, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

Antitrust & Trade Law > Sherman Act > Defenses

HN12[] **Sherman Act, Defenses**

Any action in restraint of trade is only immune on state-action grounds if it satisfies a two-part test: the anticompetitive policy not only must be (1) clearly articulated and affirmatively expressed as state policy, but also must be (2) actively supervised by the state itself. However, a state's own acts in the antitrust area are always immune, suggesting that the two-part "Midcal test" is only needed to decide whether private conduct pursuant to a state statute gets Parker immunity. In other words, a state need not show it actively supervises private parties, as long as the state itself, acting as sovereign, created the restraint of trade.

Antitrust & Trade Law > Sherman Act > Defenses

HN13[] **Sherman Act, Defenses**

A State is immune from antitrust liability unless the passage of the regulation was an attempt to give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

Antitrust & Trade Law > Sherman Act > Claims

HN14[] **Sherman Act, Claims**

No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws. Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under the American form of government the question of whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the United States Constitution.

Constitutional Law > ... > Case or Controversy > Constitutional Questions > General Overview

Governments > Legislation > Interpretation

HN15[] **Case or Controversy, Constitutional Questions**

When considering a facial challenge to a state regulation it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN16[] **Judicial Review, Standards of Review**

A statute is only subject to heightened scrutiny on an Equal Protection challenge if it proceeds along suspect lines or infringes fundamental constitutional rights.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN17[] **Judicial Review, Standards of Review**

Under rational-basis review, the regulation must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN18[] **Procedural Due Process, Scope of Protection**

Generally speaking, for purposes of Due Process, legislative actions are non-individualized determinations that affect a wider class of individuals, whereas adjudicative actions involve individualized assessments that affect a smaller number of people in a more exceptional manner.

Counsel: For XCALIBER INTERNATIONAL LIMITED LLC, Plaintiff - Appellant: Kyle M. Keegan, J. Brian Juban, Esq., Keegan, DeNicola, Kiesel, Bagwell, Juban & Lowe, L.L.C., Baton Rouge, LA.

For ATTORNEY GENERAL STATE OF LOUISIANA, James "Buddy" Caldwell, Defendant - Appellee: Richard A. Curry, Esq., Michael Brent Hicks, McGlinchey Stafford, P.L.L.C., Baton Rouge, LA; Gary Dean Wilson, Washington, DC.

Judges: Before BARKSDALE, GARZA, and DENNIS, Circuit Judges.

Opinion by: EMILIO M. GARZA

Opinion

[*371] EMILIO M. GARZA, Circuit Judge:

Plaintiff-Appellant Xcaliber International Limited LLC ("Xcaliber") appeals the district court's grant of summary judgment in favor of the Attorney General of Louisiana (the "State"). Xcaliber manufactures and sells discount cigarettes. The case presents a challenge to an amendment to the state law implementing the tobacco settlement between the largest manufacturers of cigarettes and most of the states. Xcaliber claims that the amendment is preempted by federal ***antitrust law*** and violates the Equal Protection and *Due Process Clauses*.

I

Since 2003, Xcaliber has manufactured tobacco products and distributed them primarily in Louisiana, **[**2]** Kansas, and Oklahoma. Louisiana is one of many states that, during the mid-1990s, sued the country's largest tobacco manufacturers to recover health care costs related to smoking. In 1998 these states signed the Master Settlement Agreement (the "MSA"), which settled the litigation between them and four major tobacco manufacturers ("Original Participating Manufacturers" or "OPMs").

The MSA released OPMs from all tobacco-related legal claims initiated by the states. In return, each OPM agreed to make annual payments into a collective fund with each OPM's contribution determined primarily by multiplying an agreed sum that increased each year by each OPM's respective cigarette market share. The total of all payments was then to be allocated among the states based on a fixed formula, with Louisiana receiving approximately 2.26 percent of the total as its "allocable share." The MSA also placed various restrictions on each OPM. For example, it (1) banned political lobbying; (2) restricted trade association activities; (3) **[*372]** prevented legal challenges to various state tobacco laws; and, (4) prohibited some forms of advertising.

Other tobacco manufacturers were later given the opportunity to join **[**3]** the MSA. Those who did are referred to as Subsequent Participating Manufacturers ("SPMs"). SPMs that joined the MSA within ninety days were given special treatment (*i.e*., "grandfathered in"). These "exempt" SPMs do not pay a per cigarette amount on current sales until those sales exceed the level of their 1998 sales or 125% of their 1997 sales. The combination of the OPMs and SPMs are collectively referred to as PMs (*i.e*., participating manufactures). Tobacco manufacturers, like Xcaliber, that are not PMs are referred to as Non-Participating Manufacturers ("NPMs").

Standing alone, the MSA would put PMs at a cost disadvantage in comparison to NPMs since only the PMs are required to pay a per-cigarette amount under the terms of the MSA. As a result of the MSA, PMs must raise prices in order to stay profitable at a rate similar to the pre-MSA rate while satisfying their payments under the MSA. Thus, absent some mechanism to impose similar per-cigarette costs on NPMs, NPMs could sell at lower prices and potentially increase their market share.

To neutralize this effect, the MSA requires each state to enact legislation, which in Louisiana is codified at *LA. REV. STAT. §§ 13:5061*)5063. ***HN1***[] The **[**4]** statute requires every NPM selling cigarettes in Louisiana to either (1) become a PM under the MSA's terms, or (2) deposit money annually into an escrow account. *See* *§ 13:5063*. The amount to be deposited is calculated by multiplying the numbers of cigarettes sold in the state by a fixed charge listed in the amended statute that increases over time. *See* *§ 13:5063(C)(1)*. The amount is roughly the same as that paid by PMs, currently .025 cents per cigarette. The interest accrued on the escrowed funds is paid out to the NPM, and the principal is either paid to Louisiana to satisfy a future judgment entered against such NPM, or returned to the NPM if twenty-five years pass without such a judgment. *See* *§ 13:5063(C)(2)*.

Until 2003, the statute also contained the following provision:

> (b) To the extent that a [NPM] establishes that *the amount it was required to place into escrow in a particular year was greater than the state's allocable share of the total payments that such manufacturer would have been required to make in that year under the [Agreement]*. . . had it been a [PM], the excess shall be released from escrow and revert back to such [NPM].

§ 13:5063(C)(2)(b) (emphasis added) (the "Original **[**5]** Escrow Provision"). The Original Escrow Provision created a loophole. An NPM could recover funds that it placed into escrow in a particular state to the extent that those funds exceeded the amount the state would receive from that manufacturer as its allocable share, had the manufacturer been a PM. Thus, by concentrating its distribution to just a few states, an NPM could recover a greater percentage of the total money it placed into escrow because those states were allowed to retain only their relatively small percentage shares. [1]

[*373] In order to close this loophole, Louisiana, along with every settling state except Missouri, amended the Original Escrow Provision. It now reads:

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[1] If an NPM distributed its cigarettes nationally, and its distribution patterns approximated those of the national market, its payment obligations on its national sales would be apportioned 100 percent among the settling states, with the result that something close to 100 percent of its payments would, in the aggregate, be retained under the Original Escrow Provision. However, if an NPM were to concentrate its business to a single state, such as Louisiana, it would make 100 percent of its sales there and would be able to recoup the payments on all but roughly 2.26 percent, which is Louisiana's approximate allocable share. While the PMs would be required **[**6]** to continue 100 percent of their payments under the MSA, an NPM that focused on a single regional area could be virtually exempt from the payments, thereby gaining a competitive advantage.

> HN2[] To the extent that a [NPM] establishes that *the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the [MSA] payments* . . . that such [NPM] would have been required to make on account of such units sold had it been a [PM], the excess shall be released from escrow and revert back to such [NPM].

LA. REV. STAT. § 13:5063 (C)(2)(b) (emphasis added) (the "Allocable Share Revocation" or "ASR"). The ASR establishes a limit on the amount of escrow funds that will be released back to an NPM in a particular year. By removing the "state's allocable share" language, the ASR limits the release to the amount the NPM would have paid as a PM on the same amount of sales, rather than the State's allocable share of this amount. For example, if an NPM makes half of its total sales in Louisiana, under the amendment, **[**7]** the NPM will be entitled to a release only to the extent that its escrow deposit exceeds what its MSA payment would have been on the number of cigarettes represented by half of its total sales. Instead of basing the escrow release on the fiction of national pay-in followed by a release based on the State's allocable share, the release is tied directly to the number of cigarettes actually sold in the State.

Because Xcaliber distributes products in only a few states, it formerly utilized the loophole in the original statute, but can no longer do so post-amendment. According to Xcaliber, as a result of the ASR, the barriers against NPMs have been heightened dramatically, and the ability of an NPM to compete within a regional market has been destroyed.

Xcaliber filed suit against the Louisiana Attorney General, seeking declaratory and injunctive relief based on violations of the *First Amendment* and the Commerce, Equal Protection, and *Due Process Clauses*, and the corresponding clauses of the Louisiana Constitution. Xcaliber sought only to prevent the enforcement of the ASR. It did not seek to invalidate the entire MSA and its implementing legislation. The district court dismissed each claim **[**8]** under *Rule 12(b)(6)*. Xcaliber appealed, [2] and this court reversed and remanded. On remand, Xcaliber amended its complaint to add a claim that the ASR is in violation of, and preempted by, the Sherman Act. Both parties moved for summary judgment. The district court denied Xcaliber's motion and granted summary judgment in favor of the State. This appeal followed. [3]

[*374] II

HN3[] We review a district court's grant of summary judgment de novo. *Scottsdale Ins. Co. v. Knox Park Constr., Inc., 488 F.3d 680, 683 (5th Cir. 2007)*. We view all facts in the light most favorable to the non-movant, and affirm only when the evidence **[**9]** "show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*; *see also* *Coury v. Moss, 529 F.3d 579, 584 (5th Cir. 2008)*. A genuine issue of material fact exists if the summary judgment evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

III

A

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[2] Xcaliber did not challenge the dismissal of its *Commerce Clause* claim in the previous appeal. Therefore, that claim is no longer part of the suit.

[3] Xcaliber asserted no claim for direct relief under the *First Amendment* on summary judgment and does not advance a direct claim under the *First Amendment* on appeal. Also, Xcaliber's briefing on its Equal Protection and Due Process claims only discusses the United States Constitution. Accordingly, any separate arguments based on the Louisiana Constitution are waived. *See* *In re Texas Mortgage Servs., Inc., 761 F.2d 1068, 1073, 74 (5th Cir. 1985)*.

Xcaliber contends that the Sherman Act preempts the ASR. ***HN4***[] To determine whether a state statute is preempted by the Sherman Act, we apply a two-step analysis, as set forth by the Supreme Court in *Rice v. Norman Williams Co., 458 U.S. 654, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)*. [4] First, we inquire whether the state legislation "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id. at 661*. That is, we ask whether "the conduct contemplated by the statute is in all cases a *per se* violation." *Id*. Second, we consider whether the state statute is saved from preemption by the state action immunity doctrine. *See Id. at 662 n.9* (citing **[**10]** *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943))*.

The only change effected by the ASR is to remove the language that tied the escrow release to the State's allocable share of tobacco settlement payments under the MSA. The ASR does not change how much an NPM must pay per cigarette, nor **[*375]** does it allow other market participants to change **[**12]** that amount. It only changes how much of the total amount paid is released back to the NPM. *See LA. REV. STAT. § 13:5063 (C)(2)(b)*. [5]

HN6[] *Section 1* of the Sherman Act, which is the basis of Xcaliber's complaint, outlaws "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 1*. *Section 1* addresses joint action by private parties **[**13]** that restrains trade. *See Parker, 317 U.S. at 351*. While the Act is not specific as to which types of conduct it prohibits, courts have found illegal a broad range of actions including monopolization, price fixing, territorial divisions, output restrictions, group boycotts, and refusals to deal. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*; *White Motor Co. v. United States, 372 U.S. 253, 260, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*; *United States v. Griffith, 334 U.S. 100, 106, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)*; *Associated Press v. United States, 326 U.S. 1, 12)13, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. These activities are considered pernicious to competition and, with the exception of monopolization, are generally considered per se violations of the antitrust laws.

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[4] Xcaliber argues that *Rice* is not the correct standard and cites to other preemption cases that supposedly show that the proper inquiry is much broader. We find Xcaliber's complaints about *Rice* to be misguided. First, the preemption cases Xcaliber cites do not involve the Sherman Act. ***HN5***[] Because states are permitted to enact legislation that impacts competition without necessarily running afoul of the Sherman Act, see *Community Communications Co. v. City of Boulder, 455 U.S. 40, 64, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*, the preemption analysis under the Sherman Act is different than the preemption analysis under other statutes. Second, even if *Rice* applies only to facial challenges, the point does not help Xcaliber because its complaint presents a facial challenge. Rather than seeking a private remedy against private parties or an injunction against enforcement of the statute in some specific, limited situation, Xcaliber seeks a declaratory judgment that the ASR is preempted by the Sherman Act and an injunction against the enforcement of the ASR in all situations. That is, Xcaliber claims the ASR is unconstitutional under the *Supremacy Clause* in its every application. Accordingly, **[**11]** we apply the *Rice* per se analysis rather than rule of reason analysis. *See Rice, 458 U.S. at 661*. We also note that the other courts that have considered a claim that the MSA or its related legislation is preempted by the Sherman Act have applied *Rice. See Grand River Enters. Six Nations, Ltd. v. Beebe, 574 F.3d 929, 936 (8th Cir. 2009)*; *KT & G Corp. v. Att'y Gen. of State of Okla., 535 F.3d 1114, 1126 (10th Cir. 2008)*; *Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007)*, *cert. denied*, ***553 U.S. 1031, 128 S. Ct. 2427, 171 L. Ed. 2d 229 (2008)***; *S & M Brands, Inc. v. Summers, 393 F. Supp. 2d 604, 628 (M.D. Tenn. 2005)*, *aff'd*, *228 Fed. Appx. 560*; *Tritent Int'l Corp. v. Ky., 467 F.3d 547, 554 (6th Cir. 2006)*; *Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 222*, *reh'g denied*, *363 F.3d 149 (2d Cir. 2004)*, *on remand, Freedom Holdings, Inc. v. Cuomo, 592 F. Supp. 2d 684, 696 (S.D.N.Y. 2009)*, *appeal docketed*, No. 09-0547 (2d Cir. Feb. 10, 2009).

[5] We note that Xcaliber's Sherman Act argument is undermined by an obvious incongruity between its allegations and the relief it seeks. Xcaliber specifically limits its complaint to the ASR. We have difficulty understanding why an agreement implemented pursuant to the MSA, but inadvertently advantageous to Xcaliber, would be acceptable while a modification of that same scheme that closes a loophole would violate ***antitrust law*** and be preempted. It would seem that Xcaliber's logic would require us to invalidate the entire statutory structure implementing the MSA rather than just the ASR. A related Fifth Circuit case for which oral argument was recently held presents a challenge to the MSA itself. *See S&M Brands Inc. v. James Caldwell*, No. 09-30985.

Given the traditional scope of antitrust violations and the limited effect of the ASR, we cannot say that the ASR "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases." On its face, the ASR does not force or allow private parties to collude, set prices, divide markets, or in any other manner violate ***antitrust law***. The ASR simply alters the amount of money to be refunded **[**14]** to NPMs by changing how much of the NPMs' annual escrow payments are released. We agree with the Tenth Circuit, see *KT&G, 535 F.3d at 1128*, that nothing in the text of the ASR removes from tobacco manufacturers the ability to unilaterally set their own prices for products or determine their output. *See also* *Grand River, 574 F.3d at 938*; *Sanders, 504 F.3d at 911*; *Tritent, 467 F.3d at 557*. Accordingly, we have little trouble concluding that the ASR does not "mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases." *Rice, 458 U.S. at 661*.

Likewise, we cannot say that the ASR "places irresistible pressure on a private party to violate the ***antitrust law*** in order to comply with the statute." *Id*. Since the ASR does not affect PMs, the only parties potentially facing "irresistible pressure" from the ASR are NPMs. Although the ASR forces NPMs to charge a higher price for their products to maintain the same level of profitability, it does not pressure them to conspire together to set a specific price, to carve up markets, or otherwise to violate ***antitrust law***. *See* *Sanders, 504 F.3d at 911*. Neither the **[*376]** plain language of the Sherman Act nor the courts' **[**15]** interpretation of it necessarily equate charging a higher price with violating ***antitrust law***. Moreover, we do not understand Xcaliber to argue that it is somehow pressured into violating the antitrust laws. [6] Since the only parties affected by the ASR are not violating the antitrust laws))indeed, even according to Xcaliber, NPMs are the *victims* of other parties' violations of the antitrust laws rather than the violators))it follows that the ASR does not irresistibly pressure private parties to violate the antitrust laws in order to comply with the statute.

B

Xcaliber also contends that the ASR violates the Sherman Act under a hybrid restraint analysis. [7] ***HN7***[] A hybrid violation arises when "what appears to be a state[-]. . . administered price stabilization scheme is really a private price-fixing conspiracy, concealed under a 'gauzy cloak of state involvement.'" *Fisher v. City of Berkeley, Cal., 475 U.S. 260, 269, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)* (citing *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 106, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980))*. **[**16]** Although governmental intrusions into the market are generally acceptable, see *id. at 264*, "[n]ot all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of *§ 1*." *Id. at 267*. When the government's action grants "private actors . . . a degree of private regulatory power," it is a "nonmarket mechanism merely enforc[ing] private marketing decisions" and thus not immunized from the antitrust laws. *Id. at 268*.

The cases that have found violations of the antitrust laws based on hybrid restraints have dealt with situations in which the government gave regulatory authority to private parties. As the Ninth Circuit has noted, ***HN8***[] the hybrid restraint cases "hinged on a state's decision to let producers dictate market conditions to others))for example, by 'posting' prices that then became legally binding on buyers and other producers." *Sanders, 504 F.3d at 918* (referencing *Fisher, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206*; *Midcal, 445 U.S. 97, 100 S. Ct. 937, 63 L.*

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[6] Rather, as discussed *infra*, Xcaliber alleges that the ASR effectively allows the PMs to conduct their business as though they were part of an output cartel, thereby destroying competition and forcing NPMs from the market.

[7] The case law is not entirely clear as to whether the hybrid restraint analysis is a separate means of satisfying *Rice's* per se violation requirement or another means of addressing *Parker* state-action immunity under the second prong of *Rice. Compare* *Fisher v. City of Berkeley, Cal., 475 U.S. 260, 267-70, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986)* (concluding that a housing ordinance was not a hybrid restraint and therefore not addressing whether the ordinance would be exempt from antitrust scrutiny under the *Parker* state-action doctrine), *and* *KT&G, 535 F.3d at 1133* (declining to address the state-action doctrine after having found no hybrid restraint in a case essentially identical to this case), *with* *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 103-06, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* **[**17]** (addressing concepts that later courts have treated as elements of the hybrid restraint analysis as part of discussion of *Parker* state action immunity, after having found a per se violation), *and* *Sanders, 504 F.3d at 911* (finding no per se violation under *Rice* but addressing *Parker* state-action immunity through a discussion of cases generally associated with the hybrid restraint analysis).

Ed. 2d 233; 324 Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035, 60 Ohio Law Abs. 81 (1951)). Here, since the ASR establishes a **[*377]** state regulatory scheme that does not require or allow any input from private parties, it cannot be classified as a hybrid restraint. *See* Grand River, 574 F.3d at 939; **[**18]** KT & G, 535 F.3d at 1131; Sanders, 504 F.3d at 919.

C

Although we could conceivably end our preemption analysis at this point, see Rice, 458 U.S. at 662 n.9; KT&G, 535 F.3d at 1133, we nonetheless address Xcaliber's state-action immunity argument because neither the first prong of *Rice* nor the hybrid restraint analysis fully captures Xcaliber's argument. Xcaliber alleges that the ASR, together with the MSA and statutes implementing it, enables and implements an output cartel whose purpose and effect is to protect PM's market shares and drive NPMs out of business, all resulting in raising prices to supra-competitive levels. In effect, Xcaliber alleges that the OPMs are using Louisiana to impose a private anti-competitive conspiracy. According to Xcaliber, Louisiana acted entirely at the behest of the OPMs, which exercised control over Louisiana via the threat of reduced payments under the MSA if Louisiana refused to enact the ASR.

Absent some provision for imposing similar costs on NPMs, the MSA would put PMs at a competitive disadvantage since, under the MSA, PMs are required to make per-cigarette payments, which increase their cost of doing business. Without the burden of these additional **[**19]** costs, NPMs would, all things being equal, be able to charge lower prices and increase their market share. With the express purpose of counteracting this effect, see LA. REV. STAT. § 13:5061(6), [8] Louisiana passed statutes that effectively require the NPMs either to raise their prices to cover their escrow payment obligations--which has the effect of prohibiting the NPMs from undercutting the PMs' prices--or to abandon the Louisiana market.

Thus, we have no doubt that Louisiana purposefully sought to increase the costs **[**20]** of NPMs to a level comparable to those faced by PMs. [9] The Original Escrow Statute failed to accomplish that purpose, and Louisiana passed the ASR to rectify the problem. However, the critical issue is not whether Louisiana sought to impair the competitiveness of the NPMs, but whether Louisiana runs afoul of federal ***antitrust law*** by doing so.

HN10[] A state statute is not preempted merely "because the state scheme might have an anticompetitive effect." Community ***[*378]*** Communications Co. v. Boulder, 455 U.S. 40, 64, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982); Rice, 458 U.S. at 659; KT & G, 535 F.3d at 1129. If any conflict between a state law and the Sherman Act meant that the state law were preempted, "the States' power to **[**21]** engage in economic regulation would be effectively destroyed." Exxon Corp. v. Governor of Md., 437 U.S. 117, 133, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978). This cannot be the case, for as the Court has recognized, "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims." Fisher, 475 U.S. at 264. State police powers and regulatory

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[8] LA. REV. STAT. § 13:5061(6) provides:

> ***HN9***[] It would be contrary to the policy of this state if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the state to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.

[9] Since the ASR explicitly aimed, at least in part, at counteracting the competitive advantage that NPMs would enjoy absent some mechanism for enforcing per-cigarette costs on NPMs, the analysis does not turn on whether Xcaliber presented sufficient evidence of anticompetitive effect to survive summary judgment. Indeed, for purposes of our antitrust analysis, we assume that Xcaliber has demonstrated that the ASR increases the costs of NPMs, at least in part, in order to undermine their competitive advantage over PMs.

authority extend legitimately to a range of anticompetitive schemes. [10] The ASR, like these other regulations, alters the competitive environment for market participants.

As the Court noted in *Parker*, ***HN11***[] "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." *317 U.S. at 351*. The Court highlighted that the Sherman Act applies to "persons" rather than states and aims "to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations." *Id*. However, the Court also said that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action **[**22]** is lawful." *Id*. (citations omitted).

Xcaliber alleges that the entire regulatory structure created by the MSA, its implementing legislation, and the ASR represents a private conspiracy enacted by the legislature at the behest of the OPMs. That is, the legislature, by passing the legislation, attempted to authorize a private conspiracy that would clearly violate the antitrust laws but for the State's involvement. [11]

[*379] As evidence that the Louisiana legislature acted at the OPMs' behest in passing the ASR, Xcaliber points to the timing of the legislation, which was passed soon after it began appearing as a talking point in the corporate literature of the OPMs. *See* *Freedom Holdings, Inc. v. Spitzer, 447 F. Supp. 2d 230, 259-60 (S.D.N.Y. 2004)*. **[**25]** Xcaliber also points out that Louisiana would risk losing substantial amounts of money due under the MSA if it refused to pass the ASR. Xcaliber quotes commentary from the Louisiana House floor that the ASR had to be passed exactly as written. According to Xcaliber, this evidence demonstrates that the ASR is plainly not a unilateral, sovereign act, but rather was passed at the insistence of OPMs in order to continue their control of the market.

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[10] Obvious examples include public utilities, zoning ordinances, and enterprise zones.

[11] Although Xcaliber brought suit only against the State, its antitrust theory essentially requires us to find that Louisiana is authorizing conduct that would be illegal as a private conspiracy. By asserting a theory that depends on private violations in a suit against the State, Xcaliber has muddled the various lines of antitrust authority from the Supreme Court. As a result of this confusion, Xcaliber has placed undue emphasis on the State's failure to address the two-prong test established in *Midcal*. As explained in *Sanders*:

> A series of Supreme Court cases holds that ***HN12***[] any action in restraint of trade is only immune [on state-action grounds] if it satisfies a two-part test: The anticompetitive policy not only must be (1) "clearly articulated and affirmatively expressed as **[**23]** state policy," but also must be (2) "actively supervised by the state itself." *Midcal, 445 U.S. at 105* (quoting *City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (plurality opinion)) (internal quotation marks omitted); *see also* *324 Liquor, 479 U.S. at 343-44*; *Patrick v. Burget, 486 U.S. 94, 100, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*; *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. Other Supreme Court cases, however, explicitly hold that a state's own acts in the antitrust area are always immune; these cases suggest that the two-part "*Midcal* test" is only needed to decide whether private conduct pursuant to a state statute gets *Parker* immunity. In other words, a state need not show it "actively supervises" private parties, as long as the state itself, acting as sovereign, created the restraint of trade. *See* *Hoover v. Ronwin, 466 U.S. 558, 568-69, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)*; *City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 377-79, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*.

504 F.3d at 915)16 (citations altered); *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (declining to impose active supervision requirement when defendant was a municipality); *see also* *Earles v. State Bd. of Certified Pub. Accountants of La., 139 F.3d 1033, 1040-42 (5th Cir. 1998)* **[**24]** (recognizing that different state-action test applies based on the status of the defendant); *Indep. Taxicab Drivers' Employees v. Greater Houston Transp., 760 F.2d 607, 610 n.5 (5th Cir. 1985)* (same). We find the Ninth Circuit's explanation of why *Hoover* rather than *Midcal* should apply to cases challenging a state's action in passing the MSA and its implementing legislation to be persuasive. *See* *Sanders, 504 F.3d at 917*)18; *see also* *Grand River, 574 F.3d at 939*)41. Thus, Xcaliber's arguments that the State is not entitled to the protection of the state-action doctrine because it has failed to satisfy both of the *Midcal* prongs are unavailing. ***HN13***[] The State is immune from antitrust liability unless the passage of the ASR was an attempt to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker, 317 U.S. at 351*.

Xcaliber's evidence, however, amounts to little more than speculation. Louisiana has articulated its reasons for entering into the MSA and how the ASR advances its goals. *See* *LA. REV. STAT. § 13:5061*. The actual effect of the statute seems to bear out the legislature's belief that the ASR would further its expressly stated goals. The MSA has brought about a substantial reduction in cigarette consumption and substantial reimbursements to the states for the public costs of cigarette consumption. By implementing the ASR, Louisiana has ensured these beneficial achievements are not corrupted by allowing NPMs to sell cigarettes at prices unburdened by any payment obligation, and potentially to dodge liability by closing up shop and selling elsewhere. **[**26]** Louisiana has articulated reasonable goals, linked to its public health needs, that support its decision to pass the ASR.

Although we recognize that Louisiana was under considerable financial pressure to pass the ASR, we are extremely hesitant to embrace an argument that depends on our finding that the tobacco lobby captured the Louisiana legislature. Although PMs may have lobbied in favor of passing the ASR, it does not follow that the Louisiana legislature acted solely at their behest or that lobbying itself can be the basis of a Sherman Act violation. Indeed, in addressing private parties' violations of the Sherman Act, the Court has noted that ***HN14***[] "[n]o violation can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern R.R. Presidents Conference v. Noerr Motor-Freight, Inc., 365 U.S. 127, 135, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. The Court continued:

> [W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question of whether a law of that kind should pass, or if passed be enforced, is the responsibility **[**27]** of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

[*380] *Id. at 136* (internal citations omitted). Although we recognize that the *Noerr-Pennington* doctrine, see *Noerr, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*, is not entirely applicable to the instant case, we nonetheless find that it supports our reasoning. It would be highly incongruous for a private party to be immune from antitrust liability predicated on its attempts to influence the legislature, but for the legislature to run afoul of ***antitrust law*** when it passes a statute after lobbying by private parties. *See* *Hoover, 446 U.S. at 579-80* ("[W]here the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action.").

In conclusion, we hold that the district court correctly granted summary judgment in favor of the State on Xcaliber's Sherman Act claim.

IV

Xcaliber contends that the ASR violates the *Equal Protection Clause*. According to Xcaliber, we should review the statute under strict scrutiny because the ASR coerces **[**28]** Xcaliber into relinquishing its *First Amendment* rights to freedom of speech, association, and petition. [12] The basic argument is that the ASR makes doing business as an NPM so unattractive that it compels NPMs to join the MSA, thereby waiving their *First Amendment* rights. Xcaliber also argues that even if strict scrutiny does not apply, the ASR nonetheless violates the *Equal Protection Clause* under rational-basis review.

Xcaliber contends that it presented the district court with sufficient evidence of compulsion to join the MSA to be granted summary judgment, or, at the least, to preclude summary judgment for the State. The evidence falls into two broad categories: price and non-price. Regarding price, Xcaliber claims that it demonstrated that NPMs pay a higher cost per cigarette than PMs generally, and a much higher cost than the exempt SPMs. Xcaliber also contends that PMs pay less than the amounts they theoretically owe under the MSA because they are able to

[12] The State has not disputed Xcaliber's claim that joining the MSA would burden Xcaliber's *First Amendment* rights. We assume without deciding that joining the MSA would in fact burden Xcaliber's *First Amendment* rights.

withhold **[**29]** payments based on disputes over adjustments built into the MSA. Regarding non-price coercion, Xcaliber contends that it demonstrated: the large scale exclusion of NPMs from retail outlets based on retailers' and distributors' unfounded fear of potential liability; the greater administrative costs associated with escrow compliance for NPMs than for PMs complying with the MSA; the inability of NPMs to dispute and withhold payments, which is a routine practice of PMs; and the harm flowing from Louisiana's policy of holding escrow deposits in accounts generating extremely low interest rates.

Regarding price, according to the plain language of the ASR, Xcaliber is entitled to a refund for any amount it deposits greater than the payment it would have made as a PM. *See* *LA. REV. STAT. § 13:5063 (C)(2)(b)*. If Xcaliber's allegations are true and NPMs are indeed paying more, Louisiana has provided Xcaliber with a remedy under the ASR. Nevertheless, Xcaliber has chosen not to pursue that remedy and instead asked us to invalidate the ASR on constitutional grounds. Under these circumstances, a federal court, properly mindful of fundamental **[*381]** principles of state sovereignty and constitutional avoidance, **[**30]** must be extremely hesitant to strike down a state statute on constitutional grounds when such a drastic remedy may not be necessary. *See* *Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)* (***HN15***[] "[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.").

Xcaliber's allegations of non-price coercion are undermined by the limited relief it seeks. Because Xcaliber seeks only to invalidate the ASR and not the entire MSA statutory structure, the relevant comparison is not simply between NPMs under the ASR and PMs. We also must consider how granting the relief sought would remedy the harms of which Xcaliber complains. That is, we must also compare NPMs under the ASR with NPMs under the Original Escrow Statute. Having done so, it is apparent that none of the non-price coercion that Xcaliber alleges would be remedied by a declaratory judgment that the ASR is unconstitutional. Even without the ASR, NPMs would still face exclusion from retail outlets, bear greater administrative costs, and be unable to dispute payments. Similarly, Louisiana would still hold the escrow **[**31]** deposits in accounts generating the same interest rates. [13] Because the non-price coercion of which Xcaliber complains will exist whether or not we declare the ASR unconstitutional, we do not consider it an adequate reason for subjecting the ASR to heightened constitutional scrutiny.

HN16[] A statute is only subject to heightened scrutiny on an Equal Protection challenge if it "proceeds along suspect lines [or] infringes fundamental constitutional rights." *See* *FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)*. Since we are not persuaded by Xcaliber's arguments implicating the *First Amendment*, Xcaliber's Equal Protection claim is subject to rational-basis review. *Id*. ***HN17***[] Under rational-basis review, the ASR "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id*.

We agree with the other circuits who have addressed this issue, see *Grand River, 574 F.3d at 944*)45; *KT&G, 535 F.3d at 1137*)40, **[**32]** and hold that the ASR does not violate the *Equal Protection Clause* under rational-basis review. Louisiana has articulated several reasons for passing the MSA legislation, see *LA. REV. STAT. § 13:5061(1)-(5)*, and explained why the ASR is important to furthering the goals of the MSA. *See id*. *§ 13:5061(6)*. This explanation is easily sufficient to uphold the ASR under rational-basis review. *See* *KT&G, 535 F.3d at 1140* (citing numerous cases that have upheld the MSA and its related statutes against Equal Protection claims).

V

Xcaliber contends that the ASR violates the *Due Process Clause*. Relying principally on *Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)*, Xcaliber argues that a deprivation based on a future, hypothetical finding of judicial liability is an adjudicative deprivation that requires pre-deprivation process directed at determining

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[13] This reasoning also undermines Xcaliber's complaints about the PMs' ability to withhold disputed payments and the treatment of the exempt PMs, which exist regardless of whether or not the ASR is in effect.

whether the liability actually exists. According to Xcaliber, since the **[*382]** ASR does not provide any pre-deprivation process, it violates the *Due Process Clause*.

This issue turns on whether the state action prompting the escrow payments is properly characterized as legislative or adjudicative. ***HN18***[] Generally speaking, legislative actions are non-individualized determinations **[**33]** that affect a wider class of individuals, whereas adjudicative actions involve individualized assessments that affect a smaller number of people in a more exceptional manner. *Compare Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372 (1915)*, *with Londoner v. Denver, 210 U.S. 373, 385, 28 S. Ct. 708, 52 L. Ed. 1103 (1908)*; *see also Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070, 1074 (5th Cir. 1989)*; *United States v. LULAC, 793 F.2d 636, 648 (5th Cir. 1986)*.

In *Bell*, the Court evaluated a Georgia statute that suspended an uninsured motorist's vehicle registration and driver's license when that motorist was involved in an accident, unless the motorist first posted security to cover the amount of damages claimed by the aggrieved parties in the accident reports. The Court held that the statute deprived the uninsured motorist of property without due process. *See Bell, 402 U.S. at 542*. The Court made clear, however, that "[i]f the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the *Fourteenth Amendment*." *Id. at 539*.

According to the State, the ASR does not **[**34]** offend *Bell* because it imposes a security-posting requirement on all cigarette manufacturers that have not settled their potential liability to the State. Xcaliber argues that the "generally applicable" exception does not apply because the escrow provisions are limited to NPMs. Although Xcaliber is correct that the ASR applies only to NPMs, it does not follow that the statute is not generally applicable. Since the PMs have agreed to make payments in exchange for a release from liability, the NPMs are the only potentially liable parties. The ASR generally applies to all NPMs, the only manufacturers that may in the future be found liable to the State for the damages inflicted by their products. *See KT&G, 535 F.3d at 1141-42*.

The problem in *Bell* was not that liability was generally involved, but that the payments were tied to specific accidents, and therefore to actual liability. Under the statute at issue in *Bell*, uninsured motorists were required to post security *after* they had been in an accident. *402 U.S. at 535*. Because the posting of security essentially turned on an assessment of the individual's fault in causing the accident, liability was an important factor in the deprivation. **[**35]** *See Logan v. Zimmerman, 455 U.S. 422, 433, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982)* (quoting *Bell, 402 U.S. at 541*). By contrast, the ASR requires NPMs to create an escrow account as a precondition to selling cigarettes in Louisiana. Although the payout of escrowed funds to satisfy a judgment will ultimately depend on an individualized assessment of liability, the initial depositing of funds does not. Put differently, "the escrow reserves are not specific to any particular litigation; rather, they are legislative preconditions for the privilege of engaging in future cigarette sales in the individual states." *Grand River, 425 F.3d at 174*.

Since we conclude that Louisiana's decision to require NPMs to make escrow deposits is legislative in character, no further process is required, see *Jackson **[*383]** Court Condominiums, 874 F.2d at 1074*, and Xcaliber's argument fails.

VI

For the foregoing reasons, we AFFIRM the district court's grant of summary judgment in favor of the State.

United States v. Daily Gazette Co.

United States District Court for the Southern District of West Virginia, Charleston Division

July 19, 2010, Decided

Civil Action No. 2:07-0329

Reporter
2010 U.S. Dist. LEXIS 85553 *; 2010-2 Trade Cas. (CCH) P77,105; 2010 WL 3290289

UNITED STATES OF AMERICA, Plaintiff, v. DAILY GAZETTE COMPANY, and MEDIANEWS GROUP, INC., Defendants.

Prior History: United States v. Daily Gazette Co., 2010 U.S. Dist. LEXIS 44583 (S.D. W. Va., May 6, 2010)

Core Terms

Partnership, limited partner, general partner, joint venture, limited partnership, Newspapers, Mail, distributions, editorial, Holder, allocated, parties, Affiliate, provisions, rights, terms, managing board, arbitration, termination, fiscal year, Notice, appoint, purposes, time to time, circulation, partnership interest, fair market value, obligations, Restated, print

Counsel: **[*1]** For United States of America, Plaintiff: Bennett J. Matelson, Bernard M. Hollander, LEAD ATTORNEYS, PRO HAC VICE, U. S. DEPARTMENT OF JUSTICE, Antitrust Division, Litigation III Section, Washington, DC; David L. Meyer, J. Robert Kramer, Jennifer A. Wamsley, John R. Read, Mark A. Merva, Matthew J. Bester, William H. Jones, II, LEAD ATTORNEYS, U. S. DEPARTMENT OF JUSTICE, Antitrust Division, Litigation III Section, Washington, DC; Stephen M. Horn, LEAD ATTORNEY, Charles T. Miller, U. S. ATTORNEY'S OFFICE, Charleston, WV; Thomas O. Barnett, LEAD ATTORNEY, U. S. DEPARTMENT OF JUSTICE, Antitrust Division, Washington, DC.

For Daily Gazette Company, and, Defendant: Ambika J. Biggs, LEAD ATTORNEY, PRO HAC VICE, BAKER & HOSTETLER, Washington, DC; Benjamin L. Bailey, Brian A. Glasser, LEAD ATTORNEYS, BAILEY & GLASSER, Charleston, WV; Lee H. Simowitz, Ronald F. Wick, LEAD ATTORNEYS, BAKER & HOSTETLER, Washington, DC.

For MediaNews Group, Inc., Defendant: Alan L. Marx, Steven C. Douse, LEAD ATTORNEYS, KING & BALLOW, Nashville, TN; John R. Hoblitzell, Michael T. Chaney, LEAD ATTORNEYS, KAY CASTO & CHANEY, Charleston, WV.

For Newspaper Association of America, Amicus: David A. Barnette, LEAD ATTORNEY, **[*2]** JACKSON KELLY, Charleston, WV; Gary L. Halling, Thomas D. Nevins, LEAD ATTORNEYS, SHEPPARD MULLIN RICHTER & HAMPTON, San Francisco, CA.

For Newspaper Guild-CWA, Amicus: Donald I. Baker, W. Todd Miller, LEAD ATTORNEYS, BAKER & MILLER, Washington, DC.

Judges: John T. Copenhaver, Jr., United States District Judge.

Opinion by: John T. Copenhaver, Jr.

Opinion

FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on May 22, 2007, the United States and Defendants, Daily Gazette Company and MediaNews Group, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt adoption of certain procedures and prohibitions by Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to agree to certain procedures and prohibitions for the purpose of remedying the **[*3]** loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the actions required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I.Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under *Section 7* of the Clayton Act, as amended (*15 U.S.C. § 18*), and Sections 1 and 2 of the Sherman Act, as amended (*15 U.S.C. §§ 1* & *2*).

II.Definitions

As used in this Final Judgment:

A. "*Charleston Daily Mail*" means the Daily Newspaper of that name distributed in the Charleston, West Virginia Area.

B. "*Charleston Gazette*" means the Daily Newspaper of that name distributed in the Charleston, West Virginia Area.

C. "Charleston Newspapers" means the unincorporated joint venture operating under the laws of West Virginia, with **[*4]** its principal place of business in Charleston, West Virginia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their shareholders, directors, officers, managers, agents, and employees.

D. "Charleston Newspapers Holdings, L.P." means the Delaware Limited Partnership formed on May 7, 2004.

E. "Charleston, West Virginia Area" means Kanawha and Putnam Counties in West Virginia.

F. "Daily Newspaper" means a print publication which is published no fewer than five days per week and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

G. "Editorial Content" means the news, feature, and opinion content of, and the format, dress, makeup, and design of, a Daily Newspaper.

H. "Failing Firm" means a firm that has satisfied all of the conditions stated in the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines as applied by the Department of Justice and/or federal courts to newspapers published in a joint operating agreement under the Newspaper Preservation Act, *15 U.S.C. §§ 1801-1804*.

I. "Final Judgment" includes the following agreements attached **[*5]** as Exhibit A: Amended and Restated Limited Partnership Agreement for Charleston Newspapers Holdings L.P; Amended and Restated Operating Agreement of Daily Gazette Holding Company, LLC; Second Amended and Restated Joint Operating Agreement; the Put/Call Agreement; and the Charleston Newspapers Holdings L.P. Warrant to Purchase Class B Limited Partnership Units Initially Constituting a 20% Percentage Interest.

J. "Gazette Company" means defendant Daily Gazette Company, a privately-held corporation organized and existing under the laws of the State of West Virginia, with its principal place of business in Charleston, West Virginia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their shareholders, directors, officers, managers, agents, and employees. Without limiting the foregoing, Gazette Company shall include Charleston Newspapers.

K. "Intellectual Property of the *Charleston Daily Mail*" includes the masthead, trademarks, copyrights, trade names, service names and service marks of the *Charleston Daily Mail*; its subscriber lists and advertiser lists; print and electronic archives; associated web sites and URLs (including **[*6]** "dailymail.com"); and all legal rights associated with these assets.

L. "MediaNews Group" means defendant MediaNews Group, Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Denver, Colorado, its successors and assigns, and their shareholders, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees. Without limiting the foregoing, MediaNews Group shall include Charleston Publishing Company.

M. "Person" means any natural person, corporate entity, partnership, joint venture, association, government entity, trust, or other business or legal entity, whether private or governmental.

N. "Publication" means all activities associated with the business of offering a Daily Newspaper to the public as a commercial endeavor, including but not limited to, editing, writing, printing, circulating, operating, marketing, and distributing such Daily Newspapers and selling advertisements and promotions therein.

O. "Relating to" or "Relates to" means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, **[*7]** or stating.

P. "United States" means the Department of Justice, Antitrust Division.

Q. The terms "and" and "or" have both conjunctive and disjunctive meanings.

III. **Applicability**

This Final Judgment applies to Gazette Company and MediaNews Group, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. **Required And Prohibited Conduct**

A. (1) Within 5 business days after the entry of this Final Judgment, Gazette Company and MediaNews Group shall enter into, and abide by the terms of, the Amended and Restated Limited Partnership Agreement for Charleston Newspapers Holdings L.P.; the Amended and Restated Operating Agreement of Daily Gazette Holding Company, LLC; the Second Amended and Restated Joint Operating Agreement; the Put/Call Agreement; and the Charleston Newspapers Holdings L.P. Warrant to Purchase Class B Limited Partnership Units Initially Constituting a 20% Percentage Interest, which are incorporated into this Final Judgment and attached hereto as Exhibit A. Gazette Company and MediaNews Group shall operate Charleston Newspapers, Charleston Newspapers Holdings L.P., **[*8]** the *Charleston Gazette* and the *Charleston Daily Mail* in accordance with the terms of the agreements in Exhibit A. No agreement in Exhibit A may be modified, amended, superseded or terminated without the prior written approval of the United States for the term of the Final Judgment. Upon entering into the contracts in Exhibit A, any existing agreements between Gazette Company and MediaNews Group relating to the Publication of any Daily Newspaper in Charleston, West Virginia, other than those contained in Exhibit A, shall be void and shall not be enforced thereafter. Except as expressly authorized by the agreements in Exhibit A, Gazette Company and MediaNews Group shall not directly or indirectly enter into any agreement for the term of this Final Judgment that relates to the Publication of any Daily Newspaper in Charleston, West Virginia, other than agreements entered into with third parties in the ordinary course of business, without the prior written consent of the United States.

(2) Defendants shall not, without the prior written consent of the United States, pledge or otherwise offer as security or collateral, the assets comprising the Intellectual Property of the *Charleston Daily* ***[*9]*** *Mail*, in whole or in part, for credit or other consideration, to a greater extent than such assets were pledged or offered as security or collateral as of December 11, 2009.

B. The *Charleston Daily Mail* shall continue to be published as a Daily Newspaper. The publication of the *Charleston Daily Mail* as a Daily Newspaper shall not be terminated unless it is a Failing Firm and the United States has given its prior written approval, which approval shall not be unreasonably withheld. Prior to receiving written approval from the United States to terminate publication of the *Charleston Daily Mail* as a Daily Newspaper, Gazette Company and MediaNews Group may not establish a termination date for the *Charleston Daily Mail*. The United States shall, within 90 days after Defendants have substantially complied with requests for information by the United States pursuant to Section VI of this Final Judgment (unless such deadline is altered by mutual agreement of the parties), provide notice to the Defendants stating whether Defendants have established to the satisfaction of the United States that the *Charleston Daily Mail* is a Failing Firm. Disputes regarding the application of the provisions of this **[*10]** Section IV(B) may be submitted to the Court for resolution.

C. If during the term of this Final Judgment the *Charleston Daily Mail* shall cease publication as a Daily Newspaper, or the operating agreement between Defendants governing Charleston Newspapers is dissolved or terminated, or Charleston Newspapers Holdings, L.P. is dissolved or terminated (collectively referred to as "Termination Events"), ownership of the Intellectual Property of the *Charleston Daily Mail* shall, after the prior satisfaction of the claims of all creditors of Charleston Newspapers Holdings, L.P. in accordance with the provisions of Section 7.3 of the Amended and Restated Limited Partnership Agreement for Charleston Newspapers Holdings, L.P., immediately be transferred to MediaNews Group at no cost. Within ninety days prior to the occurrence of any of the Termination Events, Gazette Company shall hire, subject to the approval of the United States, an appraiser experienced in the newspaper industry to perform an assessment of the fair market value, separately, of each asset comprising the Intellectual Property of the *Charleston Daily Mail*. To the extent the valuations determine that any assets comprising the Intellectual **[*11]** Property of the *Charleston Daily Mail* may be freely disposed of by Gazette Company under the terms of Section 7.8 of the United Bank Loan Agreement or the equivalent provision of any future credit agreement, Gazette Company shall transfer those assets to MediaNews Group (or its assignee) at no cost. In the event Gazette Company is unable to transfer immediately all or some of the assets comprising the Intellectual Property of the *Charleston Daily Mail* due to any security interest or lien held on those assets by any creditor, Gazette Company shall use its good faith efforts to (1) persuade any such creditor to release the security interest or lien on those assets; (2) assist any third party seeking such a release; or (3) transfer the assets as soon as possible in the next fiscal year (to the extent permissible under the United Bank Loan Agreement or any future credit agreement). Any assets that are released by the creditors shall be transferred to MediaNews Group (or its assignee) at no cost. In the event that the *Charleston Daily Mail*'s print and electronic archives are not transferred to MediaNews Group, Charleston Newspapers will grant to MediaNews Group (or its assignee) a royalty-free **[*12]** license to use the *Charleston Daily Mail*'s print and electronic archives for the sole purpose of continuing to publish the *Charleston Daily Mail* for so long as MediaNews Group (or its assignee) publishes the *Charleston Daily*

Mail as a Daily Newspaper in Charleston. Except as expressly authorized by this Final Judgment, Gazette Company shall not directly or indirectly transfer to any other Person the ownership of some or all of the Intellectual Property of the *Charleston Daily Mail* without the prior written consent of the United States. If during the term of this Final Judgment the ownership of some or all of the Intellectual Property of the *Charleston Daily Mail* is transferred from Gazette Company to any other Person, Gazette Company shall not reacquire any part of the Intellectual Property of the *Charleston Daily Mail* during the term of this Final Judgment. Transfer of title to the Intellectual Property of the *Charleston Daily Mail* by Gazette Company shall be made free and clear of any liens or other encumbrances to the free transfer of title by the acquirer (including but not limited to rights of first refusal).

D. The Editorial Content of the *Charleston Daily Mail* shall be determined **[*13]** solely by MediaNews Group and the staff of the *Charleston Daily Mail*. The Editorial Content of the *Charleston Gazette* shall be determined solely by Gazette Company and the staff of the *Charleston Gazette*. Gazette Company shall not, directly or indirectly, take any action to influence the Editorial Content of the *Charleston Daily Mail*, nor shall MediaNews Group, directly or indirectly, take any action to influence the Editorial Content of the *Charleston Gazette*. Gazette Company and MediaNews Group shall not enter into any agreement limiting the separate and independent determination of the Editorial Content of their respective Daily Newspapers.

E. Gazette Company and MediaNews Group shall not take any action with the intent to cause the *Charleston Daily Mail* to become a Failing Firm. Neither Gazette Company nor MediaNews Group shall discriminate against, or cause Charleston Newspapers to discriminate against, the *Charleston Daily Mail* in performing circulation sales or advertising sales activities.

F. Commencing no later than thirty (30) days after the entry of this Final Judgment and continuing for a period of no less than six (6) months thereafter, Defendants shall cause Charleston **[*14]** Newspapers to offer the *Charleston Daily Mail* at a discount of no less than fifty (50) percent off the regular subscription price to all new subscribers. Charleston Newspapers shall inform prospective new subscribers of this discount in any subscription solicitation efforts that it undertakes (including telemarketing, door-to-door, and kiosk sales efforts; single-copy promotions; and solicitations on the *Charleston Daily Mail's* website). During this period, Charleston Newspapers may not extend this same discount, or any greater discount, to subscribers of the *Charleston Gazette*. For purposes of this paragraph IV(F), a new subscriber is any person who purchases a subscription to the *Charleston Daily Mail* and who has not subscribed to the daily *Charleston Daily Mail* or the daily *Charleston Gazette* within sixty (60) days of making such purchase.

V.<u>Affidavits</u>

Within sixty (60) calendar days of the entry of this Final Judgment in this matter, and every year thereafter until the expiration of this Final Judgment, Defendants shall deliver to the United States an affidavit as to the fact and manner of their compliance with Section IV of this Final Judgment. Assuming the information set forth **[*15]** in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

VI.<u>Compliance Inspection</u>

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, or determining whether to consent to any proposed agreement per Section IV(A), or whether to approve a termination of publication per Section IV(B), or whether to consent to any transfer per Section IV(C), and subject to any legally recognized privilege, from time to time authorized representatives of the United States, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, **[*16]** and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time **[*17]** information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under *Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure*, and defendants mark each pertinent page of such material, "Subject to claim of protection under *Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure*," then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VII.Retention of Jurisdiction and Expiration of Final Judgment

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, including the agreements of the parties attached hereto as Exhibit A, to modify any of their provisions, to enforce compliance, and to punish violations of their provisions. Unless this Court grants an extension, this Final Judgment shall expire five (5) years from the date of its entry. The expiration of this Final Judgment **[*18]** shall not trigger the termination of the agreements contained in Exhibit A. After the expiration of this Final Judgment, the agreements contained in Exhibit A will be governed by their own terms.

VIII.Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16*, including making copies available to the public of this Final Judgment and the Competitive Impact Statement. No public comments were received. Based upon the record before the Court, entry of this Final Judgment is in the public interest.

DATED: July 19, 2010

/s/ John T. Copenhaver, Jr.

John T. Copenhaver, Jr.

United States District Judge

EXHIBIT A

AMENDED AND RESTATED LIMITED PARTNERSHIP AGREEMENT FOR CHARLESTON NEWSPAPERS HOLDINGS, L.P. A DELAWARE LIMITED PARTNERSHIP

__, 2009

THIS AMENDED AND RESTATED LIMITED PARTNERSHIP AGREEMENT is entered into as of __, 2009 by and among Daily Gazette Holding Company, LLC, a Delaware limited liability company ("DGHC") and Charleston Publishing Company, a Delaware corporation ("CPC").

RECITALS

WHEREAS, the Partnership was formed on May 7, 2004 in connection with the **[*19]** transactions contemplated by that certain Master Restructuring and Purchase Agreement (the "Master Restructuring Agreement") entered into on May 7, 2004, by Daily Gazette Company, MediaNews Group, Inc. (now known as Affiliated Media, Inc.) ("MNG"), CPC and the Joint Venture;

WHEREAS, the Partnership has managed and will, pursuant to the Second Amended and Restated Joint Venture Agreement dated as of even date herewith (the "JOA"), continue to manage the business and affairs of the Joint Venture; and

WHEREAS, DGHC and CPC desire to amend various provisions of the Limited Partnership Agreement dated May 7, 2004 (the "Prior Partnership Agreement"), by and among DGHC, CPC and ABRY/Charleston, Inc. to restate it in its entirety and to supplement it, as herein provided;

NOW, THEREFORE, the parties agree as follows:

ARTICLE I

Definitions

1.1 Definitions. As used herein, the following terms shall have the following meanings:

1.1.1 Act: the Delaware Revised Uniform Limited Partnership Act, 6 Del. Code, as it may be amended from time to time, and any successor to such Act.

1.1.2 Affiliate: with respect to any Person, any other Person directly or indirectly controlling or controlled by such Person or **[*20]** under direct or indirect common control with such Person.

1.1.3 Adjusted Capital Account: with respect to any Partner, the deficit balance, if any, in such Partner's Capital Account as of the end of the relevant Fiscal Year or other period, after giving effect to the following adjustments:

(i) Crediting to such Capital Account any amounts that such Partner is obligated to restore to the Partnership pursuant to this Agreement or as otherwise described *Treasury Regulations Section 1.704-1(b)(2)(ii)(c)* or is deemed to be obligated to restore pursuant to the penultimate sentences of *Treasury Regulations Sections 1.704-2(g)(1)* and *1.704-2(i)(5)*; and

(ii) Debiting from such Capital Account the items described in *Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4)*, *1.704-1(b)(2)(ii)(d)(5)* and *1.704-1(b)(2)(ii)(d)(6)*.

The foregoing definition of Adjusted Capital Account is intended to comply with the provisions of *Treasury Regulations Section 1.704-1(b)(2)(ii)(d)* and shall be interpreted consistently therewith.

1.1.4 Agreement: this Amended and Restated Limited Partnership Agreement, as it may be amended from time to time.

1.1.5 Capital Account: with respect to any Partner, the account maintained **[*21]** for such Partner in accordance with the capital accounting rules of *Section 704(b)* of the Code and the provisions of *Treasury Regulations Section 1.704-1(b)(2)(iv)*. Subject to any contrary requirements of the Code and the Treasury Regulations issued thereunder, each Partner's Capital Account shall equal (1)(i) the amount set forth as such Partner's capital account as of the date hereof as set forth on Exhibit B; (ii) the amount of money which has been contributed by that Partner to the Partnership after the date hereof, if any; (ii) the fair market value, determined without regard to Code *Section 7701(g)* of the property, if any, which has been contributed by that Partner to the Partnership after the date hereof (net of any liabilities that are secured by such contributed property or that the Partnership or any other Partner is considered to assume under Code *Section 752*); (iii) allocations which have been made to that Partner of Net Profit and items of income and gain pursuant to Article V after the date hereof; and (iv) other additions which have been made in accordance with the Code after the date hereof, decreased by (2)(i) the amount of cash which has been distributed to that Partner **[*22]** by the Partnership after the date hereof; (ii) allocations which have been made to that Partner of Net Loss and items of loss and deduction pursuant to Article V after the date hereof; (iii) the fair market value, determined without regard to Code *Section 7701(g)*, of any property which has been distributed to that Partner by the Partnership after the date hereof (net of any liabilities that are secured by such distributed property or that such Partner is considered to assume or take under Code *Section 752*); and (iv) other deductions which have been made in accordance with the Code after the date hereof.

1.1.6 Capital Contribution: with respect to any Partner, any cash or other property that such Partner has contributed to the capital of the Partnership pursuant to the terms of this Agreement.

1.1.7 Certificate of Limited Partnership: the certificate of limited partnership of the Partnership, as amended.

1.1.8 Class A Limited Partner: a Person owning Class A Limited Partner Units that has been admitted to the Partnership as a Limited Partner pursuant to the terms of this Agreement.

1.1.9 Class A Limited Partnership Interest: the Partnership Interest with respect to the Class A Limited Partner **[*23]** Units.

1.1.10 Class A Limited Partner Unit: any Partnership Unit having the rights and obligations specified in this Agreement with respect to a Class A Limited Partner Unit.

1.1.11 Class B Limited Partner: a Person owning Class B Limited Partner Units that has been admitted to the Partnership as a Limited Partner pursuant to the terms of this Agreement.

1.1.12 Class B Limited Partner Unit: any Partnership Unit having the rights and obligations specified in this Agreement with respect to a Class B Limited Partner Unit.

1.1.13 Code: the Internal Revenue Code of 1986, as amended.

1.1.14 Depreciation: with respect to each Fiscal Year, an amount equal to the depreciation, amortization or other cost recovery deduction allowable with respect to an asset for such Fiscal Year, except that if the Gross Asset Value of an asset differs from its adjusted basis for federal income tax purposes at the beginning of such Fiscal Year, Depreciation shall be determined in the manner that is described in *Treasury Regulations Section 1.704-1(b)(2)(iv)(g)(3)* or *Treasury Regulations Section 1.704-3(d)(2)*, as applicable.

1.1.15 Fair Market Value of the Partnership: has the meaning given such term in Section 5.2.3(b).

1.1.16 **[*24]** Fiscal Year: the calendar year or, in the case of the first and the last fiscal years, the fraction thereof commencing on the date on which the Partnership is formed under the Act or ending on the date on which the winding up of the Partnership is completed, as the case may be.

1.1.17 General Partner: DGHC and any successor General Partner.

1.1.18 General Partner Unit: any Partnership Unit having the rights and obligations specified in this Agreement with respect to a General Partner Unit.

1.1.19 GP Board: has the meaning given such term in Section 4.5.2.

1.1.20 Gross Asset Value: with respect to any asset, the asset's adjusted basis for Federal income tax purposes, except as follows:

(i) The initial Gross Asset Value of any asset contributed by a Partner to the Partnership after the date hereof shall be the gross fair market value of such asset as determined by the contributing Partner and the General Partner;

(ii) The Gross Asset Value of each Partnership asset shall be adjusted to equal its gross fair market value, as determined by the General Partner, as of the following times: (a) the acquisition of an additional interest in the Partnership by any new or existing Partner in exchange **[*25]** for more than a *de minimis* Capital Contribution; (b) the distribution by the Partnership to a Partner of more than a *de minimis* amount of Partnership property as consideration for an interest in the Partnership; and (c) the liquidation of the Partnership within the meaning of *Treasury Regulations Section 1.704-1(b)(2)(ii)(g)*. However, the adjustments which are described in clauses (a) and (b) above shall be made only if the General Partner reasonably determines that such adjustments are necessary or appropriate to reflect the relative economic interests of the Partners in the Partnership;

(iii) The Gross Asset Value of any Partnership asset distributed to any Partner shall be adjusted to equal the gross fair market value of such asset on the date of distribution, as determined by the distributee Partner and the General Partner; and

(iv) The Gross Asset Value of each Partnership asset shall be increased (or decreased) to reflect any adjustments to the adjusted basis of such asset pursuant to Code *Section 734(b)* or Code *Section 743(b)*, but only to the extent that such adjustments are taken into account in determining Capital Accounts pursuant to *Treasury Regulations Section 1.704-1(b)(2)(iv)(m)* **[*26]** and Section 5.3.8. However, Gross Asset Value shall not be adjusted pursuant to this clause (iv) to the extent that an adjustment pursuant to clause (ii) is necessary or appropriate in connection with a transaction that would otherwise result in an adjustment pursuant to this clause (iv).

If the Gross Asset Value of an asset has been determined or adjusted pursuant to clauses (i), (ii) or (iv) of this definition, such Gross Asset Value shall thereafter be adjusted by the Depreciation taken into account with respect to such asset for purposes of computing Net Profit and Net Loss.

1.1.21 Indemnified Person: has the meaning given such term in Section 4.7.

1.1.22 JOA: has the meaning given such term in the Recitals to this Agreement, as such agreement may be amended from time to time.

1.1.23 Joint Venture: Charleston Newspapers, an unincorporated West Virginia joint venture.

1.1.24 Limited Partner: any Class A Limited Partner or Class B Limited Partner.

1.1.25 Limited Partner Unit: any Class A Limited Partner Unit or Class B Limited Partner Unit.

1.1.26 Mail: The Charleston Daily Mail.

1.1.27 MNG: has the meaning given such term in the Recitals to this Agreement, and includes any successor or **[*27]** assign.

1.1.28 Net Cumulative Profit: with respect to a Partner, an amount equal to the excess, if any, of (i) the aggregate Net Profits and items of income and gain allocated to such Partner pursuant to Article V for all Fiscal Years (or other periods) after the date hereof, over (ii) the aggregate Net Loss and items of loss and deduction allocated to such Partner pursuant to Article V for all Fiscal Years (or other periods) after the date hereof.

1.1.29 Net Profit and Net Loss: with respect to each Fiscal Year or other period, an amount which is equal to the Partnership's taxable income or loss for such year or period, as determined in accordance with Code *Section 703(a)* (for this purpose, all items of income, gain, loss or deduction that are required to be stated separately pursuant to Code *Section 703(a)(1)* shall be included in taxable income or loss), with the following adjustments:

(i) Any income of the Partnership that is exempt from Federal income tax and not otherwise taken into account in computing Net Profit or Net Loss shall be added to such taxable income or loss;

(ii) Any expenditures of the Partnership described in Code *Section 705(a)(2)(B)*, or treated as Code *Section 705(a)(2)(B)* **[*28]** expenditures pursuant to *Treasury Regulations Section 1.704-1(b)(2)(iv)(i)*, and which are not otherwise taken into account in computing Net Profit or Net Loss, shall be subtracted from such taxable income or loss;

(iii) In the event the Gross Asset Value of any Partnership asset is adjusted pursuant to clause (ii) or (iii) of the definition of Gross Asset Value, the amount of such adjustment shall be taken into account as gain or loss from the disposition of such asset for purposes of computing Net Profit or Net Loss;

(iv) Gain or loss resulting from any disposition of Partnership property with respect to which gain or loss is recognized for Federal income tax purposes shall be computed by reference to the Gross Asset Value of the property disposed of, notwithstanding that the adjusted tax basis of such property differs from its Gross Asset Value;

(v) In lieu of the depreciation, amortization and other cost recovery deductions that are taken into account in computing such taxable income or loss, there shall be taken into account Depreciation for such Fiscal Year or other period;

(vi) Notwithstanding anything to the contrary that may be contained in the definition of the terms "Net Profit" **[*29]** and "Net Loss," any items that are specially allocated pursuant to Section 5.3 or 5.4 hereof shall be excluded in computing Net Profit or Net Loss; and

(vii) For purposes of this Agreement, any deduction for a loss on a sale or exchange of Partnership property which is disallowed to the Partnership under Code *Section 267(a)(1)* or *707(b)* shall be treated as a Code *Section 705(a)(2)(B)* expenditure.

The amounts of the items of Partnership income, gain, loss, or deduction available to be specially allocated pursuant to Section 5.3 or 5.4 shall be determined by applying rules analogous to those set forth in this definition of Net Profit and Net Loss.

1.1.30 Newspapers: The Charleston Gazette, The Saturday Gazette-Mail, The Sunday Gazette-Mail and the Mail collectively, and a "Newspaper" means any one of the Newspapers.

1.1.31 Nonrecourse Deductions: losses, deductions or Code *Section 705(a)(2)(B)* expenditures that are attributable to Nonrecourse Liabilities of the Partnership. The amount of Nonrecourse Deductions for a Fiscal Year shall be determined in accordance with *Treasury Regulations Section 1.704-2(c)*.

1.1.32 Nonrecourse Liability: has the meaning set forth in *Treasury Regulations Sections 1.704-2(b)(3)* **[*30]** and *1.752-1(a)(2)*.

1.1.33 Partner: any of the General Partner and the Limited Partners individually, and "Partners" means each of the General Partner and the Limited Partners collectively.

1.1.34 Partner Nonrecourse Debt: has the meaning set forth in *Treasury Regulations Section 1.704-2(b)(4)*.

1.1.35 Partner Nonrecourse Debt Minimum Gain: has the meaning set forth in *Treasury Regulations Section 1.704-2(i)(2)*. The amount of Partner Nonrecourse Debt Minimum Gain shall be determined in accordance with *Treasury Regulations Section 1.704-2(i)(3)*.

1.1.36 Partner Nonrecourse Deductions: losses, deductions or Code *Section 705(a)(2)(B)* expenditures that are attributable to Partner Nonrecourse Debt. The amount of Partner Nonrecourse Deductions for a Fiscal Year shall be determined in accordance with *Treasury Regulations Section 1.704-2(i)(2)*.

1.1.37 Partner Ratio Percentage: with respect to any Class B Limited Partner, the percentage obtained by dividing the Percentage Interest of such Class B Limited Partner by the General Partner's Percentage Interest.

1.1.38 Partnership: Charleston Newspapers Holdings, L.P., a Delaware limited partnership.

1.1.39 Partnership Interest: means the entire ownership **[*31]** interest of a Partner in the Partnership at any particular time, including all of its rights and obligations hereunder and under the Act.

1.1.40 Partnership Minimum Gain: has the meaning set forth in *Treasury Regulations Section 1.704-2(b)(2)*. The amount of Partnership Minimum Gain for a Fiscal Year shall be determined in accordance with *Treasury Regulations Section 1.704-2(d)*.

1.1.41 Percentage Interest: with respect to any Class B Limited Partner and the General Partner, means the ratio of the number of Units held by such Partner divided by the total number of Class B Limited Partner Units and General Partner Units outstanding.

1.1.42 Person: means any individual, partnership, joint venture, association, corporation, trust, estate, limited liability company, limited liability partnership or any other legal entity.

1.1.43 Put/Call Agreement: a put/call agreement entered into by a Class B Limited Partner, DGHC and the Partnership in connection with the exercise by the Warrant Holder of its right to purchase Class B Limited Partner Units pursuant to the terms of the Warrant, in substantially the form attached to the Warrant as Exhibit B thereto.

1.1.44 Regulatory Allocations: has the meaning **[*32]** given such term in Section 5.4.

1.1.45 Subsidiary: means any Person (including the Joint Venture) that is controlled by the Partnership.

1.1.46 Tax-Adjusted Percentage Interests: with respect to any Class B Limited Partner, the percentage determined by dividing (i) such Class B Limited Partner's Percentage Interest by (ii) one (1) minus the Tax Rate; and with respect to the General Partner, the percentage determined as one (1) minus the Tax-Adjusted Percentage Interest of such Class B Limited Partner. By way of illustration, if such Class B Limited Partner's Percentage Interest is 6.42% and the Tax Rate is 40%, such Class B Limited Partner's Tax Adjusted Percentage Interest shall be 10.70% and the General Partner's Tax-Adjusted Percentage Interest shall be 89.30%.

1.1.47 Tax Distributions: distributions made pursuant to Section 5.1.2.

1.1.48 Tax Gross-Up Amount: has the meaning given such term in Section 5.2.3 (a)(ii)(4).

1.1.49 Tax Rate: the highest effective combined rate of federal, state and local income and franchise tax applicable to corporations doing business in Charleston, West Virginia.

1.1.50 Tax Shortfall: has the meaning given such term in Section 5.1.2(b).

1.1.51 Transfer: has **[*33]** the meaning given to such term in Section 6.1.1.

1.1.52 Transferee: any Person that acquires a Partnership Interest from a Partner in accordance with the provisions of this Agreement.

1.1.53 Treasury Regulations: the Income Tax Regulations that have been promulgated under the Code, as such regulations may be amended from time to time.

1.1.54 Unit: an undivided share of the interests in the Partnership of all the Partners, which include General Partner Units, Class A Limited Partner Units, and Class B Limited Partner Units, as set forth on Exhibit A attached hereto, as amended from time to time.

1.1.55 Value of the Partnership's Business: has the meaning given such term in Section 5.2.3.

1.1.56 Warrant: that certain warrant, dated as of even date herewith, granted to the Warrant Holder by the Partnership to purchase Class B Limited Partner Units.

1.1.57 Warrant Holder: CPC or any permitted transferee of the Warrant.

ARTICLE II

Formation of the Partnership

2.1 Formation. The Partnership was formed as a Delaware limited partnership pursuant to the terms of the Act and the Prior Partnership Agreement. The rights and liabilities of the Partners shall be determined pursuant to the Act and this Agreement. **[*34]** To the extent the rights or obligations of any Partner are different by reason of any provision of this Agreement than they would be in the absence of such provision, this Agreement shall, to the extent permitted by the Act, control.

2.2 Partners. As of the date hereof, DGHC is the sole General Partner of the Partnership, CPC is the sole Class A Limited Partner of the Partnership and there is no Class B Limited Partner.

2.3 Name. The name of the Partnership is "Charleston Newspapers Holdings, L.P." The business of the Partnership may be conducted under that name or, upon compliance with applicable laws, any other name that the General Partner deems appropriate or advisable.

2.4 Purpose. The purposes of the Partnership shall be (i) to own, directly and indirectly, all the interests in the Joint Venture, (ii) to engage in the business, directly and indirectly, of owning, operating and managing newspaper properties, including managing the business and affairs of the Joint Venture in accordance with the JOA, (iii) to borrow or raise money, to guarantee the obligations of others, and to secure the payment thereof by mortgage upon or pledge of the whole or any part of the property of the Partnership, **[*35]** (iv) to exercise all rights, powers, privileges and other incidents of ownership or possession with respect to securities or other assets held or owned by the Partnership, and (v) to do any act and thing and to enter into any contract incidental to, or necessary, proper or advisable for, the accomplishment of such purposes as determined by the General Partner in its sole discretion, including without limitation, entering into the JOA, the Warrant and a Put/Call Agreement and performing thereunder.

2.5 Place of Business. The principal place of business of the Partnership is c/o Daily Gazette Company, 1001 Virginia Street, East, Charleston, West Virginia 25301, subject to change by the General Partner upon notice to all Partners.

2.6 Agent for Service of Process. The agent of the Partnership for service of process in Delaware is the Corporation Service Company, 2711 Centerville, Road, Suite 400, Wilmington, Delaware 19808, subject to replacement from time to time by direction of the General Partner.

2.7 Term. The term of the Partnership commenced on the date the Certificate of Limited Partnership was filed with the Secretary of State of the State of Delaware, and shall continue until June **[*36]** 30, 2024, unless sooner terminated as provided in this Agreement.

2.8 Tax Matters. The parties acknowledge that for income tax purposes, the Partnership shall be treated as the continuation of the Joint Venture following the deemed merger of the Joint Venture and the Partnership.

ARTICLE III

Capital of the Partnership

3.1 Transfers to Partnership. DGHC and CPC each made the transfers to the Partnership specified on Exhibit A and received the Units specified in Exhibit A.

3.2 Future Capital Contributions; Capital Assets.

3.2.1 The Limited Partners shall have no obligation to make any further contributions to the capital of the Partnership, subject to CPC's obligation to reimburse the Joint Venture for any expenses paid by the Joint Venture on behalf of CPC in accordance with the provisions of the JOA.

3.2.2 DGHC shall in the future make such additional contributions to the capital of the Partnership as shall be necessary in its reasonable judgment to (1) fund acquisitions of capital assets necessary for the business and operations of the Partnership and/or the Joint Venture; (2) fund acquisitions of capital assets necessary for the business and operations of the editorial departments of each **[*37]** of the Newspapers to the extent such editorial departments' tangible capital assets on the date hereof require supplementation or replacement, (3) provide the Partnership and the Joint Venture with adequate working capital, and (4) ensure that the Partnership has adequate funds to make on a timely basis the cash distributions to CPC contemplated by Section V J (1) through (3) of the JOA, provided this is not intended to impose any greater obligation on the General Partner than is imposed on general partners generally under applicable law. The General Partner shall not have any personal liability for the repayment of the Capital Contributions of any other Partner; provided that the General Partner shall promptly return to the Partnership or to the Partner or Partners entitled thereto any distributions received by the General Partner in excess of those to which the General Partner is entitled under this Agreement.

3.3 Interest on Capital Contributions. No interest shall be paid by the Partnership on Capital Contributions.

3.4 Liability Limited to Capital. Except as otherwise provided under applicable law, the liability of a Limited Partner shall be limited to the total amount of Capital **[*38]** Contributions which such Limited Partner has made or is required to make pursuant to Section 3.1 hereof, and the Limited Partners shall have no further personal liability to contribute money to or in respect of the liabilities or obligations of the Partnership, nor shall the Limited Partners, as such, be personally liable for any obligation of the Partnership. A Limited Partner may, under certain circumstances, be required by law to return to the Partnership, for the benefit of the Partnership's creditors, amounts previously distributed. No Limited Partner shall be obligated by this Agreement to pay those distributions to or for the account of the Partnership or any creditor of the Partnership. However, if any court of competent jurisdiction holds that, notwithstanding the provisions of this Agreement, a Limited Partner must return or pay over any part of those distributions, the obligation shall be that of such Limited Partner alone and not of any other Partner. Any payment returned to the Partnership by a Partner or made directly by a Partner to a creditor of the Partnership shall be deemed a Capital Contribution by such Partner.

3.5 Withdrawal of Capital. A Partner shall not be entitled **[*39]** to withdraw any part of its Capital Contribution or to receive any distribution from the Partnership, except as provided in this Agreement or the JOA.

ARTICLE IV

Management of the Partnership

4.1 General Partner. DGHC shall serve as the General Partner of the Partnership.

4.2 Partnership Powers. In furtherance of its purposes, the Partnership is hereby authorized to enter into any kind of lawful activity and to enter into, perform and carry out contracts of any kind in connection with the purposes of the Partnership.

4.3 Authority, Responsibilities and Powers of General Partner. Subject to Section 4.5.2 hereof, the General Partner shall have complete authority over and exclusive control and management of the business and affairs of the Partnership and all of the rights, powers and privileges of partners of a general partnership and of general partners of a limited partnership under the laws of the State of Delaware. The General Partner shall devote such time to the Partnership as it may reasonably deem to be required for the achievement of its purposes. In connection with such management, the General Partner (i) may delegate such general or specific authority to the officers and employees **[*40]** of the Partnership and its Affiliates with respect to the business and day-to-day operations of the Partnership and its Affiliates as it may from time to time consider desirable, and the officers and employees of the Partnership may exercise the authority granted to them, and (ii) may employ on behalf of the Partnership any other Persons to perform services for the Partnership, including Affiliates of any Partner.

4.4 No Management Participation by any Limited Partner. Subject to Section 4.5.2, no Limited Partner shall take part in, or at any time interfere in any manner with, the management, conduct or control of the business and operations of the Partnership, nor have any right or authority as such to act for or bind the Partnership in any manner whatsoever. No Partner shall have the power, right or authority to remove DGHC as the General Partner.

4.5 Scope of Authority of the General Partner.

4.5.1 Subject to Section 4.5.2 and 4.5.3 hereof, all decisions to be made on behalf of the Partnership shall be made by the General Partner and all actions to be taken or documents to be executed on behalf of the Partnership shall be taken and executed by the General Partner.

4.5.2 While the general **[*41]** authority to manage the day-to-day business and affairs of the General Partner shall be vested in its members, the management of the General Partner shall be delegated to a board of managers of the General Partner (the "GP Board") consisting of up to five individual managers appointed by Daily Gazette Company and in no event may the GP Board consist of more than five managers without the consent of the managers appointed pursuant to Section 5(b) of the Operating Agreement of DGHC by the Warrant Holder or the Class B Limited Partner(s), as applicable; provided, however, that in no event may the GP Board consist of more than five managers unless not fewer than forty percent (40%) are appointed by the Warrant Holder or the Class B Limited Partner(s), as applicable. Unless and until the Warrant Holder exercises its rights under the Warrant to purchase any Class B Limited Partner Units, Daily Gazette Company shall delegate its right to appoint two (2) of the members of the GP Board (or such greater number as required by Section 5(b)(ii) of the Operating Agreement of DGHC) to the Warrant Holder, and upon the purchase by the Warrant Holder of any Class B Limited Partner Units pursuant to **[*42]** the Warrant, Daily Gazette Company shall delegate its right to appoint two (2) of the members of the GP Board (or such greater number as required by Section 5(b)(ii) of the Operating Agreement of DGHC) to the Class B Limited Partner(s). If there is more than one Class B Limited Partner, then the right to appoint two (2) of the members of the GP Board (or such greater number as required by Section 5(b)(ii) of the Operating Agreement of DGHC) will be vested solely in the Class B Limited Partner that supervises editorial and reportorial functions of the Mail pursuant to Section 9.1 hereof. Neither the Warrant Holder nor the Class B Limited Partner(s) may appoint current employees of the Joint Venture, Daily Gazette Company, DGHC, the Partnership or Daily Gazette Publishing Company, LLC to represent it on the GP Board. The GP Board shall only have the power and authority to act by the vote of the constituent managers and no individual manager, in the capacity of manager, shall have the power or authority to bind the General Partner. Voting by the managers shall be on a per capita basis. Actions may be taken by the GP Board by, but only by, a majority vote of the managers; provided, however, **[*43]** that actions by the GP Board concerning (x) the budgeted Editorial Expenses (as that term is defined in the JOA) for The Charleston Gazette and the Mail or (y) "news hole" and color usage allocations for The Charleston Gazette and the Mail shall require the prior approval of at least 75% of the managers of the GP Board (i.e., if the GP Board consists of four managers, not fewer than three managers must vote in favor of the particular action, and if the GP Board consists of five managers, not fewer than four managers must vote in favor of the particular action). Either Daily Gazette Company or, as applicable, the Warrant Holder or the Class B Limited Partner(s) may at any time, by written notice to the other, remove its managers, with or without cause, and substitute managers to serve in their stead. No manager shall be removed from office, with or without cause, without the consent of the Person that designated him. Each member of the GP Board appointed by the Warrant Holder or the Class B Limited Partner(s) may act (or refrain from acting), and the Warrant Holder or the Class B Limited Partner(s) may instruct such members of the GP Board, in their capacity as such, to act (or refrain **[*44]** from acting) solely according to the interests (or the perceived interests) of the Warrant Holder or the Class B Limited Partner(s) and none of the foregoing shall be deemed to breach any fiduciary duty that, pursuant to this Agreement or at law or in equity, the Warrant Holder or the Class B Limited Partner(s) otherwise would be deemed to have to the Partnership, the General Partner or Daily Gazette Company. The GP Board shall hold such meetings no less frequently than once per calendar quarter and at such times and places as shall be determined by the members of the GP Board. Special meetings of the GP Board may be called at any time by agreement of the members of the GP Board. The GP Board may establish such procedures for the conduct of meetings as may be agreed by the members of the GP Board.

4.5.3 Without the written consent of the Limited Partners, or except as specifically authorized in this Agreement, the General Partner may not:

(a) Do any act in contravention of this Agreement, the JOA or the Certificate of Limited Partnership.

(b) Do any act that would make it impossible to carry on the ordinary business of the Partnership.

(c) Change the purposes of the Partnership as set **[*45]** forth in Section 2.4 hereof.

(d) Dissolve the Partnership.

(e) Make any disposition of assets contributed by CPC to the Partnership on the date of the Prior Partnership Agreement that would impair the ability of the Partnership to make the terminating distributions to CPC that are contemplated by Section 7.3 hereof (provided no consent of the Limited Partners will be required for any disposition of such assets pursuant to any foreclosure action of the Joint Venture's lenders).

4.6 Liability. If any provision herein shall, under applicable law, subject any Limited Partner to liability as a general partner of the Partnership, such provision shall be deemed suspended and of no force and effect until such time as the effectiveness of such provision does not subject such Limited Partner to such liability.

4.7 Indemnification. The Partnership shall indemnify the General Partner and its Affiliates and the employees, officers, directors, each member of the GP Board, shareholders, partners, members and agents of such Persons (each an "Indemnified Person") and shall defend and hold the Indemnified Persons harmless from any claim, demand, judgment, cost or expense (including attorneys' fees, which **[*46]** shall be paid as incurred) arising out of or related to any act or omission by such Indemnified Persons on behalf of the Partnership, except for any act or omission which is finally adjudicated to have constituted willful misconduct on the part of such Indemnified Person. In no event shall any Indemnified Person be liable to the Partnership or to any other Partner, except for conduct which is finally adjudicated to have constituted willful misconduct on the part of such Indemnified Person. Any Person who is within the definition of "Indemnified Person" at the time of any act or omission shall be entitled to the benefits of this Section 4.7 as an "Indemnified Person" regardless of whether such Person continues to be within the definition of "Indemnified Person" at the time of his or its claim for indemnification or exculpation hereunder.

4.8 Partnership Expenses. The Partnership shall pay for all necessary and reasonable direct expenses of the Partnership.

4.9 Other Ventures. Subject to the terms of the JOA, neither Daily Gazette Company, nor any Partner, may engage in other ventures in the Charleston, West Virginia market that are competitive with that of the Partnership or any of its **[*47]** Subsidiaries. For purposes of this Section 4.9, any competitive venture undertaken by an Affiliate of a Partner in the Charleston, West Virginia market will be deemed to be a competitive venture undertaken by such Partner and a breach of this Agreement by such Partner.

ARTICLE V

Distributions and Allocations

5.1 Distributions.

5.1.1 Distributions to Class A Limited Partner. With respect to each Fiscal Year that the Class A Limited Partner produces editorial and news copy for the Mail, the General Partner shall cause the Partnership to distribute cash to the Class A Limited Partner in an amount equal to the cash received by the Partnership with respect to its interest in the Joint Venture, pursuant to and subject to the terms of paragraphs (1), (2) and (3) of Section V J of the JOA. Such cash shall be distributed by the Partnership to the Class A Limited Partner as soon as reasonably practicable following its receipt by the Partnership.

5.1.2 Tax Distributions.

(a) During each Fiscal Year, the General Partner shall cause the Partnership to distribute cash to the Class B Limited Partner(s) and to the General Partner in an amount equal to the excess, if any, of (i) the product of (1) the Net **[*48]** Cumulative Profit allocated to such Partner and (2) the Tax Rate with respect to such Fiscal Year, over (ii) the aggregate distributions to such Partner after the date hereof pursuant to Section 5.1.4 and this Section 5.1.2 (such excess being such Partner's "Tax Shortfall"). For purposes of this Section 5.1.2(a), distributions made within 120 days of the end of any Fiscal Year may be designated by the General Partner as Tax Distributions with respect to such Fiscal Year and shall be treated for purposes of this Section 5.1.2(a) as having been made during such Fiscal Year.

(b) If the aggregate amount to be distributed by the Partnership pursuant to Section 5.1.2(a) is less than the aggregate amount of the Tax Shortfall for all Partners, then the amount to be distributed will be distributed among the Partners pro rata in accordance with the amounts of their respective Tax Shortfalls.

5.1.3 Distributions to General Partner. With respect to a Fiscal Year, after the distributions required by Sections 5.1.1 and 5.1.2, the General Partner shall cause the Partnership to distribute cash in an amount not to exceed $650,000 to the General Partner. The distributions provided in this Section 5.1.3 **[*49]** shall be made only to the extent such distributions are not prohibited by the Partnership's credit agreements or other agreements to which the Partnership is a party.

5.1.4 Other Cash Distributions. During a Fiscal Year; after the distributions required by Sections 5.1.1, 5.1.2 and 5.1.3, the General Partner may cause the Partnership to distribute additional cash at such times and in such amounts as the General Partner may determine to be appropriate in its sole discretion, in the following order and priority:

(a) If the product of the Partner Ratio Percentage of any Class B Limited Partner and the sum of all distributions to the General Partner pursuant to Section 5.1.2 is greater than the sum of all distributions to such Class B Limited Partner pursuant to Section 5.1.2, cash shall be distributed to such Class B Limited Partner in the amount of such excess;

(b) If the sum of all distributions to any Class B Limited Partner pursuant to Section 5.1.2 is greater than the product of Partner Ratio Percentage of such Class B Limited Partner and the sum of all distributions to the General Partner pursuant to Section 5.1.2, cash shall be distributed to the General Partner in the amount of such **[*50]** excess;

(c) Thereafter, cash shall be distributed to the Class B Limited Partner(s) and the General Partner pro rata in accordance with their Capital Account balances until such Capital Account balances are zero; and

(d) Any additional cash shall be distributed to the Class B Limited Partner(s) and the General Partner in accordance with their Percentage Interests.

5.1.5 Withholding. Any amount that has been withheld pursuant to the Code or any provision of any state or local tax law with respect to any payment or distribution to the Partnership or the Partners shall be treated as an amount which was distributed to a Partner pursuant to Section 5.1 hereof for all purposes of this Agreement.

5.2 Allocations of Net Profit and Net Loss.

5.2.1 Net Profit. Except as otherwise provided in this Agreement, Net Profit of the Partnership for each Fiscal Year shall be allocated as follows:

(a) first, Net Profit shall be allocated so as to offset any Net Loss allocated to the General Partner pursuant to Section 5.2.2(c);

(b) second, Net Profit shall be allocated to the Class B Limited Partner(s) and to the General Partner so as to offset any Net Loss allocated to them pursuant to Section 5.2.2(b), pro **[*51]** rata in proportion to the amount of Net Loss to be offset; and

(c) thereafter, Net Profit shall be allocated to the Class B Limited Partner(s) and the General Partner in accordance with their Tax-Adjusted Percentage Interests.

5.2.2 Net Loss. Except as otherwise provided in this Agreement, Net Loss of the Partnership for each Fiscal Year shall be allocated as follows:

(a) first, Net Loss shall be allocated to the Class B Limited Partner(s) and to the General Partner so as to offset any Net Profit allocated to them pursuant to Section 5.2.1(c) (to the extent not distributed pursuant to Section 5.1), pro rata in proportion to the amount of Net Profit to be offset.

(b) second, Net Loss shall be allocated to the Class B Limited Partner(s) and the General Partner in accordance with their Percentage Interests until the Class B Limited Partner's or Partners' Adjusted Capital Account balance is zero; and

(c) thereafter, all remaining Net Loss shall be allocated to the General Partner.

5.2.3 Allocations of Net Profit and Net Loss Following Dissolution.

(a) Notwithstanding Sections 5.2.1 and 5.2.2, following the dissolution of the Partnership pursuant to Article VII, beginning in the Fiscal Year in **[*52]** which such dissolution occurs or beginning in any Fiscal Year prior to the Fiscal Year in which such dissolution occurs if the Partnership's Federal income tax return for such prior Fiscal Year has not yet been required to be filed (not including extensions), items of income, gain, loss and deduction described in clause (iii) of Section 1.1.29 that are attributable to the adjustment to the Gross Asset Value of assets distributed in kind to the Class A Limited Partner pursuant to Section 7.3.2 (if any) shall be allocated to the Class A Limited Partner, and thereafter, all remaining items of income, gain, loss and deduction shall be allocated among the Partners so as to cause the credit balance in each Partner's Capital Account to equal the amount of distributions such Partner would be entitled to receive if the Partnership were to distribute an amount equal to the aggregate credit balances in all Partners' Capital Accounts (after such allocations of income and gain, loss and deduction) in accordance with the following:

(i) First, the Partnership would distribute to the Class A Limited Partner cash in an amount equal to the aggregate cash distributed to the Partnership pursuant to clause **[*53]** (2)(a) of Section VI B of the JOA;

(ii) Second, the Partnership would distribute to each Class B Limited Partner cash in an amount equal to the following:

(1) the product of such Class B Limited Partner's Percentage Interest and the Fair Market Value of the Partnership; *plus*

(2) the excess (only if such amount is greater than zero) of (A) the product of such Class B Limited Partner's Partner Ratio Percentage and the sum of all distributions to the General Partner pursuant to Section 5.1.2 over (B) the sum of all distributions to such Class B Limited Partner pursuant to Section 5.1.2; *less*

(3) the excess (only if such amount is greater than zero) of (A) the sum of all distributions to such Class B Limited Partner pursuant to Section 5.1.2 over (B) the product of such Class B Limited Partner's Partner Ratio Percentage and the sum of all distributions to the General Partner pursuant to Section 5.1.2; *plus*

(4) an amount equal to the excess, if any, of (A) the quotient obtained by dividing Net Cumulative Profits allocated to such Class B Limited Partner by one (1) minus the Tax Rate then in effect, over (B) Net Cumulative Profits allocated to such Class B Limited Partner (such amount being the **[*54]** "Tax Gross-Up Amount").

(iii) Thereafter, the Partnership would distribute all remaining cash and other assets of the Partnership to the General Partner.

(b) For purposes of this Section 5.2.3, the "Fair Market Value of the Partnership" shall equal:

(i) the Value of the Partnership's Business, *plus*

(ii) any current assets of the Partnership, calculated as of the date of dissolution, as defined and determined in accordance with generally accepted accounting principles, *less*

(iii) the sum of $2,448,300 (which the parties agree shall represent the amount of the unfunded accrued benefit obligation for the Charleston Newspapers Retirement Benefit Plan as of the date of dissolution), and $506,731 (which the parties agree shall represent the amount of the unfunded accrued benefit obligation for the Charleston Newspapers Post Retirement Medical Benefit Program as of the date of dissolution), *less*

(iv) any debts and liabilities of the Partnership and reserves for unmatured, contingent or unforeseen liabilities of the Partnership (other than unfunded obligations under the Charleston Newspapers Retirement Benefit Plan and Post-Retirement Medical Benefit Program), calculated as of the date of dissolution, **[*55]** as defined and determined in accordance with Section 7.3 and generally accepted accounting principles, *less*

(v) the costs of an investment banking firm or appraisal firm or firms selected to determined the Fair Market Value of the Partnership, *less*

(vi) the amount determined in Sections 5.2.3(a)(ii)(2) and 5.2.3(a)(ii)(3), if any.

The "Value of the Partnership's Business" shall be the going concern value of the Partnership as of the date of dissolution as determined by mutual agreement of the General Partner and the Class B Limited Partner(s) or by appraisals in accordance with this Section 5.2.3.

In determining the Value of the Partnership's Business, the General Partner and the Class B Limited Partner(s), or the appraisers selected to determine the Fair Market Value of the Partnership, as the case may be, (1) shall assume that the value of any business is the cash price at which the assets of such business as a going concern would change hands between a willing buyer and a willing seller (neither acting under compulsion) in an arms-length transaction, on terms and subject to conditions and costs applicable in the newspaper publishing industry, (2) shall assume that all assets used in **[*56]** the operation of the business of the Partnership and its Subsidiaries, whether owned by or licensed to the Partnership or any of its Subsidiaries (and all other assets of any Affiliate of the Partnership that are used by the Partnership or any of its Subsidiaries), were entirely owned directly by the Partnership, (3) shall not take into account expenditures in respect of any management agreements entered into by the Joint Venture. In the event the General Partner and the Class B Limited Partner(s) do not agree on the Fair Market Value of the Partnership within twenty days, then within fifteen days of the expiration of such twenty day period (or such longer period as the General Partner and the Class B Limited Partner(s) mutually agree), each of the General Partner and the Class B Limited Partner(s) shall select a nationally recognized appraiser with experience in the newspaper industry to prepare, using the methodology described in this paragraph, a written appraisal setting forth such appraiser's determination of the Fair Market Value of the Partnership. If either the General Partner and the Class B Limited Partner(s) fail to so appoint an appraiser within such fifteen day period, **[*57]** then its right to do so shall lapse and the appraisal made by the one appraiser who is timely appointed shall be the Fair Market Value of the Partnership. If two appraisals are made, unless the higher of the two appraisals is more than 110% more than the lower appraisal, the Fair Market Value of the Partnership will be the average of the two appraisals, and if the higher of the two appraisals is more than 110% more than the lower of the appraisals, the General Partner and the Class B Limited Partner(s) shall jointly select a third appraiser, and the Fair Market Value will be the average of the two of the three appraisals that are closest together in amount. All appraisals will be made within twenty days of appointment of such appraiser and must separately identify the amount of each of the items described in clauses (i) through (vi) of Section 5.2.3(b). A written notice of the results of each such appraisal shall be given to the General Partner and the Class B Limited Partner(s). The General Partner and the Class B Limited Partner(s) will each pay the fees of the appraiser selected by it, and the General Partner and the Class B Limited Partner(s) will share equally the fees of the **[*58]** third appraiser, if any. The General Partner and each Member will cooperate fully with each appraiser's attempt to determine the Fair Market Value of the Partnership.

5.3 Special Allocations.

5.3.1 Limited Partners.

(a) The Partnership shall specially allocate to the Class A Limited Partner (in its capacity as such) items of Partnership income for each Fiscal Year in an amount equal to the cash distributed to the Class A Limited Partner (in its capacity as such) pursuant to Section 5.1.1. Notwithstanding any other provisions of this Agreement, except Section 5.2.3 and this Section 5.3.1, no other items of income, gain, loss or deduction shall be allocated to the Class A Limited Partner (in its capacity as such).

(b) The Partnership shall specially allocate to the General Partner items of Partnership income and gain in the amount of $650,000 for each Fiscal Year.

5.3.2 Minimum Gain Chargeback. Notwithstanding any other provision of this Article V to the contrary, if there is a net decrease in Partnership Minimum Gain for any Fiscal Year, each of the General Partner and each Class B Limited Partner shall be specially allocated items of Partnership income and gain for such Fiscal Year (and **[*59]** if necessary, for succeeding Fiscal Years) in an amount equal to such Partner's share of the net decrease in Partnership Minimum Gain as determined in accordance with *Treasury Regulations Section 1.704-2(g)*. Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Partner pursuant thereto. However, this Section 5.3.2 shall not apply to the extent that the circumstances which are described in *Treasury Regulations Sections 1.704-2(f)(2)*, *1.704-2(f)(3)*, *1.704-2(f)(4)* or *1.704-2(f)(5)* exist. The items of Partnership income and gain that are to be allocated pursuant to this Section 5.3.2 shall be determined in accordance with Treasury Regulations Sections *1.704-2(f)(6)* and *1.704-2(j)(2)*. This Section 5.3.2 is intended to comply with the minimum gain chargeback requirement of *Treasury Regulations Section 1.704-2(f)* and shall be interpreted consistently therewith.

5.3.3 Partner Minimum Gain Chargeback. Notwithstanding any other provision of this Article V, except Section 5.3.2, to the contrary, if, during any Fiscal Year, there is a net decrease in Partner Nonrecourse Debt Minimum Gain attributable to a Partner Nonrecourse **[*60]** Debt, each of the General Partner and each Class B Limited Partner with a share of that Partner Nonrecourse Debt Minimum Gain attributable to such Partner Nonrecourse Debt (as determined in accordance with *Treasury Regulations Section 1.704-2(i)(5)*) as of the beginning of such Fiscal Year shall be specially allocated items of Partnership income and gain for the Fiscal Year (and, if necessary, for succeeding Fiscal Years) in an amount equal to such Partner's share of the net decrease in the Partner Nonrecourse Debt Minimum Gain attributable to such Partner Nonrecourse Debt in accordance with *Treasury Regulations Section 1.704-2(i)(4)*. Allocations pursuant to the previous sentence shall be made in proportion to the respective amounts required to be allocated to each Partner pursuant thereto. The items of Company income and gain to be allocated pursuant to this Section 5.3.3 shall be determined in accordance with *Treasury Regulations Sections 1.704-2(i)(4)* and *1.704-2(j)(2)*. This Section 5.3.3 is intended to comply with the minimum gain chargeback requirement in *Treasury Regulations Section 1.704-2(i)(4)* and shall be interpreted consistently therewith.

5.3.4 Qualified Income Offset. In **[*61]** the event that any Partner unexpectedly receives any of the adjustments, allocations or distributions described in *Treasury Regulations Section 1.704-1(b)(2)(ii)(d)(4)*, *1.704-1(b)(2)(ii)(d)(5)* or *1.704-1(b) (2)(ii)(d)(6)*, items of Partnership income and gain shall be specially allocated to such Partner in an amount and manner sufficient to eliminate, to the extent required by the Treasury Regulations, any deficit balance of such Partner's Adjusted Capital Account as quickly as possible. However, an allocation shall be made pursuant to this Section 5.3.4 if, and only to the extent that, such Partner would have a deficit balance in its Adjusted Capital Account after all of the other allocations that are provided for in this Article V have been tentatively made as if this Section 5.3.4 were not a part of this Agreement.

5.3.5 Gross Income Allocation. In the event that any Partner has a deficit Capital Account at the end of any Fiscal Year that is in excess of the sum of (i) the amount such Partner is obligated to restore to the Partnership pursuant to this Agreement or as otherwise described in *Treasury Regulations Section 1.704-1(b)(2)(ii)(c)*, (ii) the amount such Partner is deemed to **[*62]** be obligated to restore pursuant to the penultimate sentence of *Treasury Regulations Section 1.704-2(g)(1)* and (iii) the amount such Partner is deemed to be obligated to restore pursuant to the penultimate sentence of *Treasury Regulations Section 1.704-2(i)(5)*, such Partner shall be specially allocated items of Partnership income and gain in the amount of such excess as quickly as possible. However, an allocation shall be made pursuant to this Section 5.3.5 if, and only to the extent that such Partner would have a deficit Capital Account in excess of such sum after all of the other allocations that are provided for in this Article V have been tentatively made as if Section 5.3.4 and this Section 5.3.5 were not a part of this Agreement.

5.3.6 Nonrecourse Deductions. Nonrecourse Deductions for any Fiscal Year or other period shall be specially allocated to the General Partner.

5.3.7 Partner Nonrecourse Deductions. Any Partner Nonrecourse Deductions for any Fiscal Year or other period shall be specially allocated to the Partner who bears the economic risk of loss with respect to the Partner Nonrecourse Debt to which such Partner Nonrecourse Deductions are attributable in accordance with **[*63]** *Treasury Regulation Section 1.704-2(i)*.

5.3.8 Section 754 Adjustment.

(a) To the extent an adjustment to the adjusted tax basis of any Partnership asset pursuant to Code *Section 734(b)* or *743(b)* is required pursuant to *Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4)* to be taken into account in determining Capital Accounts as a result of a distribution other than in liquidation of a Partner's Partnership Interest, the amount of such adjustment shall be treated as an item of gain (if the adjustment increases the basis of such asset) or loss (if the adjustment decreases the basis of the asset) from the disposition of the asset and shall be taken into account for purposes of computing Net Profit and Net Loss.

(b) To the extent an adjustment to the adjusted tax basis of any Partnership asset pursuant to Code *Section 734(b)* or Code *743(b)* is required, pursuant to *Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(2)* or *1.704-1(b)(2)(iv)(m)(4)*, to be taken into account in determining Capital Accounts as the result of a distribution to a Partner in complete liquidation of its interest, the amount of such adjustment to Capital Accounts shall be treated as an item of gain (if the adjustment **[*64]** increases the basis of the asset) or loss (if the adjustment decreases such basis) from the disposition of the asset and shall be specially allocated to the Partners as Net Profit or Net Loss in the event *Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(2)* applies, or to the Partner to whom such distribution is made in the event *Treasury Regulations Section 1.704-1(b)(2)(iv)(m)(4)* applies.

5.4 Curative Allocations. The allocations set forth in Sections 5.3.2, 5.3.3, 5.3.4, 5.3.5, 5.3.6, 5.3.7 and 5.3.8 hereof (the "Regulatory Allocations") are intended to comply with certain requirements of the Treasury Regulations. It is the intent of the Partners that, to the extent possible, all Regulatory Allocations shall be offset either with other Regulatory Allocations or with special allocations of other items of income, gain, loss, or deduction pursuant to this Section 5.4. Therefore, notwithstanding any other provision of this Article V (other than the Regulatory Allocations), the General Partner shall make such offsetting special allocations of income, gain, loss, or deduction in whatever manner it determines appropriate so that, after such offsetting allocations are made, each Partner's **[*65]** Capital Account balance is, to the extent possible, equal to the Capital Account balance such Partner would have had if the Regulatory Allocations were not in this Agreement. In exercising its discretion under this Section 5.4, the General Partner shall take into account future Regulatory Allocations under Sections 5.3.2 and 5.3.3 that, although not yet made, are likely to offset other Regulatory Allocations previously made under Sections 5.3.6 and 5.3.7.

5.5 Tax Allocations; Code *Section 704(c)*.

5.5.1 Except as otherwise provided in this Section 5.5, each item of income, gain, loss and deduction of the Partnership recognized for income tax purposes shall be allocated to the Partners in accordance with the allocation of the corresponding "book" items pursuant to Sections 5.2, 5.3 and 5.4.

5.5.2 In accordance with Code *Section 704(c)* and the Treasury Regulations thereunder, income, gain, loss and deduction with respect to any property contributed to the capital of the Partnership shall, solely for tax purposes, be allocated among the Partners so as to take account of any variation between the adjusted basis of such property to the Partnership for Federal income tax purposes and its initial **[*66]** Gross Asset Value in accordance with Code *Section 704(c)* and the Treasury Regulations thereunder, provided, however, that no such *Section 704(c)* allocations shall be made to the Class A Limited Partner (in its capacity as such).

5.5.3 In the event that the Gross Asset Value of any Partnership asset is adjusted pursuant to clause (ii) of the definition of Gross Asset Value, subsequent allocations of income, gain, loss and deduction with respect to such asset shall take account of any variation between the adjusted basis of such asset for Federal income tax purposes and its Gross Asset Value in accordance with Code *Section 704(c)* and the Treasury Regulations thereunder, provided, however, that no such *Section 704(c)* allocations shall be made to the Class A Limited Partner (in its capacity as such).

5.5.4 Any elections or other decisions relating to such allocations shall be made by the Tax Matters Partner in any manner that reasonably reflects the purpose and intention of this Agreement. Allocations that are made pursuant to this Section 5.5 are made solely for purposes of Federal, state and local taxes and shall not affect, or in any way be taken into account in computing, any Partner's **[*67]** Capital Account or share of Net Profit, Net Loss or other items or distributions pursuant to any provision of this Agreement.

5.6 Allocation in Event of Transfer. If a Partnership Interest is Transferred in accordance with Article VI of this Agreement, the Net Profit and Net Loss of the Partnership shall be calculated as of the end of the month immediately prior to the month in which the transfer is effective. The transferor Partner shall be allocated an amount which is equal to the Net Profit and Net Loss of the Partnership that is allocable to the period ending on the last day of the month immediately prior to the Transfer. The Transferee shall be allocated an amount which is equal to the Net Profit and Net Loss of the Partnership that is allocable to the remainder of the calendar year. As of the effective date of such Transfer, the Transferee shall succeed to the Capital Account of the transferor Partner with respect to the Transferred Partnership Interest. This Section 5.6 shall apply for purposes of computing a Partner's Capital Account and for Federal income tax purposes.

ARTICLE VI

Transfer of Partnership Interests

6.1 Limitations on Transfers.

6.1.1 Except as provided in Section 6.1.2, **[*68]** no sale, assignment, transfer, pledge, hypothecation or other disposition (any or all of the foregoing, a "Transfer") of a Partnership Interest will be effective nor will any purported Transferee become a Partner or otherwise be entitled to any of the attributes of ownership of the Partnership purportedly Transferred.

6.1.2 The restrictions of Section 6.1.1 shall not apply to:

(a) a Transfer pursuant to Article VII;

(b) in the case of the Class A Limited Partner, a Transfer of its entire Class A Limited Partnership Interest approved by the General Partner, which approval shall not be unreasonably withheld (the Class A Limited Partner acknowledges and agrees that the General Partner's ability to grant consent to a Transfer is circumscribed by certain contractual restrictions under the Joint Venture's financing arrangements and the withholding of consent by the General Partner in order to comply with these contractual restrictions will not be considered unreasonable);

(c) in the case of a Class B Limited Partner, a Transfer permitted by and made in accordance with the provisions of the Put/Call Agreement to which such Class B Limited Partner is a party;

(d) in the case of the General Partner **[*69]** or any permitted Transferee of the General Partner, any Transfer to an Affiliate of the General Partner and any other Transfer so long as at the time of such Transfer the Joint Venture is current in the distributions and payments required to be made to the Class A Limited Partner pursuant to Section V J(1) through (4) of the JOA, and provided that if the Joint Venture is not so current, the General Partner shall obtain the consent of the Class A Limited Partner prior to any Transfer pursuant to this Section 6.1.2(d);

(e) a Transfer pursuant to a foreclosure action by the Joint Venture's lenders; or

(f) any Transfer of all or any portion of the ownership interests in the Class A Limited Partnership Interest or the Partnership Interest with respect to any of the Class B Limited Partner Units to MNG or an Affiliate of MNG so long as (1) all of the other requirements of this Article VI have been complied with and (2) MNG or an Affiliate of MNG holds and maintains, directly or indirectly, voting control of such Transferee following such Transfer.

6.2 Transferees.

6.2.1 Notwithstanding any provision to the contrary contained herein, no Partnership Interest may be transferred unless such Transfer **[*70]** is made in accordance with the provisions of this Article VI and the transferor and the Transferee have complied with the following conditions:

(a) the transferor has executed and delivered to the General Partner a copy of the assignment of the Partnership Interest to Transferee in form and substance reasonably satisfactory to the General Partner; and

(b) the Transferee, if not already a party to this Agreement, becomes a party to this Agreement, assumes all of the obligations hereunder of its transferor in respect of such Partnership Interest and agrees to be bound by the terms and conditions hereof in the same manner as the transferor.

6.2.2 Upon compliance with Section 6.1 and 6.2.1, any Transferee shall be substituted as a Partner for, and shall enjoy the same rights and be subject to the same obligations as, its predecessor as a Partner hereunder, and the General Partner shall prepare and file as soon as practicable, if required by law, an amendment to the Certificate of Limited Partnership and any other qualification documents. Exhibit A hereto shall also be amended to reflect such Transfer.

6.2.3 If there is a permitted Transfer of a Partnership Interest under this Agreement:

(a) **[*71]** In the case of a Transfer by any Partner, such Partner shall, upon the effectiveness of such Transfer, be released and discharged from any further liability under this Agreement in respect of such Partnership Interest, provided, however, that such transferring Partner shall remain liable to the Partnership for any Partnership distributions wrongfully paid to or received by such transferring Partner or that are required by law to be returned to the Partnership; and

(b) If requested to do so by any transferring Partner or by the Transferee by notice given to the Partners, the Partnership shall make an election under *Section 754* of the Code (and a corresponding election under applicable state and local law). Upon the request of any Partner, the Partnership shall also make a timely election under Section 754 of the Code upon a distribution of property or money to a Partner.

6.3 Transfers of Interests in Partners.

6.3.1 The transfer of a majority of the issued and outstanding capital stock (or equivalent interest) of a Partner or a controlling interest of a Partner, however accomplished, whether in a single transaction or in a series of related or unrelated transactions, and whether directly **[*72]** or by transfer of stock (or equivalent interest) of a direct or indirect parent corporation or other entity or otherwise, shall be deemed to be a purported Transfer of an interest in the Partnership for purposes of this Agreement.

6.3.2 Except as provided in Section 6.3.3, MNG agrees that it will not Transfer (whether voluntarily, involuntarily or by operation of law) all or any part of its ownership interests in the Class A Limited Partner, without the consent of the General Partner, which consent shall not be unreasonably withheld (MNG acknowledges and agrees that the General Partner's ability to grant consent to a Transfer is circumscribed by certain contractual restrictions under the Joint Venture's financing arrangements and the withholding of consent by the General Partner in order to comply with these contractual restrictions will not be considered unreasonable).

6.3.3 The restriction of Section 6.3.1 shall not apply and no consent of the General Partner shall be required for (x) a Transfer directly or indirectly by MNG or CPC of its ownership interests in the Class A Limited Partner or any Class B Limited Partner to an Affiliate of MNG so long as (1) all of the other requirements **[*73]** of this Article VI have been complied with and (2) MNG or a MNG Affiliate holds and maintains, directly or indirectly, voting control of such Transferee following such Transfer, and (y) the grant of a security interest in the ownership interests in the Class A Limited Partner or any Class B Limited Partner.

6.4 Other Consents and Requirements. Any Transfer must be in compliance with all requirements imposed by any state securities administrator having jurisdiction over the Transfer and the United States Securities and Exchange Commission.

6.5 Assignment Not In Compliance. Any Transfer in contravention of any of the provisions of this Article VI (whether voluntarily, involuntarily or by operation of law) shall be void and of no effect, and shall neither bind nor be recognized by the Partnership.

6.6 Pledge. Each Partner and any permitted Transferee of each Partner may collaterally assign its Partnership Interest and its attendant rights under this Agreement to the Joint Venture's lenders for security purposes. Each Limited Partner may at any time assign its Partnership Interest and its rights under this Agreement as collateral security to Persons extending financing to such Limited Partner **[*74]** or any of its Affiliates (and such Persons may at any time foreclose on such security interest).

6.7 Division of Partnership Interests. The several rights and obligations inherent in the Capital Account and Partnership Interest are indivisible except in equal proportions, such that the assignment of a specified percentage of a Partner's Partnership Interest may only represent an equal percentage of the total Capital Account that was attributable to such Partner's Partnership Interest prior to the assignment.

6.8 Withdrawal of Partners. No Partner may withdraw from the Partnership except upon the transfer of its Partnership Interest permitted under the provisions of this Agreement or upon the dissolution and winding up of the Partnership in accordance with the provisions of Article VII. For purposes of this Agreement, the term "withdrawal" does not include the happening of any event described in *Section 17-402(a)(4)* or *(5)* of the Act, and no Partner shall cease to be a Partner solely upon the happening of such event(s). The withdrawal of a Partner shall not alter the allocations and distributions to be made to the Partners pursuant to this Agreement.

6.9 Issuance of Partnership Interests. **[*75]** Subject to the provisions of any Put/Call Agreement, the General Partner may cause the Partnership to issue additional Partnership Interests to any Person and may admit to the Partnership as additional Partners the Person acquiring such Partnership Interests, if such Persons were not previously admitted as Partners. The Persons acquiring such Partnership Interests shall have the rights and be subject to the obligations set forth in this Agreement as it may be amended in accordance with Section 9.8 in connection therewith. A Person admitted as a new Partner shall only be entitled to distributions and allocations of Net Profit and Net Loss attributable to the period beginning on the effective date of its admission to the Partnership, and the Partnership shall attribute Net Profit and Net Loss to the period before the effective date of the admission of a new Partner and to the period beginning on the effective date of the admission of a new Partner by the closing of the books method. The Partnership will not issue any additional Class A Limited Partner Units to any other Person without the consent of the Class A Limited Partner and will not issue Class B Limited Partner Units to any other **[*76]** Person without the consent of the holders of the majority of the Class B Limited Partner Units.

ARTICLE VII

Dissolution and Liquidation

7.1 Events of Dissolution. The Partnership shall be dissolved, terminated and liquidated upon the happening of any of the following events:

(a) the expiration of the term of the Partnership as set forth in Section 2.7;

(b) at such time as the JOA shall expire or otherwise terminate;

(c) upon mutual agreement of the Partners; or subject to any provision of this Agreement that limits or prevents dissolution, the happening of any event that, under applicable law, causes the dissolution of a limited partnership.

7.2 Liquidation. Upon dissolution of the Partnership for any reason, the Partnership shall immediately commence to wind up its affairs in accordance with this Article VII. A reasonable period of time shall be allowed for the orderly termination of the Partnership's business, discharge of its liabilities, and distribution or liquidation of the remaining assets so as to enable the Partnership to minimize the normal losses attendant to the liquidation process. The dissolution and liquidation of the Partnership shall be conducted and supervised by the General **[*77]** Partner, who is hereby authorized and empowered to execute on behalf of the Partnership any and all documents necessary or desirable to effectuate the dissolution and liquidation of the Partnership and the transfer of any property of the Partnership.

7.3 Priority on Liquidation. The General Partner shall, to the extent feasible, liquidate and/or distribute the assets of the Partnership as promptly as shall be practicable consistent with the other provisions hereof. Such assets, or the proceeds of such liquidation, shall be applied as follows:

7.3.1 first, to the payment of the debts and liabilities of the Partnership, in the order of priority provided by law (excluding any loans by any Partner to the Partnership);

7.3.2 second, the Partnership shall distribute to the Class A Limited Partner the Mail masthead, all trademarks, copyrights, trade names, service names and service marks of the Mail, subscriber and advertiser lists, print and electronic archives of the Mail, associated websites and URLs (including "dailymail.com") and all legal rights associated with these assets, subject to such dispositions, additions or substitutions relating thereto which may have occurred in the ordinary **[*78]** course of the operations of the Partnership or the Joint Venture subsequent to the date hereof, including in particular, any and all lists of advertisers and subscribers to Mail, together with copies of any contracts with such subscribers relating to Mail and any executory contracts for the purchase of advertising in Mail, free and clear of any lien, encumbrance, right or interest (including any option or any license or other right of use) of or in favor of a third party, transfer restriction (including any right of first offer or refusal or similar provision) or any other similar right or interest whatsoever;

7.3.3 third, to the payment of loans by any Partner to the Partnership and the payment of the expenses of liquidation;

7.3.4 fourth, to the setting up of any reserve which the General Partner may deem reasonably necessary for contingent or unforeseen liabilities or obligations of the Partnership or any liability or obligation not then due and payable; provided, however, that any such reserve shall be paid over by the General Partner into a Partnership account established for such purpose, to be held in such account for the purpose of disbursing such reserves in payment of such **[*79]** liabilities, and, at the expiration of such holdback period as the General Partner shall deem advisable, to distribute the balance thereafter remaining in the manner herein provided; and

7.3.5 fifth, to payment to the Partners, in accordance with the following order of priority:

(a) First, the Partnership shall distribute to the Class A Limited Partner, subject to the prior satisfaction of the claims of all creditors, cash in an amount equal to the aggregate cash distributed to the Partnership from the Joint Venture pursuant to clause (2)(a) of Section VI B of the JOA.

(b) Thereafter, the Partnership shall distribute all remaining assets to the Class B Limited Partner(s) and the General Partner in accordance with their respective Capital Account balances.

7.4 Statements on Liquidation. Each of the Partners shall be furnished with a statement which shall set forth the assets and liabilities of the Partnership as at the date of dissolution and as at the date of complete liquidation, the share of each Partner thereof, and a reasonably detailed report of the manner of disposition of the assets of the Partnership. Upon compliance with the foregoing distribution plan and completion of the winding **[*80]** up process, the Partnership shall be terminated and the General Partner shall cause the cancellation of the Certificate of Limited Partnership and all qualifications of the Partnership as a foreign limited partnership in jurisdictions other than the State of Delaware and shall take such other action as may be necessary to terminate the Partnership.

7.5 Return of Capital or Partition. No Partner shall have any right to receive its Capital Contribution or any profit of the Partnership or to obtain a partition of assets of the Partnership or to cause the dissolution of the Partnership other than as provided in this Agreement. The General Partner shall not be personally liable for the return of the Capital Contributions of the Limited Partners, or of any portion thereof, it being expressly understood that any such return shall be made solely from Partnership assets.

ARTICLE VIII

Records and Accounting

8.1 Books and Records. At all times during the continuance of the Partnership, the General Partner shall keep or cause to be kept books of account of the transactions of the Partnership consistent with the provisions of the JOA. The books of account, records and all documents and other writings **[*81]** of the Partnership shall be kept and maintained at the principal office of the Partnership or of the General Partner. Each Partner and its representatives shall, upon reasonable notice to the General Partner, have access to such books, records and documents during reasonable business hours and may inspect and make copies of any of them at its own expense.

8.2 Bank Accounts. The General Partner may from time to time open and maintain on behalf of the Partnership a bank account or accounts with such depositaries as the General Partner shall determine, in which monies received by or on behalf of the Partnership shall be deposited. All withdrawals from such accounts shall be made upon the signature of such Person or Persons as the General Partner may from time to time designate.

8.3 Required Filings. The General Partner shall cause the Partnership to file, on or before the dates the same may be due, giving effect to extensions obtained, all reports, returns and applications which may be required by any taxing authority or other governmental body having jurisdiction. The General Partner shall timely deliver to each of the Partners such information, including Schedules K-1, as may be necessary **[*82]** for the preparation by such Partner of its Federal, state or other tax returns.

ARTICLE IX

Miscellaneous

9.1 Supervision of Editorial Staff. In order to fulfill its obligations under the JOA, CPC shall exercise exclusive supervision over all editorial and reportorial functions of the Mail. CPC shall select the staff, designate all editors and newsroom managers, make all newsroom assignments, and set all editorial policies for the Mail. DGHC, as General Partner of the Partnership, shall cause the Joint Venture to employ the employees selected by CPC and to assign those employees to work exclusively as the staff of the Mail. CPC shall have complete control and authority over the editors and other staff of the editorial department of the Mail (including the exclusive authority to determine the number, identity and salaries of the editorial department of the Mail and to make hiring and firing decisions, so long as the Editorial Expense for the Mail does not exceed the approved budgeted amount for the Mail). The term "editorial department" as used herein shall include the news, editorial, editorial promotion and photographic functions of the Mail.

9.2 Notices. All notices, demands and other **[*83]** communications which may or are to be given hereunder or with respect hereto shall be in writing, shall be given either by personal delivery, facsimile or by certified or special express mail or recognized overnight delivery service, first class postage prepaid, or when delivered to such delivery service, charges prepaid, return receipt requested, and shall be deemed to have been given or made when personally received by the addressee, addressed as follows:

(1) If to the Class A Limited Partner, to:

MediaNews Group, Inc.

101 W. Colfax Ave., Suite 1100

Denver, CO 80202

Attn: Joseph J. Lodovic, IV President

Facsimile: (303) 954-6320

With a copy to:

Hughes Hubbard & Reed LLP

One Battery Park Plaza

New York, New York 10004-1482

Attn: James Modlin

Facsimile: (212) 422-4726

or such other addresses as the Class A Limited Partner may from time to time designate.

(2) If to the General Partner or the Partnership, to:

Daily Gazette Company

1001 Virginia Street, East Charleston, WV 25301

Attn: Ms. Elizabeth E. Chilton, President

Facsimile: (304) 348-5180

And

Attn. Mr. Norman Watts Shumate III

Facsimile: (304) 348-1795

With a copy to:

Edmondson + Blumenthal PLLC

12 Cadillac Drive, Suite 210

Brentwood, TN 37027

Attn: Steven **[*84]** E. Blumenthal

Facsimile: (615) 296-4600

or such other addresses as the General Partner or the Partnership may from time to time designate.

9.3 Further Assurances. The Partners will execute and deliver such further instruments and do such further acts and things as may be required to carry out the intent and purposes of this Agreement.

9.4 Agreement in Counterparts. This Agreement may be executed in counterparts and all counterparts so executed shall constitute one agreement binding on all the parties hereto notwithstanding that all the parties hereto are not signatories to the original or to the same counterpart.

9.5 Captions. Captions contained in this Agreement are inserted as a matter of convenience and in no way define the scope of this Agreement or the intent of any provision hereof.

9.6 Construction. None of the provisions of this Agreement shall be for the benefit of or be enforceable by any creditor of the Partnership or of any Partner (subject to the security interest and other rights in favor of the Joint Venture's lenders).

9.7 Successors. Except as otherwise expressly provided in this Agreement, all provisions of this Agreement shall be binding upon, inure to the benefit of, and **[*85]** be enforceable by or against the successors and permitted assigns of the parties hereto.

9.8 Amendments.

9.8.1 This Agreement may be modified or amended only upon the written agreement of each of the Partners (and subject to any applicable contractual restrictions under the Joint Venture's financing arrangements), except that this Agreement may be amended from time to time by the General Partner without the consent of the Limited Partners:

(a) to reflect the rights and obligations of a Person admitted as a Partner upon the issuance of Partnership Interests pursuant to Section 6.9 and any change in the rights and obligations of any existing Partner upon the issuance to any Person of partnership interests pursuant to Section 6.9, provided that the consent of an affected Limited Partner and/or the Warrant Holder shall be required to the extent such amendment adversely affects the interests of such Limited Partner and/or the Warrant Holder, as the case may be;

(b) to change the Partnership's principal office or other place of business;

(c) to change the Partnership's method of allocating income and loss for tax purposes to the extent required by new or changes to Treasury Regulations, Internal **[*86]** Revenue Service announcements or rulings, or final courts decisions, provided that the consent of an affected Limited Partner and/or the Warrant Holder shall be required to the extent such amendment adversely affects the interests of such Limited Partner and/or the Warrant Holder, as the case may be;

(d) to add to the representations, duties or obligations of the General Partner (other than duties or obligations relating to the editorial and reportorial functions of the Mail); and

(e) to cause to be deleted from this Agreement any provision or part of any provision that is found by a court of competent jurisdiction to be invalid or unenforceable in any respect, which provision may be deleted from this Agreement by the General Partner to the extent of such invalidity or unenforceability without in any way affecting the remaining parts of such provision or the remaining provisions of this Agreement.

No change in the number of General Partner Units or Class B Limited Partner Units (whether by an amendment or otherwise) will be effective unless it has been executed or approved in writing by the holders of a majority of the Class B Limited Partner Units (or, prior to the exercise in full of **[*87]** the Warrant (or the termination of the Warrant), the Warrant Holder).

9.8.2 The General Partner will give notice to the Limited Partners (and, prior to the exercise in full (or termination) of the Warrant, the Warrant Holder) ten days prior to any modification or amendment to this Agreement pursuant to this Section 9.8.

9.8.3 The General Partner will cause the Partnership to prepare and file any amendment to the Certificate of Limited Partnership that may be required to be filed under the Act as a consequence of any amendment to this Agreement.

9.9 Governing Law. This Agreement and the rights and obligations of the Partners shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to its conflicts of laws principles.

9.10 Integration. This Agreement amends and restates the Prior Partnership Agreement in its entirety. This Agreement, together with the JOA and the Warrant, constitute the entire agreement among the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements (oral or written) and understandings pertaining thereto. In the event of any conflict between this Agreement and the JOA, this Agreement shall **[*88]** control.

9.11 Severability. The invalidity of any article, section, subsection, clause or provision of this Agreement shall not affect the validity of the remaining articles, sections, subsections, clauses or provisions hereof.

9.12 Representations by Partners. Each Partner represents and warrants to the other Partners and the Partnership that this Agreement is and will remain its valid and binding agreement, enforceable in accordance with its terms. Each Partner represents and warrants to the Partnership and the other Partners that: (i) it is fully aware that its Partnership Interest is not being registered under the Securities Act of 1933, as amended, and has been issued and sold in reliance upon federal and state exemptions for transactions not involving a public offering, that its Partnership Interest cannot and will not be sold or transferred except in a transaction that is exempt from registration under federal and state securities laws, and that such Partner is an "accredited investor" within the meaning of Regulation D under the Securities Act of 1933, as amended.

9.13 Non-Disclosure. Each Partner agrees that, except as otherwise consented to by the General Partner, all non-public **[*89]** information furnished to it or to which it has access pursuant to this Agreement will be kept confidential and will not be disclosed by such Partner or by any of its agents, representatives or employees, in any manner whatsoever, in whole or in part, except that:

(a) each Partner shall be permitted to disclose such information to those of its (and its Affiliates') Affiliates, agents, representatives and employees who need to be familiar with such information in connection with such Partner's investment in the Partnership and who agree to maintain the confidentiality thereof in accordance with the provisions of this Section 9.13;

(b) each Partner shall be permitted to disclose such information to its Affiliates;

(c) each Partner shall be permitted to disclose information to the extent required by law, including federal or state securities laws or regulations, by the rules and regulations of any stock exchange or association on which securities of such Partner or any of its Affiliates are traded or by subpoena or other legal process so long as such Partner shall have first given the Partnership notice in advance of such disclosure (so that the Partnership may attempt to contest the necessity **[*90]** of disclosing such information) to the extent practicable under the circumstances;

(d) each Partner shall be permitted to disclose information to the extent necessary for the enforcement of any right of such Partner arising under this Agreement;

(e) each Partner shall be permitted to disclose information to a permitted Transferee or a prospective Permitted Transferee, so long as such Person agrees (in a writing which provides the Partnership with an independent right of enforcement) to be bound by the provisions of this Section;

(f) each Partner shall be permitted to disclose information that is or becomes generally available to the public other than as a result of a disclosure by such Partner, its agents, representatives, or employees; and

(g) each Partner shall be permitted to disclose information that becomes available to such Partner on a nonconfidential basis from a source (other than the Partnership, any other Partner, or their respective agents, representatives, and employees) that, to the best of such Partner's knowledge, is not prohibited from disclosing such information to such Partner by a legal, contractual, or fiduciary obligation to the Partnership or any other Partner or **[*91]** hat is derived by such Partner or its agents without reliance on information the disclosure of which is prohibited by this Section 9.13.

9.14 Execution of Papers. The Partners agree that they will not unreasonably refuse to execute such instruments, documents and papers as the General Partner deems necessary or appropriate to carry out the intent of this Agreement.

IN WITNESS WHEREOF, the parties hereto have each caused this Agreement to be duly executed by their respective officers duly authorized.

DAILY GAZETTE HOLDING COMPANY, LLC

By: Daily Gazette Company, Sole Member

By: _

Title: _

CHARLESTON PUBLISHING COMPANY

By:_

Title:_

MEDIANEWS GROUP, INC. now known as AFFILIATED MEDIA, INC. (for purposes of Section 6.3)

By:_

Title:_

DAILY GAZETTE COMPANY (for purposes of Section 4.9)

By:_

Title:_

EXHIBIT A

TRANSFERS TO PARTNERSHIP BY PARTNERS

Partner	**Contribution**
Daily Gazette Holding Company, LLC	(i) 100% of the ownership interests in Daily Gazette Publishing Company, LLC (ii) cash and other assets provided in Master Restructuring Agreement
Charleston Publishing Company	Intangible and other assets more fully described in Master Restructuring Agreement

Partner	**Units Received**
Daily Gazette Holding Company, LLC	9,358 General Partner Units
Charleston Publishing Company	1 Class A Limited Partnership Unit

EXHIBIT [*92] B

CAPITAL ACCOUNT BALANCES AS OF DATE HEREOF

Partner	**Value**
Daily Gazette Holding Company, LLC	$63,750,000
Charleston Publishing Company	$1

AMENDED AND RESTATED OPERATING AGREEMENT OF DAILY GAZETTE HOLDING COMPANY, LLC

THIS AMENDED AND RESTATED OPERATING AGREEMENT OF DAILY GAZETTE HOLDING COMPANY, LLC, is entered into effective as of __, 2009, by and between Daily Gazette Holding Company, LLC, a limited liability company organized pursuant to the Delaware Limited Liability Company Act (the "Company"), and Daily Gazette Company, a West Virginia corporation, its sole member.

RECITAL

The parties desire to amend and restate the Operating Agreement of the Company, dated as of May 7, 2004, as set forth herein.

AGREEMENT

In consideration of the mutual covenants and agreements set forth in this Agreement, the parties agree as follows.

1. DEFINITIONS

The following terms, as used in this Agreement, have the meanings set forth in this Section:

"Act" means the Delaware Limited Liability Company Act.

"Affiliate" means, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with such Person. For purposes of **[*93]** this definition, the term "controls" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise. The terms "controlled by" and "under common control with" have meanings corresponding to the meaning of "controls."

"Agreement" means this Amended and Restated Operating Agreement, as it may be amended, restated, modified, or supplemented from time to time in accordance with its terms.

"Board of Managers" shall have the meaning set forth in Section 5 hereof.

"Certificate" is the Certificate of Formation of Daily Gazette Holding Company, LLC as filed with the Secretary of State of the State of Delaware, as the same may be amended from time to time.

"Class B Limited Partner" shall have the meaning set forth in Section 1.1.11 of the Partnership Agreement.

"Class B Limited Partner Unit" shall have the meaning set forth in Section 1.1.12 of the Partnership Agreement.

"Class B Managers" means the Managers appointed by either the Warrant Holder or the Class B Limited Partner(s) pursuant to Section 5(b)(ii) hereof.

"JOA" means that certain Second Amended **[*94]** and Restated Joint Venture Agreement dated as of even date herewith, as such agreement may be amended from time to time.

"Joint Venture" means Charleston Newspapers, an unincorporated West Virginia joint venture.

"Manager" means a member of the Board of Managers.

"Member" means Daily Gazette Company and its successors-in-interest under this Agreement.

"Person" means an individual, corporation, limited liability company, association, general partnership, limited partnership, limited liability partnership, joint venture, trust, estate, or other entity or organization.

"Partnership" means Charleston Newspapers Holdings, L.P., a Delaware limited partnership.

"Partnership Agreement" means that certain Amended and Restated Limited Partnership Agreement for Charleston Newspapers Holdings, L.P., dated as of even date herewith, as such agreement may be amended from time to time

"Put/Call Agreement" means a put/call agreement entered into by a Class B Limited Partner, the Company and the Partnership in connection with the exercise by the Warrant Holder of its right to purchase Class B Limited Partner Units pursuant to the terms of the Warrant, in substantially the form attached to the Warrant as Exhibit **[*95]** B thereto.

"Warrant" means that certain warrant, dated as of even date herewith, granted to the Warrant Holder by the Partnership to purchase Class B Limited Partner Units.

"Warrant Holder" means Charleston Publishing Company or any permitted transferee of the Warrant.

2. THE COMPANY AND ITS BUSINESS

(a) Formation. The Company was formed on April 12, 2004, pursuant to the provisions of the Act. Except as provided in this Agreement, all rights, liabilities, and obligations among the Member, the Company, and other Persons, shall be as provided in the Act, and this Agreement shall be construed in accordance with the provisions of the Act. To the extent that the rights or obligations of the Member are different by reason of any provision of this

Agreement than they would be in the absence of such provision, this Agreement shall, to the extent permitted by the Act, control.

(b) Filing of Certificate of Limited Liability Company. The Member has caused the Certificate to be filed with the Secretary of State of Delaware and shall cause the Certificate to be filed or recorded in any other public office where filing or recording is required or advisable. The Member shall do, and continue to do, all **[*96]** other things that are required or advisable to maintain the Company as a limited liability company existing pursuant to the laws of the State of Delaware.

(c) Company Name. The name of the Company shall be "Daily Gazette Holding Company, LLC." The business of the Company may be conducted under that name or, upon compliance with applicable laws, any other name that the Member deems appropriate or advisable. The Member shall file any assumed name certificates and similar filings, and any amendments thereto, that the Member considers appropriate or advisable.

(d) Term of the Company. The term of the Company commenced on the date of the filing of the Certificate with the Secretary of State of the State of Delaware and shall continue until the Company is dissolved and its affairs wound up in accordance with the Act and Article 8 of this Agreement.

(e) Purpose of the Company. The purpose of the Company is to do all lawful acts and things necessary, appropriate, proper, advisable, incidental to, or convenient for the furtherance and accomplishment of the foregoing purpose.

(f) Authority of the Company. The Company shall be empowered and authorized to do all lawful acts and things necessary, appropriate, **[*97]** proper, advisable, incidental to, or convenient for the furtherance and accomplishment of its purposes.

(g) Principal Office and Other Offices; Registered Agent. The address of the Company's registered office which is required to be maintained by the Company in the State of Delaware pursuant to *Section 18-104* of the Act shall be located at Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808, and the name of the Company's registered agent at such address is Corporation Service Company. The principal office of the Company shall be c/o Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808. The Company may maintain any other offices at any other places that the Board of Managers deems advisable. The Company may, upon compliance with the applicable provisions of the Act, change its principal office or registered agent from time to time at the discretion of the Board of Managers.

(h) Foreign Qualification. The Company shall take all necessary actions to be authorized to conduct business legally in all appropriate jurisdictions, including registration or qualification of the Company as a foreign limited liability company **[*98]** in those jurisdictions that provide for registration or qualification.

(i) Fiscal Year. The fiscal year of the Company shall be the calendar year. The Company shall have the same fiscal year for income tax purposes and for financial accounting purposes.

3. COMPANY CAPITAL

(a) Capital Contributions. The Member shall make such capital contributions to the Company as it deems appropriate.

(b) Disbursements. Subject to Section 5 hereof, the Company shall pay all costs and expenses of the Company business. The Company may set aside funds for any items that are proper Company purposes, as determined by the Board of Managers.

4. CASH DISTRIBUTIONS; ALLOCATIONS OF PROFITS AND LOSSES

(a) Distributions. All cash of the Company available for distribution shall be distributed to the Member at such times and in such amounts as the Board of Managers may determine.

(b) Allocations of Profits and Losses. All profits and losses of the Company shall be allocated to the Member.

5. RIGHTS AND POWERS OF THE MEMBER; BOARD OF MANAGERS.

(a) Management Rights Generally. The responsibility and control of the management and conduct of the Company's day-to-day activities and operations shall be vested in the Member, subject **[*99]** to Section 5(b) below.

(b) Board of Managers.

(i) The business and affairs of the Company shall be managed by or under the direction of a Board of Managers (the "Board of Managers") and all actions outside of the ordinary course of business of the Company, to be taken by or on behalf of the Company, shall require the approval of the Board of Managers. Except as otherwise provided in this Agreement, the Board of Managers shall have the duties, powers and rights of the board of directors of a corporation organized under the General Corporation Law of the State of Delaware (it being understood and agreed, nonetheless, that the individual Managers appointed by the Warrant Holder or the Class B Limited Partner(s) as provided below represent the interests of the Warrant Holder or the Class B Limited Partner(s)).

(ii) The Board of Managers shall consist of up to five individual Managers appointed by the Member and in no event may the Board of Managers consist of more than five Managers without the consent of the Class B Managers; provided, however, that in no event may the Board of Managers consist of more than five Managers unless not fewer than forty percent (40%) of the Managers are Class **[*100]** B Managers. Unless and until the Warrant Holder exercises its rights under the Warrant to purchase any Class B Limited Partner Units, the Member shall delegate its right to appoint two (2) of the Managers (or such greater number as required by the first sentence of this section) to the Warrant Holder, and upon the purchase by the Warrant Holder of any Class B Limited Partner Units pursuant to the Warrant, the Member shall delegate its right to appoint two (2) of the Managers (or such greater number as required by the first sentence of this section) to the Class B Limited Partner(s). If there is more than one Class B Limited Partner, then the right to appoint two (2) of the Managers (or such greater number as required by the first sentence of this section) will be vested solely in the Class B Limited Partner that supervises editorial and reportorial functions of <u>The Charleston Daily Mail</u> pursuant to Section 9.1 of the Partnership Agreement. Neither the Warrant Holder nor the Class B Limited Partner(s) may appoint current employees of the Joint Venture, the Member, the Company, the Partnership or Daily Gazette Publishing Company, LLC to represent it on the Board of Managers.

(iii) The **[*101]** Board of Managers shall only have the power and authority to act by the vote of the constituent Managers and no individual Manager, in the capacity of Manager, shall have the power or authority to act as the agent or representative of the Company or to otherwise bind the Company. Voting by the Managers shall be on a per capita basis. Actions may be taken by the Board of Managers by, but only by, a majority vote of the Managers; provided, however, that actions by the Board of Managers concerning (x) the budgeted Editorial Expenses (as that term is defined in the JOA) for <u>The Charleston Gazette</u> and <u>The Charleston Daily Mail</u> or (y) "news hole" and color usage allocations for <u>The Charleston Gazette</u> and <u>The Charleston Daily Mail</u> shall require the prior approval of at least 75% of the Managers (i.e., if the Board of Managers consists of four Managers, not fewer than three Managers must vote in favor of the particular action, and if the Board of Managers consists of five Managers, not fewer than four Managers must vote in favor of the particular action); provided further that no Manager appointed by the Warrant Holder or the Class B Limited Partner(s), as the case may be, shall participate **[*102]** in any decisions concerning the news, editorial policy or content of <u>The Charleston Gazette</u> or <u>The Charleston Gazette-Mail</u> or have any connection with the news and editorial operations of <u>The Charleston Gazette</u> or <u>The Charleston Gazette-Mail</u>, and all such decisions shall be made exclusively by the Managers appointed by the Member. Either the Member or, as applicable, the Warrant Holder or the Class B Limited Partner(s) may at any time, by written notice to the other, remove its Managers, with or without cause, and substitute Managers to serve in their stead. No Manager shall be removed from office, with or without cause, without the consent of the Person that designated such Manager. Each Manager appointed by the Warrant Holder or the Class B Limited Partner(s) may act (or refrain from acting), and the Warrant Holder or the Class B Limited Partner(s) may instruct such Managers, in their capacity as such, to act (or refrain from acting) solely according to the interests (or the perceived interests) of the Warrant Holder or the Class B Limited Partner(s) and none of the foregoing shall be deemed to breach any fiduciary duty that, pursuant to this Agreement or at law or in equity, the **[*103]** Warrant Holder or the Class B Limited Partner(s) otherwise would be deemed to have to the Company, the Partnership or the Member. The Board of Managers shall hold such meetings no less frequently than once per calendar quarter and at such times and places as shall be determined by the Managers. Special meetings of the Board of Managers may be called at any time by agreement of the Managers. The Board of Managers may establish such procedures for the conduct of meetings as may be agreed by the Managers.

(c) Officers. The Board of Managers may appoint such officers, from time to time, as the Board of Managers deems necessary and advisable.

(d) Authority of the Member. Subject to the management of the business and affairs of the Company by the Board of Managers pursuant to Section 5(b) hereof, the Member shall have all powers necessary to manage and control the day-to-day activities and operations of the Company.

(e) Admission of Additional Members. The Member, in its discretion, may admit additional members to the Company on terms and conditions agreed to by the Member and the Person being admitted as an additional member; provided, however, that the Board of Managers shall not consist **[*104]** of more than five Managers without the consent of the Class B Managers and in no event may the Board of Managers consist of more than five Managers if fewer than forty percent (40%) of the Managers are Class B Managers.

(f) Limitation of Liability of the Member and Managers. The debts, obligations, and liabilities of the Company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations, and liabilities of the Company; and the Member and the Managers shall not be obligated personally for any such debt, obligation, or liability of the Company solely by reason of being the Member or a Manager, except and only to the extent as otherwise expressly required by law.

(g) Indemnification.

(i) In any threatened, pending, or completed claim, action, suit, or proceeding to which the Member or a Manager was or is a party or is threatened to be made a party by reason of its activities on behalf of the Company, the Company shall indemnify and hold harmless such Member and Manager against losses, damages, expenses (including attorneys' and accountants' fees), judgments, and amounts paid in settlement actually and reasonably incurred in connection with such claim, action, **[*105]** suit, or proceeding, except that the Member and the Managers shall not be indemnified for actions constituting the improper receipt of personal benefits, willful misconduct, recklessness, or gross negligence with respect to the business of the Company; provided, however, that to the extent the Member or a Manager has been successful on the merits or otherwise in defense of any action, suit, or proceeding to which it was or is a party or is threatened to be made a party by reason of the fact that it was or is a Member or Manager of the Company, or in defense of any claim, issue, or matter in connection therewith, the Company shall indemnify such Member and Manager and hold him harmless against the expenses (including attorneys' and accountants' fees) actually incurred by such Member and Manager in connection therewith.

(ii) Expenses (including attorneys' and accountants' fees) incurred in defending a civil or criminal claim, action, suit, or proceeding shall be paid by the Company in advance of the final disposition of the matter upon receipt of an undertaking by or on behalf of the Member or a Manager to repay such amount if such Member or Manager is ultimately determined not to be **[*106]** entitled to indemnity.

(iii) For purposes of this Section 5(g), the termination of any action, suit, or proceeding by judgment, order, settlement, or otherwise adverse to the Member or a Manager shall not, of itself, create a presumption that the conduct of such Member or Manager constitutes willful misconduct, recklessness, or gross negligence with respect to the business of the Company.

6. PERMITTED TRANSACTIONS

(a) Other Businesses. The Member, the Managers and their respective affiliates, agents, and representatives, may engage in or possess an interest in other business ventures of any nature or description, independently or with others, whether currently existing or hereafter created and whether or not competitive with or advanced by the business of the Company. The Company shall not have any rights in or to the income or profits derived therefrom.

(b) Transactions with the Company. The Company may, in the sole discretion of the Board of Managers, contract with any Person (including the Member or any Person affiliated with the Member or in which the Member may be interested) for the performance of any services which may reasonably be required to carry on the business of the Company, **[*107]** and any such Person dealing with the Company, whether as an independent contractor, agent, employee, or otherwise, may receive from others or from the Company profits, compensation, commissions, or other income incident to such dealings.

7. ASSIGNMENT, TRANSFER, OR SALE OF INTERESTS IN THE COMPANY

Subject to the Put/Call Agreement, the Company may sell, assign, pledge, or otherwise encumber or transfer all or any part of its interest in the Company to any Person.

8. DISSOLUTION AND TERMINATION OF THE COMPANY

(a) Events of Dissolution. The Company shall dissolve upon the earlier to occur of:

(i) an election to dissolve the Company made by the Board of Managers, subject to any restriction in any agreement to which the Company is a party; or

(ii) the happening of any event that, under the Act, causes the dissolution of a limited liability company.

(b) Actions on Dissolution. Upon the dissolution of the Company, the Board of Managers shall act as liquidator to wind up the Company. The proceeds of liquidation shall be applied first to the payment of the debts and liabilities of the Company (including any loans to the Company made by the Member), the expenses of liquidation, and the establishment **[*108]** of any reserves that the liquidator deems necessary for potential or contingent liabilities of the Company. Remaining proceeds shall be distributed to the Member as provided in Section 4(a). Upon the dissolution and winding up of the Company, the liquidator shall file a certificate of cancellation with the Secretary of State of Delaware in accordance with *Section 18-203* of the Act. Upon the completion of the distribution of Company assets and the proceeds of liquidation as provided in this Section 8(b), the Company shall be terminated.

9. BOOKS, RECORDS, AND RETURNS

(a) Books of Account and Records. A copy of this Agreement and any other records required to be maintained by the Act shall be maintained at the principal office of the Company at the location specified in Section 2(g). All such books and records shall be available for inspection and copying by the Member or its duly authorized representatives during ordinary business hours. The Company shall keep accurate books and records of the operation of the Company which shall reflect all transactions, be appropriate and adequate for the Company's business and for carrying out the provisions of this Agreement.

(b) Deposit of Company **[*109]** Funds. All revenues, assessments, loan proceeds, and other receipts of the Company will be maintained on deposit in interest-bearing and non-interest bearing accounts and other investments as the Board of Managers deems appropriate.

10. MISCELLANEOUS

(a) Captions. All section or paragraph captions contained in this Agreement are for convenience only and shall not be deemed part of this Agreement.

(b) Pronouns, Singular and Plural Form. All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, and neuter as the identity of the Person or Persons referred to may require, and all words shall include the singular or plural as the context or the identity of Persons may require.

(c) Further Action. The parties shall execute and deliver all documents, provide all information, and take, or forbear from, all actions that may be necessary or appropriate to achieve the purposes of this Agreement.

(d) Entire Agreement. Except as to matters with respect to which additional agreements are referenced herein, this Agreement contains the entire understanding among the parties and supersedes any prior understandings and agreements between them regarding the subject matter **[*110]** of this Agreement.

(e) Agreement Binding. This Agreement shall be binding upon the successors and assigns of the parties.

(f) Severability. If any provision or part of any provision of this Agreement shall be invalid or unenforceable in any respect, such provision or part of any provision shall be ineffective to the extent of such invalidity or unenforceability only, without in any way affecting the remaining parts of such provision or the remaining provision of this Agreement.

(g) Counterparts. This Agreement may be signed in counterparts with the same effect as if the signature on each counterpart were upon the same instrument.

(h) Governing Law. This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Delaware (without regard to the choice of law provisions thereof).

(i) Amendment. This Agreement shall not be amended without the prior written consent of the Warrant Holder or, if applicable, the Class B Limited Partner(s).

(j) No Third-Party Beneficiaries. With the exception of the Warrant Holder, the Class B Limited Partner(s) and the Class B Managers, this Agreement is not intended to, and shall not be construed to, create any right enforceable **[*111]** by any Person not a party hereto, including any creditor of the Company or of the Member.

IN WITNESS WHEREOF, the undersigned have executed this Agreement to be effective as of the date first above written.

DAILY GAZETTE COMPANY

By:

Elizabeth B. Chilton

President

DAILY GAZETTE HOLDING COMPANY, LLC

By: Daily Gazette Company, its sole member

By:

Elizabeth B. Chilton

President

SECOND AMENDED AND RESTATED

JOINT OPERATING AGREEMENT

BY AND AMONG

DAILY GAZETTE COMPANY, A WEST VIRGINIA CORPORATION; DAILY GAZETTE HOLDING COMPANY, LLC, A DELAWARE LIMITED LIABILITY COMPANY; CHARLESTON NEWSPAPERS, A WEST VIRGINIA UNINCORPORATED JOINT VENTURE; CHARLESTON NEWSPAPERS HOLDING, L.P., A DELAWARE LIMITED PARTNERSHIP; DAILY GAZETTE PUBLISHING COMPANY, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CHARLESTON PUBLISHING COMPANY, A DELAWARE CORPORATION

__, 2009

THIS SECOND AMENDED AND RESTATED JOINT OPERATING AGREEMENT (this "JOA") is dated as of __, 2009 by and among Daily Gazette Company, a West Virginia corporation ("DGC"); Daily Gazette Holding Company, LLC, a Delaware limited liability company ("DGHC"); Charleston Newspapers, a West Virginia unincorporated joint venture (the "Joint Venture"); Charleston Newspapers **[*112]** Holdings, L.P., a Delaware limited partnership (the "Limited Partnership"); Daily Gazette Publishing Company, LLC, a Delaware limited liability company ("DGPC"); and Charleston Publishing Company, a Delaware corporation ("CPC").

WHEREAS, DGHC, the Joint Venture, the Limited Partnership, DGPC and CPC previously entered into an Amended and Restated Joint Venture Agreement dated as of May 7, 2004 (the "Prior JVA"), pursuant to which the Joint Venture prior to the date hereof managed and operated The Charleston Gazette ("Gazette"), The Sunday Gazette-Mail ("Gazette-Mail") and The Charleston Daily Mail ("Mail") (collectively, the "Newspapers" and individually a "Newspaper"), except for the news and editorial departments of Gazette and Gazette-Mail, on one hand, and Mail, on the other, which have remained separate and independent;

WHEREAS, simultaneously with the execution of this agreement, DGC and CPC and certain affiliated parties are effectuating certain transactions relating to the ownership and management of the Joint Venture and which are described herein;

WHEREAS, DGC, CPC, DGHC, DGPC, the Limited Partnership and the Joint Venture desire to amend various provisions of the Prior JVA, **[*113]** to restate it in its entirety and to supplement it, as herein provided;

WHEREAS, the purpose and intent of the JOA is to provide a plan of common operation of the Newspapers, so as to (1) provide efficient newspaper operations, (2) produce high quality newspapers that are attractive to readers and advertisers and (3) maintain the separate identities and free editorial and news voices of the Newspapers; and

WHEREAS, the JOA will continue to maintain as separate and independent the respective news and editorial operations of the Newspapers consistent with the requirements of the Newspaper Preservation Act, *15 U.S.C. § 1801 et seq.*;

NOW THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, the parties hereby agree as follows:

I. THE LIMITED PARTNERSHIP

A. General. On May 7, 2004, a limited partnership (the "Limited Partnership") was formed by DGHC, as the sole General Partner, CPC, as the sole Class A Limited Partner, and ABRY/Charleston, Inc., as the sole Class B Limited Partner. Prior to the date hereof, ABRY/Charleston, Inc.'s entire interest as a Class B Limited Partner in the Limited Partnership was redeemed by the Partnership. **[*114]** Simultaneously herewith, the Limited Partnership is granting to CPC (in its capacity as the holder of the Warrant and any permitted transferee of the Warrant, the "Warrant Holder") a warrant (the "Warrant") to subscribe for and purchase up to an aggregate number of Class B Limited Partner Units in the Limited Partnership that constitute a twenty percent (20%) Percentage Interest (as defined in the Amended and Restated Limited Partnership Agreement of the Limited Partner dated as of the date hereof (the "Limited Partnership Agreement"), by and among DGHC and CPC, the Limited Partnership) as of the date of exercise, subject to adjustment as provided therein.

B. Future Capital Contributions; Capital Assets. CPC and any other limited partners of the Limited Partnership shall have no obligation to make any further contributions to the capital of the Limited Partnership. DGHC shall in the future make such additional contributions to the capital of the Limited Partnership as shall be necessary in its reasonable judgment to (1) fund acquisitions of capital assets necessary for the business and operations of the Limited Partnership and/or the Joint Venture; (2) fund acquisitions of capital assets **[*115]** necessary for the business and operations of the editorial departments of each of the Newspapers to the extent such editorial departments' tangible capital assets on the date hereof require supplementation or replacement, (3) provide the Limited Partnership and the Joint Venture with adequate working capital, and (4) ensure that the Limited

Partnership and the Joint Venture have adequate funds to make on a timely basis the cash distributions and payments contemplated by Section V J (1) through (4) of this JOA. DGHC may from time to time cause the Limited Partnership or the Joint Venture to distribute and transfer to it one or more capital assets of the Limited Partnership so long as after such transfer the Limited Partnership and the Joint Venture shall have, as a result of their remaining capital assets and any other capital assets which DGHC shall at the time contribute or make available to the Limited Partnership and/or the Joint Venture pursuant hereto, capital assets whose adequacy and suitability for the Limited Partnership's and/or the Joint Venture's performance of the business and operations of the Newspapers are substantially the same as prior to such transfer.

C. Management **[*116]** of Partnership and General Partner. The Limited Partnership shall be managed exclusively by DGHC as the General Partner of the Limited Partnership. The members of DGHC have delegated the management of DGHC to a board of managers consisting of up to five individual managers, and in no event may the board of managers consist of more than five managers without the consent of the managers appointed pursuant to Section 5(b) of the Operating Agreement of DGHC by the Warrant Holder or the Class B Limited Partner(s), as applicable; provided, however, that in no event may the board of managers consist of more than five managers unless not fewer than forty percent (40%) are appointed by the Warrant Holder or the Class B Limited Partner(s), as applicable. DGC will appoint the members of DGHC's board of managers; provided, however, that until and unless the Warrant Holder exercises its rights under the Warrant and purchases any Class B Limited Partner Units, DGC will delegate to the Warrant Holder the right to appoint two (2) of the members of DGHC's board of managers (or such greater number as required by Section 5(b)(ii) of the Operating Agreement of DGHC) and, upon the purchase by the Warrant **[*117]** Holder of any Class B Limited Partner Units pursuant to the Warrant, DGC will delegate to the Class B Limited Partner(s) the right to appoint two (2) of the members of DGHC's board of managers (or such greater number as required by Section 5(b)(ii) of the Operating Agreement of DGHC). If there is more than one Class B Limited Partner, then the right to appoint two (2) of the members of DGHC's board of managers (or such greater number as required by Section 5(b)(ii) of the Operating Agreement of DGHC) will be vested solely in the Class B Limited Partner that supervises editorial and reportorial functions of the Mail pursuant to Section V H hereof. The Warrant Holder or the Class B Limited Partner(s), as applicable, may not appoint any person who is, at the time of his or her appointment, an employee of the Joint Venture, DGC, DGHC, the Limited Partnership or DGPC to represent it on DGHC's board of managers.

II. THE JOINT VENTURE

A. Continuation of Joint Venture. By this JOA, the Limited Partnership and DGPC shall continue the conduct of a joint venture for the publication of the Newspapers; provided (1) that there shall continue to be no merger, combination or amalgamation of the editorial **[*118]** or reportorial staff of Gazette and Gazette-Mail, on the one hand, and Mail, on the other hand, (2) that CPC shall continue to independently determine the editorial, news policy and content of Mail and (3) that DGHC shall continue to independently determine the editorial, news policy and content of Gazette and Gazette-Mail.

B. Name and Place of Business. The Joint Venture shall continue to be conducted under the name "Charleston Newspapers" from its place of business at 1001 Virginia Street, East, City of Charleston, County of Kanawha, State of West Virginia.

C. Ownership of and Title to Property. All of the parties hereto hereby confirm and agree that the ownership of and title to all real property and all tangible personal property used in and useful to the Joint Venture is exclusively in the Joint Venture rather than in any other party to this JOA, jointly or individually, and without regard to whether any property was contributed by any party to this JOA to the Joint Venture, was otherwise made available to the Joint Venture by any party to this JOA or was otherwise acquired by the Joint Venture, except that certain property is owned by G.M. Properties, Inc., a West Virginia corporation, **[*119]** of which all the outstanding shares are owned by the Joint Venture.

D. Revenues, Expenses and Obligations. The Joint Venture shall receive all income and revenues of the Joint Venture and shall pay all expenses incurred or assumed by it. No party hereto shall be or shall become liable upon any contract or other obligation of the Joint Venture or any other party hereto, unless such party shall expressly assume such contract or other obligation or liability is imposed by law.

E. Management of Joint Venture. Subject to the provisions of this JOA concerning the editorial independence of the Newspapers and such other limitations as are expressly set forth in this JOA or the Limited Partnership Agreement, the Limited Partnership shall have complete authority over and exclusive control and management of the business and affairs of the Joint Venture. The Limited Partnership may delegate such general or specific authority to the officers and employees of the Joint Venture with respect to the business and day-to-day operations of the Joint Venture as it may from time to time consider desirable, and the officers and employees of the Joint Venture may exercise the authority granted to them. The **[*120]** Joint Venture shall indemnify, defend and hold harmless DGPC and the Limited Partnership and its partners (and their respective shareholders, members, partners, directors, managers, officers, employees and agents) from any liability, loss or damage suffered by them by reason of any act or omission by them in connection with the business of the Joint Venture; provided, however, that indemnification shall not be available for any claim that results from the willful misconduct of such person or the breach by such person of its obligations under this JOA or other agreements to which such person may be subject. The Limited Partnership shall not be liable, in damages or otherwise, to the Joint Venture or its direct or indirect partners for any act or omission in the absence of willful misconduct.

III. EDITORIAL INDEPENDENCE

Preservation of the editorial independence of the Newspapers is the essence of this JOA. DGHC and CPC each agree to strictly maintain the separateness of their respective limited liability company and corporate identities, as the case may be, and to retain the editorial independence of Gazette and Gazette-Mail, on the one hand, and Mail, on the other hand. CPC agrees that **[*121]** neither it nor any affiliate shall have any connection with the news or editorial operations of Gazette or Gazette-Mail. The separate editorial and reportorial staffs of Gazette and Gazette-Mail, on the one hand, and Mail, on the other hand, shall be independent and shall not be merged, combined or amalgamated, and their editorial policies shall be independently determined. DGHC agrees that neither it nor any affiliate shall have any connection with the news or editorial operations of Mail. Actions of DGHC with respect to Mail shall be confined exclusively to its role as General Partner of the Limited Partnership and in such role to cause the Joint Venture to print, sell and distribute the Newspapers, and to solicit and sell advertising space therein, and to perform such other functions as are described in this JOA.

IV. TERM

Unless sooner terminated in accordance with the terms hereof, this JOA shall continue in effect from the date hereof through the close of business on June 30, 2024. This JOA shall thereupon be automatically renewed for additional five-year terms unless any party hereto gives written notice to the contrary to each of the other parties hereto at least 12 months prior **[*122]** to the end of the then-current term.

V. CONTINUING OPERATIONS

A. General. On and after the date hereof the Joint Venture shall control, supervise, manage and perform all operations (other than the news and editorial operations of the Newspapers) involved in producing, printing, selling and distributing the Newspapers; to determine press runs, press times, page sizes and cutoffs of the Newspapers; to determine whether supplemental products will be distributed in or with one or more Newspapers, including whether and how certain products will be distributed to non-subscribers; to purchase newsprint, materials and supplies as required; to solicit and sell advertising space in the Newspapers; to collect the Newspapers' circulation and advertising accounts receivable; to provide or make available to each Newspaper such parking, subscriptions, messenger services, and data processing services as are reasonable and appropriate (the costs for which shall be borne by the Joint Venture and which shall not be an Editorial Expense); and to make all determinations and decisions and do any and all acts and things necessarily connected with the foregoing activities, including maintaining insurance coverage **[*123]** that is normal and appropriate for similarly-situated businesses. The parties recognize that DGHC as General Partner of the Limited Partnership shall have general charge and supervision of the business of the Newspapers, but shall treat each of the Newspapers as separate and distinct editorial products, and shall have no duties or authority with respect to the news or editorial functions of Mail.

B. Production. On and after the date hereof, the Joint Venture shall print the Newspapers on equipment owned or leased by the Joint Venture in plant or plants located at such place or places as the Joint Venture may determine, and all operations under this JOA, except the operation of the Newspapers' editorial departments, shall be carried on and performed by the Joint Venture with equipment from the Joint Venture's plant or plants or by independent contractors or agents selected by the Joint Venture. During the term of this JOA, CPC agrees to produce Mail's editorial and news copy, and DGHC agrees to produce Gazette's and Gazette-Mail's editorial and news copy, on equipment which is provided by the Joint Venture or which is compatible with the equipment used by the Joint Venture in its production **[*124]** facilities.

C. Advertising and Circulation.

(1) In general and subject to the exceptions set forth in clauses (a) through (d) below, the Joint Venture shall have complete control of and the right to determine the advertising and circulation rates for each of the Newspapers, and the Joint Venture shall use its reasonable efforts to sell advertising space in each Newspaper and to sell, promote and distribute each Newspaper as widely as practicable, consistent, however, with the objective of enhancing the overall economic performance of the Joint Venture and the Newspapers considered together in a manner that does not have a material adverse impact on the cash flow of the Joint Venture and the ability of the Joint Venture to make on a timely basis the cash distributions to the Limited Partnership and the payments to CPC contemplated by Section V J (1) through (4) hereof.

(a) The Joint Venture may not reduce the primary circulation area of Mail as of August 1, 2009 without CPC's approval.

(b) For a six month period commencing within a reasonable time after the date hereof, the Joint Venture will promote Mail by offering subscriptions at a 50% discounted rate. This promotion will be applicable **[*125]** solely to Mail.

(c) Except as set forth in clause (b) above or as otherwise approved by CPC, the Joint Venture will offer the same promotions for Mail and Gazette to potential subscribers.

(d) The Joint Venture will not discriminate against Mail in advertising, promotions or other sales or marketing efforts.

(2) The Joint Venture shall be free to select and alter from time to time the national advertising representative(s) for each of the Newspapers and the commission payable to such national advertising representative(s) and any other terms of such arrangement(s) shall be determined by the Joint Venture; provided, however that the Joint Venture will not discriminate against Mail in advertising, promotions or other sales or marketing efforts.

(3) The Joint Venture will pay to each of the Publisher of Mail and the Circulation Director of the Joint Venture a bonus for increases in Mail's average daily paid print circulation (as stated in the most recent six month audit conducted by the Audit Bureau of Circulations or other reputable third party media auditor). If the average daily paid print circulation of Mail for a six month audit period is greater than the average daily paid print circulation **[*126]** for the immediately preceding six month audit period, the bonus will be $3.00 per each additional subscriber and will be paid within a reasonable time after the Joint Venture receives the applicable six month audit.

D. Publication Schedule. DGHC shall publish Gazette daily on weekdays and Saturday mornings and Gazette-Mail on Saturday and Sunday mornings, and CPC shall publish Mail daily on weekday mornings. The Joint Venture will not change the press deadlines, delivery targets, number of editions and days of publication of Mail without CPC's approval. If at any time DGHC determines in the good faith exercise of business judgment as General Partner of the Limited Partnership that the continuation of any scheduled publication of any edition(s) of Gazette or Gazette-Mail is no longer in the best interests of those Newspapers and the Joint Venture considered together, then, subject to the Newspaper Preservation Act, *15 U.S.C. § 1801 et seq.* (the "Act"), within thirty days after written notice by the Limited Partnership to CPC, the scheduled publication of such edition(s) may be discontinued. The Joint Venture will not discontinue publication of Mail without CPC's approval unless (i) the **[*127]** incremental revenue from Mail fails to cover Mail's incremental costs and the discontinuation of Mail can be effected by satisfying the failing firm test as applicable to joint operating agreement newspapers under the Act and (ii) the U.S. Department of Justice approves the discontinuation of publication of Mail.

E. Office Space and Equipment. On and after the date hereof, the Joint Venture shall furnish reasonably adequate office space for the separate use of the editorial departments of the Gazette, on the one hand, and Mail on the other hand. Such space shall be furnished with furniture and equipment which in the Joint Venture's reasonable judgment is sufficient and technologically adequate for each Newspaper's news and editorial operations.

F. Other Services. The parties recognize that in addition to the operations with respect to the Newspapers contemplated by this JOA, the Joint Venture may also utilize its production and other facilities, personnel, and agents for any other lawful activities it may deem appropriate, including distributing news, advertising or other information to non-subscribers; distributing or making available all or a portion of the information or advertising **[*128]** in the Newspapers to subscribers by means of electronic distribution, microfilm, microfiche or mail; commercial printing, including commercial printing of other newspapers; distribution services; and any other activities not inconsistent with its principal business; provided, however, that such activities shall not unreasonably interfere with the printing or distribution of the Newspapers.

G. Future Purchases. On and after the date hereof, subject to Section V H, the Joint Venture shall be responsible for the purchase of all inventory, supplies, equipment and services as it deems to be necessary or desirable in connection with the operation of the Newspapers and other functions as are described in this JOA. In the event of shortages of inventory, supplies, equipment or services, no Newspaper shall be unfairly favored or discriminated against as regards the other.

H. News and Editorial Matters. DGHC and CPC shall furnish complete news and editorial services necessary and appropriate for the publication of their respective Newspapers in the manner provided in this JOA.

(1) Each of DGHC and CPC shall have complete and exclusive control and direction of the editorial department and editorial **[*129]** policies of its respective Newspapers and shall be responsible for and shall bear all of its respective Editorial Expense (as defined below). Without limiting the generality of the foregoing, each of DGHC and CPC shall have the exclusive right to determine the editorial format, dress, makeup and news and feature content of its respective Newspapers (including the content of all advertisements and advertising matter), and each shall have complete control and authority over the editors and editorial department staff of its respective Newspapers (including the exclusive authority to determine the number, identity and salaries of the editorial department of its respective Newspapers and to make hiring and firing decisions, so long as the Editorial Expense for each Newspaper does not exceed the budgeted amount for such Newspaper for the applicable year determined in accordance with Section V J(8) below). The term "editorial department" as used herein shall include the news, editorial, editorial promotion and photographic functions of the applicable Newspaper. DGHC and CPC each recognize the importance of the editorial quality of their respective Newspapers and each of them agrees to use **[*130]** reasonable efforts to provide editorial products for their Newspapers which are compatible with the needs of the Charleston, West Virginia area newspaper market and to preserve with respect to their Newspapers a high standard of newspaper quality and journalistic excellence.

(2) The amount of reading content (sometimes known as "news hole") and the amount of color usage of each of the Newspapers shall be determined by the board of managers of the Limited Partnership during the annual budgeting process; provided, however, that the news hole and color usage allocations will be budgeted at the same level for both Mail and Gazette. Each Newspaper may elect to publish pages in excess of their news hole and/or exceed the amount of color usage determined for such Newspapers by the Joint Venture, provided the Joint Venture has the production capacity to accommodate such excesses. However, if any of the Newspapers exceeds its budgeted news hole allocation or color usage, then any newsprint and other production costs attributable to such excess shall be borne by such Newspaper, and upon being invoiced therefor by the Joint Venture, DGHC or CPC, as appropriate, shall reimburse the Joint Venture **[*131]** for such expense. If, from time to time following the determination by the Joint Venture of the news hole allocation, the Joint Venture shall require a greater news hole allocation for one or more editions of one or more of the Newspapers, the Newspapers shall have no obligation to reimburse the Joint Venture for any additional expense the Joint Venture may incur as a consequence thereof, and

the Joint Venture shall reimburse the Newspapers promptly upon being invoiced therefor for any additional expenses the Newspapers may incur as a consequence thereof.

(3) DGHC, independently of CPC, shall develop standards for determining the acceptability of advertising copy for publication in Gazette and Gazette-Mail. CPC, independently of DGHC and the Joint Venture, shall develop standards for determining the acceptability of advertising copy for publication in Mail.

(4) Except as provided otherwise herein, the term "Editorial Expense" as used in this JOA shall mean all costs and expenses associated with the news and editorial departments of each Newspaper, including but not limited to: (a) compensation, including payroll taxes, retirement, pension, health and death benefits, worker's compensation **[*132]** insurance and group insurance of news and editorial employees; (b) severance pay of news and editorial employees; (c) travel and other expenses of news and editorial employees; (d) press association assessments and charges; (e) charges for news services and editorial wire services; (f) charges for the right to publish news and editorial features, daily or weekly comics and other editorial material of every kind and character; (g) the cost of news and editorial materials, printing, stationery, office supplies and postage for the news and editorial department; (h) donations; (i) the cost of editorial promotions; (j) telegraphic, telephone, long-distance telephone and intemet access charges of the news and editorial departments; (k) charges for the purchase, rental, repair and maintenance of editorial department cameras and related photographic equipment (provided, however, that the term "Editorial Expense" shall not include any cost, charge or expense related to any camera or other equipment made available to the editorial departments of the Newspapers pursuant to Section V E of this JOA, or to any equipment that is an integral part of the production process even though located in the **[*133]** news and/or editorial department of a Newspaper, or related to any editorial department capital assets owned by either Newspaper); (1) the cost of liability insurance and insurance with respect to libel and right of privacy and similar hazards; and (m) the cost of any Charleston, West Virginia based executive-level management of Mail. Notwithstanding the foregoing, the following shall not be included in the term "Editorial Expense" and shall be separately borne by the Newspaper which incurs them: (i) certain uninsured liabilities for published or excluded material as provided in Section VII B, (ii) costs for excess news hole allocation or color usage as provided in Section V H(2), (iii) costs related to material changes from present, usual or customary practices as provided in Section V H(5), (iv) any interest, indebtedness, amortization, organizational costs or other costs or expenses relating to Mail and (v) except as described in (m) above, any portion of any salaries, expenses, overhead or corporate allocation attributable to any non-Charleston, West Virginia based ownership, management or supervision of Mail.

(5) All Editorial Expense of the editorial departments of Gazette and **[*134]** Gazette-Mail shall be borne by DGHC, and all Editorial Expense of the editorial department of Mail shall be borne by CPC; provided, however, that costs resulting from any material change by any Newspaper from its present, usual or customary practices that result in additional future newsprint, production or other costs to be incurred on the part of the Joint Venture shall be borne by such Newspaper, and upon being invoiced therefor by the Joint Venture, DGHC or CPC, as appropriate, shall reimburse the Joint Venture for such costs.

I. Accounting Matters. The Joint Venture shall cause to be maintained full and accurate books of account and records showing all transactions hereunder. Such books and records shall be kept on the basis of a year ending December 31 and under the accounting methods currently employed by DGC in accordance with generally accepted accounting principles, and shall at all times be kept at the principal place of business of the Joint Venture. The independent auditors of the Joint Venture shall be the independent auditors of DGC. Any changes in accounting method shall be consistent with accepted accounting principles and with changes made generally by DGC, and CPC **[*135]** shall receive prompt notice of any such changes that could reasonably be expected to have an adverse effect on its interests under this JOA or the Limited Partnership Agreement. CPC and its respective authorized agents or representatives shall have access to and may inspect such books and records at any time and from time to time during ordinary business hours. Statements shall be rendered and settlements under this JOA shall be made on a monthly basis on the 15th day following the end of each monthly accounting period, with annual adjustments as soon as practicable at the conclusion of each year during the term of this JOA. An annual statement shall be furnished by the Joint Venture to the Limited Partnership not later than the 31st day of March of each year, summarizing in reasonable detail and fairly reflecting the transactions and the results of operations under this JOA during the preceding year. All payments shown to be due by CPC, DGHC or the Joint Venture shall be paid within thirty (30) days after the delivery of the applicable statement.

J. Distributions to Partners.

(1) For each year of this JOA, the Joint Venture shall distribute to the Limited Partnership cash equal to the **[*136]** amount actually expended or accrued as a current liability in accordance with generally accepted accounting principles by CPC for Editorial Expenses during such year; provided, however, that the amount distributed by the Joint Venture to the Limited Partnership pursuant to this Section V J(1) shall not, in respect of any year, exceed the budgeted amount for such year determined by the Joint Venture in accordance with Section V J(8) below; and provided further that the amount to be distributed by the Joint Venture to the Limited Partnership shall be reduced by any obligation of CPC to reimburse the Joint Venture for expenses paid by the Joint Venture on behalf of CPC. The Limited Partnership shall in turn distribute such net amount to CPC.

(2) If, for any year, with the prior written concurrence of the Joint Venture, CPC makes a permanent reduction in its editorial workforce in accordance with the requirements of applicable laws, regulations and agreements, and if and to the extent the severance costs associated with such reduction are not included in CPC's applicable budgeted Editorial Expenses for such year determined in accordance with Section V J(8) below, then (a) the Joint Venture **[*137]** shall, in addition to the cash amounts described in subsection (1) above, distribute to the Limited Partnership in cash an amount equal to that portion of such severance costs that is reasonable and required to be incurred for such year pursuant to applicable laws, regulations or agreements, and that in any event does not exceed the costs DGHC would have incurred if DGHC had made corresponding reductions.

(3) The distributions described in subsection (1) above shall be made on a monthly basis in increments of 1/12 of the applicable budgeted amount determined by the Joint Venture, subject to adjustment by the Joint Venture at the end of each year so that such aggregate distributions for the year are in such amounts as the Joint Venture shall determine (based on such records and evidence as the Joint Venture may request from CPC) are equal to the amounts expended or accrued by CPC for such year as provided in Section V J(8), but no greater than the budgeted Editorial Expenses of Mail for such year. The distributions described in subsection (2) above shall also be made on a monthly basis and shall be in such amounts as the Joint Venture shall determine (based on such records and evidence **[*138]** as the Joint Venture may request from CPC) are equal to the amounts expended or accrued by CPC for such period within the applicable budget amounts, with such subsequent adjustment as may be appropriate.

(4) In addition to the distributions to the Limited Partnership and, in turn, to CPC provided for in Sections V J (1)—(3) above, there also shall be paid to CPC a fee for its services in the management and supervision of the news and editorial operations of the Mail. The management fee shall be paid on May 7 of each year during the term of this JOA (each date a "Payment Date"). The amount of the management fee payable on May 7, 2010 shall be $225,000. For each Payment Date after May 7, 2010, the management fee payable to CPC shall be $225,000 adjusted to reflect the aggregate change since May 7, 2010 in the Consumer Price Index. The "Consumer Price Index" for purposes of this JOA shall mean "The Consumer Price Index for All Urban Consumers (CPI-U) for the U.S. City Average for All Items, 1982-84 = 100" released by the U.S. Department of Labor, Bureau of Labor Statistics, or any similar replacement index. For each Payment Date after May 7, 2010, the management fee payable to CPC shall **[*139]** also be adjusted annually on a non-cumulative basis as follows:

(a) If Mail's average daily paid print circulation for the most recent 12 month audited period exceeds the average daily paid print circulation for the immediately preceding 12 month audited period by more than 1%, the management fee payable on such Payment Date will be increased by $25,000.

(b) If Mail's average daily paid print circulation for the most recent 12 month audited period is the same as the average daily paid print circulation for the immediately preceding 12 month audited period or if Mail's average daily paid print circulation for the most recent 12 month audited period exceeds the average daily paid print circulation for the immediately preceding 12 month audited period by 1% or less, the management fee payable on such Payment Date will be increased by $10,000.

(c) If Mail's average daily paid print circulation for the most recent 12 month audited period decreases by 1% or less from the average daily paid print circulation for the immediately preceding 12 month audited period, the management fee payable on such Payment Date will be decreased by $10,000 (provided that in no event will the management fee payable **[*140]** on any Payment Date be reduced to an amount below $225,000).

(d) If Mail's average daily paid print circulation for the most recent 12 month audited period decreases by more than 1% from the average daily paid print circulation for the immediately preceding 12 month audited period, the management fee payable on such Payment Date will be decreased by $25,000 (provided that in no event will the management fee payable on any Payment Date be reduced to an amount below $225,000).

For purposes of the adjustments described in clauses (a) through (d) above, Mail's average daily paid print circulation will be determined based on 12 month audits conducted by the Audit Bureau of Circulations or other reputable third party media auditor.

(5) Except for the foregoing distributions to the Limited Partnership, and except for such cash as the Limited Partnership may from time to time determine is necessary or desirable to retain in the Joint Venture for working capital purposes, the Joint Venture shall (subject to any applicable contractual restrictions under the Joint Venture's financing arrangements) distribute all remaining cash (including without limitation the proceeds from any sale or disposition **[*141]** of Joint Venture capital assets) equally to the Limited Partnership and DGPC. Such distributions shall be made from time to time as determined by the Limited Partnership, but no such distributions shall be made at any time when the Joint Venture is not current in making the distributions to the Limited Partnership and the payments to CPC described in Section V J(1) through (4) hereof.

(6) Pending the distributions contemplated by this Section V J, DGHC shall be authorized to manage the Joint Venture's cash pursuant to the corporate-wide policies of DGC.

(7) All income, gain, profits, losses, and expenses of the Joint Venture shall be allocated between the Limited Partnership and DGPC in proportion to the cash distributed to them pursuant to this Section V J.

(8) For each year of this JOA, the budgeted Editorial Expenses for Mail and Gazette shall be in amounts determined by the board of managers of DGHC and approved by at least 75% of the members of the board of managers (i.e., if the board consists of four members, not fewer than three members must vote in favor, and if the board consists of five members, not fewer than four members must vote in favor); provided, however that for Mail's **[*142]** 2010 annual Editorial Expense budget the staffing level in Mail's news and editorial departments will be budgeted at thirty-two (32) full time employees. Any Editorial Expense budget may be adjusted by action of the board of managers of DGHC (subject to the 75% supermajority voting requirement) from time to time during the course of a year of this JOA to take appropriate account of developments in products or technologies, material changes in any Newspaper's editorial workforce, or other material changes which may occur relative to any Newspaper's operations or circulation in any given year.

VI. TERMINATION

A. Termination.

(1) If DGHC or CPC defaults by failing to make any payment hereunder when due or by otherwise failing to fulfill in any material respect any of its obligations under this JOA and the party in default does not correct its default within ninety (90) days after receipt from the other of written notice specifying the default, then the non-defaulting party may, at its election, terminate this JOA upon ninety (90) days' prior written notice.

(2) If publication of Mail is discontinued in accordance with the terms of this JOA or the Limited Partnership is dissolved, terminated **[*143]** and liquidated, this JOA shall terminate.

B. Action After Termination.

(1) It is understood that, as soon as practicable after the termination of this JOA by lapse of time or otherwise, the Limited Partnership shall, subject to the prior satisfaction of the claims of all creditors (other than the partners of the

Limited Partnership) and the payment of the fee provided in Section V J(4), distribute to CPC, the Mail masthead, all trademarks, copyrights, trade names, service names and service marks of the Mail, the Mail subscriber and advertiser lists, print and electronic archives of the Mail, associated web sites and URLs (including "dailymail.com") and all legal rights associated with these assets, subject to such dispositions, additions or substitutions relating thereto which may have occurred in the ordinary course of the operations of the Limited Partnership or the Joint Venture or in satisfaction of the claims of creditors subsequent to the formation of the Limited Partnership, including, in particular, any and all lists of subscribers to Mail, together with copies of any contracts with such subscribers relating to Mail and any executory contracts for the purchase of advertising **[*144]** in Mail, free and clear of any lien, encumbrance, right or interest (including any option or any license or other right of use) of or in favor of a third party, transfer restriction (including any right of first offer or refusal or similar provision) or any other similar right or interest whatsoever.

(2) Upon the termination of this JOA by lapse of time or otherwise, the Joint Venture shall dissolve and shall distribute its assets as follows:

(a) That portion of any distributions to which the Limited Partnership may be entitled but which has not yet been distributed for the period up to the date of termination pursuant to Section V J(1) through (3) hereof, shall be distributed to the Limited Partnership.

(b) All other assets of the Joint Venture shall be distributed equally to DGPC and the Limited Partnership.

(3) A partial accounting and partial settlement under this JOA shall be made as promptly as practicable and a final accounting and final settlement shall be made not later than the 31st day of March of the year following the year in which this JOA is terminated.

VII. MISCELLANEOUS PROVISIONS

A. Certain Liabilities; Force Majeure. Except as otherwise provided in this JOA, no party shall **[*145]** be charged with or held responsible for any contract, debt, claim, demand, damage, suit, action, obligation or liability arising by reason of any act or omission on the part of any other party, and no party shall be liable to any other for any failure or delay in performance under this JOA occasioned by war, riot, act of God or the public enemy, strike, labor dispute, shortage of any supplies, failure of supplier or workmen, or any cause beyond the control of the party required to perform, and such failure or delay shall not be considered a default hereunder.

B. Liabilities for Published or Excluded Material. The Joint Venture shall obtain insurance to insure each of the Newspapers against liability for libel and right of privacy in such amount as it deems appropriate, with the premiums for such insurance being an Editorial Expense as provided in Section V H(4). However, the entire cost and expense of defending, settling, paying and discharging any liability or other claim which is not covered by the libel insurance obtained by the Joint Venture (excluding any such cost or expense which is not covered as a result of the application of any deductible amount or co-payment requirement **[*146]** provided under the insurance policy) for Gazette and Gazette-Mail on account of anything published in or excluded from Gazette or Gazette-Mail, or arising by reason of anything done or omitted to be done by the editorial departments thereof, shall be borne by DGHC; and any similar cost and expense on account of anything published in or excluded from Mail, or arising by reason of anything done or omitted to be done by the editorial department thereof, shall be borne by CPC. DGHC and CPC each agree to indemnify and hold the other party, the Joint Venture and the Limited Partnership harmless against any cost, expense or liability which such other party, the Joint Venture or the Limited Partnership may suffer or incur as a result of any such action or inaction for which the indemnifying party is responsible as provided above.

C. Contravention of Law. Nothing contained in this JOA shall be construed to permit any party acting jointly or by unified action to engage in any predatory pricing, predatory practice or any other conduct which would be unlawful under any ***antitrust law*** as engaged in by any single entity. The parties hereto further mutually agree that if any part or provision of this **[*147]** JOA shall hereafter become, or be determined by action in any proper court to be, in contravention of law, this JOA shall not thereby be considered or adjudged to be a nullity, but that all parties shall, and each hereby agrees, immediately to take, or authorize such action to be taken, to reform this JOA, or to modify, alter or supplement any of its provisions, as may be necessary to permit the intention and purpose of the parties hereto to be properly and lawfully carried out.

D. Further Assurances. From time to time on and after the date hereof, each of the parties hereto will execute all such instruments and take all such actions as the other party shall reasonably request in connection with carrying out and effectuating the intention and purpose hereof and all transactions and things contemplated by this JOA, including, without limitation, the execution and delivery of any and all confirmatory and other instruments and the taking of any and all actions which may reasonably be necessary or desirable to complete the transactions contemplated thereby.

E. Assignments and Transfers.

(1) Except as authorized under the Limited Partnership Agreement, CPC may not sell, assign or transfer **[*148]** (including any pledge or hypothecation), any of its rights or interests under this JOA or pertaining to the Joint Venture or the Limited Partnership or the Newspapers to any person without the prior written consent of DGHC, which shall not be unreasonably withheld. Without limiting the generality of the foregoing, except as authorized under the Limited Partnership Agreement, a controlling interest in the capital stock of CPC may not be sold, assigned or transferred to any person without the prior written consent of DGHC, which shall not be unreasonably withheld. No consent of DGHC shall be required for a transfer relative to the Limited Partnership or any interests therein that is expressly authorized and made in compliance with the transfer provisions under the Limited Partnership Agreement, and, the foregoing transfer restrictions shall not apply to any transfer of any right or interest under this JOA or pertaining to the Joint Venture or the Newspapers to MNG or an affiliate of MNG so long as MNG or an affiliate of MNG holds and maintains, directly or indirectly, voting control of such transferee following such transfer. CPC acknowledges and agrees that DGHC's ability to grant consent **[*149]** to a transfer is circumscribed by certain contractual restrictions under the Joint Venture's financing arrangements and the withholding of consent by DGHC in order to comply with these contractual restrictions will not be considered unreasonable.

(2) DGC, DGHC, the Limited Partnership, DGPC and the Joint Venture may, without the consent of CPC, sell, assign or transfer a part or all or substantially all of the assets of Gazette and Gazette-Mail as a going concern to any person and assign a part or all of their rights and obligations under this JOA to the purchaser thereof, or sell, assign or transfer part or all of their direct or indirect interests in DGHC, the Limited Partnership, DGPC and the Joint Venture to any person, so long as (1) at the time of such sale the Joint Venture is current in the distributions required to be made to the Limited Partnership and the payments required to be made to CPC pursuant to Section V J(1) through (4) hereof, and (2) the purchaser assumes (in the case of an assets sale) all of the obligations of the assignors pursuant to this JOA. In the event DGC, DGHC, the Limited Partnership, DGPC or the Joint Venture engages in an assets sale contemplated by **[*150]** this Section VII E, they shall, effective on the closing thereof, be released and discharged from any further liability under this JOA. No consent of CPC shall be required for (i) a pledge by DGC, DGHC, the Limited Partnership, DGPC or the Joint Venture of their rights under this JOA or their direct or indirect interests in DGHC, the Limited Partnership, DGPC and the Joint Venture to the Joint Venture's lenders for security purposes or a transfer of such interests and rights pursuant to any foreclosure action by the Joint Venture's lenders or any transfer in lieu of foreclosure.

F. Other Ventures. Neither DGC nor any Partner of the Limited Partnership may engage in other ventures in the Charleston, West Virginia market that are competitive with that of the Limited Partnership or any of its Subsidiaries (including the Joint Venture). For purposes of this Section VII F, any competitive venture undertaken by an affiliate of a Partner in the Charleston, West Virginia market will be deemed to be a competitive venture undertaken by such Partner.

G. Entire Agreement. This JOA amends and restates the Prior JVA in its entirety.

H. Notices. All notices, requests, demands, claims and other communications **[*151]** which may or are to be given hereunder or with respect hereto shall be in writing, shall be given either by personal delivery, facsimile or by certified or special express mail or recognized overnight delivery service, first class postage prepaid, or when delivered to such delivery service, charges prepaid, return receipt requested, and shall be deemed to have been given or made when personally received by the addressee, addressed as follows:

(1) If to CPC, to:

Affiliated Media, Inc.

101 W. Colfax Avenue, Suite 1100

Denver, CO 80202

Attn: Joseph J. Lodovic, IV President

Facsimile: (303) 954-6320

With a copy to:

Hughes Hubbard & Reed LLP

One Battery Park Plaza

New York, New York 10004

Attn: James Modlin

Facsimile: (212) 422-4726

or such other addresses as CPC may from time to time designate.

(2) If to DGC, DGHC, DGPC, the Joint Venture or the Limited Partnership, to:

Daily Gazette Company

1001 Virginia Street, East

Charleston, WV 25301

Attn: Ms. Elizabeth E. Chilton, President

Facsimile: (304) 348-5180

And

Attn: Mr. Norman Watts Shumate III

Facsimile: (304) 348-1795

With a copy to:

Baker & Hostetler LLP

1050 Connecticut Avenue, N.W., Suite 1100

Washington, DC 20036

Attn: Lee H. Simowitz

Facsimile: (202) 861-1783

or **[*152]** such other addresses as DGHC, DGC, DGPC, the Joint Venture or the Limited Partnership may from time to time designate.

I. Announcements/Disclosures. The parties agree that, except as required by law, and then only upon the maximum advance notice to the other parties which is practicable under the circumstances, they will make no public announcement concerning this JOA and the transactions contemplated hereby prior to the first mutually agreed upon announcement thereof without the consent of the other parties as to the form, content, and timing of such announcement or announcements.

J. Headings. Titles, captions or headings contained in this JOA are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this JOA or the intent of any provisions hereof.

K. Governing Law. This JOA shall be construed and enforced in accordance with the internal laws of the State of West Virginia.

L. Modifications. This JOA shall be amended only by an agreement in writing and signed by the party against whom enforcement of any waiver, modification or discharge is sought (subject to any applicable contractual restrictions under the Joint Venture's **[*153]** financing arrangements).

M. Specific Performance. In addition to any other remedies the parties may have, each party shall have the right to enforce the provisions of this JOA through injunctive relief or by a decree or decrees of specific performance.

N. No Third Party Beneficiaries. Nothing in this JOA, express or implied, shall give to anyone other than the parties hereto (and the parties entitled to indemnification hereunder) and their respective permitted successors and assigns any benefit, or any legal or equitable right, remedy or claim, under or in respect of this JOA.

O. Nature of Relationship. Nothing contained in this JOA shall constitute the parties hereto as alter egos or joint employers or as having any relationship other than as specifically provided herein and in any other agreement to which they are subject. DGHC and CPC each will retain and be responsible for (and will indemnify the other parties, the Joint Venture and the Limited Partnership against) all of their respective debts, obligations, liabilities, and commitments which have not been expressly assumed by the Joint Venture pursuant to this JOA or the Limited Partnership, or for which the Joint Venture was not **[*154]** already liable under the Prior JVA.

O. Survival. The expiration or termination of this JOA shall not abrogate the rights and obligations of the parties under Section VII (B) or any other provision of this JOA that contemplates actions to be taken after the expiration or termination of this JOA.

P. Dispute Resolution. The terms of Exhibit A attached hereto, which include provisions related to the procedures pursuant to which the parties shall resolve any disputes, claims or controversies arising under, out of or in connection with this JOA are incorporated herein by this reference as if set out herein in full.

DAILY GAZETTE COMPANY

By:__

Title:__

DAILY GAZETTE HOLDING COMPANY, LLC

By: Daily Gazette Company, Sole Member

By:__

Title:__

CHARLESTON PUBLISHING COMPANY

By:__

Title:__

CHARLESTON NEWSPAPERS

By: Charleston Newspapers Holdings, L.P., General Partner

By: Daily Gazette Holding Company, LLC, General Partner

By: Daily Gazette Company, Sole Member

By:__

Title:__

DAILY GAZETTE PUBLISHING COMPANY, LLC

By: Charleston Newspapers Holdings, L.P., Sole Member

By: Daily Gazette Holding Company, LLC, General Partner

By: Daily Gazette Company, Sole Member

By:__

Title:__

CHARLESTON NEWSPAPERS HOLDINGS, L.P.

By: **[*155]** Daily Gazette Holding Company, LLC, General Partner

By: Daily Gazette Company, Sole Member

By:__

Title:__

Exhibit Ato Amended and Restated Joint Operating Agreement

Dispute Resolution

(a) Any dispute, claim or controversy arising under, out of, in connection with or relating to this JOA, or any course of conduct, course of dealing, statements (oral or written), or actions of any party relating to this JOA, including any claim based on or arising from an alleged tort (each, a "Dispute"), shall be resolved solely in the following manner:

(i) Pre-arbitration procedures.

(A) Each party shall cause one of its senior officers to first meet with the other party's senior officer and attempt to resolve the Dispute by agreement.

(B) Failing resolution, either party may submit to the other party a written request for non-binding mediation. Within ten (10) business days after such written request is made, the parties shall attempt to agree on a single mediator. If the parties cannot agree on a mediator within such period, either party may proceed to implement the arbitration provisions of clause (a)(ii) below.

(C) Mediation shall take place at the place or places and at the time or times set by the mediator, **[*156]** but shall not be held in public. The rules of procedure, evidence and discovery with respect to any mediation shall be as directed by the mediator. Neither party may be represented at hearings before the mediator by an attorney but the parties may consult with counsel outside the hearing room and counsel may assist in preparing any written materials to be used in the mediation, including statements and briefs.

(D) The mediator shall facilitate communications between the parties and assist them in attempting to reach a mutually acceptable resolution of the Dispute by agreement. The mediator shall make no binding determinations, findings, or decisions.

(E) The mediator's expenses shall be borne equally by the parties.

(F) At any point in the mediation process after the initial meeting with the mediator, either party may declare in writing that an impasse exists, and thereafter either party may proceed to implement the arbitration provisions of clause (a)(ii) below. If the parties have not resolved their dispute pursuant to the provisions of this clause (a)(i) within thirty (30) days after appointment of the mediator, the parties shall immediately proceed to implement the arbitration provisions **[*157]** of clause (a)(ii) below.

(ii) Arbitration.

(A) All Disputes between the parties that are not resolved under clause (a)(i) above shall be finally resolved by arbitration in accordance with the rules of JAMS (or its successor) described below, subject to the limitations of this clause (a)(ii).

(B) Except as provided in clause (a)(ii)(C), with respect to a Dispute in which the claim, counterclaim or amount in controversy does not exceed Two Hundred Fifty Thousand Dollars ($250,000) (a "Minor Dispute"), a single arbitrator shall decide the Minor Dispute in accordance with the JAMS Streamlined Arbitration Rules and Procedures then in effect (the "Streamlined Rules"). In the event the parties are unable to agree upon an arbitrator, the arbitrator shall be appointed by JAMS under the Streamlined Rules. The arbitrator shall determine the Minor Dispute in accordance with the terms of this JOA and the laws designated in Section VII K of the JOA and shall have authority to render a maximum award of Two Hundred Fifty Thousand Dollars ($250,000), including all damages of any kind and costs, fees and the like.

(C) With respect to a Dispute in which (x) the claim, counterclaim or amount in controversy **[*158]** exceeds Two Hundred Fifty Thousand Dollars ($250,000), or (y) the resolution of the Dispute may give a party a right to terminate this JOA ("Major Dispute"), any such Major Dispute shall be decided by a majority vote of three arbitrators. In the event the parties are unable to agree on the three arbitrators, the three arbitrators shall be appointed by JAMS under the JAMS Comprehensive Arbitration Rules and Procedures then in effect (the "Comprehensive Rules"). The three arbitrators shall determine the Major Dispute in accordance with the terms of this JOA and the laws designated in Section VII K of this JOA. The majority of the three arbitrators may grant any award, remedy or relief ("Award") that they deem just and equitable and within the scope of this JOA. The majority of the arbitrators may also grant such ancillary relief as is necessary to make effective the Award, including injunctive relief and/or specific performance. In all arbitration proceedings in connection with a Major Dispute, the arbitrators shall make specific, written findings of fact and conclusions of law. In all Major Disputes, the parties shall, in addition to the limited statutory right to seek vacation or modification **[*159]** of any Award pursuant to applicable law, have the right to seek vacation or modification of any Award that is based in whole, or in part, on an incorrect or erroneous ruling of law by appeal to an appropriate court having jurisdiction; provided, however, that any application for vacation or modification of an Award based on an incorrect ruling of law must be filed in a court having jurisdiction pursuant to clause (c) below within thirty (30) days from the date the Award is rendered. The findings of fact made by the arbitrators shall be binding on all parties and shall not be subject to further review except as otherwise allowed by applicable law.

(D) The non-prevailing party, as determined by the arbitrator or arbitrators, shall be required to pay all of the arbitrator's fees and shall reimburse the prevailing party for any advances made by such party in respect of such fees.

(E) The arbitrator(s) shall not have the power to award (i) damages inconsistent with this JOA or (ii) punitive damages or any other damages not measured by the prevailing party's actual damages, and the parties expressly waive their right to obtain such damages in arbitration or in any other forum. In no event, **[*160]** even if any other portion of these provisions is held to be invalid or unenforceable, shall the arbitrator(s) have power to make an award or impose a remedy that could not be made or imposed by a court deciding the matter under the law designated in Section VII K of this JOA.

(F) The arbitrator(s) shall have the authority to order the parties to produce documents or things for inspection and to provide appropriate discovery to each other, including the depositions of witnesses and the exchange of expert reports.

(G) Neither the parties nor any arbitrator may disclose the existence, content or results of the arbitration, except as necessary to enforce an Award or comply with legal or regulatory requirements. Before making any such disclosure, a party shall give written notice to all other parties and shall afford these parties a reasonable opportunity to protect their interests.

(H) Except as otherwise provided in clause (a)(ii)(C) above, the result of the arbitration will be binding on the parties, and judgment on the arbitrator's Award may be entered in a court designated in clause (c) below.

(I) At the request of either party, arbitration proceedings shall include an oral hearing for **[*161]** the presentation of oral testimony and oral argument. Written presentations may also be received. The parties shall have the right to cross-examine witnesses, if requested. The arbitrator(s) shall have the authority to administer oaths and to issue orders requiring the presence of witnesses at the hearing if consistent with the law designated in Section VII K of this JOA, or to apply to a court designated in clause (c) below to issue such orders.

(J) All arbitration hearings will be commenced within sixty (60) days of demand for arbitration by any party, provided, upon a showing of cause, the arbitrator or arbitrators may extend the commencement of such hearing for up to an additional thirty (30) days.

(b) Limitations on Arbitration Requirement.

(i) No provision of, nor the exercise of any rights under, this JOA regarding arbitration shall limit the right of either party to join the other party in litigation in the event of any litigation or proceeding commenced by any third party against a party to this JOA in which the other party is an indispensable party or potential third party defendant (e.g., where such other party may be obligated to indemnify the defendant in such third party **[*162]** action).

(ii) No provision of, nor the exercise of any rights under, this JOA regarding arbitration shall limit the right of either party to seek provisional or ancillary judicial remedies with respect to any Dispute, such as preliminary injunctive relief, sequestration, attachment, garnishment, or the appointment of a receiver from a court having jurisdiction before, during or after the pendency of any arbitration. The institution and maintenance of an action for such judicial remedies shall not constitute a waiver of the right of any party, including the claimant in such action, to submit to arbitration nor render inapplicable the compulsory arbitration provisions hereof.

(iii) Nothing in this JOA shall be deemed to limit applicability of any otherwise applicable statutes of limitation and any waivers contained in this JOA. No provision in this Exhibit regarding submission to jurisdiction and/or venue in any court is intended or shall be construed to be in derogation of the provisions in this Exhibit for arbitration of any Dispute.

(c) WITH RESPECT TO ANY SUIT, ACTION OR PROCEEDING RELATING TO ANY AWARD OR ANY ACTION, INCLUDING A SUMMARY OR EXPEDITED PROCEEDING, TO COMPEL ARBITRATION **[*163]** OF ANY DISPUTE TO WHICH THIS EXHIBIT APPLIES, AND FOR ANY OTHER MATTER SO DESIGNATED IN THIS

EXHIBIT, EACH PARTY IRREVOCABLY (1) CONSENTS AND SUBMITS TO THE EXCLUSIVE JURISDICTION OF ANY UNITED STATES FEDERAL COURT OR WEST VIRGINIA STATE COURT SITTING IN THE CITY OF CHARLESTON IN THE STATE OF WEST VIRGINIA, (2) WAIVES ANY OBJECTION THAT IT MAY HAVE AT ANY TIME TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN SUCH COURT, (3) WAIVES ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM, (4) WAIVES THE RIGHT TO OBJECT, WITH RESPECT TO ANY SUCH CLAIM, SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT, THAT SUCH COURT DOES NOT HAVE JURISDICTION OVER THE PARTY, AND (5) WAIVES ALL RIGHT TO TRIAL BY JURY.

PUT/CALL AGREEMENT

PUT/CALL AGREEMENT, dated as of __ (the "**Effective Date**"), among DAILY GAZETTE HOLDING COMPANY, LLC, a limited liability company organized under the laws of the State of Delaware ("**DGHC**"); CHARLESTON NEWSPAPERS HOLDINGS, L.P., a limited partnership organized under the laws of the State of Delaware (the "**Limited Partnership**"); and __, a __ (the "**Class B Partner**").

RECITALS

WHEREAS, **[*164]** the parties desire to enter into this Agreement to set forth certain agreements with respect to the Class B Partner's ownership of its Class B Limited Partner Units, including put rights and call rights;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements set forth herein, the parties agree as follows:

ARTICLE I

DEFINITIONS

1.1 Definitions. The following terms used in this Agreement have the meanings given such terms in this Section 1.1:

"**Affiliate**" means, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with such first-named Person.

"**Agreement**" means this Put/Call Agreement, as it may be amended, restated, modified or supplemented from time to time in accordance with its terms.

"**Buyer**" has the meaning given such term in Section 3.1(a).

"**Call**" has the meaning given such term in Section 5.1(b).

"**Call Notice**" has the meaning given such term in Section 5.1(b).

"**Class B Limited Partner**" has the meaning given such term in Section 1.1.12 of the Limited Partnership Agreement.

"**Class B Limited Partner Unit**" has the meaning given such term in Section 1.1.14 **[*165]** of the Limited Partnership Agreement.

"**CPC**" means Charleston Publishing Company, a Delaware corporation.

"**DGC**" means Daily Gazette Company, a corporation organized under the laws of the State of West Virginia.

"**DGHC**" has the meaning given such term in the Preamble.

"**Drag-Along Notice**" has the meaning given such term in Section 4.1(a).

"**Drag-Along Right**" has the meaning given such term in Section 4.1(a).

"**Election Notice**" has the meaning given such term in Section 6.1.

"**Fair Market Value of the Partnership**" has the meaning given such term in Section 5.2.3 of the Limited Partnership Agreement.

"**General Partner**" means DGHC and any successor General Partner.

"**General Partner Unit**" has the meaning given such term in Section 1.1.18 of the Limited Partnership Agreement.

"**JOA**" means the Second Amended and Restated Joint Operating Agreement dated as of the date hereof, by and among DGC, DGHC, the Joint Venture, the Limited Partnership, Daily Gazette Publishing Company, LLC, a Delaware limited liability company, and CPC.

"**Joint Venture**" means Charleston Newspapers, a West Virginia unincorporated joint venture.

"**Limited Partnership Agreement**" means that certain Amended and Restated Limited Partnership Agreement **[*166]** for Charleston Newspapers Holdings, L.P. dated as of __, 2009, by and among DGHC and CPC, as such agreement may be amended, restated, modified or supplemented from time to time in accordance with its terms.

"**New Units**" means any Units offered by the Limited Partnership after the date of this Agreement.

"**Partner**" means any Person admitted as a Partner of the Limited Partnership in accordance with the provisions of the Limited Partnership Agreement.

"**Permitted Transferee**" means any other Person that directly or indirectly succeeds to any or all of its Class B Limited Partner Units in accordance with the provisions of this Agreement and Article VI of the Limited Partnership Agreement and is admitted as a Partner in accordance with the provisions of Article VI of the Limited Partnership Agreement.

"**Person**" means any individual, general partnership, limited partnership, corporation, limited liability company, limited liability partnership, joint venture, trust, business trust, cooperative, association, governmental agency or a division or subdivision of any of the foregoing, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context **[*167]** so permits.

"**Pro Rata Portion**" means the Class B Partner's Percentage Interest in the Limited Partnership (as defined in the Limited Partnership Agreement).

"**Residual Class B Partner Percentage**" means, as of any date, the percentage of the aggregate distributions by the Limited Partnership to the General Partner and the Class B Partner that the Class B Partner would be entitled to receive under Section 7.3 of the Limited Partnership Agreement if (i) the Limited Partnership were to sell its assets at the Fair Market Value of the Partnership, (ii) income, gain, loss and deduction arising from such sale were allocated among the Partners in accordance with Section 5.2.3 of the Limited Partnership Agreement, but without giving effect to any allocation of income or gain attributable to the Tax Gross-Up Amount (as defined in the Limited Partnership Agreement), and (iii) the Limited Partnership were then liquidated on such date, taking into account all unrealized appreciation or decline in value of the assets of the Limited Partnership, and assuming all reserves were distributed.

"**Subsidiary**" means any Person (including the Joint Venture) that is controlled by the Limited Partnership.

"**Tax-Adjusted [*168] Residual Class B Partner Percentage**" means, as of any date, the percentage of the aggregate distributions by the Limited Partnership to the General Partner and the Class B Partner that the Class B Partner would be entitled to receive under Section 7.3 of the Limited Partnership Agreement if (i) the Limited Partnership were to sell its assets at the Fair Market Value of the Partnership, (ii) income, gain, loss and deduction arising from such sale were allocated among the Partners in accordance with Section 5.2.3 of the Limited Partnership Agreement, and (iii) the Limited Partnership were then liquidated on such date, taking into account all unrealized appreciation or decline in value of the assets of the Limited Partnership, and assuming all reserves were distributed.

"**Taxes**" means any and all taxes, fees, duties, tariffs, imposts and other charges of any kind imposed by any government or taxing authority, including, without limitation: federal, state, local, or foreign income, gross receipts, windfall profits, severance, property, ad valorem, sales, use, license, excise franchise, capital, transfer, recordation, employment, withholding, or other tax or governmental assessment.

"**Tax [*169] Interest**" means any interest, additions, or penalties with respect to Taxes and any interest in respect of such additions or penalties.

"**Unit**" means an undivided share of the interests in the Limited Partnership of all the Partners, which include the General Partner Units and Class B Limited Partner Units.

"**Unpaid Tax Liabilities**" means the sum of (i) all unpaid Transfer Tax Liabilities, plus (ii) all unpaid Taxes of the Class B Partner due and owing, (but, in the case of any Tax attributable to income or gain allocated to the Class B Partner by the Limited Partnership, only to the extent that such Tax would have been paid by the Class B Partner if the Class B Partner had used the full amount of all distributions received by it from the Limited Partnership after such Tax became due and payable to pay such Tax and all other Taxes arising thereafter), plus Tax Interest attributable thereto.

ARTICLE II

RESTRICTION ON TRANSFER

2.1 Restriction on Transfer of Class B Limited Partner Units.

(a) Permitted Transfer. Except as otherwise specifically provided in Section 2.1(c), the Class B Partner shall have the right to sell, exchange, transfer, pledge, hypothecate, assign or otherwise dispose of **[*170]** (any of the foregoing transactions referred to herein as a "**Transfer**") all or any part of its Class B Limited Partner Units to any Person.

(b) Transfer to an Affiliate. The Class B Partner shall be permitted to Transfer its Class B Limited Partner Units to an Affiliate of the Class B Partner and to assign its Class B Limited Partner Units and its rights under this Agreement as collateral security to Persons extending financing to such Limited Partner or any of their Affiliates (and such Persons may at any time foreclose on such security interest).

(c) Restriction on Transfer. Notwithstanding anything contained in Sections 2.1(a) or 2.1(b) to the contrary, the Class B Partner shall not have the right to Transfer all or any part of its Class B Limited Partner Units to any Person that is, or that is an Affiliate of a Person that is, a publisher of a general circulation daily newspaper (other than a newspaper published by the Joint Venture) whose principal newsroom is located in Kanawha County, West Virginia, or Putnam County, West Virginia; provided, however, that the foregoing restriction shall not apply to a publisher of a general circulation daily newspaper with a circulation market **[*171]** share in Kanawha and Putnam Counties of 5% or less. Any Transfer that is made in violation of this Section 2.1(c) shall not be permitted and shall be null and void for all purposes.

(d) Transfer Tax Liabilities. Upon a Transfer of any Class B Limited Partner Units by the Class B Partner pursuant to this Section 2.1, the Class B Partner and/or the transferee of such Class B Limited Partner Units shall be liable for all Taxes and Tax Interest, resulting from such Transfer ("**Transfer Tax Liabilities**") and shall not be entitled to receive any tax distributions under the Limited Partnership Agreement in respect thereof (provided that this Section 2.1(d) shall not affect the Class B Partner's rights to receive distributions in accordance with the Limited Partnership Agreement).

(e) Transfer in Compliance with the Limited Partnership Agreement; Agreement to be Bound by this Agreement. No Transfer may be made pursuant to this Section 2.1 unless such Transfer is also made in accordance with Article VI of the Limited Partnership Agreement and, without limiting the generality of the foregoing, the transferee of any Class B Limited Partner Units pursuant to this Section 2.1, if not already a party **[*172]** to this Agreement, shall execute and deliver an agreement to the General Partner by which it agrees to become a party to this Agreement, assume all of the obligations hereunder of its transferor with respect to the Class B Limited Partner Units transferred to it and be bound by the terms and conditions hereof in the same manner as the transferor with respect to such Units. Without limiting the generality of the foregoing, any and all Class B Limited Partner Units transferred pursuant to this Section 2.1 shall remain subject to, and shall enjoy the rights under, the Tag-Along Right, Drag-Along Right, Put and Call provisions set forth in Articles III, IV and V hereof and the Class B Limited Partner shall continue to have the Class B Partner Board Right set forth in Article VII hereof and the Limited Partnership Agreement. No Transfer may be made pursuant to this Section 2.1 unless such Transfer is also made in accordance with all applicable laws, including federal and state securities laws.

ARTICLE III

TAG-ALONG RIGHTS

3.1 Tag-Along Rights

(a) If the General Partner proposes to Transfer any General Partner Units ("**Transferor Units**"), to one or more Persons who is not an Affiliate of the **[*173]** General Partner (each such Person, a "**Buyer**"), then, as a condition to such transfer, the General Partner shall cause the Buyer to include an offer (the "**Tag-Along Offer**") to the Class B Partner to purchase from the Class B Partner, at the option of the Class B Partner, that number of Class B Limited Partner Units as determined in accordance with Section 3.1(b), on the same terms and conditions as are applicable to the Transferor Units (with the portion of the purchase price payable to the Class B Partner being the aggregate amount of the purchase price for all Units included in such sale multiplied by the Tax-Adjusted Residual Class B Partner Percentage). The General Partner shall provide a written notice (the "**Tag-Along Notice**") of the Tag-Along Offer to the Class B Partner, which may accept the Tag-Along Offer by providing a written notice of acceptance of the Tag-Along Offer to the General Partner within thirty (30) days of the delivery of the Tag-Along Notice. Subject to Section 3.1(e), if the Class B Partner fails to accept a Tag Along Offer within thirty (30) days of delivery of the Tag-Along Notice, the Class B Partner shall cease to have any rights hereunder with respect to **[*174]** such Tag-Along Offer.

(b) The Class B Partner shall have the right (a "**Tag-Along Right**") to sell pursuant to the Tag-Along Offer the percentage of its Class B Limited Partner Units then held equal to the percentage of General Partner Units proposed to be sold by the General Partner (which percentage of General Partner Units may be reduced in the sole discretion of the General Partner and the Buyer).

(c) The Class B Partner's Tag-Along Right shall not apply to any (i) pledge by the General Partner of Units for security purposes under any bona fide loan transaction; (ii) Transfer of Units pursuant to a foreclosure action under any bona fide loan transaction; or (iii) Transfer of Units by the General Partner to an Affiliate. If the General Partner Transfers any General Partner Units to an Affiliate of the General Partner, such Affiliate transferee shall become a party to and be bound by the terms of this Agreement to the same extent as the General Partner.

(d) If the Class B Partner fails to accept a Tag-Along Offer within thirty (30) days of delivery of the Tag-Along Notice, the Buyer shall have one hundred twenty (120) days, commencing on the thirtieth (30th) day after delivery of the **[*175]** Tag-Along Notice to the Class B Partner, in which to purchase on terms no more favorable to the transferor than the terms set forth in the Tag-Along Offer from the General Partner the number of Transferor Units with respect to which the Tag-Along Notice was delivered. If such purchase and sale is not consummated on terms no more favorable to the transferor than the terms set forth in the Tag-Along Offer within such one hundred twenty (120) day period, any Transfer of the Transferor Units shall again be subject to the provisions of this Section 3.1.

(e) The provisions of this Section 3.1 shall apply to a sale of any membership interest in the General Partner to the same extent as such provisions apply to a sale of Units by the General Partner.

ARTICLE IV

DRAG-ALONG RIGHTS

4.1 Drag-Along Rights. In the event the General Partner proposes to Transfer all of its General Partner Units for cash, in a single transaction or a series of related transactions, to a Person that is not an Affiliate of the General Partner, the General Partner shall have the right (the "**Drag-Along Right**") to cause the Class B Partner to sell all of its Class B Limited Partner Units to such Person on the same terms and **[*176]** conditions as the General Partner proposes to Transfer its General Partner Units (with the portion of the purchase price payable to the Class B Partner being the aggregate amount of the purchase price for all Units included in such sale multiplied by the Tax-Adjusted Residual Class B Partner Percentage). The General Partner may exercise its Drag-Along Right by giving written notice of such exercise (the "**Drag-Along Notice**") to the Class B Partner not fewer than ten (10) days prior to the consummation of the Transfer that is the subject of the Drag-Along Right. The Drag-Along Notice shall contain a copy of any definitive documentation pursuant to which Transfer is to be made and will state the name and address of the purchaser and the anticipated closing date of such Transfer. Upon delivery of the Drag-Along Notice, the Class B Partner shall be obligated to Transfer and deliver its Class B Limited Partner Units on the terms and conditions applicable to the Transfer and shall use commercially reasonable efforts to cooperate in the Transfer and take all necessary actions to enter into appropriate Transfer or transaction documents. The Class B Partner's indemnification obligations under **[*177]** the transaction documents governing a Transfer pursuant to this Section 4.1 shall be limited to the amount of any portion of the proceeds paid for the Class B Limited Partner Units sold in such transaction that is held in escrow for such purpose and not paid to the Class B Partner, such transaction documents shall not require the Class B Partner to make any representations other than those with respect to the Class B Partner's ownership of and its ability to Transfer the Class B Limited Partner Units to be sold in such transaction and any indemnification obligations shall be limited to breach of such representations only.

ARTICLE V

PUT AND CALL RIGHTS

5.1 Put and Call Rights.

(a) Class B Partner Put Right. Upon the cessation of the publication of The Charleston Daily Mail, the Class B Partner shall be required to sell to the General Partner (or an Affiliate or designee thereof) and the General Partner (or an Affiliate or designee thereof), shall be required, subject to the terms and conditions set forth in this Agreement, to purchase from the Class B Partner all, but not less than all, of the Class B Limited Partner Units. Additionally, at any time from and after the termination of the **[*178]** JOA by lapse of time or otherwise and/or dissolution and/or termination of the Joint Venture or upon the occurrence of any event which constitutes or results in a Change of Control (as defined below) of the Joint Venture, the Class B Partner shall have the right to sell to the General Partner (or an Affiliate or designee thereof) and the General Partner (or an Affiliate or designee thereof), shall be required, subject to the terms and conditions set forth in this Agreement, to purchase from the Class B Partner all, but not less than all, of the Class B Limited Partner Units. The obligation or right to sell and obligation to buy set forth in the preceding two sentences shall be referred to herein as the "**Put**". With respect to the Put described in the second sentence of this Section 5.1(a), if the Class B Partner elects to exercise the Put, it shall send written notice thereof to the General Partner (the "**Put Notice**"). The General Partner's designation of an Affiliate or other designee to purchase the Class B Limited Partner Units in connection with the exercise of the Put will not relieve the General Partner of its obligations hereunder. For purposes of this Section, "Change of Control"

[*179] means any event, transaction or occurrence as a result of which DGC ceases to control the General Partner, and "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(b) General Partner Call Right. At any time from and after the termination of the JOA by lapse of time or otherwise and/or the dissolution and/or termination of the Joint Venture, the General Partner (or an Affiliate or designee thereof) shall have the right to purchase from the Class B Partner, and the Class B Partner shall be required, subject to the terms and conditions set forth in this Agreement, to sell to the General Partner (or an Affiliate or designee thereof), all, but not less than all, of the Class B Limited Partner Units (such right to purchase, the "**Call**"). If the General Partner elects to exercise the Call, it shall send written notice thereof to the Class B Partner (the "**Call Notice**").

(c) Purchase Price. The purchase price to be paid to the Class B Partner upon the exercise of the Put or Call (the "**Put/Call Purchase Price**") shall be equal to **[*180]** (A) the amount that would be distributed to the Class B Partner under Section 7.3 of the Limited Partnership Agreement if the Limited Partnership were to sell its assets on the Put/Call Closing Date for the Fair Market Value of the Partnership and the income, gain, loss and deduction arising from such sale were allocated among the Partners in accordance with Section 5.2.3 of the Limited Partnership Agreement, but without giving effect to any allocation of income or gain attributable to the Tax Gross-Up Amount (as defined in the Limited Partnership Agreement), and the Limited Partnership were then liquidated in accordance with Article VII of the Limited Partnership Agreement on the Put/Call Closing Date, minus (B) the amount of any Unpaid Tax Liabilities or other outstanding liabilities of the Class B Partner (other than liabilities for Taxes and Tax Interest). The Fair Market Value of the Partnership shall be determined as of the Put/Call Closing Date by mutual agreement of the General Partner and the Class B Partner or by appraisals in accordance with the terms hereof. In the event the General Partner and the Class B Partner do not agree on the Fair Market Value of the Partnership **[*181]** within twenty days, then within fifteen days of the expiration of such twenty day period (or such longer period as the General Partner and the Class B Partner mutually agree), each of the General Partner and the Class B Partner shall select a nationally recognized appraiser with experience in the newspaper industry to prepare, using the methodology described in Exhibit A attached hereto, a written appraisal setting forth such appraiser's determination of the Fair Market Value of the Partnership. If either the General Partner and the Class B Partner fail to so appoint an appraiser within such fifteen day period, then its right to do so shall lapse and the appraisal made by the one appraiser who is timely appointed shall be the Fair Market Value of the Partnership. If two appraisals are made, unless the higher of the two appraisals is more than 110% more than the lower appraisal, the Fair Market Value of the Partnership will be the average of the two appraisals, and if the higher of the two appraisals is more than 110% more than the lower of the appraisals, the General Partner and the Class B Partner shall jointly select a third appraiser, and the Fair Market Value will be the average **[*182]** of the two of the three appraisals that are closest together in amount. All appraisals will be made within twenty days of appointment of such appraiser and must separately identify the amount of each of the items described in clauses (i) through (vi) of Section 5.2.3(b) of the Limited Partnership Agreement. A written notice of the results of each such appraisal shall be given to the General Partner and the Class B Partner. The General Partner and the Class B Partner will each pay the fees of the appraiser selected by it, and the General Partner and the Class B Partner will share equally the fees of the third appraiser, if any. The General Partner and each Member will cooperate fully with each appraiser's attempt to determine the Fair Market Value of the Partnership.

(d) Closing. The closing of the transaction pursuant to the exercise of the Put or Call, as the case may be, shall take place at the principal offices of the Limited Partnership no later than the thirtieth (30th) day following the final determination of the Put/Call Purchase Price; provided that such date shall be extended as necessary and for so long as necessary to permit the parties to comply with applicable law to obtain **[*183]** all regulatory approvals, if any, necessary to consummate such transaction (such 30th day, as it may be extended, the "**Put/Call Closing Date**"). The General Partner shall be responsible (solely at the General Partner's expense) for obtaining all approvals and consents necessary to permit the General Partner and Class B Partner to consummate such transactions (other than any such approvals or consents that are unique to the Class B Partner). Each party agrees to use its commercially reasonable efforts to cooperate in obtaining any regulatory approvals necessary to consummate such transaction as promptly as possible. If the closing of the transaction pursuant to the exercise of the Put has not occurred by the tenth (10th) day after the Put/Call Closing Date, the General Partner shall pay to the Class B Partner at the closing interest in an amount equal to 14.5% of the Put/Call Purchase Price accruing daily on the basis of a 360-day year and compounding at the end of each 90-day period after the Put/Call Closing Date. At the closing of the Put or Call, as the case may be, the General Partner shall pay the Put/Call Purchase Price and any interest accrued thereon to the Class B Partner in **[*184]** cash or immediately available funds and the Class B Partner shall deliver instruments, in form and substance reasonably satisfactory to the General Partner, assigning all of its interest in the Class B Limited Partner Units to the General Partner free and clear of all liens, claims and encumbrances of any nature whatsoever (other than those arising under this Agreement, the Limited Partnership Agreement or the JOA or in favor of any lender(s) to the Limited Partnership or any of its Subsidiaries) against payment of the Put/Call Purchase Price therefor.

ARTICLE VI

PREEMPTIVE RIGHTS

6.1 Class B Partner Preemptive Rights. Prior to issuing any New Units to any Person ("**New Unit Offerees**"), the Limited Partnership shall offer (the "**New Unit Offer**") the Class B Partner an opportunity to purchase all or a portion of its Pro Rata Portion of such New Units upon the same terms and conditions offered to the New Unit Offerees, The Limited Partnership shall make such New Unit Offer by providing the Class B Partner with notice (the "**New Unit Notice**") setting forth: (i) the Class B Partner's Pro Rata Portion of such New Units; (ii) the consideration to be paid for each of the New Units; and (iii) all **[*185]** other material terms of such New Units. The Class B Partner may elect to accept the New Unit Offer by delivering written notice of its acceptance to the Limited Partnership within thirty (30) days after delivery of the New Unit Notice (the "**Election Notice**") setting forth the number of New Units the Class B Partner wishes to purchase. If the Class B Partner elects to purchase all or a portion of its Pro Rata Portion of such New Units, the sale thereof shall be consummated on the closing date applicable to all New Unit Offerees. In the event the Class B Partner elects not to exercise its right pursuant to this Section 6.1, fails to timely give an Election Notice or fails to purchase the New Units allocated to it at the closing designated therefor by the Limited Partnership, the Class B Partner shall cease to have any rights hereunder with respect to such New Unit Offer, provided that if there is any material change to the terms of the New Unit Offer following such non-exercise or failure, the Class B Partner's rights under this Section 6.1 will be reinstated.

6.2 Issuance of New Units. In the event the Limited Partnership issues any New Units for no consideration or for consideration **[*186]** which is less than the fair market value of such New Units at the time of sale (as mutually determined by the General Partner and the Class B Partner or if the General Partner and Class B Partner cannot agree, pursuant to an appraisal process similar to the process set forth in Section 5.1(c) and at the Limited Partnership's expense) and the New Units are entitled to a portion of the net equity value of the Limited Partnership on liquidation and/or distributions under the Limited Partnership Agreement, then the Limited Partnership Agreement shall be amended to change the terms of the Class B Limited Partner Units so that, after giving effect to such amendment, the value of the net equity of the Limited Partnership and distributions by the Limited Partnership to which the Class B Partner is entitled by virtue of its ownership of Class B Limited Partner Units is the same as the value of the net equity of the Limited Partnership and distributions by the Limited Partnership to which the Class B Partner was entitled prior to giving effect to such issuance and such amendment (the intention of the parties being such amendment will afford the Class B Partner a benefit of the type afforded **[*187]** by a customary weighted-average antidilution adjustment). The parties will act in good faith to agree upon and execute such amendment to the Limited Partnership Agreement, which shall also provide for additional distributions to be paid to the Class B Partner on the date such amendment becomes effective in order to give effect to the terms of such amendment with respect to distributions (if any) made by the Limited Partnership after such issuance but prior to such amendment becoming effective.

6.3 Termination of Preemptive Rights. The Class B Partner's preemptive rights pursuant to this Article VI shall terminate upon the completion of a successful underwritten public offering by the Limited Partnership (or any corporate successor thereto).

6.4 Application of Article VI to Joint Venture. The provisions of this Article VI shall apply mutatis mutandis if the Joint Venture or any other Subsidiary of the Limited Partnership issues any new equity interests (other than any such equity interest issued to the Limited Partnership or another Subsidiary or the Limited Partnership).

ARTICLE VII

DGHC BOARD REPRESENTATION

7.1 Class B Partner Board Representation. The Class B Partner (together with any **[*188]** other Class B Limited Partners) shall have the right to appoint two (2) members to the board of managers of DGHC or such greater number as required by Section 5(b)(ii) of the Operating Agreement of DGHC (the "**Class B Partner Board Right**"), which board of managers shall be governed by the Limited Partnership Agreement and the Operating Agreement of DGHC attached hereto as Exhibit B. The board of managers shall consist of up to five individual managers and in no event may the board of managers consist of more than five managers without the consent of the managers appointed by the Class B Partner(s) pursuant to Section 5(b) of the Operating Agreement of DGHC; provided, however, that in no event may the board of managers consist of more than five managers unless not fewer than forty percent (40%) of the managers are appointed by the Class B Partner(s) pursuant to Section 5(b) of the Operating Agreement of DGHC. If there is more than one Class B Limited Partner, then the Class B Partner Board Right will be vested solely in the Class B Limited Partner that supervises editorial and reportorial functions of the The Charleston Daily Mail pursuant to Section 9.1 of the Limited Partnership Agreement. **[*189]** In no event may the Class B Limited Partner(s) appoint as members to the board of managers of DGHC any person who is, at the time of his or her appointment, an employee of the Joint Venture, DGC, DCHC, the Limited Partnership or Daily Gazette Publishing Company, LLC.

ARTICLE VIII

MISCELLANEOUS

8.1 Registration Rights. The parties agree that prior to the consummation of any public offering of the Limited Partnership (or any corporate successor thereto), the parties will agree on a registration rights agreement which will include one demand registration and an unlimited number of piggyback registrations with respect to the Class B Partner's securities of the Limited Partnership (or any corporate successor thereto), in each case, at the Limited Partnership's (or any corporate successor thereto's) expense, containing customary terms and conditions and otherwise in form and substance reasonably acceptable to the parties.

8.2 Assignment. This Agreement shall be binding upon and inure only to the benefit of and be enforceable against the parties hereto and their respective permitted successors and assigns. Nothing in this Agreement, express or implied, is intended to confer upon any Person, other **[*190]** than the parties hereto and their respective permitted successors and assigns, any rights or remedies under or by reason of this Agreement. The Class B Partner may assign this Agreement and such party's rights hereunder to any Permitted Transferee hereunder. The General Partner may assign this Agreement and its rights hereunder to any of its Affiliates, to a successor General Partner or as collateral for a loan or other financing; provided that no such assignment shall release the General Partner from any obligation hereunder.

8.3 Amendment. This Agreement may not be amended except by a written instrument signed by the General Partner, the Limited Partnership and the Class B Partner.

8.4 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia, without regard to its conflicts of law principles.

8.5 Notices. All notices and other communications given or made pursuant hereto shall be in writing and shall be deemed to have been duly given or made as of the date delivered if delivered by hand, by telecopier device or by overnight courier service to the parties at the following addresses:

If to General Partner: c/o Daily Gazette **[*191]** Company

1001 Virginia Street, East

Charleston, WV 25301

Attn: Ms. Elizabeth E. Chilton, President,

Facsimile: (304) 348-5180, and

Attn: Mr. Norman Watts Shumate III,

Facsimile: (304) 348-1795

With A Copy to: Edmondson + Blumenthal PLLC

12 Cadillac Drive, Suite 210

Brentwood, TN 37027

Attn: Steven E. Blumenthal

Facsimile: (615) 296-4600

If to Class B Partner: [insert notice information]

8.6 Severability. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner adverse to any party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner to the end that transactions contemplated hereby are fulfilled to the greatest extent possible.

8.7 Counterparts. This Agreement may be executed in one **[*192]** or more counterparts, each of which shall be an original, but all of which taken together shall constitute one and the same agreement.

8.8 Headings. The section headings used in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of any term or provision of this Agreement.

8.9 Integration. This Agreement (together with the Limited Partnership Agreement and the JOA) represents the entire understanding of the parties with reference to the matters set forth herein. This Agreement supersedes all prior negotiations, discussions, correspondence, communications and prior agreements among the parties relating to the subject matter herein.

IN WITNESS WHEREOF, the parties have caused this Put/Call Agreement to be duly executed as of the date first above written.

DAILY GAZETTE HOLDING COMPANY, LLC

By: Daily Gazette Company, its sole member

By: __

Name:

Title:

CHARLESTON NEWSPAPERS HOLDINGS, L.P.

TBy: Daily Gazette Holding Company, LLC, its general partner

By: Daily Gazette Company, its sole member

By: __

Name:

Title:

[insert name of Class B Partner]

By: __

Name:

Title:

DAILY GAZETTE COMPANY (solely for the purposes of Article VII)

By: __

Name:

Title:

Exhibit A

Appraisal [*193] Methodology

In determining the Fair Market Value, the appraiser will use the following methodology:

> The appraiser shall determine the Fair Market Value of the Partnership based on the going concern value of the Partnership as of the relevant date. In determining the Partnership's going concern value, the appraiser (i) shall assume that the value of any business is the cash price at which the assets of such business as a going concern would change hands between a willing buyer and a willing seller (neither acting under compulsion) in an arms-length transaction, on terms and subject to conditions and costs applicable in the newspaper publishing industry, (ii) shall assume that all assets used in the operation of the business of the Partnership and its Subsidiaries, whether owned by or licensed to the Partnership or any of its Subsidiaries (and all other assets of any Affiliate of the Partnership that are used by the Partnership or any of its Subsidiaries), were entirely owned directly by the Partnership, and (iii) shall not take into account expenditures in respect of any management agreements entered into by the Joint Venture.

Exhibit B

Operating Agreement of DGHC

NEITHER THIS WARRANT NOR **[*194]** THE CLASS B LIMITED PARTNER UNITS TO BE ISSUED UPON EXERCISE HEREOF HAS BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"). NO SALE OR OTHER DISPOSITION OF THIS WARRANT OR THE CLASS B LIMITED

PARTNER UNITS ISSUABLE UPON EXERCISE HEREOF MAY BE MADE WITHOUT AN EFFECTIVE REGISTRATION STATEMENT RELATED THERETO OR PURSUANT TO AN EXEMPTION FROM REGISTRATION UNDER THE SECURITIES ACT. THIS WARRANT IS ALSO SUBJECT TO CERTAIN ADDITIONAL TRANSFER RESTRICTIONS PROVIDED FOR HEREIN.

CHARLESTON NEWSPAPERS HOLDINGS, L.P.

WARRANT TO PURCHASE CLASS B LIMITED PARTNER UNITS INITIALLY CONSTITUTING A 20% PERCENTAGE INTEREST

This certifies that Charleston Publishing Company, a Delaware corporation ("Holder"), is entitled to subscribe for and purchase from Charleston Newspapers Holdings, L.P., a Delaware limited partnership (hereinafter, the "Partnership"), up to an aggregate number of duly authorized, validly issued, fully paid and nonassessable Class B Limited Partner Units equal to the Warrant Units Amount, at a purchase price per Class B Limited Partner Unit equal to the Warrant Price (as defined below), subject to the provisions and upon the terms and conditions hereinafter **[*195]** set forth. Capitalized terms used herein and not otherwise defined herein shall have the meanings assigned to them in that certain Amended and Restated Limited Partnership Agreement for Charleston Newspapers Holdings, L.P. by and among Daily Gazette Holding Company, LLC, a Delaware limited liability company ("DGHC"), and Charleston Publishing Company (as it may be amended from time to time, the "Partnership Agreement").

The purchase price of each Class B Limited Partner Unit shall be the price per Class B Limited Partner Unit determined in accordance with Exhibit A attached hereto and set forth in an addendum to this Warrant executed by Holder and the Partnership (the "Warrant Price"). The maximum number of Class B Limited Partner Units to be issued upon exercise of this Warrant (as adjusted from time to time, the "Warrant Units Amount") shall be equal to the number of Class B Limited Partner Units that constitute a twenty percent (20%) Percentage Interest in the Partnership (subject to adjustment as provided below (as adjusted from time to time, the "Warrant Percentage Amount") as of the date of exercise. The term "Class B Units" shall mean, unless the context otherwise requires, the **[*196]** Class B Limited Partner Units and other property at the time receivable upon the exercise of this Warrant. The term "Warrant(s)" as used herein shall include this Warrant and any warrant(s) delivered in substitution or exchange therefor as provided herein.

1. Method of Exercise; Payment.

The purchase right represented by this Warrant may be exercised by Holder, in whole or in part, by:

a. the surrender of this Warrant at the principal office of the Partnership located at c/o Daily Gazette Company, 1001 Virginia Street, East, Charleston, WV 25301, Attn: Ms. Elizabeth Chilton, President, together with a written notice of Holder's election to exercise this Warrant, which notice shall specify the number of Class B Units (or the Percentage Interest of the Partnership) to be purchased;

b. the payment to the Partnership, by wire transfer of immediately available funds to an account designated by the Partnership, of an amount equal to the aggregate Warrant Price of the Class B Units being purchased;

c. if Holder is not already a party to the Partnership Agreement, the execution and delivery by Holder of an amendment to the Partnership Agreement (in a form prepared by Holder and reasonably acceptable **[*197]** to the General Partner) pursuant to which Holder will become a party to the Partnership as a Class B Limited Partner and agree to be bound by the terms and conditions of the Partnership Agreement (a "Partnership Amendment"); and

d. if Holder is not already a party to a put/call agreement in substantially the form attached to this Warrant as Exhibit B (a "Put/Call Agreement"), the execution and delivery by Holder of a Put/Call Agreement.

Class B Units purchased pursuant to this Warrant shall be uncertificated. Unless this Warrant has been fully exercised or has expired, a new Warrant representing the Class B Units with respect to which this Warrant shall not then have been exercised shall be issued to Holder as soon as practicable after each exercise of this Warrant, and in any event within thirty (30) days after the surrender of this Warrant. Each exercise of this Warrant shall be deemed to have been effected immediately prior to the close of business on the date on which items (a) and (b) above have been satisfied, and the person entitled to receive the Class B Units issuable upon such exercise shall be treated for all purposes as the holder of such Class B Units of record as of the **[*198]** close of business on such date.

2. Certain Agreements.

Upon surrender of this Warrant pursuant to Section 1:

a. the Partnership will cause the General Partner to immediately execute and deliver to Holder the Partnership Amendment executed and delivered by Holder pursuant to Section 1(c) above; and

b. the Partnership will (and the Partnership will cause the General Partner to) immediately execute and deliver to Holder the Put/Call Agreement executed and delivered by Holder pursuant to Section 1(d) above.

3. Covenant of Non-Impairment.

The Partnership will not, by amendment of the Partnership Agreement or through reorganization, consolidation, merger, dissolution, issue or sale of Partnership Interests or other securities, sale of assets or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Warrant, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such action as may be necessary or appropriate in order to protect the rights of Holder against dilution or other impairment.

4. Adjustment of Percentage Interest.

At the end of each of the 2010, 2011, 2012, 2013 and 2014 fiscal years **[*199]** of the Partnership, the Warrant Percentage Amount shall be subject to adjustment as follows:

a. If the Daily Mail's percentage share of the Combined Circulation for the most-recently ended 12-month audit period exceeds the Daily Mail's percentage share for the immediately preceding 12-month audit period by more than one (1) percentage point, then the Warrant Percentage Amount will increase one (1) percentage point.

b. If the Daily Mail's percentage share of the Combined Circulation for the most-recently ended 12-month audit period is more than one (1) percentage point lower than the Daily Mail's percentage share for the immediately preceding 12-month audit period, then the Warrant Percentage Amount will decrease one (1) percentage point.

For purposes of determining adjustments to be made pursuant to this Section 3, the terms set forth below shall have the meanings assigned to them below:

i. "Daily Mail": The Charleston Daily Mail.

ii. "Charleston Gazette": The Charleston Gazette.

iii. "Daily Print Circulation": the average weekday paid print circulation of a newspaper as stated in the most recent 12-month audit conducted by the Audit Bureau of Circulations or other reputable third party **[*200]** media auditor.

iv. "Combined Circulation": the sum of the Daily Print Circulation of the Daily Mail and the Charleston Gazette.

5. Term; Termination.

This Warrant may be exercised in whole or in part at any time and from time to time, on or after [insert date] and shall terminate three (3) years thereafter. Notwithstanding the foregoing, this Warrant shall terminate immediately upon the cessation of the publication of The Charleston Daily Mail.

6. No Partner Rights.

Holder shall not, solely by virtue hereof, be entitled to any rights of a partner of the Partnership prior to any exercise of this Warrant, and nothing contained in this Warrant shall be construed as imposing any obligation on Holder to purchase any Partnership Interest or as imposing any liabilities on Holder as a partner of the Partnership (prior to any exercise of this Warrant), whether such obligation or liabilities are asserted by the Partnership or by creditors of the Partnership.

7. Transfer.

This Warrant may not be sold, assigned, disposed, hypothecated, pledged or otherwise transferred in whole or in part; provided, however, (x) Holder may assign this Warrant to any of Holder's Affiliates, provided that such Affiliate **[*201]** agrees to be bound by the provisions of this Warrant and (y) Holder may assign its rights under this Warrant as collateral security to persons or entities extending financing to Holder or any of its Affiliates (and such persons or entities may at any time foreclose on such security interest). The term "Holder" as used herein shall include any transferee to whom this Warrant has been transferred in accordance with this Section 7. Any transfer or attempted transfer in violation of this Section 7 shall be null and void. The term "Affiliate" as used herein shall mean, with respect to any person or entity, any other person or entity directly or indirectly controlling or controlled by such person or entity or under direct or indirect common control with such person or entity.

8. Securities Act of 1933.

In addition to (and not in limitation of) the restrictions set forth in Section 6 above, Holder, by acceptance hereof, agrees that, absent an effective registration statement under the Securities Act of 1933, as amended (the "Securities Act"), covering the disposition of the Warrant or Class B Units issued or issuable upon exercise hereof, Holder will not sell or transfer any or all of such **[*202]** Warrant or Class B Units unless such sale or transfer will be exempt from the registration and prospectus delivery requirements of the Securities Act and an opinion of counsel reasonably satisfactory to the Partnership regarding such exemption is delivered to the Partnership. Holder consents to the Partnership's making a notation on its records in order to implement such restriction on transferability. Holder represents that it is an "accredited investor" within the meaning of *Rule 501* under the Securities Act.

9. Remedies.

The Partnership stipulates that the remedies at law of Holder, in the event of any default or threatened default by the Partnership in the performance of or compliance with any of the terms of this Warrant, are not and will not be adequate and that, to the fullest extent permitted by law, such terms may be specifically enforced by a decree for the specific performance of any agreement contained herein or by an injunction against a violation of any of the terms hereof or otherwise.

10. Loss or Mutilation.

Upon receipt by the Partnership of evidence satisfactory to it (in the exercise of reasonable discretion) of the ownership of and the loss, theft, destruction or mutilation **[*203]** of this Warrant and (in the case of loss, theft, or destruction) of indemnity satisfactory to it (in the exercise of reasonable discretion), and (in the case of mutilation) upon surrender and cancellation thereof, the Partnership will execute and deliver in lieu hereof a new Warrant of like tenor.

11. Successors.

All the covenants and provisions of this Warrant shall bind and inure to the benefit of Holder and the Partnership and their respective successors and permitted assigns.

12. Notices.

All notices and other communications given pursuant to this Warrant shall be in writing and shall be deemed to have been given when personally delivered or when mailed by prepaid registered, certified or express mail, return receipt requested. Notices should be addressed as follows:

a. If to Holder, then to:

Affiliated Media, Inc.

101 W. Colfax Avenue, Suite 1100

Denver, CO 80202

Attention: Joseph J. Lodovic, IV, President

With a copy (which shall not constitute notice) to:

Hughes Hubbard & Reed LLP

One Battery Park Plaza

New York, New York 10004

Attention: James Modlin

b. If to the Partnership, then to:

Daily Gazette Company

1001 Virginia Street, East

Charleston, WV 25301

Attention: Elizabeth E. Chilton, President **[*204]** and

Norman Watts Shumate III

With a copy (which shall not constitute notice) to:

Edmondson + Blumenthal PLLC

12 Cadillac Drive, Suite 210

Brentwood, TN 37027

Attention: Steven E. Blumenthal

Such addresses for notices may be changed by any party by written notice to the other party pursuant to this Section 12.

13. Amendment.

This Warrant may be amended only by an agreement in writing signed by the Partnership and Holder.

14. Construction of Warrant.

Captions contained in this Warrant are inserted as a matter of convenience and in no way define the scope of this Warrant or the intent of any provision hereof. None of the provisions of this Warrant shall be for the benefit of or be enforceable by any creditor of the Partnership, any Partner or Holder. This Warrant, together with the exhibits attached hereto and the Partnership Agreement and the JOA, constitute the entire agreement between the parties hereto pertaining to the subject matter hereof and supersedes all prior agreements (oral or written) and understandings pertaining thereto. In the event of any conflict between this Warrant and any other agreement, this Warrant shall control. The invalidity of any article, section, subsection, clause **[*205]** or provision of this Warrant shall not affect the validity of the remaining articles, sections, subsections, clauses or provisions hereof.

15. Governing Law.

This Warrant and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of Delaware, without regard to its conflicts of law principles.

Dated as of [insert date]

Charleston Newspapers Holdings, L.P.

By: Daily Gazette Company, General Partner

By: __

Elizabeth E. Chilton, President

Exhibit A

Methodology for Determining Price per Class B Limited Partner Unit

The Warrant Price will be the appraised value of a Class B Limited Partner Unit as of the date of this Warrant, as determined promptly following the execution and delivery of this Warrant by a nationally-recognized appraiser with experience in the newspaper industry that is reasonably acceptable to both Daily Gazette Company and the Holder.

Each of the following appraisers are hereby deemed to be "reasonably acceptable" to both Daily Gazette Company and the Holder:

Dirks, Van Essen & Murray

In determining the price per Class B Limited Partner Unit, the appraiser will use the following methodology:

The appraiser shall determine **[*206]** the fair market value of the Partnership based on the going concern value of the Partnership as of the relevant date, with the following adjustments. In determining the Partnership's going concern value, the appraiser (i) shall assume that the value of any business is the cash price at which the assets of such business as a going concern would change hands between a willing buyer and a willing seller (neither acting under compulsion) in an arms-length transaction, on terms and subject to conditions and costs applicable in the newspaper publishing industry, (ii) shall assume that all assets used in the operation of the business of the Partnership and its Subsidiaries, whether owned by or licensed to the Partnership or any of its Subsidiaries (and all other assets of any Affiliate of the Partnership that are used by the Partnership or any of its Subsidiaries), were entirely owned directly by the Partnership, and (iii) shall not take into account expenditures in respect of any management agreements entered into by the Joint Venture. The Warrant Price with respect to any Class B Limited Partner Unit shall be an amount equal to (x) the fair market value of the Partnership as of the date **[*207]** of this Warrant (as determined in accordance with the preceding sentence) multiplied by (y) the Percentage Interest in the Partnership represented by such Class B Limited Partner Unit as of the date of exercise of the Warrant.

<u>Exhibit B</u>

Form of Class B Units Put/Call Agreement

[Attached]

Facebook, Inc. v. Power Ventures, Inc.

United States District Court for the Northern District of California, San Jose Division

July 20, 2010, Decided; July 20, 2010, Filed

NO. C 08-05780 JW

Reporter
2010 U.S. Dist. LEXIS 93517 *; 2010 WL 3291750

Facebook, Inc., Plaintiff, v. Power Ventures, Inc., et al., Defendants.Power Ventures, Inc., et al., Counterclaimants, v. Facebook, Inc., Counterdefendants.

Prior History: *Facebook, Inc. v. Power Ventures, Inc., 2009 U.S. Dist. LEXIS 42367 (N.D. Cal., May 11, 2009)*

Core Terms

users, website, permission, pleadings, motion to dismiss, computer system, summary judgment, violations, accessed, terms, computer network, counterclaims, affirmative defense, allegations, contends, barriers, motion for judgment, cases, violation of the term, block, criminal liability, anticompetitive, authorization, infringement, non-moving, genuine, notice, unfair, unauthorized access, legislative intent

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Pretrial Judgments, Judgment on Pleadings**

Under *Fed. R. Civ. P. 12(c)*, any party may move for judgment on the pleadings at any time after the pleadings are closed but within such time as not to delay the trial. *Fed. R. Civ. P. 12(c)*. For the purposes of the motion, the allegations of the nonmoving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false. Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. When brought by the defendant, a motion for judgment on the pleadings under *Rule 12(c)* is a means to challenge the sufficiency of the complaint after an answer has been filed. A motion for judgment on the pleadings is therefore similar to a motion to dismiss. When the district court must go beyond the pleadings to resolve an issue on a motion for judgment on the pleadings, the proceeding is properly treated as a motion for summary judgment.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN2[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses.

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

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

HN3[] **Burdens of Proof, Movant Persuasion & Proof**

The party moving for summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying the evidence which it believes demonstrates the absence of a genuine issue of material fact. The nonmoving party must then identify specific facts that might affect the outcome of the suit under the governing law, thus establishing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN4[] **Summary Judgment, Evidentiary Considerations**

When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. The court draws all reasonable inferences in favor of the nonmoving party, including questions of credibility and of the weight that particular evidence is accorded. The court determines whether the nonmoving party's specific facts, coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the nonmoving party. In such a case, summary judgment is inappropriate. However, where a rational trier of fact could not find for the nonmoving party based on the record as a whole, there is no genuine issue for trial.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN5[] **Motions for Summary Judgment, Cross Motions**

Although the district court has discretion to consider materials in the court file not referenced in the papers opposing summary judgment, it need not do so. The district court need not examine the entire file for evidence establishing a genuine issue of fact. However, when the parties file cross-motions for summary judgment, the district court must consider all of the evidence submitted in support of both motions to evaluate whether a genuine issue of material fact exists precluding summary judgment for either party.

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

HN6[] **Motions to Dismiss, Failure to State Claim**

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. For purposes of evaluating a motion to dismiss, the court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party. Any existing ambiguities must be resolved in favor of the pleading.

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

Computer & Internet Law > Civil Actions > Damages

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN7[] **Motions to Dismiss, Failure to State Claim**

Mere conclusions couched in factual allegations are not sufficient to state a cause of action. The complaint must plead enough facts to state a claim for relief that is plausible on its face. A claim is plausible on its face when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Thus, for a complaint to survive a motion to dismiss, the nonconclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief. Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

HN8[] **Criminal Offenses, Data Crimes & Fraud**

See *Cal. Penal Code § 502(e)(1)*.

Computer & Internet Law > Civil Actions > Damages

HN9[] **Civil Actions, Damages**

Cal. Penal Code § 502(c)(2), *(3)*, and *(7)* require that the defendant's actions be taken without permission. However, the statute does not expressly define the term without permission.

Governments > Legislation > Interpretation

HN10[] **Legislation, Interpretation**

In interpreting any statutory language, the court looks first to the words of the statute. If the language is unambiguous, the statute should be interpreted according to the plain meaning of the text. The structure and purpose of a statute can provide guidance in determining the plain meaning of its provisions. Statutory language is ambiguous if it is capable of being understood in two or more possible senses or ways. If a statutory provision is ambiguous, the court turns to the legislative history for guidance.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

HN11[] **Criminal Offenses, Data Crimes & Fraud**

Cal. Penal Code § 502(c)(2) holds liable any person who knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

HN12[] Criminal Offenses, Data Crimes & Fraud

Cal. Penal Code § 502(c)(3) holds liable any person who knowingly and without permission uses or causes to be used computer services.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

HN13[] Criminal Offenses, Data Crimes & Fraud

Cal. Penal Code § 502(c)(7) holds liable any person who knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

HN14[] Criminal Offenses, Data Crimes & Fraud

Using a computer network for the purpose that it was designed to serve, even if in a manner that is otherwise improper, is not the kind of behavior that the legislature sought to prohibit when it enacted *Cal. Penal Code § 502*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Vagueness

HN15[] Procedural Due Process, Scope of Protection

It is a fundamental tenet of due process that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. Thus, a criminal statute is invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. Where a statute has both criminal and noncriminal applications, courts must interpret the statute consistently in both contexts. In the United States Court of Appeals for the Ninth Circuit, to survive vagueness review, a statute must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, nondiscriminatory manner.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

HN16[] Criminal Offenses, Data Crimes & Fraud

In order to avoid rendering *Cal. Penal Code § 502* constitutionally infirm, the United States District Court for the Northern District of California finds that a user of internet services does not access or use a computer, computer network, or website without permission simply because that user violated a contractual term of use.

Business & Corporate Compliance > ... > Computer & Internet Law > Criminal Offenses > Data Crimes & Fraud

HN17[] Criminal Offenses, Data Crimes & Fraud

If a violation of a term of use is by itself insufficient to support a finding that the user's access was without permission in violation of *Cal. Penal Code § 502*, the issue becomes what type of action would be sufficient to support such a finding. The United States District Court for the Northern District of California finds that a distinction can be made between access that violates a term of use and access that circumvents technical or code-based barriers that a computer network or website administrator erects to restrict the user's privileges within the system, or to bar the user from the system altogether. Limiting criminal liability to circumstances in which a user gains access to a computer, computer network, or website to which access was restricted through technological means eliminates any constitutional notice concerns, since a person applying the technical skill necessary to overcome such a barrier will almost always understand that any access gained through such action is unauthorized. Thus, the court finds that accessing or using a computer, computer network, or website in a manner that overcomes technical or code-based barriers is without permission, and may subject a user to liability under *§ 502*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN18[] Actual Monopolization, Claims

To state a *15 U.S.C.S. § 2* claim for monopolization, the claimant must show that the alleged monopolist (1) possesses monopoly power in the relevant market (2) through the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident, (3) that causes antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN19[] Actual Monopolization, Claims

The United States Court of Appeals for the Ninth Circuit has held that merely introducing a product that is not technologically interoperable with competing products is not violative of *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN20[] Attempts to Monopolize, Elements

Anticompetitive conduct is an element of a claim for attempted monopolization under *15 U.S.C.S. § 2*.

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

HN21[] Deceptive & Unfair Trade Practices, State Regulation

California's Unfair Competition Law (UCL) prohibits any unlawful, unfair or fraudulent business act or practice. *Cal. Bus. & Prof. Code § 17200*. "he broad scope of the statute encompasses both anticompetitive business practices and practices injurious to consumers. An act or practice may be actionable as unfair under the UCL even if it is not unlawful.

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

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

An act or practice is unfair under California's Unfair Competition Law if that conduct threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Likewise, the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not unfair toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of pro-competitive conduct.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN23[] **Defenses, Demurrers & Objections, Motions to Strike**

Pursuant to *Fed. R. Civ. P. 12(f)*, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. However, motions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic. Accordingly, such motions should be denied unless the matter has no logical connection to the controversy at issue and may prejudice one or more of the parties to the suit.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Strike > General Overview

HN24[] **Defenses, Demurrers & Objections, Motions to Strike**

When considering a motion to strike, the court must view the pleading in a light most favorable to the pleading party.

Counsel: **[*1]** For Facebook, Inc., a Delaware corporation, Plaintiff: David P. Chiappetta, LEAD ATTORNEY, Corrs Chambers Westgarth, Melbourne, VIC; Indra Neel Chatterjee, LEAD ATTORNEY, Orrick Herrington & Sutcliffe LLP, Menlo Park, CA; Joseph Perry Cutler, LEAD ATTORNEY, PRO HAC VICE, Perkins Coie, Seattle, WA; Jessica Susan Pers, Orrick Herrington & Sutcliffe LLP, San Francisco, CA; Julio Cesar Avalos, Orrick Herrington & Sutcliffe, Menlo Park, CA; Thomas J. Gray, Orrick Herrington & Sutcliffe LLP, Irvine, CA.

For Power Ventures, Inc., a Cayman Island Corporation, Defendant: Scott A. Bursor, LEAD ATTORNEY, PRO HAC VICE, Law Offices of Scott A. Bursor, New York, NY; Alan R Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Thomas J. Gray, Orrick Herrington & Sutcliffe LLP, Irvine, CA; Lawrence Timothy Fisher, Barroway Topaz Kessler Meltzer & Check LLP, San Francisco, CA.

For Steven Vachani, an individual, Defendant: Alan R Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Lawrence Timothy Fisher, Barroway Topaz Kessler Meltzer & Check LLP, San Francisco, CA.

For Electronic Frontier Foundation, Amicus: Cindy Ann Cohn, Electronic Frontier Foundation, San Francisco, **[*2]** CA.

For Steven Vachani, an individual, Power Ventures, Inc., a California corporation, Counter-claimants: Lawrence Timothy Fisher, Barroway Topaz Kessler Meltzer & Check LLP, San Francisco, CA.

For Facebook, Inc., a Delaware corporation, Counter-defendant: David P. Chiappetta, LEAD ATTORNEY, Corrs Chambers Westgarth, Melbourne, VIC; Indra Neel Chatterjee, LEAD ATTORNEY, Orrick Herrington & Sutcliffe LLP, Menlo Park, CA; Joseph Perry Cutler, LEAD ATTORNEY, Perkins Coie, Seattle, WA; Jessica Susan Pers, Orrick Herrington & Sutcliffe LLP, San Francisco, CA; Julio Cesar Avalos, Orrick Herrington & Sutcliffe, Menlo Park, CA.

For Power Ventures, Inc., a Cayman Island Corporation, Counter-claimant: Scott A. Bursor, LEAD ATTORNEY, Law Offices of Scott A. Bursor, New York, NY; Alan R Plutzik, Bramson Plutzik Mahler & Birkhaeuser, LLP, Walnut Creek, CA; Lawrence Timothy Fisher, Barroway Topaz Kessler Meltzer & Check LLP, San Francisco, CA.

Judges: JAMES WARE, United States District Judge.

Opinion by: JAMES WARE

Opinion

ORDER DENYING FACEBOOK'S MOTION FOR JUDGMENT ON THE PLEADINGS; DENYING THE PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT; GRANTING FACEBOOK'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS; DENYING FACEBOOK'S MOTION [*3] TO STRIKE DEFENDANTS' AFFIRMATIVE DEFENSES

I. INTRODUCTION

Facebook, Inc. ("Plaintiff" or "Facebook") brings this action against Power Ventures, Inc. ("Defendant" or "Power") alleging, *inter alia*, violations of the California Comprehensive Computer Data Access and Fraud Act, *Cal. Penal Code § 502* ("*Section 502*"). Facebook alleges that Power accessed the Facebook website in violation of Facebook's Terms of Use, and when Facebook tried to stop Power's unauthorized access, Power circumvented Facebook's technical barriers. Power brings counterclaims against Facebook alleging, *inter alia*, violations of the Sherman Act, *15 U.S.C. § 2*.

Presently before the Court are Facebook's Motion for Judgment on the Pleadings Pursuant to *Fed. R. Civ. P. 12(c)* or, in the Alternative, Partial Summary Judgment of Liability Under *California Penal Code § 502*; [1] Defendants' Motion for Summary Judgment; [2] and Facebook's Motion to Dismiss Counterclaims and Strike Affirmative Defenses. [3] The Court conducted a hearing on June 7, 2010. Based on the papers submitted to date and oral argument, the Court DENIES Facebook's Motion for Judgment on the Pleadings, DENIES the parties' Cross-Motions for Summary Judgment, GRANTS **[*4]** Facebook's Motion to Dismiss Defendants' counterclaims for violations of *Section 2 of the Sherman Act*, GRANTS Facebook's Motion to Dismiss Defendants' UCL counterclaim, and DENIES Facebook's Motion to Strike Defendants' Affirmative Defenses.

II. BACKGROUND

[1] (hereafter, "Facebook's Motion for Judgment on the Pleadings," Docket Item No. 56.)

[2] (Docket Item No. 62.)

[3] (hereafter, "Facebook's Motion to Dismiss," Docket Item No. 58.)

A. **Factual Background**

A detailed outline of the factual allegations in this case may be found in the Court's May 11, 2009 Order Denying Motion to Dismiss and Granting in Part and Denying in Part Motion for More Definite Statement. [4] The Court will address the facts of the case, as they relate to the present Motions, in the Discussion section below.

B. **Procedural History**

In its May 11 Order, the Court denied Defendants' Motion to Dismiss Plaintiff's claims for copyright infringement, violation of the Digital Millennium Copyright Act ("DMCA"), trademark infringement under federal law, trademark infringement under state law, and violation of the California Unfair Competition Law ("UCL"), and granted Defendants' Motion for a **[*5]** More Definite Statement with respect to Plaintiff's UCL claim.

On October 22, 2009, the Court issued an Order Granting Facebook's Motion to Dismiss Counter-Complaint and Strike Affirmative Defenses. (hereafter, "October 22 Order," Docket Item No. 52.) In its October 22 Order, the Court found that the counterclaims, as stated in Defendants' Answer and Counter-Complaint, were insufficient because they consisted only of conclusory recitations of the applicable legal standard and a general "reference [to] all allegations of all prior paragraphs as though fully set forth herein." (Id. at 3.) Similarly, the Court found Defendants' affirmative defenses deficient because they referenced the introductory section without delineating which allegations supported each affirmative defense. (Id. at 3-4.) The Court granted leave to amend the counterclaims and affirmative defenses. (Id. at 4.) On November 23, 2010, Defendants filed the Amended Answer and Counterclaims of Defendants Power Ventures, Inc. and Steve Vachani. (hereafter, "Amended Answer," Docket Item No. 54.) On February 26, 2010, Judge Fogel recused himself from the case. (See Docket Item No. 72.) On March 2, 2010, the case was reassigned **[*6]** to Judge Ware. (See Docket Item No. 73.)

Presently before the Court are the parties' various Motions. The Court addresses each Motion in turn.

III. STANDARDS

A. **Motion for Judgment on the Pleadings**

HN1[] Under *Federal Rule of Civil Procedure 12(c)*, any party may move for judgment on the pleadings at any time after the pleadings are closed but within such time as not to delay the trial. *Fed. R. Civ. P. 12(c)*. "For the purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990)*. Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Id. When brought by the defendant, a motion for judgment on the pleadings under *Federal Rule of Civil Procedure 12(c)* is a "means to challenge the sufficiency of the complaint after an answer has been filed." *New. Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1115 (C.D. Cal. 2004)*. A motion for judgment **[*7]** on the pleadings is therefore similar to a motion to dismiss. Id. When the district court must go beyond the pleadings to resolve an issue on a motion for judgment on the pleadings, the proceeding is properly treated as a motion for summary judgment. *Fed. R. Civ. P. 12(c)*; *Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1301 (9th Cir. 1982)*.

B. **Motion for Summary Judgment**

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[4] (hereafter, "May 11 Order," Docket Item No. 38.)

HN2[] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

HN3[] The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying the evidence which it believes demonstrates the absence of a genuine issue of material fact." *Celotex, 477 U.S. at 323*. The non-moving party must then identify specific facts "that might affect the outcome of the suit under the governing **[*8]** law," thus establishing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

HN4[] When evaluating a motion for summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The court draws all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight that particular evidence is accorded. See, e.g. *Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1992)*. The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party. *T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987)*. In such a case, summary judgment is inappropriate. *Anderson, 477 U.S. at 248*. However, where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

HN5[] Although the district court has discretion to consider materials in the **[*9]** court file not referenced in the opposing papers, it need not do so. See *Carmen v. San Francisco Unified School District, 237 F.3d 1026, 1028-29 (9th Cir. 2001)*. "The district court need not examine the entire file for evidence establishing a genuine issue of fact." *Id. at 1031*. However, when the parties file cross-motions for summary judgment, the district court must consider all of the evidence submitted in support of both motions to evaluate whether a genuine issue of material fact exists precluding summary judgment for either party. *The Fair Housing Council of Riverside County, Inc. v. Riverside Two, 249 F.3d 1132, 1135 (9th Cir. 2001)*.

C.Motion to Dismiss

HN6[] Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*; *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984)*. For purposes of evaluating a motion to dismiss, **[*10]** the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)*. Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973)*.

However, *HN7*[] mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*; see also *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988)*. The complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)*. **[*11]** Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000)*.

IV. DISCUSSION

A. Statutory Standing

As a threshold matter, Defendants contend that Facebook does not have standing to bring its *Section 502* claim because it has not made an adequate showing that it has suffered damage or loss within the meaning of the statute. [5]

Section 502(e)(1) provides:

> *HN8*[] In addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation of any of the provisions of subdivision (c) may bring a civil action against the violator for compensatory damages and injunctive relief. Compensatory damages shall include any expenditure reasonably and necessarily incurred by the owner or lessee to verify that a computer system, computer network, computer program, or data was or was not altered, damaged, or deleted by the access. . . .

Facebook relies **[*12]** solely on the undisputed facts from the pleadings to support its Motion. In their Amended Answer, Defendants admit that: (1) Facebook communicated to Defendant Steven Vachani ("Vachani"), the purported CEO of Power.com, its claim that "Power.com's access of Facebook's website and servers was unauthorized and violated Facebook's rights, including Facebook's trademark, copyrights, and business expectations with its users;" [6] (2) "Vachani offered to attempt to integrate Power.com with Facebook Connect," a Facebook program that "permits integration with third party websites," but "Vachani communicated concerns about Power's ability to integrate Power.com with Facebook Connect on the schedule that Facebook was demanding;" [7] and (3) "Facebook implemented technical measures to block users from accessing Facebook through Power.com," but nonetheless "Power provided users with tools necessary to access Facebook through Power.com." [8]

In support of their contention that Plaintiff did not suffer damage or loss, Defendants provide the declaration of Vachani, in which he states **[*13]** that Facebook had no cause for concern over Power's access to its website, and that "in its communications with [Vachani], Facebook never suggested any concern that its computers or data had been altered, deleted, damaged, or destroyed." [9] Vachani further declares that to his knowledge, "Facebook did not . . . make any expenditure to verify that its computers or data had not been altered, deleted, damaged, or destroyed." (Id.)

Upon review of the pleadings and evidence presented, the Court finds that the undisputed facts show that Facebook suffered some damage or loss as a result of Power's actions. Specifically, Defendants' admissions that Facebook attempted to block Power's access and that Power provided users with tools that allowed them to access

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[5] (Defendants' Reply Brief in Support of Motion for Summary Judgment at 5-14, hereafter, "Defendants' Reply re Summary Judgment," Docket Item No. 68.)

[6] (FAC P 57, Amended Answer P 57.)

[7] (FAC PP 28, 58, 60, Amended Answer PP 58, 60.)

[8] (FAC PP 63-64, Amended Answer PP 63-64.)

[9] (Declaration of Steve Vachani in Support of Defendants' Opposition to Facebook Inc.'s Motion for Judgment on the Pleadings Pursuant to *Fed. R. Civ. P. 12(c)* or, in the Alternative, Partial Summary Judgment of Liability Under ***California Penal Code § 502(c)*** P 12, hereafter, "Vachani Decl.," Docket Item No. 65.)

the Facebook website through Power.com adequately demonstrates that Facebook expended resources to stop Power from committing acts **[*14]** that Facebook now contends constituted *Section 502* violations. Although Defendants contend that any steps that Facebook took to block Power's access to the Facebook website were *de minimus*, and would involve only a "a few clicks of a mouse . . . and ten keystrokes," [10] *Section 502* sets no threshold level of damage or loss that must be reached to impart standing to bring suit. Under the plain language of the statute, any amount of damage or loss may be sufficient.

Moreover, Defendants provide no foundation to establish that Vachani has personal knowledge of what steps Facebook took, or would reasonably have to take, to block Power's access to the Facebook website. Since information regarding Facebook's technical measures, and the cost Facebook expended implementing those measures, is likely to be in Facebook's possession and not Power's, the Court finds that Vachani's declaration alone cannot defeat Plaintiff's standing.

Defendants further contend that to impart standing, damage or loss must amount to an "injury." (Defendants' Reply re Summary Judgment at 4.) The statute defines an "injury" as "any alteration, deletion, damage, or destruction of a computer system, computer **[*15]** network, computer program, or data caused by the access, or the denial of access, to legitimate users of a computer system, network, or program." *Cal. Penal Code § 502(b)(8)*. However, Defendants provide no authority for equating damage and loss with injury beyond the observation that the terms are synonyms. (Defendants' Reply re Summary Judgment at 4.) In fact, the only place in *Section 502* that the term injury appears, other than the clause defining the term itself, is in the criminal liability provision, which has no bearing on the civil provision granting a private right of action. See *§ 502(d)* (setting more stringent penalties for violations that result in an injury).

Since the undisputed facts demonstrate that Facebook has suffered some damage or loss in attempting to block Power's access to the Facebook website, the Court finds that Facebook has standing to bring suit pursuant to *Section 502(e)*. The Court proceeds to examine Defendants' liability under *Section 502*.

B. Defendants' *Section 502* Liability

Facebook contends that the undisputed facts prove that Defendants violated *Section 502*. (Facebook's Motion for Judgment on the Pleadings at 1.) Facebook bases its *Section 502* claim **[*16]** solely on facts that Defendants admit in their Amended Answer, which Facebook contends show beyond dispute that Power accessed the Facebook website in violation of the Facebook terms of use, and that when Facebook tried to stop Power, Power worked around Facebook's technical barriers. (Id.) Defendants respond, *inter alia*, that there is no evidence that Power ever accessed the Facebook website without the express permission of the user and rightful owner of the accessed data. [11]

On May 5, 2010, the Court granted the Electronic Frontier Foundation's ("EFF") Motion to File Amicus Curiae in support of Defendants' Motion. [12] EFF contends that in order to avoid constitutional vagueness concerns, the Court must construe the statutory phrase "without permission" narrowly to exclude access to a website or computer network that merely violates a term of use. [13] Allowing criminal liability **[*17]** based only on violation of contractual terms of service, EFF contends, would grant the website or network administrator essentially unlimited authority to

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[10] (Vachani P 9.)

[11] (Defendants' Corrected Opposition to Facebook Inc.'s Motion for Judgment on the Pleadings Pursuant to *Fed. R. Civ. P. 12(c)* or, in the Alternative, Partial Summary Judgment of Liability Under ***California Penal Code § 502(c)*** at 11, hereafter, "Defendants' Opposition re Summary Judgment," Docket Item No. 74.)

[12] (Docket Item No. 79.)

[13] (Brief of Amicus Curiae Electronic Frontier Foundation in Support of Defendant Power Ventures' Motion for Summary Judgment on ***Cal. Penal Code 502(c)*** at 24-28, hereafter, "Amicus Brief," Docket Item No. 83.) On July 6, 2010, Facebook filed its Reply to EFF's Amicus Brief. (hereafter, "Amicus Reply," Docket Item No. 86.)

define the scope of criminality and potentially expose millions of average internet users to criminal sanctions without any meaningful notice. (Id.)

The Court finds that ***HN9***[] all of the subsections of *Section 502(c)* that potentially apply in this case require that the defendant's actions be taken "without permission." See *Cal. Penal Code § 502(c)(2)*, *(3)*, *(7)*. However, the statute does not expressly define the term "without permission." ***HN10***[] In interpreting any statutory language, the court looks first to the words of the statute. *Lamie v. U.S. Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)*. If the language is unambiguous, the statute should be interpreted according to the plain meaning of the text. *Id. at 534*. The **[*18]** structure and purpose of a statute can provide guidance in determining the plain meaning of its provisions. *K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988)*. Statutory language is ambiguous if it is capable of being understood in two or more possible senses or ways. *Chickasaw Nation v. United States, 534 U.S. 84, 90, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001)*. If a statutory provision is ambiguous, the court turns to the legislative history for guidance. *SEC v. McCarthy, 322 F.3d 650, 655 (9th Cir. 2003)*.

Here, the Court first looks to the plain language of the statute. However, the term "without permission" can be understood in multiple ways, especially with regard to whether access is without permission simply as a result of violating the terms of use. Thus, the Court must consider legislative intent and constitutional concerns to determine whether the conduct at issue here falls within the scope of the statute. See *F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 129 S. Ct. 1800, 1811, 173 L. Ed. 2d 738 (2009)* (noting that "the canon of constitutional avoidance in an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts").

1. Plain Language of the Statute

Here, Facebook does not **[*19]** allege that Power has altered, deleted, damaged, or destroyed any data, computer, computer system, or computer network, so the subsections that require that type of action are not applicable. However, the Court finds that the following subsections of *Section 502* do not require destruction of data, and thus may apply here:

(1) ***HN11***[] *Section 502(c)(2)* holds liable any person who "[k]nowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network;"

(2) ***HN12***[] *Section 502(c)(3)* holds liable any person who "[k]nowingly and without permission uses or causes to be used computer services;" and

(3) ***HN13***[] *Section 502(c)(7)* holds liable any person who "[k]nowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network."

To support its claim that Defendants violated these provisions, Facebook relies solely on facts that Defendants admitted in their Amended Answer. Specifically, Facebook points to Defendants' admissions that: (1) "Power permits users **[*20]** to enter their account information to access the Facebook site through Power.com;" [14] (2) "Defendants developed computer software and other automated devices and programs to access and obtain information from the Facebook website for aggregating services;" [15] (3) Facebook communicated to Vachani its claims that "Power.com's access of Facebook's website and servers was unauthorized and violated Facebook's rights, including Facebook's trademark, copyrights, and business expectations with its users;" [16] (4) "Facebook

[14] (Amended Answer PP 18, 45, 50.)

[15] (Id. P 74; FAC P 74.)

implemented technical measures to block users from accessing Facebook through Power.com;" [17] and (5) "Power provided users with tools necessary to access Facebook through Power.com." [18] Since all three of the subsections at issue here require that Defendants' acts with respect to the computer or computer network be taken without permission, the Court analyzes that requirement first.

Defendants and EFF contend that Power's actions could not have been without permission because Power only accessed the Facebook website with the permission of a Facebook **[*21]** account holder and at that account holder's behest. (See Defendants' Opposition re Summary Judgment at 11; Amicus Brief at 11.) Facebook, on the other hand, contends that regardless of whatever permission an individual Facebook user may have given to Power to access a particular Facebook account, Power's actions clearly violated the website's terms of use, which state that a Facebook user may not "collect users' content or information, or otherwise access Facebook, using automated means (such as harvesting bots, robots, spiders, or scrapers) without [Facebook's] permission." [19]

Since Power admits that it utilized "automated devices" to gain access to the Facebook website, the Court finds that it is beyond dispute that Power's activities violated an express term of the Facebook terms of use. [20] The issue then becomes whether an access or use that involves a violation **[*22]** of the terms of use is "without permission" within the meaning of the statute. In the modern context, in which millions of average internet users access websites every day without ever reading, much less understanding, those websites' terms of use, this is far from an easy or straightforward question. Without clear guidance from the statutory language itself, the Court turns to case law, legislative intent, and the canon of constitutional avoidance to assist in interpreting the statute, and then analyzes whether the acts at issue here were indeed taken without permission.

2. Caselaw

Since the California Supreme Court has not directly addressed the question of whether the violation **[*23]** of a term of use constitutes access or use without permission pursuant to *Section 502*, the Court looks to analogous state appellate court cases and federal court cases from this district for guidance as to the statute's proper construction. The Court also considers cases interpreting the Computer Fraud and Abuse Act ("CFAA"), the federal corollary to *Section 502*, in evaluating how broad an application *Section 502* should properly be given.

EFF relies on two state appellate cases for the proposition that *Section 502* should not apply to persons who have permission to access a computer or computer system, but who use that access in a manner that violates the rules applicable to that system. *Chrisman v. City of Los Angeles, 155 Cal. App. 4th 29, 32, 65 Cal. Rptr. 3d 701 (Cal. Ct. App. 2007)*; *Mahru v. Superior Court, 191 Cal. App. 3d 545, 549, 237 Cal. Rptr. 298 (Cal. Ct. App. 1987)*. In Chrisman, the court found that a police officer did not violate *Section 502* when, while on duty, the officer "accessed the Department computer system [] for non-duty-related activities." *155 Cal. App. 4th at 32*. The court found that at essence, *Section 502* is an anti-hacking statute, and "[o]ne cannot reasonably describe appellant's improper computer **[*24]** inquiries about celebrities, friends, and others as hacking." *Id. at 35*. The officer's "computer

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[16] (Amended Answer P 57; FAC P 57.)

[17] (Amended Answer P 63.)

[18] (Id. P 64.)

[19] (Facebook Inc.'s Reply Brief in Support of its Motion for Judgment on the Pleadings or, in the Alternative, Partial Summary Judgment of Liability Under ***California Penal Code Section 502*** and Opposition to Defendants' Motion for Summary Judgment at 5-6, hereafter, "Facebook's Reply re Summary Judgment," Docket Item No. 66.)

[20] This, of course, assumes that Power was in fact subject to the Facebook terms of use, an issue which was not briefed by either party. However, the terms of use state, "By accessing or using our web site . . . , you (the 'User') signify that you have read, understand and agree to be bound by these Terms of Use . . . , whether or not you are a registered member of Facebook." (FAC, Ex. A.) Thus, in the act of accessing or using the Facebook website alone, Power acceded to the Terms of Use and became bound by them.

queries seeking information that the department's computer system was designed to provide to officers was misconduct if he had no legitimate purpose for that information, but it was not hacking the computer's 'logical, arithmetical, or memory function resources,' as [the officer] was entitled to access those resources." Id. While *Chrisman* does not address the specific issue before the Court here, and focuses on the statutory definition of "access" rather than "without permission," the Court finds that the case helps to clarify that ***HN14***[] using a computer network for the purpose that it was designed to serve, even if in a manner that is otherwise improper, is not the kind of behavior that the legislature sought to prohibit when it enacted *Section 502*.

In Mahru, the court found that the director and part owner of a data-processing firm was not liable under *Section 502* when he instructed the company's chief computer operator to make specified changes in the names of two files in a former customer's computer program in retaliation for that customer terminating its contract with the company. *191 Cal. App. 3d at 547-48*. **[*25]** These changes had the effect of preventing the former customer's employees from being able to run their computer programs without the assistance of an expert computer software technician. Id. In finding that *Section 502* had not been violated by the company's actions, the court stated:

> The Legislature could not have meant, by enacting *section 502*, to bring the Penal Code into the computer age by making annoying or spiteful acts criminal offenses whenever a computer is used to accomplish them. Individuals and organizations use computers for typing and other routine tasks in the conduct of their affairs, and sometimes in the course of these affairs they do vexing, annoying, and injurious things. Such acts cannot all be criminal.

Id. at 549. However, the court in Mahru based its finding of no liability in part on documentary evidence establishing that the company, and not the former customer, owned the computer hardware and software, which explains why the company's manipulation of files stored on that computer hardware was merely vexatious and not unlawful hacking. The Court finds that *Mahru* is not applicable to the circumstances here, where it is undisputed that Power accessed data stored **[*26]** on Facebook's server.

In support of its contention that Facebook users cannot authorize Power to access Facebook's computer systems, Facebook relies on a previous order in this case and another case from this District. On May 11, 2009, Judge Fogel issued an order denying Defendants' Motion to Dismiss Plaintiff's copyright infringement, DMCA, and trademark infringement claims. In addressing Plaintiff's copyright infringement claim, Judge Fogel found that, "[v]iewing the allegations in the FAC as true, the utilization of Power.com by Facebook users exceeds their access rights pursuant to the Terms of Use. Moreover, when a Facebook user directs Power.com to access the Facebook website, an unauthorized copy of the user's profile page is created." (May 11 Order at 6-7.) The Court finds that whether or not Facebook users' utilization of Power.com exceeds their access rights under Facebook's terms of use is not the issue presented in these Motions. Instead, the Court must determine whether such a violation of the terms of use constitutes use "without permission" within the meaning of *Section 502*, a question that the May 11 Order did not directly address.

Finally, in Facebook, Inc. v. ConnectU **[*27]** LLC, Judge Seeborg found that a competing social networking site violated *Section 502* when it accessed the Facebook website to collect "millions" of email addresses of Facebook users, and then used those email addresses to solicit business for itself. *489 F. Supp. 2d 1087, 1089 (N.D. Cal. 2007)*. In that case, Judge Seeborg found unavailing ConnectU's contention that it did not act without permission because it only "accessed information on the Facebook website that ordinarily would be accessible only to registered users by using log-in information voluntarily supplied by registered users." *Id. at 1090-91*. Judge Seeborg found that ConnectU was subject to Facebook's terms of use and rejected ConnectU's contention that "a private party cannot define what is or what is not a criminal offense by unilateral imposition of terms and conditions of use." *Id. at 1091*. The court held that "[t]he fact that private parties are free to set the conditions on which they will grant such permission does not mean that private parties are defining what is criminal and what is not." Id.

The Court finds that of the cases discussed so far, the holding in *ConnectU* is most applicable to the present case. However, **[*28]** the Court respectfully disagrees with *ConnectU* in one key respect. Contrary to the holding of ConnectU, the Court finds that allowing violations of terms of use to fall within the ambit of the statutory term "without permission" does essentially place in private hands unbridled discretion to determine the scope of criminal liability recognized under the statute. If the issue of permission to access or use a website depends on adhering to unilaterally imposed contractual terms, the website or computer system administrator has the power to determine which actions may expose a user to criminal liability. This raises constitutional concerns that will be addressed below.

Although cases interpreting the scope of liability under the CFAA do not govern the Court's analysis of the scope of liability under *Section 502*, CFAA cases can be instructive. EFF points to several CFAA cases for the proposition that the CFAA prohibits trespass and theft, not mere violations of terms of use. See, e.g., *LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1130 (9th Cir. 2009)* ("[F]or purposes of the CFAA, when an employer authorizes an employee to use a company computer subject to certain limitations, the employee **[*29]** remains authorized to use the computer even if the employee violates those limitations."); *Diamond Power Int'l, Inc. v. Davidson, 540 F. Supp. 2d 1322 (N.D. Ga. 2007)* ("Under the more reasoned view, a violation for accessing 'without authorization' occurs only where initial access is not permitted."); But see *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc., 119 F. Supp. 2d 1121, 1125-29 (W.D. Wash. 2000)* (finding employee may be held liable under CFAA for taking employer information from the company's computer system to his next job on the ground that he was "without authorization" when he "allegedly sent [the employer's] proprietary information to the defendant").

While there appears to be some disagreement in the district courts as to the scope of the term "without authorization" in the CFAA context, the Court finds the Ninth Circuit's opinion in *LVRC Holdings* to be particularly useful in construing the analogous term in *Section 502*. In that case, the Ninth Circuit found that access to a computer may be "authorized," within the statutory meaning of the term, even if that access violates an agreed upon term of using that computer. In general, the Court finds that the more **[*30]** recent CFAA cases militate for an interpretation of *Section 502* that does not premise permission to access or use a computer or computer network on a violation of terms of use. However, since none of the cases discussed provides a definitive definition of without permission under *Section 502*, the Court now looks to the legislative purpose of the statute to the extent that it can be discerned.

3. Legislative Purpose

Section 502 includes the following statement of statutory purpose:

> It is the intent of the Legislature in enacting this section to expand the degree of protection afforded to individuals, businesses, and governmental agencies from tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems. The Legislature finds and declares that the proliferation of computer technology has resulted in a concomitant proliferation of computer crime and other forms of unauthorized access to computers, computer systems, and computer data.
>
> The Legislature further finds that protection of the integrity of all types and forms of lawfully created computers, computer systems, and computer data is vital to the protection of the privacy of individuals **[*31]** as well as to the well-being of financial institutions, business concerns, governmental agencies, and others within this state that lawfully utilize those computers, computer systems, and data.

Cal. Penal Code § 502(a).

Facebook contends that this language evidences legislative intent to address conduct beyond "straightforward hacking and tampering." (Facebook's Reply re Summary Judgment at 2.) Specifically, Facebook contends that the legislature's use of the phrases "protection . . . from . . . unauthorized access" and "protection of the integrity of all types and forms of computers, computer systems, and computer data" demonstrates a far-reaching legislative purpose to protect the entire commercial computer infrastructure from trespass. (Id. at 2-3.)

The Court declines to give the statute's statement of legislative intent the sweeping meaning that Facebook ascribes to it. *Section 502(a)* speaks in general terms of a "proliferation of computer crime and other forms of unauthorized access to computers," but does not offer any further guidance as to what specific acts would constitute such crime or unauthorized access. It is far from clear what conduct the legislature believed posed a threat **[*32]** to the integrity of computers and computer systems, or if the legislature could even fathom the shape that those threats would take more than twenty years after the statute was first enacted.

Thus, the Court does not assign any weight to the statute's statement of legislative intent in construing the liability provisions of *Section 502*.

4. Rule of Lenity

EFF contends that interpreting *Section 502* broadly to allow liability where the absence of permission is based only on the violation of a contractual term of use or failure to fully comply with a cease and desist letter would render the statute unconstitutionally vague, stripping the statute of adequate notice to citizens of what conduct is criminally prohibited. (Amicus Brief at 24-28.) EFF further contends that giving the statute the broad application that Facebook seeks could expose large numbers of average internet users to criminal liability for engaging in routine web-surfing and emailing activity. (Id.)

HN15[] "It is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1993)*. Thus, a criminal **[*33]** statute is invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954)*. Where a statute has both criminal and noncriminal applications, courts must interpret the statute consistently in both contexts. *Leocal v. Ashcroft, 543 U.S. 1, 11 n.8, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)*. In the Ninth Circuit, "[t]o survive vagueness review, a statute must '(1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner.'" *United States v. Sutcliffe, 505 F.3d 944, 953 (9th Cir. 2007)*.

The Court finds that interpreting the statutory phrase "without permission" in a manner that imposes liability for a violation of a term of use or receipt of a cease and desist letter would create a constitutionally untenable situation in which criminal penalties could be meted out on the basis of violating vague or ambiguous terms of use. In the words of one commentator, "By granting the computer owner essentially unlimited authority to define authorization, the contract standard **[*34]** delegates the scope of criminality to every computer owner." [21] Users of computer and internet services cannot have adequate notice of what actions will or will not expose them to criminal liability when a computer network or website administrator can unilaterally change the rules at any time and are under no obligation to make the terms of use specific or understandable to the general public. Thus, ***HN16***[] in order to avoid rendering the statute constitutionally infirm, the Court finds that a user of internet services does not access or use a computer, computer network, or website without permission simply because that user violated a contractual term of use. [22]

HN17[] If a violation of a term of use is by itself insufficient to support a finding that the user's access was "without permission" in violation **[*35]** of *Section 502*, the issue becomes what type of action would be sufficient to support such a finding. The Court finds that a distinction can be made between access that violates a term of use and access that circumvents technical or code-based barriers that a computer network or website administrator erects to restrict the user's privileges within the system, or to bar the user from the system altogether. [23] Limiting criminal liability to circumstances in which a user gains access to a computer, computer network, or website to

[21] Orin S. Kerr, *Cybercrime's Scope: Interpreting "Acess" and "Authorization" in Computer Misuse Statutes*, *78 N.Y.U.L. Rev. 1596, 1650-51 (2003)*.

[22] This is not to say that such a user would not be subject to a claim for breach of contract. Where a user violates a computer or website's terms of use, the owner of that computer or website may also take steps to remove the violating user's access privileges.

[23] See generally Kerr, *supra* note 20.

which access was restricted through technological means eliminates any constitutional notice concerns, since a person applying the technical skill necessary to overcome such a barrier will almost always understand that any access gained through such action is unauthorized. Thus, the Court finds that accessing or using a computer, computer network, or website in a manner that overcomes technical or code-based barriers is "without permission," and may subject a user to liability under *Section 502*.

Applying this construction of the statute here, the Court finds that Power did not act "without permission" within the meaning of *Section 502* **[*36]** when Facebook account holders utilized the Power website to access and manipulate their user content on the Facebook website, even if such action violated Facebook's Terms of Use. However, to the extent that Facebook can prove that in doing so, Power circumvented Facebook's technical barriers, Power may be held liable for violation of *Section 502*. Here, Facebook relies solely on the pleadings for its Motion. In their Answer, Defendants do not directly admit that the tools Power provided to its users were designed to circumvent the technical barriers that Facebook put in place to block Power's access to the Facebook website. Thus, the Court finds that there is a genuine issue of material fact as to whether Power's access or use of the Facebook website was "without permission" within the meaning of *Section 502*.

EFF contends that even if Power evaded the technical barriers that Facebook implemented to deny it access, Power's conduct does not fall within the scope of *Section 502* liability. (Amicus Brief at 19-28.) More specifically, EFF contends that it would be inconsistent to allow liability for ignoring or bypassing technical barriers whose sole purpose is to enforce contractual limits **[*37]** on access while denying liability for violating those same contractual limits when technological means of restricting access are not employed. (Id. at 19.) Thus, according to EFF, Power's efforts to circumvent Facebook's IP-blocking efforts did not violate *Section 502* because Facebook was merely attempting to enforce its Terms of Use by other means. [24] (Id. at 23-24.) The Court finds EFF's contentions unpersuasive in this regard. EFF has not pointed to any meaningful distinction between IP address blocking and any other conceivable technical barrier that would adequately justify not finding *Section 502* liability in one instance while finding it in the other. Moreover, the owners' underlying purpose or motivation for implementing technical barriers, whether to enforce terms of use or otherwise, is not a relevant consideration when determining the appropriate scope of liability for accessing a computer or network without authorization. There can be no ambiguity or mistake as to whether access has been authorized when one encounters a technical block, and thus there is no potential failure of notice to the computer user as to what conduct may be subject to criminal liability, as when **[*38]** a violation of terms of use is the sole basis for liability. [25]

Accordingly, the Court DENIES Facebook's Motion for Judgment on the **[*39]** Pleadings, and DENIES the parties' Cross-Motions for Summary Judgment as to Facebook's *Section 502* cause of action.

C. Defendants' Counterclaims

Facebook moves to dismiss Defendants' causes of action for violation of *Section 2* of the Sherman Act ("*Section 2*") on the ground that Defendants have failed to allege sufficient facts to state a claim for monopolization or attempted monopolization. (Facebook's Motion to Dismiss at 4-9.)

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[24] The Court notes that although both parties discuss IP address blocking as the form of technological barrier that Facebook utilized to deny Power access, Facebook's use of IP-blocking and Power's efforts to avoid those blocks have not been established as undisputed facts in this case. However, for purposes of this Motion, the Court finds that the specific form of the technological barrier at issue or means of circumventing that barrier are not relevant. Rather, the issue before the Court is whether there are undisputed facts to establish that such avoidance of technological barriers occurred in the first instance.

[25] As Facebook contends in its Amicus Reply, the Court finds that evidence of Power's efforts to circumvent Facebook's technical barrier is also relevant to show the necessary mental state for ***Section 502*** liability. (Amicus Reply at 10-11.) Since the facts relating to such circumvention efforts are still in dispute, the Court finds that there is also a genuine issue of material fact as to whether Defendants possessed the requisite mental state.

HN18[] To state a *Section 2* claim for monopolization, the claimant must show that the alleged monopolist (1) possesses monopoly power in the relevant market (2) through the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident, (3) that causes antitrust injury. *Verizon Commc'ns v. Trinko, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

Since the Court finds that the element of willful acquisition or maintenance of monopoly power is dispositive, the Court addresses this issue first. Defendants allege, in pertinent part:

> Facebook has acquired and maintained market power through two devices: Facebook solicited (and continues to solicit) internet users to provide their account names **[*40]** and passwords for users' email and social networking accounts, such as Google's Gmail, AOL, Yahoo, Hotmail, or other third party websites. Facebook then uses the account information to allow the user to access those accounts through Facebook, and to run automated scripts to import their lists of friends and other contacts—i.e., to "scrape data"-from those third-party sites into Facebook. This practice fueled Facebook's growth by allowing Facebook to add millions of new users, and to provide users with convenient tools to encourage their friends and contacts to join Facebook as well. On information and belief it is estimated that at least approximately 35% to 50% of Facebook's "132 million active users" . . . registered with Facebook as a result of an invitation generated using this device.
> Facebook simultaneously prohibited (and prohibits) users from using the same type of utility to access their own user data when it is stored on the Facebook site. Thus, Facebook prohibits users from logging into Facebook through third-party sites, such as Power.com, and also restricts users from running automated scripts to retrieve their own user data from the Facebook site.

(Amended Answer P 174.)

> Facebook **[*41]** has also maintained its monopoly power by systematically threatening new entrants, such as Power.com and others, who seek to attract users through the same device . . . that Facebook itself used to fuel its own growth. On information and belief, for approximately the past 36 months, Facebook has threatened dozens of new entrants since 2006 with baseless intellectual property claims, and has engaged in systematic and widespread copyright misuse . . . to discourage market entry and to stifle competition from new entrants.

(Amended Answer P 176.)

The Court finds that Defendants' allegations cannot support a Section 2 monopolization claim. Defendants cite no authority for the proposition that Facebook is somehow obligated to allow third-party websites unfettered access to its own website simply because some other third-party websites grant that privilege to Facebook. In fact, **HN19**[] the Ninth Circuit has held that merely introducing a product that is not technologically interoperable with competing products is not violative of *Section 2*. See *Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983)*.

In response to Facebook's Motion, Defendants merely assert that Facebook's actions **[*42]** are anticompetitive because Defendants have alleged so, and that the Court must accept this allegation as true at the motion to dismiss stage. [26] In maintaining this position, Defendants miss the fact that he issue of whether or not a particular practice is anticompetitive is determinative of an essential element of a monopoly claim, and is thus a question of law that may be determined by the Court. The Court is not obligated to accept as true Defendants' allegations that amount to conclusions of law, and the Court rejects Defendants' naked assertion here that Facebook's practices are predatory. *Papasan, 478 U.S. at 286*.

The Court likewise finds that Defendants' allegation that Facebook maintained monopoly power by threatening potential new entrants to the social networking market with baseless intellectual property lawsuits cannot support a Section 2 claim. If Facebook has the right to manage access to and use of its website, then there can be nothing

[26] (Defendants' Opposition to Motion of Facebook, Inc. to Dismiss Counterclaims and Strike Affirmative Defenses at 4-5, hereafter, "Defendants' Opposition re Motion to Dismiss," Docket Item No. 63.)

anticompetitive about taking legal action **[*43]** to enforce that right. Furthermore, whether or not a particular lawsuit is "baseless" is a legal conclusion, and thus the Court need not accept Defendants' allegations as to the merits of Facebook's lawsuits as true. Again, Defendants cite no authority for the proposition that filing lawsuits against competitors for infringing on one's intellectual property rights can be deemed an anticompetitive or predatory practice.

In light of the Court's finding that Defendants do not plead sufficient facts to satisfy one of the essential elements of their Section 2 claim, the Court need not address the sufficiency of Defendants' pleadings as to the remaining elements. Since ***HN20***[] anticompetitive conduct is also an element of a claim for attempted monopolization under *Section 2*, the Court finds that Defendants' pleadings are deficient as to that claim as well. See *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 567 F.3d 1084, 1093 (9th Cir. 2009)*.

Accordingly, the Court GRANTS Facebook's Motion to Dismiss Defendants' counterclaims for violations of *Section 2* of the Sherman Act. Since Defendants have already had the opportunity to amend their counterclaims once, the Court dismisses these claims **[*44]** with prejudice.

D.UCL Claim

Facebook moves to dismiss Defendants' UCL claim on the ground that if Facebook's conduct is not anticompetitive under *Section 2* of the Sherman Act, a UCL claim cannot be premised on that same conduct. (Facebook's Motion to Dismiss at 8-9.)

HN21[] The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. "The broad scope of the statute encompasses both anticompetitive business practices and practices injurious to consumers. An act or practice may be actionable as 'unfair' under the unfair competition law even if it is not 'unlawful.'" *Chavez v. Whirlpool Corp., 93 Cal. App. 4th 363, 375, 113 Cal. Rptr. 2d 175 (Cal. Ct. App. 2001)*.

In Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tele. Co., [27] the court concluded that ***HN22***[] an act or practice is "unfair" under the UCL if that conduct "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." Likewise,

> the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct **[*45]** is not "unfair" toward consumers. To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct.

Chavez, 93 Cal. App. 4th at 375.

Here, the Court has found that Facebook's conduct is not anticompetitive. Thus, Defendants cannot premise their UCL claim on Facebook's conduct under either the unlawful or the unfair prong. Accordingly, the Court GRANTS Facebook's Motion to Dismiss as to Defendants' UCL counterclaim with prejudice.

E.Affirmative Defenses

Facebook moves to strike Defendants' affirmative defenses of misuse of copyright and fair use. (Facebook's Motion to Dismiss at 9-11.)

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[27] *20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (Cal. Ct. App. 1999)*.

HN23[] Pursuant to Federal Rule of Civil Procedure 12(f), "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." However, "[m]otions to strike are generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1152 (C.D. Cal. 2003); **[*46]** see, e.g., Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028 (C.D. Cal. 2002). Accordingly, such motions should be denied unless the matter has no logical connection to the controversy at issue and may prejudice one or more of the parties to the suit. SEC v. Sands, 902 F. Supp. 1149, 1166 (C.D. Cal. 1995); LeDuc v. Kentucky Central Life Ins. Co., 814 F. Supp. 820, 820 (N.D. Cal. 1992). HN24[] When considering a motion to strike, the court "must view the pleading in a light most favorable to the pleading party." In re 2TheMart.com, Inc. Securities Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000).

Here, the Court previously struck Defendants' affirmative defenses because they "contain[ed] no factual allegations." (October 22 Order at 3.) Instead, the pleadings merely referred back to the "Introduction and Background" section with the phrase "conduct, as described herein." (Id. at 4.) The Court found such barebones pleading inadequate, but gave Defendants leave to amend. In their Amended Answer, Defendants plead in much greater detail their misuse of copyright and fair use affirmative defenses. (Amended Answer PP 161-68.) The Court finds that Defendants' amended **[*47]** allegations are sufficient to provide Facebook with "fair notice of the defense." See Mag Instrument, Inc. v. JS Prods., 595 F. Supp. 2d 1102, 1107 (C.D. Cal. 2008).

Accordingly, the Court DENIES Facebook's Motion to Strike Defendants' Affirmative Defenses.

V. CONCLUSION

The Court DENIES Facebook's Motion for Judgment on the Pleadings, DENIES the parties' Cross-Motions for Summary Judgment, GRANTS Facebook's Motion to Dismiss Defendants' counterclaims for violations of Section 2 of the Sherman Act with prejudice, GRANTS Facebook's Motion to Dismiss Defendants' UCL counterclaim with prejudice, and DENIES Facebook's Motion to Strike Defendants' Affirmative Defenses.

On **August 23, 2010 at 10 a.m.**, the parties shall appear for a Further Case Management Conference. On or before **August 13, 2010**, the parties shall file a Joint Case Management Statement. The Statement shall include an update on the parties' discovery efforts and proposed schedule on how this case should proceed in light of this Order.

Dated: July 20, 2010

/s/ James Ware

JAMES WARE

United States District Judge

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Ackerman v. Coca-Cola Co.

United States District Court for the Eastern District of New York

July 21, 2010, Decided; July 21, 2010, Filed

CV-09-0395 (JG) (RML)

Reporter
2010 U.S. Dist. LEXIS 73156 *; 2010 WL 2925955

BATSHEVA ACKERMAN, RUSLAN ANTONOV, JAMES KOH, JERRAD PELKEY, JACK PETTY, and PHYLLIS VALENTINE, individually and on behalf of those similarly situated, Plaintiffs, - against - THE COCA-COLA COMPANY and ENERGY BRANDS INC. (d/b/a GLACEAU), Defendants.

Notice: FOR ELECTRONIC PUBLICATION ONLY

Subsequent History: Transferred by *In re Glaceau Vitaminwater Mktg. & Sales Practices Litig., 764 F. Supp. 2d 1349, 2011 U.S. Dist. LEXIS 12665 (J.P.M.L., 2011)*

Magistrate's recommendation at *Ackerman v. Coca-Cola Co., 2013 U.S. Dist. LEXIS 184232 (E.D.N.Y., July 17, 2013)*

Core Terms

food, vitaminwater, nutrient, consumers, labeling, FDA, misleading, healthy, fortification, vitamins, nutritional, plaintiffs', regulations, sugar, misrepresentation, advertising, ingredients, preemption, dietary, unfair, allegations, preempted, flavor, deceptive, practices, amended complaint, fortified, fraudulent, beverage, courts

Counsel: **[*1]** For Plaintiff: REESE RICHMAN, LLP, New York, NY, By: Michael R. Reese, Kim E. Richman.

For Plaintiff: WHATLEY DRAKE & KALLAS, LLC, New York, NY, By: Deborah Clark-Weintraub.

For Plaintiff: CENTER FOR SCIENCE IN THE PUBLIC INTEREST, Dallas, TX, By: Stephen Gardner.

For Defendants: SHOOK, HARDY & BACON, LLP, Kansas City, MO, By: James R. Eiszner.

For Defendants: EMERY, CELLI, BRINCKERHOFF & ABADY, LLP, New York, NY, By: Andrew Celli.

For Defendants: THE COCA-COLA COMPANY, Atlanta, Georgia, By: Russell S. Bonds, Brian Howard.

Judges: JOHN GLEESON, United States District Judge.

Opinion by: John Gleeson

Opinion

MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

In October 2009, the plaintiffs in the above-captioned putative class action filed a Second Amended Complaint against The Coca-Cola Company ("Coca-Cola") and Energy Brands Inc., d/b/a/ Glaceau ("Glaceau") (collectively "defendants"), alleging claims of: (1) unlawful business acts and practices in violation of California Business and Professions Code ("Cal. BPC") *§ 17200 et seq*. ("Unfair Competition Law" or "UCL"); *Cal. BPC § 17500 et seq*. ("False Advertising Law" or "FAL"); and California's Consumers Legal Remedies Act, *Cal. Civ. Code § 1750 et seq*. ("CLRA"); **[*2]** (2) unfair business acts and practices in violation of California UCL; (3) fraudulent business acts and practices in violation of California UCL; (4) misleading and deceptive advertising in violation of California FAL; (5) untrue advertising in violation of California FAL; (6) unfair methods of competition or unfair or fraudulent acts or practices in violation of *§ 1770(a)(7) of the CLRA*; (7) deceptive acts or practices in violation of *New York General Business law ("GBL") § 349*; (8) false advertising in violation of *New York GBL § 350*; (9) violation of New Jersey Consumer Fraud Act ("NJCFA"), *N.J.S.A. 56:8-1 et seq*.; (10) breach of an express warranty; (11) breach of an implied warranty of merchantability; (12) deceit and/or misrepresentation; and (13) unjust enrichment. The claims are brought on behalf of three purported classes of plaintiffs: "[a]ll California Residents who purchased vitaminwater at any time from January 15, 2005 to [the] present," (the "California Class"); "[a]ll New York residents who purchased vitaminwater at any time from January 30, 2003 to [the] present," (the "New York Class"); and "[a]ll New Jersey residents who purchased vitaminwater at any time from January **[*3]** 22, 2003 to [the] present" (the "New Jersey Class"). [1] Claims one through six are brought on behalf of the California class, claims seven and eight on behalf of the New York Class, claim nine on behalf of the New Jersey Class, and claims ten through thirteen on behalf of all three classes.

The defendants have moved to dismiss on grounds of: (1) federal preemption and (2) failure to satisfy the pleading standards of *Federal Rules of Civil Procedure 8* and *9(b)*. For the reasons set forth below, defendants' motion is granted with respect to claims nine, ten and eleven and denied in all other respects.

BACKGROUND

The following facts are drawn from the Second Amended Complaint ("Sec. Am. Compl.") and are assumed to be true for the purposes of this motion.

A. *The Parties*

Plaintiff Batsheva Ackerman is a resident of New York. Plaintiffs Ruslan Antonov, James Koh and Jerrad Pelkey are residents of California. Plaintiffs Jack Petty and Phyllis Valentine are residents **[*4]** of New Jersey. Defendant Coca-Cola is a Georgia corporation headquartered in Atlanta, Georgia, and describes itself, according to the Second Amended Complaint, as the largest manufacturer, distributor and marketer of nonalcoholic beverage concentrates and syrups in the world. Defendant Glaceau, a wholly owned subsidiary of Coca-Cola, produces the beverage "vitaminwater," [2] is headquartered in Whitestone, New York.

B. *Procedural History*

This lawsuit is a hybrid of five substantially similar cases that had been previously filed in California, New York and New Jersey. Suit was commenced in this court by plaintiff Batsheva Ackerman by the filing of a complaint on January 29, 2009 on behalf of herself and a class consisting of all New York State residents who purchased vitaminwater within three years of the filing of the Complaint.

An amended complaint filed on May 26, 2009 added Ruslan Antonov, James Koh and Jerrad Pelkey as plaintiffs, representing a class of "all California residents who purchased vitaminwater at any time from January 15, 2005 to

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[1] Each class excludes "officers and directors of Defendants, members of their immediate families, and the[ir]. . . legal representatives, heirs, successors or assigns and any entity in which they have or have had a controlling interest."

[2] Plaintiffs refer to the product as "VitaminWater." This opinion adopts defendants' lower-case spelling of "vitaminwater."

the present." *Id*. at P 30. **[*5]** Antonov, Koh and Pelkey had previously been plaintiffs in suits filed in California federal courts, alleging similar claims. [3]

On June 1, 2009, defendants filed a motion with the Judicial Panel on Multidistrict Litigation ("JPML") for transfer of this case, together with another pending case, *Thomas Mason, et al. v. The Coca-Cola Company and Energy Brands, Inc*., Case No. 1:09-cv-00220-NLH-JH (D.N.J., filed Jan. 14, 2009) ("the New Jersey Action"), to the Northern District of California for coordinated pretrial management pursuant to *28 U.S.C. § 1407*. Defendants filed a motion to dismiss pursuant to *Federal Rule of Procedure 12(b)(6)* on June 22, 2009. On July 6, 2009, the Honorable Charles P. Sifton stayed the briefing schedule for that motion until the JPML ruled on defendants' motion for coordination and transfer. [4] On August 6, 2009, the JPML denied defendants' motion to transfer. [5] Plaintiffs filed the Second Amended Complaint on October 6, 2009, adding as **[*6]** plaintiffs Jack Petty and Phyllis Valentine, who had been plaintiffs in the New Jersey Action. On October 26, 2009, defendants filed the instant motion to dismiss.

This court has jurisdiction pursuant to *28 U.S.C. § 1332(d)*, because the aggregate claims of the class exceed $ 5,000,000 and minimal diversity exists between the proposed class members and defendants.

C. *The Federal Regulatory Scheme*

The Federal Food, Drug, and Cosmetic Act, *21 U.S.C. § 343 et seq.* ("FDCA"), was **[*7]** enacted in 1938 as a successor to the 1906 Pure Food and Drugs Act, 34 Stat. 768,, *repealed by* Act of June 25, 1938, ch. 675, § 902(a), 52 Stat. 1059, which had been the first comprehensive federal legislation designed to protect consumers from fraud or misrepresentation in the sale of food and drugs. *See generally*, James T. O'Reilly, *Food and Drug Administration* § 3:1-13 (3d ed. 2009). The FDCA empowers the Food and Drug Administration ("FDA") to (a) protect the public health by ensuring that "foods are safe, wholesome, sanitary, and properly labeled," *21 U.S.C. § 393(b)(2)(A)*; (b) promulgate regulations pursuant to this authority; and (c) enforce its regulations through administrative proceedings. *See* *21 C.F.R. § 7.1 et seq*. The FDCA deems a food as "misbranded" if its labeling "is false or misleading in any particular." *21 U.S.C.A. § 343(a)*. There is no private right of action under the statute. *Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 810, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986)*.

In 1990 Congress amended the FDCA by enacting the Nutrition Labeling and Education Act (the "NLEA"), codified as amended at *21 U.S.C. §§ 301*, *321*, *337*, *343*, *371*. "The NLEA was passed to 'clarify and to strengthen the Food and **[*8]** Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about the nutrients in foods.'" *Nutritional Health Alliance v. Shalala, 144 F.3d 220 (2d Cir. 1998)* (citing H.R. Rep. No. 101-538, at 7 (1990)). The NLEA amended the FDCA in several significant respects: it expanded the coverage of nutrition labeling requirements; it changed the form and substance of ingredient labeling on packages; it imposed limitations on health claims; it standardized the definitions of all nutrient content claims; and it required more uniform serving sizes. *See The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 Admin. L. Rev. 605, 606 (1995). The NLEA also added a preemption provision to *Section 403A* of the FDCA. It states, in relevant part:

> Except as provided in subsection (b), [6] no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce

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[3] *See Antonov v. Coca-Cola Co*. No. 4:2009cv02200 (N.D. Ca., filed May 19, 2009); *Koh v. Coca-Cola Co*., No. 3:2009cv00182 (N.D. Ca., filed Jan. 14, 2009); *Pelkey v. Coca-Cola Co*. No. 2:2009cv01239 (C.D. Ca., filed Feb. 20, 2009).

[4] This matter was originally assigned to the late Judge Charles P. Sifton. It was transferred to me on November 24, 2009.

[5] The JPML found that: (1) the litigation involved only two actions; (2) common questions of fact were not sufficiently complex and/or numerous to justify transfer; (3) alternatives to transfer existed which could minimize duplicative discovery and/or inconsistent pretrial rulings; and (4) plaintiffs in the New Jersey Action had attempted to dismiss their action and join in the complaint in the Eastern District of New York, which would have negated the multidistrict character of the litigation. *See* MDL Order, *In re: Glaceau Vitamin Water Mktg. and Sales Practices Litig*., MDL No. 2080 (August 6, 2009).

> . . . .
>
> (5) any requirement respecting any claim of the type described in section 343(r)(1) of this title [*i.e.*, nutrition levels and health-related **[*9]** claims], made in the label or labeling of food that is not identical to the requirement of section 343(r) of this title . . . .

21 U.S.C. § 343-1(a)(5) ("Section 403A").

Section 343(r)(1) of the NLEA describes claims in the labeling of food [7] that "expressly or by implication," "characterize [] the level of any nutrient" or "characterize [] the relationship of any nutrient . . . to a disease or health related condition . . . ." 21 U.S.C. § 343(r)(1). The FDA has promulgated regulations concerning three different kinds of claims of the type described in Section 343(r)(1): express nutrient-content claims, implied nutrient-content claims, and health claims. *See* 21 C.F.R. §§ 101.13 (defining express and implied nutrient-content claims), 101.14 (defining health claims). An express nutrient-content claim is a direct statement about the level or range of a nutrient in a food, such as "low sodium" or "100 calories." 21 C.F.R. § 101.13(b)(1). An "implied nutrient-content claim" is a statement suggesting "that a nutrient **[*10]** or an ingredient is absent or present in a certain amount," such as "high in oat bran," (suggesting a high dietary fiber content), a statement such as "as much fiber as an apple," which suggests a nutrient level comparable to a specified reference food, or a "general nutritional claim," (a subcategory of an implied nutrient claim) consisting of an express or implied claim that the nutrient content of a food may help consumers maintain healthy dietary practices. *See* 21 C.F.R. §§ 101.13(b)(2)(i)-(ii); 21 C.F.R. § 101.65. A claim that a product is "healthy" is generally an implied nutritional content claim. [8] "Health claims" by contrast, specifically "characterize [] the relationship of any substance to a disease or health-related condition." 21 C.F.R. 101.14.

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[6] 21 U.S.C. § 343-1(b) provides a mechanism by which a state may petition the FDA for an exemption from the FDCA's preemption provision. It is not relevant to the instant suit.

[7] Plaintiffs alternately refer to vitaminwater as a food or "dietary supplement." *See, e.g.*, Sec. Am. Compl. P 15 (referring to vitaminwater as a "dietary supplement beverage."). Although neither party asserts that this distinction is significant to the present suit, it is quite clear that vitaminwater is in fact a food rather than a dietary supplement. *See* Final Rule, Food Labeling; Requirements for Nutrient Content Claims, Health Claims, and Statements of Nutritional Support for Dietary Supplements, 62 Fed. Reg. 49859, 49862 (Sept. 23, 1997) **[*11]** ("whether a product is a dietary supplement or a conventional food will depend on how it is labeled. To be a dietary supplement, a product must bear the term 'dietary supplement' as part of its common or usual name."). *See also* FDA Draft, *Guidance for Industry: Factors that Distinguish Liquid Dietary Supplements from Beverages, Considerations Regarding Novel Ingredients, and Labeling for Beverages and Other Conventional Foods* (December 2009) (noting in non-binding recommendation that "Beverages are conventional foods under the [FDCA]. Even when the label of a liquid product characterizes it as a dietary supplement, the product may not in fact be a dietary supplement."), *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ucm192702.htm (last visited July 2, 2010); *see generally* Leah A. Satine, *Is my Yogurt Lying? Developing and Applying a Framework for Determining Whether Wellness Claims on Probiotic Yogurts Mislead*, 63 Food & Drug L.J. 537, 545-46 (2008) (noting that the FDA has interpreted the category of dietary supplements narrowly in circumstances where a product contains properties of both conventional foods and dietary supplements).

[8] The **[*12]** FDA has explained that while use of the term "healthy" typically constitutes an implied nutrient content claim, it could, in some circumstances, constitute a health claim where it is used in reference to a disease or health-related condition. *See* Final Rule, *Food Labeling; General Requirements for Health Claims for Food*:

> In the case of the word "healthy," the agency does not believe that the use of this word would normally be a health claim. "Healthy" has a wide variety of meanings in addition to ones that would satisfy the second basic element of a health claim. For example, "healthy" can certainly imply general nutritional well-being. Thus, while a claim such as "Eat a diet low in fat for a healthy heart" may be a health claim, "Eating five fruits or vegetables a day is a good way to a healthy lifestyle" is not. Moreover . . . [the] FDA may also regulate the term "healthy" . . . as an implied nutrient content claim.

58 Fed. Reg. 2478-01, 2483-84 (Jan. 6, 1993).

D. *The State Regulatory Schemes*

California, New York and New Jersey broadly prohibit the misbranding of food in language largely identical to that found in the FDCA. California's Sherman Food, Drug, and Cosmetic Law (the "Sherman **[*13]** Law"), *Health & Saf. Code § 109875 et seq*., provides that food is misbranded "if its labeling is false or misleading in any particular." *Id*. The Sherman Law explicitly incorporates by reference "[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the [FDCA]," as the food labeling regulations of California. *Cal. Health & Saf. Code, § 110100, subd. (a)*. New York's Agriculture and Marketing law similarly provides in relevant part that food shall be deemed misbranded "[i]f its labeling is false or misleading in any particular," and incorporates the FDCA's labeling provisions found in 21 C.F.R. part 101. *Agriculture and Markets Law § 201(1)*; *N.Y. Comp. Codes R. & Regs. tit. 1, § 259.1*. Likewise, New Jersey law provides that "a food shall . . . be deemed misbranded . . . [i]f its labeling is false or misleading in any particular," and incorporates by reference the FDCA's labeling regulations in 21 C.F.R. part 101. *N.J.S.A. 24:5-17 (a)*, N.J. Admin. Code tit. 8, § 24-3.6. California, New York, and New Jersey each also discourage the misbranding of food through the availability of remedies pursuant to the respective state's consumer protection laws.

DISCUSSION

A. **[*14]** *The Standard of Review*

Motions to dismiss pursuant to *Rule 12(b)(6)* test the legal, not the factual, sufficiency of a complaint. *See, e.g., Sims v. Artuz, 230 F.3d 14, 20 (2d Cir. 2000)* ("At the *Rule 12(b)(6)* stage, 'the issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims.'" (quoting *Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998))*). Accordingly, I must accept the factual allegations in the complaint as true, *Erickson v. Pardus, 551 U.S. 89, 93-94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* (per curiam), and draw all reasonable inferences in favor of the plaintiff. *Bolt Elec., Inc. v. City of New York, 53 F.3d 465, 469 (2d Cir. 1995)*. However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

In *Iqbal*, the Supreme Court provided additional guidance regarding the consideration of motions to dismiss under *Rule 12(b)(6)*. Citing its earlier decision in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, the Court explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, **[*15]** accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Iqbal, 129 S. Ct. at 1949 (internal citations and quotation marks omitted). Pursuant to *Fed. R. Civ. P. 9(b)*, the circumstances of fraud or mistake must be pleaded with particularity. *See, e.g., Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 663 (2d Cir. 1997)*.

When considering a motion to dismiss, a court may examine (1) the factual allegations in the complaint, which are accepted as true; (2) documents attached to the complaint as exhibits or incorporated in it by reference; (3) matters of which judicial notice may be taken; and (4) documents either in the plaintiff's possession or of which the plaintiff had knowledge and relied on in bringing suit. *Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993)*.

B. *Plaintiffs' Claims*

Plaintiffs' state law claims are premised on twelve allegedly misleading statements made in connection with the labeling of vitaminwater:

1. The description of the product as **[*16]** a "Nutrient-Enhanced Water Beverage";
2. The phrase "vitamins + water = all you need" on the product label;

3. Flavor names such as "rescue" and "defense";
4. The name "vitaminwater" itself;
5. The statement "vitamins + water = what's in your hand" on in-store advertising materials;
6. The statement "this combination of zinc and fortifying vitamins can . . . keep you healthy as a horse" on the label of vitaminwater's "defense" flavor;
7. The statement "specially formulated to support optimal metabolic function with antioxidants that may reduce the risk of chronic diseases, and vitamins necessary for the generation and utilization of energy from food" on the label of vitaminwater's "rescue" flavor;
8. The statement "specially formulated to provide vitamin [A] (a nutrient known to be required for visual function), antioxidants and other nutrients [that] scientific evidence suggests may reduce the risk of age-related eye disease" on the label of vitaminwater's "focus" flavor;

9. The statement "specially formulated with bioactive components that contribute to an active lifestyle by promoting healthy, pain-free functioning of joints, structural integrity of joints and bones, and optimal generation **[*17]** and utilization of energy from food" on the label of vitaminwater's "balance" flavor;
10. The statement "specially formulated with nutrients required for optimal functioning of the immune system, and the generation and utilization of energy from food to support immune and other metabolic activities" on the label of vitaminwater's "defense" flavor;
11. The statement "specially formulated with [B] vitamins and theanine. The [B] vitamins are there to replace those lost during times of stress (physical and mental). Theanine is an amino acid found naturally in tea leaves and has been shown to promote feelings of relaxation. This combination can help bring about a healthy state of physical and mental being" on the label of vitaminwater's "B-relaxed" flavor;
12. The statement "specially formulated with nutrients that enable the body to exert physical power by contributing to structural integrity of the musculoskeletal system, and by supporting optimal generation and utilization from food" on the label of vitaminwater's "Power-C" flavor. [9]

Plaintiffs no longer contend that the particular vitamins in vitaminwater fail to provide the benefit claimed. [10] Rather, they claim that vitaminwater's labeling **[*18]** and marketing is misleading because it: (1) "bombard[s] consumers with a message of purported benefits, and draw[s] consumer attention away from the significant amount of sugar in the product," Sec. Am. Compl. P 6; (2) portrays vitaminwater as healthy when it is essentially a snack food that provides nutritional benefits solely because it has been specifically fortified to do so, *see* Sec. Am. Compl. P 57; and (3) suggests that vitaminwater contains nothing but vitamins and water. *See* Sec. Am. Compl. P 26.

C. *Preemption*

Defendants argue that plaintiffs' claims should all be dismissed because they are expressly preempted by federal law, or in the alternative, because they are barred by implied conflict preemption.

Under the *Supremacy Clause, U.S. Const., Art. VI, cl.2*, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" are invalid. *Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211, 6 L. Ed. 23 (1824)*. An otherwise valid state law is preempted if: (1) Congress expressly preempts the state law; (2) Congress completely occupies the law's field of operation; (3) compliance with both federal and state law is impossible; or (4) the state law presents an obstacle to the achievement of the full purposes and objectives of

[9] The initial complaint identified numerous additional allegedly misleading statements. *See* Compl. P 18. Plaintiffs' papers on the instant motion suggest that they excluded from the Second Amended Complaint the statements most clearly regulated by the FDA so their suit would escape the bar of federal preemption. *See infra* note 19. Although it would not have altered the outcome of the motion, I do not consider the statements plaintiffs excluded from their Second Amended Complaint. *See Harris v. City of New York, 186 F.3d 243, 249 (2d Cir. 1999)* ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (quoting *Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994))*).

[10] A **[*19]** claim to that effect was included in the initial complaint. *See* Complaint P 5 (alleging that "certain vitamins purported to be contained in vitaminwater beverages are not benefiting consumers the way Defendants' claim (e.g., are incapable of being absorbed by the body or fail to maintain a potency between date of bottling and date of consumption).").

Congress. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 603-07, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991). The Supreme **[*20]** Court has instructed that the task of determining whether a federal statute has preempted state law is guided by two basic principles. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Wyeth v. Levine, 129 S. Ct. 1187, 1194, 173 L. Ed. 2d 51 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)). "Second, [i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id. at 1194-95 (quoting Lohr, 518 U.S. at 485) (quotation marks omitted). The presumption against preemption has been recognized in matters of public health and safety, including the regulation of food and drugs. *See, e.g.,* Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985); New York State Rest. Ass'n v. New York City Bd. of Health, 556 F.3d 114, 123 (2d Cir. 2009). Moreover, where Congress provides an express preemption clause, the presumption against preemption requires courts to read the clause **[*21]** narrowly. *See* Lohr, 518 U.S. at 485 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)).

Because Section 403A(a)(5) preempts any state requirement that is different than the FDCA's regulation in Section 343(r)(1), there are two ways plaintiffs may escape its preemptive force: (1) if the plaintiffs' claims seek to impose requirements that are identical to those imposed by the FDCA; or (2) if the requirements plaintiffs seek to impose are not with respect to claims of the sort described in Section 343(r)(1). With regard to the first exception, the Supreme Court has held that "in the context of express preemption provisions, 'the term "requirements". . . reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties."' In re PepsiCo, Inc., Bottled Water Mktg. and Sales Practices, 588 F. Supp. 2d 527, 532 (S.D.N.Y. 2008) (citing Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 443, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)); *see also* Riegel v. Medtronic, Inc., 552 U.S. 312, 325, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008) ("excluding common-law duties from the scope of pre-emption would make little sense"); Cipollone, 505 U.S. at 522 ("common-law damages actions. . . are premised on the existence of a legal duty, **[*22]** and it is difficult to say that such actions do not impose 'requirements or prohibitions'"). However, a state statute mirroring its federal counterpart does not impose any additional requirement merely by providing a damage remedy for conduct that would otherwise violate federal law, even if the federal statute provides no private right of action. *See* Bates, 544 U.S. at 432 (preemption of additional *requirements* "[does] not preclude States from imposing different or additional *remedies*") (emphasis in original); *see also* Medtronic, 518 U.S. at 513 (O'Connor, J., concurring in part and dissenting in part) ("[T]he threat of a [state law] damages remedy" does not impose a "requirement" where "the requirements imposed on [defendants] under state and federal law do not differ."). Accordingly, claims under state laws that parallel the FDCA's requirements are not preempted. [11]

A plaintiff's claims may avoid preemption under the second exception even if they seek to impose additional "requirements" on a defendant, as long as any such requirement is not "respecting any claim of the type described in Section 343(r)(1)." 21 U.S.C. § 343-1(a)(5). That section describes claims made in the label or labeling of food; thus, claims based on statements contained in an advertisement may not be preempted unless the advertisement qualifies as labeling under the FDCA. [12] In addition, Section 403A preempts only claims based on statements that

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[11] The FDA has taken a similar position. *See, e.g.*, Final Rule, Beverages: Bottled Water, 60 Fed. Reg. 57076, 57120 (Nov. 13, 1995) ("[I]f the State requirement does the same thing that the Federal law does, even if the words are not exactly the same, then it is effectively the same requirement as the Federal requirement **[*23]** . . . . the only State requirements that are subject to preemption are those that are affirmatively different from the Federal requirements on matters that are covered by section 403A(a) of the act.").

[12] Plaintiffs contend that defendants' preemption arguments cannot apply to the statement "vitamins + water = what's in your hand" because it was made on "in-store advertising" rather than labeling. *See* Pl. Br. at 3; Sec. Am. Coml. P 25. That contention rests on the erroneous assumption that a statement must be physically affixed to a product to constitute "labeling." **[*25]** The FDCA defines labeling to include "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." 21 U.S.C. § 321(m). The definition of "accompanying" has been interpreted broadly to include statements not attached to the product itself. *See, e.g.,* Kordel v. U.S., 335 U.S. 345, 350, 69 S.

expressly or by implication characterize the level of a nutrient or the relationship of a nutrient to a disease or health related condition; claims based on statements not falling into those categories are not preempted. Further, breach of warranty claims are generally not preempted because they are not requirements "'imposed under State law,' but rather imposed by the warrantor." Cipollone, 505 U.S. at 525-26; *see also* Bates, 544 U.S. at 444-45 **[*24]** (concluding warranty was "a contractual commitment that [defendant] voluntarily undertook by placing that warranty on its product," and therefore was not preempted by federal law). However, only those breach of warranty claims based on statements not required by federal regulations will avoid the bar of preemption; a breach of warranty claim premised on a statement that is mandated by federal statute would clearly impose a requirement contrary to federal law. *See* Horowitz v. Stryker Corp., 613 F. Supp. 2d 271 (E.D.N.Y. 2009) (citation omitted); *see also* Duvall v. Bristol-Myers-Squibb Co., 103 F.3d 324 (4th Cir. 1996) (in the context of a suit concerning allegedly defective medical device, express warranty claim is preempted only "to the extent that the claim is based on FDA-mandated labeling, packaging, or advertising.").

Accordingly, I must analyze the FDCA's labeling requirements for nutrition levels and health-related claims and then determine whether the plaintiffs' state law causes of action: (1) impose requirements that are identical to those imposed by federal law; or (2) impose additional requirements, but not respecting nutrition and health related claims.

1. *Violation of FDA Regulations*

Plaintiffs contend that their state law claims are not preempted because they are based on misleading statements that violate FDA regulations. Specifically, the Second Amended Complaint suggests that vitaminwater violates FDA regulations by: (1) making health claims or implied nutrient-content claims despite the high amount of sugar in the product; (2) making health or certain implied nutrient content claims despite the fact **[*27]** that vitaminwater has been fortified with vitamins in violation of the FDA's fortification policy; and (3) prominently featuring the name of some, but not all, of its ingredients in its product name and label. As explained below, the first argument has been rejected by the FDA, but the latter two accurately describe violations of FDA regulations, and accordingly may serve as a non-preempted basis of state law liability.

a. *Use of Health or Implied Nutrient-Content Claims in Products with High Sugar Content*

Congress has recognized that certain foods may be generally unhealthy, but nonetheless contain a nutrient that would, if considered alone, permit a health or nutritional content claim to be made about the product. In recognition of this fact, the FDCA authorizes regulations regarding "disqualifying nutrient levels;" that is, nutrient levels which would preclude any health claims from being made about that product. *See* 21 U.S.C. 343(r)(3)(A)(ii). [13] In 1993 the FDA issued a final rule regulating the nutrients that could be considered "disqualifying" for health-claim purposes, and identified only four such nutrients: total fat, saturated fat, cholesterol, or sodium. *See* 58 Fed. Reg. 2478, 2491 (Jan. 6, 1993); **[*28]** 21 C.F.R. § 101.14(a)(4) (defining "disqualifying nutrient levels" as "the levels of total fat, saturated fat, cholesterol, or sodium in a food above which the food will be disqualified from making a health claim.").

Ct. 106, 93 L. Ed. 52 (1948) (no physical attachment between the label and product is necessary); U.S. v. 24 Bottles Sterling Vinegar and Honey Aged in Wood Cider, 338 F.2d 157, 159 (2d Cir. 1964) ("The distinguishing characteristic of a label is that, in some manner or another, it is presented to the customer in immediate connection with his view and his purchase of the product."); *see generally* Louis Altman and Malla Pollack, 1A *Callmann on Unfair Comp., Trademarks & Monopolies* § 5:9 (4th Ed. 2009) ("The original distinction between labels and other advertising matter has . . . been blurred."); Sarah E. Taylor, and Harold J. Feld, *Promoting Functional Foods and Nutraceuticals on the Internet*, 54 Food & Drug L.J. 423, 446 (1999) (surveying case law and concluding "[i]f the matter is part of an integrated scheme to promote the product, **[*26]** with a readily discernible nexus between product sales and the matter, the representation will constitute labeling."). Because the statement "vitamins + water = what's in your hand" accompanied the sale of vitaminwater, it constitutes a statement made in the "labeling" under 21 U.S.C. § 321(m) and therefore does not enjoy any special exemption from the preemption provision of Section 403A.

[13] The statute does not explicitly use the term "disqualifying nutrient level"; that term is used in the FDA's implementing regulations, which are found at 21 C.F.R. § 101.14(a)(4).

The FDA received several comments during the notice and comment period proposing that sugar be included as a disqualifying nutrient. *See* 58 Fed. Reg. at 2491. However, it rejected these comments, determining that it "would not be appropriate to limit health claims on foods on the basis of added sugars" because there was "no sound basis" for doing so. *Id*. In particular, the FDA based its conclusion on the fact that "the public health community has not identified a dietary level above which consumption of sugars has been demonstrated to increase the risk of a disease," and the fact that no recommended Daily Reference Value for sugar had been established. *Id*.

In 1994, the FDA considered the related question of whether a specified level of sugar or calories should be a disqualifying nutrient for express **[*29]** or implied nutrient-content claims identifying a product as "healthy." Answering the question in the negative, the FDA concluded:

> The agency has not been persuaded by the comments that it is necessary to include a "low calorie" or "low sugar" criterion in the definition of "healthy" for the claim to be useful and not misleading to consumers. The information provided in the comments did not show that consumers expect "healthy" to be a claim about the caloric content of the food. Furthermore, the purpose of defining the term would be defeated if the term were defined so narrowly that it is appropriate only for people on weight-loss diets. Thus, the agency is not requiring that a food be "low calorie" or "low" in sugar to bear the term "healthy."

59 Fed. Reg. 24232, 24244 (May 10, 1994).

As a matter of federal law, therefore, the presence of sugar is not a disqualifying nutrient which would prohibit the defendants from "touting the purported benefits" (Sec. Am. Compl. P 3) of the other ingredients in their beverage, whether through health claims or express or implied claims of nutrient content. The FDA's decision to exclude sugar as a disqualifying ingredient is entitled to the same preemptive **[*30]** force as statutory law. *See* *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Com'n of State of N.Y., 894 F.2d 571, 576 (2d Cir. 1990)* ("Federal law need not be statutory to preempt state law. Regulations promulgated by an agency pursuant to its delegated authority may preempt similar state regulations." (citing *Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984)))*. Accordingly, any claim under state law solely premised on the notion that vitaminwater's high sugar content made its health or implied nutrient content claims misleading is preempted by the FDA's express decision to not recognize sugar as a disqualifying nutrient.

b. *Use of Health or Implied Nutrient Content Claims of "Healthiness" in Products Fortified in Violation of FDA Fortification Policy*

Plaintiffs allege that it is misleading to market vitaminwater as a product which "may help consumers maintain healthy dietary practices" when it is an essentially "a snack food that has been fortified to provide the claimed nutritional benefits." Sec. Am. Compl. P 57. *See also id*. at P 4 ("it is just another flavored, sugary snack food like Coca-Cola, except that Defendants chose not to carbonate it."). This contention bears some similarity **[*31]** to the claim discussed above but is distinct in contending that that the *fortification* of sugar water -- rather than the sugar content itself -- precludes defendants from claiming or implying that vitaminwater is a healthy beverage.

FDA regulations do not permit a health claim, or any nutrient content claim involving the word "healthy," (or any derivative) to be made about a food unless it contains, in the quantity customarily consumed at one sitting, [14] at least 10 percent of the recommended daily reference quantity [15] of vitamin A, vitamin C, calcium, iron, protein or

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[14] This reference quantity, termed "Reference Amount Customarily Consumed per Eating Occasion," is defined in the case of beverages such as vitaminwater in 21 C.F.R. § 101.12(b) as 8 fl oz (240 mL). It serves as a mandatory reference quantity for the purposes of calculating whether the 10% threshold has been met, but qualifies only as a recommended quantity for the purpose of setting serving sizes in the product label. *See id*. at n.5.

[15] These reference quantities encompass two sets of daily recommended nutrient intake values: (1) Reference Daily Intakes ("RDIs") for vitamins and minerals, and (2) Daily Reference Values ("DRVs") for macronutrients. The relevant RDI's are: 5,000 International Units of Vitamin A, 60 milligrams of Vitamin C, 1,000 milligrams of Calcium, and 18 milligrams of Iron. *See* 21 C.F.R. § 101.9(c)(8)(iv). The relevant DRV's are: 50 **[*33]** grams of protein and 25 grams of fiber. *See* 21 C.F.R. § 101.9(c)(9).

fiber ("minimum nutrient levels"). *See* 21 C.F.R. § 101.14 (e)(6) (health claim); 21 C.F.R. § 101.65(d) (nutrient content claim). In the case of a claim that a product is "healthy," a manufacturer may fortify the product with nutrients in order to reach the required 10 percent nutrient threshold only if the addition of nutrients would be consistent with the FDA's fortification policy for foods set forth in 21 C.F.R. § 104.20, which bars the "indiscriminate addition of nutrients to foods." [16] *See* 21 C.F.R. § 101.65 (d)(2)(iv). With regard to health claims, the food must contain the threshold 10 percent level of nutrients "prior **[*32]** to any nutrient addition." *See* 21 C.F.R. § 101.14(e)(6). The FDA also does not permit the use of the words "more," "fortified," "enriched," "added," "extra," or "plus" with respect to a product containing added nutrients if the addition of the nutrients itself violates the fortification policy in Section 104.20. 21 C.F.R. § 101.54(e). [17]

The FDA regulations restricting health claims (or implied claims of "healthiness") to foods which meet certain minimum nutrient levels, colloquially termed "the jelly bean rule," [18] were developed in order to prevent food producers from encouraging the consumption of "junk foods" by fortifying them with nutrients. As the FDA has explained:

> [I]n order to preclude the fortification of foods solely for the purpose of making a claim, the nutrient or nutrients must not be derived from fortification or other additions to the food. Fortification of a food of little or no nutritional value for the sole purpose of qualifying that food for a health claim is misleading for several reasons. There is great potential to confuse consumers if foods like sugars, soft drinks, and sweet desserts are fortified to qualify for a health claim when, at the same **[*35]** time, dietary guidance as contained in USDA's Food Guide Pyramid, for example, states that "[T]hese foods provide calories and little else nutritionally. Most people should use them sparingly." Indiscriminate fortification of such foods with one nutrient would not make such foods consistent with dietary guidelines. Further, fortifying such foods is not consistent with FDA's fortification policy in § 104.20 that has been in effect for many years. The fundamental objective of FDA's policy on appropriate fortification of foods is to establish a uniform set of principles that serve as a model for the rational addition of nutrients to foods. In that policy, FDA clearly states its concern that random fortification of foods could result in deceptive or misleading claims for foods.

Final Rule, *Food Labeling: General Requirements for Health Claims for Food, 58 Fed. Reg. 2478, 2522 (January 6, 1993)* (citations omitted). *See also* *Food Labeling: Nutrient Content Claims, General Principles; Health Claims, General Requirements and Other Specific Requirements for Individual Health Claims, 60 Fed. Reg. 66206, 66212*

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[16] The FDA Fortification Policy is itself non-binding but, as described above, is incorporated by reference into binding FDA regulations. As the FDA has explained:

> While it is true that the fortification policy is only a guideline, in the context of new § 101.54(e)(1) (ii), FDA has subjected the use of § 104.20 (21 C.F.R. 104.20) to notice and comment rulemaking. Interested persons were given notice that FDA intends to use that provision as more than a guideline. Such persons had an opportunity to object . . . . No comments did. Therefore, the fact that part 104 (21 CFR part 104) is generally intended to be used as a guideline has no significance here.

58 Fed. Reg. 2302, 2362. The defendants do not contend that the fortification policy is nonbinding.

[17] On December 10, 2008, the FDA sent a warning letter to defendant Coca-Cola advising that the FDA considered its product Diet Coke Plus, a soft drink fortified with vitamins and minerals, to be misbranded. The FDA's conclusion was based on the fact that Diet Coke Plus' use of the word "plus" violated 21 C.F.R. 101.54(e) because the addition of vitamins to "snack foods such **[*34]** as carbonated beverages" was contrary to the FDA's fortification policy. *See* December 10, 2008 FDA Warning Letter to Coca Coca *available at* http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2008/ucm1048050.htm. *See generally Diet Coke Plus Proves to Be a Minus With the FDA*, 16 No. 12 FDA Advertising and Promotion Manual Newsletter 11 (2009).

[18] *See, e.g.*, Pauline M. Ippolito, *What Can We Learn From Food Advertising Policy Over the Last 25 Years?*, 12 Geo. Mason L. Rev. 939, 953 (2004) (explaining that the "'jelly bean rule' . . . is designed to ensure that an advertiser of jelly beans (or other sugar-based products) would not be able to make, for example, a heart disease claim under NLEA rules, even though the product is low in fat and saturated fat, and contains no cholesterol, and thus would meet all the other conditions for a heart-healthy claim.").

(proposed Dec. 21, 1995) ("The agency is concerned, however, that eliminating the 10 **[*36]** percent nutrient contribution requirement [would] permit misleading health claims on foods with little or no nutritional value such as candies and soft drinks or will encourage overfortification of the food supply (e.g., vitamin or mineral addition to soft drinks). The appearance of health claims on such foods would be inconsistent with Congress's intent when it enacted the health claims provisions.").

The "jelly bean rule" poses no bar to nutrient-content claims generally; it is applicable only to (1) health claims; and (2) nutrient-content claims that use the word "healthy" to suggest that a food because of its nutrient content may help consumers maintain healthy dietary practices. **[*37]** *See* *21 C.F.R. §§ 101.14 (e)(6)*; *101.65(d)(2)*. Vitaminwater's labeling contains claims in each of these two categories. [19]

(i) *"Healthy" Implied Nutrient-Content Claims*

The Second Amended Complaint identifies several statements allegedly made by defendants that constitute nutrient-content claims. The label of "Rescue"-flavored vitaminwater, for instance, contains the statement that it is "specially formulated to support optimal metabolic function with antioxidants that may reduce the risk of chronic diseases and vitamins necessary for the generation and utilization of energy from food." Because the statement "suggest[s] that a food because of its nutrient content may help consumers maintain healthy dietary practices" in connection with an "implicit claim or statement about a nutrient," it constitutes a general nutritional claim (a type of nutrient-content claim) under *21 C.F.R. § 101.65(d)*. Were **[*39]** this the sole nutrient-content claim, FDA regulations would not be violated, as the jelly-bean rule does not prohibit vitaminwater from making a nutrient content claim that does not use the word "healthy." However, vitaminwater contains at least two implied nutrient claims that do contain the word "healthy":

> (1). The statement on the "defense" flavor: "[I]f you've had to use sick days because you've actually been sick then you're seriously missing out, my friends. [S]ee, the trick is to stay *healthy* and use sick days to just um, not go in. [A]nd this combination of zinc and fortifying vitamins can help out with that and keep you *healthy* as a horse. [S]o drink up."
>
> (2). The statement on the "B-Relaxed" flavor claiming that the product "is specially formulated with [B] vitamins and theanine. The [B] vitamins are there to replace those lost during times of stress (physical or mental). Theanine is an amino acid naturally found in tea leaves and has been shown to promote feelings of relaxation. This combination can help bring about a *healthy* state of physical and mental being."

Sec. Am. Compl. PP 27-28 (emphasis added, alteration in original). [20] Not every use of the word "healthy" on a food **[*40]** label conveys an implied nutrient content claim; a violation of *21 C.F.R. § 101.65(d)(2)* occurs only

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[19] Plaintiffs contend that the statements at issue are neither health claims nor implied nutrient content claims. As a result, they further contend, their "claims are completely outside the scope of the coverage of the FDCA and are [therefore] not preempted." *See* Pl. Br. at 6-7. In particular, plaintiffs contend that the Second Amended Complaint does not identify any implied nutrient content claim because the quoted statements "do not suggest that vitamins or other nutrients are present *in a certain specific amount*." Pl. Br. at 7 (emphasis in original).

This argument fails because neither the FDCA nor the FDA's implementing regulations require that a statement identify a specific nutrient by name or quantity in order to qualify as an implied nutrient-content claim. *See, e.g.*, *21 C.F.R. § 101.65(c)(3)* ("a claim that a food contains oat bran is a claim that it is a good source of dietary fiber; that a food is made only with vegetable oil is a claim that it is low in saturated fat; and that a food contains no oil is a claim that it is fat free."); *58 Fed. Reg. 2302, 2371 (Jan. 6, 1993)* **[*38]** (describing "contains corn oil" as implied nutrient content claim that the product is low in fatty acids); *21 C.F.R. § 101.54(f)(4)* (describing "high in antioxidants" as nutrient-content claim.). Defendants concede that vitaminwater's label contains at least some implied nutrient content claims. *See* Def. Br. at 8. In addition, as discussed *infra*, vitaminwater contains at least one clear example of a health claim.

[20] One additional implied nutrient-content claim containing the word "healthy" was included in the initial Complaint: VitaminWater's "multi-v," lemonade (vitamin a - zinc) flavor, was described as "specially formulated with 11 essential vitamins and minerals, from vitamin a to zinc, to provide the body with nutrients needed to remain healthy and active." Compl. P 18.

where it is used in a context suggesting that a food will, because of its nutrient content, help consumers maintain healthy dietary practices. *See* 59 Fed. Reg. 24232, 24235 (May 10, 1994). Here, the description of the product as a "Nutrient-Enhanced Water Beverage," the statement "vitamins + water = all you need," and flavor names that are associated with specific purported health benefits may collectively imply that the product will assist consumers in maintaining healthy dietary practices. By including the suggestion that the product will "keep you healthy" or "help bring about a healthy state of physical and mental being" alongside such statements, the quoted language implies that the nutrient content of vitaminwater may help consumers maintain healthy dietary practices. I conclude, therefore, in light of the language and context in which they are used, that the statements on the "defense" and "B-Relaxed" labels constitute implied nutrient content claims which use the word "healthy." Such claims are in violation of violation of FDA regulations because, as discussed below, vitaminwater **[*41]** achieves its nutritional content solely through fortification that violates FDA policy.

(ii) *Health Claim*

The label of vitaminwater's "focus" flavor states that it is "specially formulated to provide vitamin [A] (a nutrient known to be required for visual function), antioxidants and other nutrients [that] scientific evidence suggests may reduce the risk of age-related eye disease." Sec. Am. Compl. P 28 (alterations in original). That statement "expressly or by implication . . . characterizes the relationship of any substance to [the] disease or health-related condition," and accordingly is a health claim. [21] *See* 21 C.F.R. § 101.14(a)(1). Because vitaminwater does not meet the minimum nutritional requirements of 21 C.F.R. § 101.14(e)(6), any health claim about the product is contrary to FDA regulation. *Id*.

(iii) *FDA Fortification Policy*

Defendants have failed to establish that the fortification of vitaminwater complies with FDA fortification policy, which recognizes that "random fortification of foods could result in over-or underfortification in consumer diets and create

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[21] Although defendants **[*42]** have not contended that the above claim constitutes a "structure/function" claim, a relatively unregulated category of claim that are commonly present on food labels, the language of the claim suggests that it may have been drafted with that understanding in mind. As explained below, such a contention would have no merit. The term "structure/function" refers to an exception arising out of the FDCA's definition of the term "drug." Because the FDCA defines "drugs" as "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease," but contains a limited exception for food products "intended to affect the structure or any function of the body," *see* 21 U.S.C. § 321(g)(1), food (and dietary supplement) labels may make claims about the effect a product has on the "structure or function" of the body without subjecting themselves to the heightened regulations applicable to health claims. *See generally* Satine, 63 Food & Drug L.J. 537, 549 ("Because of the absence of regulation for food labeling structure/function claims, they have become one of the biggest loopholes in the regime designed to prevent misleading labeling."); Ilene Ringel Heller, *Functional* ***[*43]*** *Foods: Regulatory and Marketing Developments*, 56 Food & Drug L.J. 197, 206 (2001) (same); U.S. Gen. Accounting Office, *Food Safety: Improvements Needed in Overseeing the Safety of Dietary Supplements and "Functional Foods,"* at 18, 20 (2000) (noting that the FDA "has not clearly defined its standards for structure/function claims[,]. . . has taken no enforcement actions against questionable structure/function claims, and that "[w]hile NLEA requires FDA to rigorously review health claims before authorizing their use on product labels, there are no such requirements for structure/function claims") *available at* http://www.gao.gov/new.items/rc00156.pdf. Although the border between structure/function claims and health claims is in some cases difficult to delineate, the claim on vitaminwater's focus flavor that it may "reduce the risk of age-related eye disease," does not present a close question: the product explicitly claims it can reduce the risk of a class of diseases and uses that very word. *See* FDA Guidance for Industry: *Structure/Function Claims, Small Entity Compliance Guide*, Sec. D (January 9, 2002) (noting that claims using the word "disease" or "diseased" in connection with a reference **[*44]** to the product or its ingredients will generally exceed the bounds of the structure/function exception.), *available at* http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/DietarySupplements/ucm103340.htm (last visited July 2, 2010).

nutrient imbalances in the food supply" and "could also result in deceptive or misleading claims for certain foods." *21 C.F.R. § 104.20*. [22]

The FDA's fortification policy in *21 C.F.R. § 104.20* was enacted in 1980 and largely mirrors the aims of the FDA's 1943 **[*45]** fortification policy. The 1943 policy provided, *inter alia*:

> Enrichment of foods with nutrients that are supplied in adequate quantities by the diets of all significant population groups is not only wasteful but tends to confuse consumers as to their nutritional needs. . . [such enrichment] tends to confuse and mislead consumers through giving rise to conflicting claims of nutritional values and by creating an exaggerated impression of the benefits to be derived from the consumption of such foods.

Statement of Policy With Respect to the Addition of Nutritive Ingredients to Foods, 8 Fed. Reg. 9170-02 (July 3, 1943). *See generally* Institute of Medicine of the National Academies, Committee on Use of Dietary Reference Intakes in Nutrition Labeling, *Dietary Reference Intakes: Guiding Principles for Nutrition Labeling and Fortification* 49-51 (2003). [23]

The current policy in *21 C.F.R. § 104.20* reflects the same essential principle as the 1943 policy: fortification is not warranted absent some justification. In particular, the current policy states that "[t]he Food and Drug **[*46]** Administration does not encourage indiscriminate addition of nutrients to foods, nor does it consider it appropriate to fortify fresh produce; meat, poultry, or fish products; sugars; or snack foods such as candies and carbonated beverages," and recommends fortification in only four circumstances:

1. "[T]o correct a dietary insufficiency recognized by the scientific community. . ."
2. "[T]o restore such nutrient(s) to a level(s) representative of the food prior to storage, handling and processing. . ."
3. "[I]n proportion to the total caloric content. . . to balance the vitamin, mineral, and protein content . . . ."
4. "to avoid nutritional inferiority" when replacing a traditional food.

21 C.F.R. § 104.20(b)-(e). Defendants point out that vitaminwater is not carbonated, but do not contend that any of the four recommended bases for fortification are present. Even assuming that the fortification of sugar water with vitamins was not itself a violation of the fortification policy, there is no basis on which to conclude that any of the four sanctioned bases for fortification is applicable. The first two bases are on their face inapplicable because defendants do not allege that any relevant **[*47]** nutrient deficiency is present, or that any nutrients are lost in the production or the handling of the beverage. The third basis for fortification relates to foods that are fortified to contain 21 specified nutrients. *See* *21 C.F.R. § 104.20(d)(3)*. Defendants have not contended that those 21 nutrients are present in vitaminwater. Moreover, that provision contemplates the addition of nutrients to foods or beverages in specified, uniform quantities determined by reference to the caloric value of the product. In contrast, the Second Amended Complaint suggests that defendants fortify various flavors of vitaminwater with differing levels of vitamins in accordance with the specific purported benefit claimed on the product's label. *See* Sec. Am. Compl. P 28. The fourth basis for fortification is inapplicable because there is no basis on which to conclude that vitaminwater replaces a traditional food.

c. *Use of Product Name That Includes Some, But Not All Ingredients*

Plaintiffs allege that vitaminwater's labeling is misleading in that it uses a product name that includes of two of the product's ingredients (vitamins and water) but fails to mention one other notable ingredient (sugar). The FDA **[*48]** has recognized that such product names may mislead consumers:

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[22] Defendants' briefs discuss this issue only in passing. Because federal preemption is ordinarily an affirmative defense to a plaintiff's suit, it is defendants' burden to establish the prerequisites for preemption. *See* *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)*; *see also* ***Williams v. Gerber Prods. Co., 552 F.3d 934, 937 (9th Cir. 2008)*** (declining to address untimely preemption defense).

[23] *Available at* *http://www.nal.usda.gov/fnic/DRI/DRI_Guiding_Principles_Labeling/guiding_principles_labeling_full_report.pdf*.

> The labeling of a food which contains two or more ingredients may be misleading by reason (among other reasons) of the designation of such food in such labeling by a name which includes or suggests the name of one or more but not all such ingredients, even though the names of all such ingredients are stated elsewhere in the labeling.

21 C.F.R. § 101.18(b). The potential for confusion is heightened by the presence of other statements in vitaminwater's labeling, such as the description of the product as a "vitamin enhanced water beverage" and the phrases "vitamins + water = all you need" and "vitamins+water = what's in your hand" which have the potential to reinforce a consumer's mistaken belief that the product is comprised of only vitamins and water. A state law cause of action based on such statements is therefore not preempted by the FDCA.

In sum, plaintiffs' allegations sufficiently state a claim that defendants have violated FDA regulations by making health claims about vitaminwater even though it does not meet required minimum nutritional thresholds, by using the word "healthy" in implied nutrient content claims even though **[*49]** vitaminwater's fortification does not comply with FDA policy, and by using a product name that references only two of vitaminwater's ingredients, omitting the fact that there is a key, unnamed ingredient in the product. These claims are not preempted by the FDCA because they seek to impose requirements on the defendants that are identical to those imposed by the FDCA.

D. *Implied Preemption*

Defendants contend that implied conflict preemption bars plaintiffs' state law claims because those claims "pose [] an obstacle to the federal regulatory scheme with regard to claims about food containing sugar." Def. Br. at 10. [24] Because, as discussed above, I conclude that express preemption bars any claim solely premised on the notion that vitaminwater's high sugar content made its health or implied nutrient content claims misleading, it is not necessary to consider whether implied preemption would also bar such a claim. Plaintiffs' remaining claims are premised on conduct that is violative of federal regulations, and therefore do not raise implied conflict preemption concerns. [25]

E. *Primary Jurisdiction*

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[24] There is no dispute that implied field preemption is inapplicable. *See* Transcript of Oral Argument on February 5, **[*50]** 2010 ("Tr.") at 8:3-13. *See also* *Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028, 1032 (N.D. Cal. 2009)* ("Congress has explicitly stated that it *does not* intend to occupy the field of food and beverage nutritional labeling; instead, it permits states to regulate subject matters covered by the NLEA and its regulations provided that such state laws do not fall within the FDCA's express preemption provisions) (emphasis in original); *Cipollone, 505 U.S. at 532* ("We resort to principles of implied pre-emption -- that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law -- only when Congress has been silent with respect to pre-emption.") (Blackmun, J., concurring) (internal citation omitted).

[25] Defendants contend in a footnote that plaintiffs' claims "implicate a federal interest embodied in the Dormant *Commerce Clause*" because "the burdens of additional labeling requirements would be clearly excessive in relation to the putative local benefits, if any, of telling the public something it already knows." Def. Br. at 15 n.7 (citing *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970))*. **[*51]** Because plaintiffs' claims are premised on conduct that violates federal regulations, the Dormant *Commerce Clause* is not implicated. Moreover, *Pike* is inapposite; that case concerned state legislation, enacted for the primary purpose of promoting and preserving the reputation of Arizona farmers, which would have had the incidental effect of forcing plaintiff, a grower of cantaloupes, to construct a packing plant in Arizona. In concluding the burden imposed on interstate commerce exceeded the "minimal" interest of the state, the Court explicitly relied on the fact that the legislation did not concern the safety of food and was not designed to protect consumers from unfit goods. *Id. at 143-46*. In contrast, the legislation at issue here consists of state regulations that neither appear to be motivated by local protectionism nor have the effect of discriminating against out of state businesses in an area in which the states' regulatory interest is indisputable. *See, e.g., Plumley v. Massachusetts, 155 U.S. 461, 472, 15 S. Ct. 154, 39 L. Ed. 223 (1894)* ("If there be any subject over which it would seem the states ought to have plenary control . . . it is the protection of the people against fraud and deception in the **[*52]** sale of food products."). *See generally* 79 A.L.R. Fed. 246 *Validity, Under Commerce Clause (Art I, § 8, Cl 3), of State Statutes Regulating Labeling of Food* (2009).

Defendants contend that even if preemption does not bar plaintiffs' claims, the plaintiffs' claims should be dismissed under the doctrine of primary jurisdiction. I disagree.

As the Supreme Court explained in *United States v. Western Pacific Railroad Company*:

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial **[*53]** process is suspended pending referral of such issues to the administrative body for its views.

352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956) (citing *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433, 60 S. Ct. 325, 84 L. Ed. 361 (1940))*. Dismissal on primary jurisdiction grounds "does not speak to the jurisdictional power of the federal courts," but rather "structures the proceedings as a matter of judicial discretion, so as to engender an orderly and sensible coordination of the work of agencies and courts." *United States v. Bessemer & L.E.R. Co., 717 F.2d 593, 599, 230 U.S. App. D.C. 316 (D.C. Cir. 1983)*. While "[n]o fixed formula exists for applying the doctrine of primary jurisdiction," the Second Circuit has generally focused on four factors:

> . whether the question at issue is within the conventional experience of judges or involves technical or policy considerations within the agency's particular field of expertise;
> . whether the question at issue is particularly within the agency's discretion;
> . whether there exists a substantial danger of inconsistent rulings; and
> . whether a prior application to the agency has been made.

Ellis v. Tribune Television Co., 443 F.3d 71, 82-83 (2d Cir. 2006) (citing *Nat'l Commc'ns Ass'n, Inc. v. AT&T Co., 46 F.3d 220, 222 (2d Cir. 1995))* **[*54]** (further citations omitted). The question whether defendants have violated FDA regulations and marketed a product that could mislead a reasonable consumer is one courts are well-equipped to handle, and is not an appropriate basis for invoking the primary jurisdiction doctrine. *See Lockwood v. Conagra Foods, Inc., 597 F. Supp. 2d 1028 (N.D. Cal. 2009)*. In *Lockwood*, plaintiff consumers brought a putative class action under California's Unfair Competition Law, alleging that the defendant engaged in misleading conduct by advertising its pasta sauce as "all natural" when in fact it included high fructose corn syrup. In denying a motion to dismiss under the primary jurisdiction doctrine, the court observed that the FDA had already been asked to define the word natural, but it had declined to do so because it was not a priority in light of the limited resources possessed by the FDA. It found that "this is not a technical area in which the FDA has greater technical expertise than the courts -- every day courts decide whether conduct is misleading." *Id. at 1035*; *see also Torres-Hernandez v. CVT Prepaid Solutions, Inc., No. 3:08-cv-1057-FLW, 2008 U.S. Dist. LEXIS 105413, 2008 WL 5381227, at *4 (D.N.J. Dec. 17, 2008)* (declining **[*55]** to dismiss on primary jurisdiction grounds and observing that "the case at bar [simply] requires this Court to determine whether Plaintiff and those similarly situated received what they bargained for."). That reasoning is applicable here as well: the FDA is aware of plaintiffs' concerns but lacks the resources to take enforcement action in every instance in which its policies are violated. [26] As in *Lockwood*, the ultimate issue is whether consumers could reasonably be misled by the violations, a question that courts are well-equipped to handle. Finally, deferral to the FDA is unlikely to result in a timely resolution of plaintiffs' claims. The FDCA does not provide a private right of action, and there is no reason to believe the plaintiffs could obtain a timely determination from the FDA concerning the merits of their claims. *See Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 60 (2d Cir. 1994)* (noting, in considering issue of primary jurisdiction, that "[t]here clearly is a public interest in reasonably prompt adjudication"). *See also In re Farm Raised Salmon Cases, No. B18290 la, 2008 Cal. App.*

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[26] The Center For Science In the Public Interest ("CSPI"), co-counsel for plaintiffs in this suit, sent a petition for proposed rulemaking to the FDA in 1999, seeking daily reference values and additional labeling for "added sugars" in soft drinks and other products, and seeking corresponding changes to nutrient-content and health-claim regulations. *See* Def. Br. at 10.

Unpub. LEXIS 4000, 2008 WL 2070612 (Cal. Ct. App. 2008) (rejecting dismissal on primary jurisdiction grounds **[*56]** because adequate administrative remedy is lacking under FDCA).

F. *Pleading Standards of Fed. R. Civ. Pro. 8(a) and 9(b)*.

1. *Likelihood that Reasonable Consumers Would be Misled*

Because each claim includes the requirement that a reasonable consumer could have been misled by defendants' conduct, I address that common element first. Viewing each allegedly misleading statement in light of its context on the label and in connection with the marketing of vitaminwater as a whole, I cannot conclude as a matter of law that a reasonable consumer could not be misled into believing that vitaminwater is a product that may help maintain healthy dietary practices and fail to appreciate that the product is not solely composed of vitamins and water. The FDA has recognized that product names such as "vitaminwater" can be deceptive in that **[*57]** such names may mislead consumers into believing the listed ingredients are the sole components of a beverage. *See* 21 C.F.R. § 101.18(b). The potential for confusion by consumers is heightened by the presence of (1) claims in vitaminwater's labeling, such as "vitamins + water = all you need" or "vitamins + water = what's in your hand; [27] (2) the description of the product as a "nutrient enhanced water beverage"; (3) the fact that several varieties of the product explicitly use the word "healthy" in connection with claims about vitaminwater's nutritional benefits; and (4) the inclusion of at least one health claim suggesting that a nutrient in vitaminwater may reduce the risk of a specific class of diseases. The plaintiffs have sufficiently alleged that the collective effect of the challenged statements was to mislead a reasonable consumer into believing that vitaminwater is either composed solely of vitamins and water, or that it is a beneficial source of nutrients rather than a "food of little or no nutritional value [which has been fortified] for the sole purpose of claiming or implying that it is "healthy." 58 Fed. Reg. 2478, 2522. [28]

In finding vitaminwater's marketing and labeling to be potentially misleading, I have given substantial weight to the FDA's determination that fortification of a food in a manner that is not consistent with FDA's fortification policy may be misleading because it may lead consumers to consume foods that contain sugar or other sources of calories, but lack any inherent nutrients other than those that have been added through fortification. This conclusion has been incorporated into binding regulations, *see* 21 C.F.R. §§ 101.54(e); 101.65 (d)(2)(iv); 101.14 (e)(6), and has been expressed in multiple contexts. *See* 60 Fed. Reg. 66206, 66212 (noting that health claims on products that violate the FDA's fortification policy "would **[*60]** be misleading because consumers would be purchasing the food, in part, to achieve a more healthful diet, when, in fact, such foods are inconsistent with dietary guidelines. Further, such claims could be damaging if consumers are encouraged to replace wholesome and nutritious foods that are recommended in dietary guidelines with these foods."); 58 Fed. Reg. 2478, 2521 ("the value of health claims should not be trivialized or compromised by their use on foods of little or no nutritional value. . . [or by] claims intended to promote the consumption of a food that is incompatible with dietary guidelines would be misleading to consumers."); *cf*. FDA Compliance Policy Guide *Fortification of Standardized Juices*, CPG Sec. 510.700 (May 13,

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[27] Defendants contend that the phrase "vitamins **[*58]** + water = all you need" does not appear on the label of at least one flavor of vitaminwater, and that it is therefore "impossible for each [plaintiff] to have relied on a set of representations that included it." *See* Def. Br. at 20 n. 11. Such a fact is not contained in the Second Amended Complaint, and defendants provide no support for the quoted statement. When matters outside the pleadings are presented in connection with a motion to dismiss for failure to state a claim, "a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material." *Friedl v. City of New York, 210 F.3d 79, 83 (2d Cir. 2000)* (internal quotation marks omitted). Given the unsworn nature of the statement and the fact that no discovery has occurred, I decline to convert defendants' Rule 12(b)(6) motion into one for summary judgment and disregard defendants' assertion that the quoted language ("vitamins + water + all you need") does not appear on all flavors of vitaminwater.

[28] The Second Amended Complaint alleges that each plaintiff **[*59]** relied on the name "vitaminwater" and the statement "vitamins + water = all you need," but does not specifically allege which other statements, if any, each plaintiff relied on. Whether a consumer could reasonably have been misled by those phrases, even considered alone, cannot properly be decided on a motion to dismiss. Accordingly, even assuming the Second Amended Complaint asserts no further basis for plaintiffs' potential confusion, dismissal would not be warranted.

1988) ("It is therefore FDA's position that fortification of a food in a manner that is not consistent with FDA's fortification policy may be misleading. If the act of fortification is misleading, it follows that a common or usual name that reflects that act is also misleading."), *available at* http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm074434.htm (last visited July 2, 2010).

Defendants contend that no reasonable consumer could **[*61]** have been misled by vitaminwater's labeling because: (1) the FDA-mandated label on each bottle bears the true facts about the amount of sugar per serving; (2) the allegations about brand names like "vitaminwater," the one-word flavor names like "rescue," slogans like "vitamins + water = all you need," and sayings like "healthy as a horse" describe only puffery; and (3) no reasonable consumer could believe that vitamins and water are literally "all they need to survive" or all that "is in your hand" when holding a bottle that disclosed the presence of sugar.

The fact that the actual sugar content of vitaminwater was accurately stated in an FDA-mandated label on the product does not eliminate the possibility that reasonable consumers may be misled. This issue was squarely addressed in a recent case applying California law, *Williams v. Gerber Products Co., 552 F.3d 934 (9th Cir. 2008)*. In *Gerber*, plaintiffs alleged that the labeling of Gerber's "Fruit Juice Snacks" was misleading in that it, *inter alia*, portrayed the product as nutritious and depicted a number of different fruits, even though the product did not contain the juice of any pictured fruit and the two most prominent ingredients **[*62]** were corn syrup and sugar. The district court granted the defendants' motion to dismiss, crediting their contention that no reasonable consumer could have been misled by the product because that the ingredients were specifically identified on the FDA-mandated panel. On appeal, the Ninth Circuit reversed, holding that the mere fact that an FDA-mandated nutritional panel provided accurate nutritional information on a product did not bar claims that reasonable consumers could be misled. The court explained as follows:

> Reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box. . . . We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception. Instead, reasonable consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging.

Gerber, 552 F.3d 934, 939-40. The same holds true here: the presence of a nutritional **[*63]** panel, though relevant, does not as a matter of law extinguish the possibility that reasonable consumers could be misled by vitaminwater's labeling and marketing. [29] Morever, even reasonable consumers may not read the nutritional label prior to every purchase of a new product. *See* Lester M. Crawford, D.V.M., Ph.D., Acting Commissioner of the FDA,

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[29] The notion that the FDA-mandated nutritional facts would "cure" the potentially misleading impression that vitaminwater was a healthy beverage (rather than primarily sugar water) is further undermined by the characteristics of the label itself. For example, vitaminwater lists its sugar content and calorie total based on the assumption that one 20 ounce bottle contains 2.5 servings. This is consistent with FDA regulations, but the defendants could also have chosen to provide a "per bottle" calorie and sugar total. *See* *21 C.F.R. § 101.12(b)* **[*64]** n.5; *21 C.F.R. § 101.9(b)(6)* (Packages sold individually that contain 200% or more of the applicable reference amount may be labeled as a single serving if the entire contents of the package can reasonably be consumed at a single eating occasion). The FDA has recently considered changes to its policies regarding serving size designations. *See* Advance Notice of Proposed Rulemaking, *Food Labeling: Serving Sizes of Products That Can Reasonably Be Consumed At One Eating Occasion; Updating of Reference Amounts Customarily Consumed; Approaches for Recommending Smaller Portion Sizes, 70 Fed. Reg. 17010, 17013 (2005)* ("In general, focus group participants thought that having multiple servings listed on the label . . . was misleading and confusing."); *see also* Laura M. Tarantino, Acting Director, FDA Office of Nutritional Products, Labeling and Dietary Supplements, *Letter to Food Manufacturers about Accurate Serving Size Declaration on Food Products* (March 12, 2004) (encouraging manufacturers to label food packages as single-serving where entire contents of a package can reasonably be consumed at a single-eating occasion), *available at* http://www.fda.gov/Food/LabelingNutrition/FoodLabelingGuidanceRegulatoryInformation/InspectionCompliance/

[*65] WarningOtherLetters/ucm110234.htm; *see generally* William Neuman, *One Bowl = 2 Servings. F.D.A. May Fix That*, NY. Times, Feb. 5, 2010 (quoting current and former FDA officials and noting that FDA is considering update to misleading labeling regarding serving sizes).

Remarks at the Harvard Medical School 6th Postgraduate Nutrition Symposium (March 10, 2004) ("in survey after survey, [only] 60%-80% of food shoppers said that they'd read the food label before buying a new food."), *available at http://www.fda.gov/NewsEvents/Speeches/ucm053591.htm* (last visited July 21, 2010).

At oral argument defendants suggested that no consumer could reasonably be misled into thinking vitaminwater was a healthy beverage or was composed only of vitamins and water because the sweet taste of vitaminwater puts consumers on notice that the product contains sugar. Tr. 4:22-5:17. At least one court has adopted a similar theory. *See McKinniss v. General Mills, Inc., No. CV 07-2521 GAF, 2007 U.S. Dist. LEXIS 96107, 2007 WL 4762172, at *3 (CD. Cal. Sept. 18, 2007)* (stating, in dismissing suit which alleged "Berry Berry Kix" was misleadingly marketed as containing fruit when it had none, that "a reasonable consumer would be expected to note, upon pouring the contents of the packaging into a cereal bowl, that the product contained no actual fruit."). This argument fails at this stage of the proceedings for three reasons. First, there is no evidence before me concerning vitaminwater's taste. [30] Second, even assuming *arguendo* that I could take judicial **[*66]** notice that vitaminwater tastes sweet, a reasonable consumer might believe it had been sweetened by something other than sugar. Finally, as plaintiffs noted at oral argument, adopting such a rule would essentially insulate defendants from liability so long as consumers were only deceived once by a product; a notion contrary to the consumer protection laws of New York, New Jersey and California. Tr. 15:13-18.

As for the defendants' argument that the statements at issue are nothing more than puffery, the statements are not merely exaggerated claims of quality or **[*67]** "[s]ubjective claims about products, which cannot be proven either true or false." *Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 159 (2d Cir. 2007)* (citations omitted). Rather, they describe the contents of a food product in ways consumers might reasonably rely on in choosing to purchase vitaminwater. Further, consumers who have some awareness that food product labeling is subject to government regulation (owing in part to the ubiquitousness of the FDA's "nutrition facts" label on food products) may reasonably be expected to rely on label claims as accurate depictions of a food's contents and nutritional value. As a New Jersey court observed in another context: "it seems clear that such an impression was precisely what defendant intended to convey. If that were not the case, it is difficult to understand what defendant had in mind." *Miller v. Am. Family Publishers, 284 N.J. Super. 67, 80, 663 A.2d 643 (Super. Ct. Ch. Div. 1995)*. Accordingly, I cannot conclude as a matter of law that the statements could not have been reasonably relied on by consumers. *See e.g., Union Ink Co., Inc. v. AT&T Corp., 352 N.J. Super. 617, 645, 801 A.2d 361 (App. Div. 2002)* (concluding that "[w]hether the advertisements contained **[*68]** material misstatements of fact, or were merely puffing, as alleged by defendants, presents a question to be determined by the trier of fact."); *see also Williams v. Gerber Products Co., 552 F.3d at 938-39* ("whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires 'consideration and weighing of evidence from both sides'" and therefore usually cannot be resolved through a motion to dismiss) (citation omitted).

2 California State Law Claims

a. *Applicability of Federal Rule of Civil Procedure 9(b)*

Claims under California's Unfair Competition Law or False Advertising Law do not include fraud as an element, and therefore generally do not need to be pled with particularity. *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. Nonetheless, such claims may be subject to *Rule 9(b)* if the claims are premised on allegations of fraud. *Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004)*. Defendants argue that *Rule 9(b)* should apply to all of plaintiffs' California claims because the complaint is "fundamentally grounded in fraud or based on common law fraud elements." Def. Reply Br. at 6 (quotation marks omitted). Because, as further discussed below, **[*69]** I conclude that plaintiffs have pled each of their California state law claims with sufficient particularity to satisfy *Rule*

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[30] Defendants appear to suggest the court could take judicial notice that vitaminwater tastes sweet because it is "common sense. . . that [in] anything that's packed or loaded with sugar, as the plaintiffs allege here, you can taste the presence of sugar." Tr. 5:6-9. I do not consider that assertion to be a fact "not subject to reasonable dispute" as required by *Federal Rule of Evidence 201*. Numerous products, such as ketchup (for instance) contain added sugar but are not necessarily considered sweet. *See 21 C.F.R. § 155.194(a)(2)(ii)* (specifying that a product identified as "ketchup" "catsup" "catchup" must contain sweeteners).

9(b), I do not address whether the Second Amended Complaint is "grounded in fraud" to a degree which would subject each of plaintiffs' California state law claims to that heightened pleading standard. [31]

b. *Unlawful Business Practices and False Advertising (Claims 1, 4 and 5)* [32]

Plaintiffs allege that defendants are liable for violating California's UCL through unlawful business practices, unfair business practices, and fraudulent business practices. Because the UCL prohibits "unfair competition," which it broadly defines as including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," Cal. Bus. & Prof. Code § 17200, "it is violated where a defendant's act or practice is (1) unlawful, (2) unfair, (3) fraudulent, or (4) in violation of section 17500 (false **[*71]** or misleading advertisements)." Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007). In addition, violations of California's False Advertising Law constitute "unlawful" conduct for the purposes of the UCL. *See* Comm. on Children's Television, Inc. v. Gen. Foods Corp., 35 Cal. 3d 197, 210, 197 Cal. Rptr. 783, 673 P.2d 660 (Cal. 1983) ("[a]ny violation of the false advertising law . . . necessarily violates the unfair competition law"), *superseded by statute on another ground, as stated in* Californians for Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 227, 46 Cal. Rptr. 3d 57, 138 P.3d 207 (2006); *see also* Kasky v. Nike, Inc., 27 Cal. 4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (Cal. 2002) (noting that the Cal. Bus. & Prof. Code § 17200 defines unfair competition to include any act prohibited by California's False Advertising Law). Accordingly I consider plaintiffs' UCL "unlawful conduct" claim by analyzing whether plaintiffs have adequately pleaded a violation of California's False Advertising Law. [33]

California's False Advertising Law prohibits the dissemination in any advertising medium of any "statement" concerning real or personal property offered for sale, "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500. A claim under the FAL may be based "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." Kasky, 27 Cal. 4th at 951 (citations omitted). Accordingly, "a plaintiff must allege: (1) statements in the advertising are untrue or misleading, and (2) defendant knew, or by the exercise of reasonable care should have known, that the statements were untrue or misleading." VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 673 F. Supp. 2d 1073, 1086 (E.D. Cal. 2009) (citation omitted).

Defendants contend that plaintiffs have not adequately pled reliance or injury under the UCL. I disagree.

The UCL previously authorized "any person **[*73]** acting for the interests of itself [sic], its members or the general public" (former § 17204) to file an action for relief; standing to bring such an action did not depend on a showing of injury or damage. In the November 2, 2004 General Election, California voters approved Proposition 64, which imposed restrictions on a private individual's right to sue under the UCL or False Advertising law to those

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[31] Both parties rely heavily on Ninth Circuit cases regarding the applicability of Rule 9(b)'s heightened pleading standard to plaintiffs' California state law claims. Ninth Circuit law does not bind this court with respect to the application of Rule 9(b) in this case. There is no dispute that, as a matter of California state law, plaintiffs California claims do *not* contain fraud as an element. Whether plaintiffs' claims must comply with the pleading burdens imposed by Fed. R. Civ. P. 9(b) by virtue of the complaint "sounding in fraud" or being "grounded in fraud" is an issue of federal law, not state law. *See* Northwestern Mut. Life Ins. Co. v. Banc of Am. Sec. LLC, 254 F. Supp. 2d 390, 396 (S.D.N.Y. 2003) (concluding that "[t]his Court is required to follow the precedent of the Court of Appeals for the Second Circuit with respect to the interpretation and application **[*70]** of Rule 9(b)," regardless of which state's law governs the underlying claim); *see also* Desiano v. Warner-Lambert & Co., 467 F.3d 85, 91 (2d Cir. 2006); Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003) (same). In any event, my conclusion that plaintiffs' California claims satisfy Rule 9(b) disposes of this issue.

[32] Plaintiffs separately allege claims under California's Business & Professions Code § 17500 et seq. for "false advertising" and "untrue advertising." Neither party has attempted to distinguish these two claims, and they are addressed as one here.

[33] Plaintiffs contend in the alternative that defendants have violated the "unlawful conduct" prong of the UCL through violations of California's Sherman law. *See* Sec. Am. Compl. P 61. Because I find that plaintiffs have adequately pled a violation of the "unlawful **[*72]** conduct" prong through violations of California's FAL, I do not address this alternative contention.

individuals who have "suffered injury in fact and ha[ve] lost money or property as a result of such unfair competition." *Californians for Disability Rights, 39 Cal. 4th at 227*; *see also* Cal. Bus. & Prof. Code §§ 17203-04 (UCL), *17535* (FAL). Accordingly, the UCL and FAL now contain a reliance requirement. As the California Supreme Court explained in a recent case discussing the post-Proposition 64 standing requirements for a UCL fraud case:

> [T]here **[*74]** must be some connection between the injury and the defendant's conduct. . . . while a plaintiff must allege that the defendant's misrepresentations were an immediate cause of the injury-causing conduct, the plaintiff is not required to allege that those misrepresentations were the sole or even the decisive cause of the injury-producing conduct.

In re Tobacco II Cases, 46 Cal. 4th 298, 325-29, 93 Cal. Rptr. 3d 559, 207 P.3d 20 (Cal. 2009). *See also* *Laster v. T-Mobile USA, Inc., No. 05cv1167, 2009 U.S. Dist. LEXIS 116228, 2009 WL 4842801, at *5 n.1 (S.D. Cal. Dec. 14, 2009)* (applying the reliance requirement stated in *In re Tobacco II* to non-fraud UCL claim).

Plaintiffs' Second Amended Complaint identifies numerous specific statements alleged to be misleading, and alleges that those statements create "the central message. . . that VitaminWater is not a sugary soft drink. . . . [However] this message is false, misleading, deceptive, and unfair. Vitaminwater is not a beneficial fortified drink - it is just another flavored, sugary snack food like Coca-Cola, except that Defendants chose not to carbonate it." *Id*. at P 4. The Second Amended Complaint further alleges that:

> Each plaintiff relied on Defendants' false, misleading, and deceptive written misrepresentations **[*75]** that VitaminWater is a beneficial dietary supplement beverage including, but not limited to, "vitamins + water = all you need" and the name of the product itself- "VitaminWater" in deciding to purchase vitaminwater. Had Plaintiffs known the truth that the statements they relied on were false, misleading, deceptive, and unfair, they would have neither purchased VitaminWater nor paid the premium price Defendants charged for it.

Sec. Am. Compl. P 16. Such allegations adequately plead reliance for the purposes of the UCL. California courts have liberally construed the requirements for pleading reliance in cases in which it would be impractical to expect a plaintiff to recall with specificity each statement that he or she considered prior to making a purchase. *See* *In re Tobacco II Cases at 329* ("[W]here, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements."); *see also* *Morgan v. AT&T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1262, 99 Cal. Rptr. 3d 768 (Cal. Ct. App. 2009)* ("plaintiffs need not allege the specific advertisements the individual **[*76]** plaintiffs relied upon; it is sufficient for the plaintiff to provide a representative selection of the advertisements or other statements to indicate the language upon which the implied misrepresentations are based."); *Walter v. Hughes Commc'ns, Inc., 682 F. Supp. 2d 1031, 1045 (N.D. Cal. 2010)* (element of reliance satisfied by complaint that "roughly" identified representations relied on).

Plaintiffs have also adequately pled injury. California courts have held that a plaintiff who fails to receive the benefit bargained for because of a misrepresentation made by a defendant suffers sufficient injury to state a claim under the UCL. *See, e.g.,* *Koh v. S.C Johnson & Son, Inc., No. C-09-00927 (RMW), 2010 U.S. Dist. LEXIS 654, 2010 WL 94265, at *2 (N.D. Cal. Jan. 6, 2010)* (complaint adequately alleged injury under UCL through claims that plaintiff bought the product at a premium price in reliance on misleading suggestion that it was environmentally friendly); *Chavez v. Blue Sky Natural Beverage Co., 340 Fed. Appx. 359 (9th Cir. 2009)* (injury sufficiently pled where plaintiff purchased product because of misrepresentation that it was from New Mexico); *see also* *Lozano, 504 F.3d at 734* (plaintiff "has properly stated **[*77]** an injury that he did not receive the full value of his contract with [defendant]" due to its alleged failure to disclose certain facts about its billing practices). Accordingly, the allegations in the Second Amended Complaint adequately allege a violation of California's FAL (*§ 17500 et seq*.), and in turn, California's UCL (*§ 17200 et seq*).

c. *Unfair Business Practices (Claim 2)*

A business practice is "unfair" for the purposes of a claim under the UCL when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

[34] *Wilner v. Sunset Life Ins. Co., 78 Cal. App. 4th 952, 965, 93 Cal. Rptr. 2d 413 (Ct. App. 2000)* (citing *State Farm Fire & Cas. Co. v. Superior Court, 45 Cal. App.4th 1093, 1104, 53 Cal. Rptr. 2d 229 (Sup.Ct. 1996))*. "The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id*. To prevail, a plaintiff must establish that "the consumer injury is substantial, **[*78]** is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Daugherty v. American Honda Motor Co., Inc., 144 Cal. App. 4th 824, 839, 51 Cal. Rptr. 3d 118 (2006)*. California state courts have indicated that a plaintiff may make out a prima facie case of unfair conduct by alleging wrongful conduct on the part of the defendant; the plaintiff needn't speculate at the pleading stage as to the defendant's countervailing interests. *See* *Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740, 162 Cal. Rptr. 543 (1980)* ("[S]ince the complaint is unlikely to reveal defendant's justification, if th[e] pleading states a prima facie case of harm, . . . the defendant should be made to present its side of the story.").

Defendants have not raised any basis for dismissing plaintiffs claim based on the "unfair" prong of the UCL other than those already rejected in connection with the discussion of plaintiffs' claims under the "unlawful" prong of the UCL.

d. *UCL Fraud (Claim 3)*

Plaintiffs' third claim states a claim for fraudulent business practices under the UCL. Aside from the use of the term "fraud," a claim for fraudulent business practices under the UCL has little in common with the elements of common law fraud. "A [common law] fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief under the UCL." *In re Tobacco II Cases, 46 Cal. 4th at 312* **[*81]** (citation and quotation marks omitted). *See also* *Capitol Records, Inc. v. MP3tunes, LLC, 611 F. Supp. 2d 342 (S.D.N.Y. 2009)* ("Fraudulent as used in *§ 17200* does not refer to the common law tort of fraud but only requires a showing members of the public are likely to be deceived." (citing *Express, LLC v. Fetish Group, Inc., 464 F. Supp. 2d 965, 980 (CD. Cal. 2006)))*. To prevail, a plaintiff "must produce evidence showing 'a likelihood of confounding an appreciable number of reasonably prudent purchasers exercising ordinary care.'" *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025-26 (9th Cir. 2008)* (citations omitted).

Courts have not been consistent regarding whether a UCL fraud claim must be pled with particularity. The California Supreme Court has held that the heightened pleading requirements generally applicable to fraud claims do not apply to a claim for "fraudulent" business practices under the UCL because the latter requires only that plaintiffs

[34] Neither party discusses the elements of a claim of unfair competition under California law, an issue that remains somewhat unsettled in light of the California Supreme Court's decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. *Cel-Tech* rejected the use of "amorphous" definitions of "unfair" (such as the definition in *Wilner, supra)* and held that **[*79]** a claim of unfair business practices requires "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech at 184-85*. However, in a footnote, the court explicitly limited its holding to cases filed by business competitors, as opposed to consumers. *Id at 187 n.12*. Subsequent cases have not been uniform in their assessment of whether *Cel-Tech* altered the analysis of a claim of Unfair Business Practices in claims brought by consumers. The better view appears to be that *Cel-Tech* standard is inapplicable in a consumer action, in view of the fact that (1) the opinion's reference to ***antitrust law*** is sensible in a suit alleging anti-competitive conduct, but makes little sense in a consumer action; and (2) a contrary view would render *Cel-Tech's* footnote 12 meaningless. That position is supported by case law in the Ninth Circuit. *See, e.g.,* *Lippitt v. Raymond James Financial Services, Inc., 340 F.3d 1033, 1043 (9th Cir. 2003)* (citing *pre-Cel-Tech* analysis in consumer UCL case); ***Nat'l Rural Telecommunications Co-op. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1075 (CD. Cal. 2003)*** **[*80]** ("The test annunciated in *Cel-Tech*, however, applies only to cases between direct competitors"); *see also* *Smith v. State Farm Mutual Automobile Ins. Co., 93 Cal. App. 4th 700, 720, n.23, 113 Cal. Rptr. 2d 399 (2001)* ("we are not to read *Cel-Tech* as suggesting that such a restrictive definition of 'unfair' should be applied in the case of an alleged consumer injury"); *but see* *Scripps Clinic v. Superior Court, 108 Cal. App. 4th 917, 940, 134 Cal. Rptr. 2d 101 (Cal. Super. Ct. 2003)* (contra).

establish that members of the public are likely to be deceived, and contains no scienter requirement. *See, e.g., Comm. on Children's Television, 35 Cal. 3d at 212 n.11* ("The requirement that fraud be pleaded with specificity . . **[*82]** . does not apply to causes of action under the [UCL]"); *Morgan, 177 Cal. App. 4th at 1256* (same); *see also StreamCast Networks, Inc. v. IBIS LLC, No. CV 05-04239 (MMM), 2006 U.S. Dist. LEXIS 97607, 2006 WL 5720345, at * 11 (CD. Cal. May 2, 2006)* ("To prevail on a claim that a business practice is fraudulent under *§ 17200*, "[i]t is not necessary to show that the defendant intended to injure anyone.") (citation omitted). However, a number of recent cases from the Ninth Circuit and California district courts have held that claims of fraudulent business practices under the UCL are subject to *Rule 9(b)*'s heightened pleading requirements where the claim is "grounded in fraud." *See, e.g., Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*; *see also Parrish v. Nat'l Football League Players Ass'n, 534 F. Supp. 2d 1081 (N.D. Cal. 2007)*. Even assuming plaintiffs' claims are subject to *Rule 9(b)*, I conclude that they have met that standard.

Defendants contend that plaintiffs have not pled their claims with particularity because they have not identified which statements in vitaminwater's labeling were relied on by each individual plaintiff. Such a detailed complaint would be helpful, but it is not required by *Fed. R. Civ. Pro. 9(b)*. **[*83]** [35] To satisfy the pleading requirements of *Rule 9(b)*, a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994)*. Here plaintiffs have alleged that each plaintiff relied on at least two specific misleading statements (the name vitaminwater and the statement "vitamins + water = all you need"); explicitly identified a number of other statements made in vitaminwater's labeling which are alleged to have created that misleading impression, and identified the basis for plaintiffs' belief that the statements are deceptive. The California plaintiffs have identified the general locations where they purchased vitaminwater, the frequency with which they purchased vitaminwater, and (with the exception of plaintiff Ruslan Antonov) the specific flavors they purchased. *See* Sec. Am. Compl. PP 9, 10. Accordingly, the allegations underlying plaintiffs' California state law claims meet *Rule 9(b)*'s essential requirements of "provid[ing] a defendant with fair notice of a plaintiff's **[*84]** claim . . . safe guard [ing] a defendant's reputation from improvident charges of wrongdoing, and [] protect[ing] a defendant against the institution of a strike suit." *Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004)* (citing *O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991))*.

e. *Unfair Methods of Competition or Unfair or Fraudulent Acts or Practices in Violation of § 1770(a)(7) of the CLRA (Claim 6)*

California's CLRA, *Cal. Civ. Code § 1750 et seq*., prohibits specified "unfair methods of competition and unfair or deceptive acts or practices" in connection with the sale **[*85]** or lease of goods or services to a consumer. *See Civ. Code, § 1770(a)*. Among the practices prohibited by the CLRA is "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have" and "[r]epresenting that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another." *Civ. Code, §§ 1770(a)(5)* & *(a)(7)*. [36] *Civil Code section 1760* states that the CLRA "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Neither party has attempted to distinguish plaintiffs' CLRA claims from the UCL claims discussed

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[35] California law also does not require such specificity. As California courts have recognized: "[w]hen an unfair-competition claim is based on an alleged fraudulent business practice -- that is, a practice likely to deceive a reasonable consumer - 'a plaintiff need not plead the exact language of every deceptive statement; it is sufficient for [the] plaintiff to describe a scheme to mislead customers, and allege that each misrepresentation to each customer conforms to that scheme." *Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal. App. 4th 115, 135, 61 Cal. Rptr. 3d 221 (Cal. Ct. App. 2007)* (citation omitted).

[36] The Second Amended Complaint cites only ***Cal. Civ. Code § 1770(a)(7)***.

above. Interpreting the CLRA liberally in accordance with its language, I conclude that defendants have adequately pled a violation of the CLRA through the same allegations that satisfy their claims under the UCL and FAL. [37]

3. *New York State Law Claims*

a. *Gen. Bus. Law. §§ 349 & 350 (Claim 7 & 8)*

"In order to show that Plaintiff is entitled to relief for a violation of New York General Business Law ("GBL") § 349, relating to deceptive business practices, or § 350, relating to false advertising, a plaintiff must show: (1) that the act, practice, or advertisement was consumer-oriented; (2) that the act, practice, or advertisement was misleading in a material respect, and (3) that the plaintiff was thereby injured. *See* Stutman v. Chem. Bank, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000) (§ 349); Horowitz v. Stryker Corp., 613 F. Supp. 2d 271, 287 (E.D.N.Y. 2009) (§ 350) (citation omitted). The standard for whether an act or practice is misleading is an objective one, requiring a showing that a reasonable consumer would have been misled by the defendant's conduct. Marcus v. AT&T, 138 F.3d 46, 64 (2d Cir. 1998); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529 (N.Y. 1995)); *but see* Flattau v. John Hancock Mut. Life Ins. Co., No. 85 Civ. 5487 (JFK), 1986 U.S. Dist. LEXIS 16537, 1986 WL 14977, at *3 (S.D.N.Y. Dec 12, 1986) **[*87]** (suggesting that courts should "not look to the average customer but to the vast multitude which the statutes were enacted to safeguard--including the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions.") (citation omitted). Claims under GBL §§ 349 and 350 are not subject to the pleading-with-particularity requirements of Fed. R. Civ. P. 9(b). *See* Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005) (GBL § 349); United Magazine Co. v. Murdoch Magazines Distrib., Inc., No. 00 Civ. 3367, 2001 U.S. Dist. LEXIS 20878, 2001 WL 1607039, at *12 (S.D.N.Y. Dec. 17, 2001) (GBL § 350). To prevail on a claim under GBL § 350, a plaintiff must demonstrate reliance on defendants' false advertising. However § 349 does not require proof of reliance. *See* Leider v. Ralfe, 387 F. Supp. 2d 283, 292 (S.D.N.Y. 2005); *see also* Stutman v. Chem. Bank, 95 N.Y.2d 24, 29, 731 N.E.2d 608, 709 N.Y.S.2d 892 (2000) ("[A]s we have repeatedly stated, reliance is not an element of a section 349 claim.").

Defendants contend that plaintiffs have failed to adequately plead claims under GBL sections 349 and 350 because they have not adequately alleged reliance or injury. **[*88]** Neither contention is persuasive. As noted above, reliance is not an element of a § 349 claim. Moreover, plaintiffs have adequately pled the reliance element of a claim under § 350 through the same allegations discussed above in connection with plaintiffs' California UCL claims. *See* Pelman, 396 F.3d at 512 (if plaintiffs' allegation of a generalized campaign to create a false impression is vague, "the cure for such deficiencies, in a claim not required to be plead with particularity, is a motion for a more definite statement under Rule 12(e), Fed. R. Civ. P., rather than dismissal") (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514-15, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)).

Injury is adequately alleged under GBL §§ 349 or 350 by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate representations. *See* Jernow v. Wendy's Intern., Inc., No. 07 Civ. 3971 (LTS) (THK), 2007 U.S. Dist. LEXIS 85104, 2007 WL 4116241, at *3 (S.D.N.Y. Nov. 15, 2007) (citing Goshen v. Mut. Life Ins. Co. of New York, 98 N.Y.2d 314, 324, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (N.Y. 2002)). Defendants' contention that Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 (N.Y. 1999), compels a contrary conclusion is unpersuasive. In *Lorillard*, plaintiffs sued a number of tobacco **[*89]** companies, alleging that they had used deceptive commercial practices to sell their cigarettes to New Yorkers. Plaintiffs contended that their injury consisted of the fact that they had bought a product they otherwise would not have purchased and had become addicted to nicotine as a result of defendants' deceptive conduct. The Appellate Division, First Department, rejected plaintiffs' theory that the mere purchase of the product was sufficient to establish injury, holding that: "[i]f plaintiffs do not prove addiction, they cannot show that they were harmed." Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 7, 679 N.Y.S.2d 593 (N.Y. App. Div. 1998). On plaintiffs' appeal to the New York Court of Appeals, the New York Attorney General submitted an amicus brief supporting plaintiffs' theory of injury and arguing that "[t]he

[37] Pursuant to Civil Code section 1782, prior to a suit **[*86]** for damages under the CLRA, a plaintiff must notify the defendant of the alleged violation and allow the defendant an opportunity to remedy it. There is no dispute that this prerequisite has been met.

Appellate Division's holding, by removing a fundamental category of consumer injury from being actionable under *§ 349*, threatens to severely undermine the statute's utility to injured consumers." Amicus Curiae Brief of the New York State Attorney General, 1999 WL 33660064, at *7 (Aug. 30, 1999). Agreeing, the Court of Appeals observed: "[t]he Attorney General may be right that a plaintiff **[*90]** might have a claim" where a consumer paid a higher price for a product as the result of a misrepresentation, such as in a case "where a distributor asserts that its bottled water is from a pure and pristine mountain stream while in reality, it was only tap water." *Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 56 n.5, 720 N.E.2d 892, 698 N.Y.S.2d 615 (N. Y. 1999)*. Though the court concluded that dismissal was warranted because the plaintiffs had failed to allege that that the cost of cigarettes was affected by defendants' alleged misrepresentation, *id. at 56*, plaintiffs here explicitly allege that "[d]efendants command a premium price for vitaminwater by distinguishing it from soft drinks (including their own), and by marketing and advertising it as a fortified beverage, a dietary supplement in liquid form." Sec. Am. Compl. P 5. Accordingly, I conclude that plaintiffs' allegations of misleading marketing and labeling have adequately stated a claim under *GBL §§ 349* and *350*.

4. *New Jersey State Law Claims*

a. *N.J. Consumer Fraud Act, N.J.S.A. 56:8-1 (Claim 9)*

A party asserting a claim under New Jersey's Consumer Fraud Act ("NJCFA") must establish (1) wrongful conduct; (2) an ascertainable loss; and (3) and a causal **[*91]** relationship or nexus between the wrongful conduct and the loss. *See Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 389, 929 A.2d 1076 (N.J. 2007)*.[38] The New Jersey Supreme Court has explained that the requirement of ascertainable loss in the NJCFA replaces the traditional reliance requirement of a common law tort claim. *See id*. Plaintiffs' NJCFA claims are based on allegations that defendants both affirmatively misrepresented and intentionally omitted material facts with intent to cause consumers to purchase vitaminwater. *See* Sec. Am. Compl. P 125. The heightened pleading standards of *Rule 9(b)* are therefore applicable to plaintiffs' claims under the NJCFA. *See Frederico v. Home Depot, 507 F.3d 188, 202 (3d Cir. 2007)*.

Plaintiffs fail to **[*92]** plead their claims under New Jersey law with the requisite particularity. The Second Circuit has held that "[A] plaintiff should specify the time, place, speaker, and content of the alleged misrepresentations." *Luce v. Edelstein, 802 F.2d 49, 54 (2d Cir. 1986)*. In contrast to the detail in the Second Amended Complaint regarding the California claims, the Second Amended Complaint contains no information regarding: (1) when or how often during the class period the New Jersey plaintiffs purchased vitaminwater; (2) where they purchased vitaminwater, or whether any purchases occurred within the state of New Jersey; (3) what variety of vitaminwater they purchased. While *Rule 9(b)* is not designed to "require the impossible," and a plaintiff does not necessarily need to specify the precise time or date on which each allegedly misleading statements was made, *see, e.g., Pollack v. Laidlaw Holdings, Inc.*,

*No. 90 Civ. 5788 (DLC), 1995 U.S. Dist. LEXIS 5909, 1995 WL 261518, at *9 (S.D.N.Y. May 3, 1995)*, the New Jersey state law claims are devoid of all but the most bare facts regarding plaintiffs' purchase of vitaminwater. Such allegations are insufficient to withstand *Rule 9(b)* scrutiny.

5. *Breach of Warranty Under NY, NJ **[*93]** and CA Law (Claims 10 & 11)*

The Second Amended Complaint alleges that defendants breached express and implied warranties that vitaminwater was "beneficial and had particular beneficial characteristics as set forth above." Sec. Am. Compl. PP 128, 132. The Supreme Court has held that breach of warranty claims do not impose an additional "requirement" under state law, because the duty to honor a promise voluntarily undertaken "[can] not fairly be said to be 'imposed

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[38] Defendants have not contended that plaintiffs' NJCFA claims would be preempted or "subsumed" by the Products Liability Act ("PLA"), *N.J.S.A. 2A:58C-1 et seq*. (1987), and this opinion therefore does not address whether such a defense would have merit under New Jersey law. *See, e.g., Vercellono v. Gerber Products Co., No. 09-CV-2350 (DMC), 2010 U.S. Dist. LEXIS 9477, 2010 WL 455388, at *6 (D.N.J. 2010)* (dismissing CLA claim as preempted by PLA).

under state law,' but rather is best understood as undertaken by the manufacturer itself," and are therefore not preempted. Cipollone, 505 U.S. at 526. Nonetheless, plaintiffs have failed to plead a claim for violation of an express warranty. The Second Amended Complaint states that "Defendants provided Plaintiffs and other members of the Class with written and express warranties, including, but not limited to, warranties that their vitaminwater beverages were beneficial and had particular beneficial characteristics as set forth above." Plaintiffs do not allege that any bottle of vitaminwater contains the word "beneficial," do not state which words they allege to have created an express warranty, and do not clarify what is referred **[*94]** to by the words "as set forth above." Such conclusory language fails to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" and does not adequately plead a claim for breach of an express warranty under state law. Twombly, 550 U.S. at 555 (citation omitted). *See, e.g.,* Lake v. Kardjian, 22 Misc. 3d 960, 874 N.Y.S.2d 751, 755 (N.Y. Sup. Ct. 2008) (finding plaintiff "has not identified any specific statements by [defendant] which would constitute an express warranty, and has thereby failed to establish the existence of a claim which would escape federal preemption and survive this motion to dismiss.")); Simmons v. Stryker Corp., No. 08-3451 (JAP), 2008 U.S. Dist. LEXIS 93306, 2008 WL 4936982, at *2 (D.N.J. Nov. 17, 2008) (dismissing express warranty claim where plaintiff did not identify source of warranty); Blennis v. Hewlett-Packard Co., No. C 07-00333 JF, 2008 U.S. Dist. LEXIS 106464, 2008 WL 818526 (N.D. Cal. Mar. 25, 2008) (same).

Plaintiffs' claim for breach of an implied warranty of merchantability fails as well. [39] The law of all three states is similarly based on the Uniform Commercial Code ("UCC"). *See* Cal. Com. Code § 2314; N.J. Stats. § 12A:2-314; N.Y. U.C.C. § 2-314. Under the UCC, if a seller is a merchant, **[*95]** there is an implied contract that the goods will be of merchantable quality. *See* Denny v. Ford Motor Co., 87 N.Y.2d 248, 662 N.E.2d 730, 639 N.Y.S.2d 250 (N.Y. 1995) (citing section 2-314(2)(c) of the UCC). A warranty of merchantability, however, "does not mean that the product will fulfill a "buyer's every expectation" but rather simply "provides for a minimum level of quality." Viscusi v. Proctor & Gamble, No. 05-CV-01528 (DLI)(LB), 2007 U.S. Dist. LEXIS 51307, 2007 WL 2071546, at *13 (E.D.N.Y. July 16, 2007) (citing Denny, 87 N.Y.2d at 259). *See also* Sugawara v. Pepsico, Inc., No. 2:08-cv-01335-MCE-JFM, 2009 U.S. Dist. LEXIS 43127, 2009 WL 1439115, at *5 (E.D. Cal. 2009) (same) (citations omitted); *see generally* 18 Williston on Contracts § 52:76 (4th ed. 2009) (equating "merchantable" quality with "fitness for human use or consumption."). Even crediting each of the allegations of the complaint, plaintiffs cannot establish that vitaminwater failed to constitute a merchantable product.

6. *Common Law Deceit/Misrepresentation Under NY, NJ and CA Law (Claim 12)*

Under New Jersey law, "fraud or misrepresentation consists of the following elements: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge of the falsity by the person making the misrepresentation; (3) intent that the misrepresentation be relied upon; (4) justifiable reliance of the misrepresentation; (5) resultant damage." Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1499 (D.N.J. 1988) (citations omitted); *see also* ***[*97]*** Frederico v. Home Depot, 507 F.3d 188, 200 (3d Cir. 2007) (substituting "reasonable reliance" as fourth element). Failure to disclose facts may constitute misrepresentation where the facts concealed were "'significant and material.'" *Id*. (citation omitted).

Under California law, "to state a claim for negligent misrepresentation, a plaintiff must allege: (1) the defendant made a misrepresentation of a past or existing material fact; (2) without reasonable grounds for believing it to be true; (3) with intent to induce another's reliance on the fact misrepresented; (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed; and (5) damages." Stevens v. JPMorgan

[39] Plaintiffs contend that defendants also breached an implied warranty of fitness for a particular purpose. Such an allegation is not in the Second Amended Complaint. If it were, it would be dismissed. An implied warranty of fitness for a particular purpose use arises "[w]here the seller at **[*96]** the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." Potler v. MCP Facilities Corp., 471 F. Supp. 1344, 1349 (E.D.N.Y. 1979). Plaintiffs allege that their "particular purpose" for purchasing vitaminwater was to drink a "healthy" beverage. However, the Second Amended Complaint does not allege that defendants knew any particular plaintiff purchased vitaminwater for that purpose. Consumers may seek beverages for a variety of purposes; indeed some may desire the beverage precisely because it contains high levels of sugar.

*Chase Bank, N.A., No. C 09-03116 (SI), 2010 U.S. Dist. LEXIS 4170, 2010 WL 329963, at *6 (N.D. Cal. Jan. 20, 2010)* (citing *B.L.M. v. Sabo & Deitsch, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335, 342 (Ct. App. 1997))*.

To sustain claim for intentional misrepresentation under New York law, a plaintiff must show that: (1) the defendant made a material false statement or omission; (2) the defendant intended to defraud the plaintiff; (3) the plaintiff reasonably relied upon the representation or omission; and (4) the plaintiff suffered **[*98]** damage as a result of such reliance. *B & M Linen, Corp. v. Kannegiesser, USA, Corp., 679 F. Supp. 2d 474, 480 (S.D.N.Y. 2010)*. The Court of Appeals of New York has stated that "[A] negligent statement may be the basis for recovery of damages, where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage, but such information is not actionable unless expressed directly, with knowledge or notice that it will be acted upon, to one to whom the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all." *White v. Guarente, 43 N.Y.2d 356, 363-64, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977)* (citation omitted).

Defendants contend that each deceit/misrepresentation claim must be dismissed because it has not been pled with sufficient particularity. Although the New Jersey claims must be dismissed because they are not pled with sufficient particularity, the New York and California claims have both adequately alleged a claim for intentional or negligent misrepresentation. As discussed above, the California claims have been pled with sufficient particularity. With respect to the New York claims, **[*99]** the Second Amended Complaint alleges that plaintiff Batsheva Ackerman purchased vitaminwater's "revive" and "multi-v" flavors at their premium price approximately one to two times per week between October 2007 and October 2008 from various drug stores such as Duane Reade located in New York. When considered alongside the allegations already discussed, this suffices to plead plaintiffs New York claims with particularity. Accordingly, a deceit/misrepresentation claim is adequately pled by the New York and California plaintiffs, but is dismissed with respect to the New Jersey plaintiffs.

7. *Unjust Enrichment (Claim 13)*

Unjust enrichment is an equitable remedy requiring "that a plaintiff show that a defendant benefitted at plaintiff's expense, and equity and good conscience require plaintiff to recover. *Watts v. Jackson Hewitt Tax Serv. Inc., 579 F. Supp. 2d 334, 354 (E.D.N.Y. 2008)* (citation omitted). "A disgruntled customer may only bring a claim if he received 'less than what he bargained for.' *Id*. (citing *In re Canon Cameras, 237 F.R.D. 357, 359 (S.D.N. Y. 2006))*. Defendants sole basis for dismissal of the unjust enrichment claim is that they believe all of the remaining claims fail **[*100]** as well. Because that premise has been rejected, the unjust enrichment claim will not be dismissed.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss claims nine, ten, and eleven is granted without prejudice to a timely amendment consistent with this opinion. The motion is denied in all other respects.

So Ordered.

John Gleeson, U.S.D.J.

Dated: July 21, 2010

Brooklyn, New York

End of Document

[Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp.]

United States District Court for the Northern District of California, San Jose Division

July 21, 2010, Decided; July 21, 2010, Filed

NO. C 04-02266 JW

Reporter
2010 U.S. Dist. LEXIS 152477 *

Advanced Microtherm, Inc., et al., Plaintiffs, v. Norman Wright Mech. Equip. Corp., et al., Defendants.

Prior History: *Advanced Microtherm, Inc. v. Norman Wright Mech. Equip. Corp., 2004 U.S. Dist. LEXIS 19530 (N.D. Cal., Sept. 15, 2004)*

Core Terms

market share, summary judgment, payroll, monopolization, antitrust claim, partial summary judgment, competitors, customers, relevant market, products, calculation, sales, commercial bribery, market power, bid-rigging, antitrust, indemnity, commerce, reliable, cause of action, barriers, projects, bid, motion to exclude, price-fixing, methodology, damages, tying product, Motions, prices

Counsel: **[*1]** For Thomas HR Denver, Special Master: Thomas H R Denver, San Jose, CA USA.

For Advanced Microtherm, Inc., Plaintiff: John T. Williams, LEAD ATTORNEY, Hinkhouse Williams Walsh LLP, Chicago, IL USA; Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA USA; Russell F. Brasso, LEAD ATTORNEY, Foreman & Brasso, San Francisco, CA USA; Zane D. Negrych, LEAD ATTORNEY, Attorney at Law, San Jose, CA USA; Angelina Alioto-Grace, Alioto Law Firm, San Francisco, CA USA; Christopher T. Coco, Beaumont, TX USA.

For Hvac Sales, Inc., Plaintiff: John T. Williams, LEAD ATTORNEY, Hinkhouse Williams Walsh LLP, Chicago, IL USA; Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA USA; Russell F. Brasso, LEAD ATTORNEY, Foreman & Brasso, San Francisco, CA USA; Zane D. Negrych, LEAD ATTORNEY, Attorney at Law, San Jose, CA USA.

For John Karamanos, Plaintiff: John T. Williams, LEAD ATTORNEY, Hinkhouse Williams Walsh LLP, Chicago, IL USA; Joseph M. Alioto, Sr., Joseph Michelangelo Alioto, Jr, LEAD ATTORNEYS, Alioto Law Firm, San Francisco, CA USA; Russell F. Brasso, LEAD ATTORNEY, Foreman & Brasso, San Francisco, CA USA; Zane D. Negrych, LEAD ATTORNEY, Attorney at Law, San Jose, **[*2]** CA USA.

For Norman Wright Mechanical Equipment Corporation, Defendant: Duane E. Clapp, Jr., LEAD ATTORNEY, Clapp Moroney Bellagamva & Vucinich, Daly City, CA USA; Robert H. Bunzel, LEAD ATTORNEY, Bartko Zankel Bunzel & Miller, San Francisco, CA USA; George Fred Salamy, McCurdy & Fuller LLP, Menlo Park, CA USA; Howard Ira Miller, Mintz Levin, San Francisco, CA USA; Janette George Leonidou, Leonidou & Rosin, Mountain View, CA USA; John J. Bartko, John Francis McLean, Bartko Zankel Tarrant & Miller, Michael David Abraham, Bartko, Zankel, Bunzel & Miller, San Francisco, CA USA; Lisa Dritsas Wright, Norman S. Wright Mechanical Equipment Co., Brisbane, CA USA.

For Tempco, Inc., Defendant: Thomas Charles Tagliarini, LEAD ATTORNEY, Law Offices of Thomas C. Tagliarini, Oakland, CA USA; Matthew A. Fischer, Sedgwick LLP, San Francisco, CA USA.

For F.W. Spencer & Son, Inc., Defendant: William James McGahan, LEAD ATTORNEY, McInerney & Dillon, Oakland, CA USA; Annabel Hayoung Chang, Law Offices of Richard C.J. Wahng, Fremont, CA USA; Cassiana

Aaronson, Keller Fishback & Jackson LLP, Oakland, CA USA; Gary Alexander Sloboda, Sedgwick, Detert, Moran & Arnold, San Francsico, CA USA; LeCarie Shalece Whitfield, **[*3]** William Hugh McInerney, Jr., McInerney & Dillon, P.C., Oakland, CA USA; Sloan C. Bailey, Flynn / Williams LLP, San Rafael, CA USA.

For Ray L. Hellwig Mechanical Co., Inc., Movant: David Irwin Kornbluh, Eric Charles McAllister, Miller Morton Caillat & Nevis, LLP, San Jose, CA USA.

For Advanced Microtherm, Inc., Hvac Sales, Inc., John Karamanos, Cross-Defendants: John T. Williams, LEAD ATTORNEY, Hinkhouse Williams Walsh LLP, Chicago, IL USA; Joseph M. Alioto, Sr., LEAD ATTORNEY, Alioto Law Firm, San Francisco, CA USA; Russell F. Brasso, LEAD ATTORNEY, Foreman & Brasso, San Francisco, CA USA.

For John Stoltz, Miscellaneous: Glendon W. Miskel, LEAD ATTORNEY, Johnson & Miskel, Sausalito, CA USA.

For Arup North America Limited, Intervenor: Stephen D. Kaus, LEAD ATTORNEY, Cooper White & Cooper LLP, San Francisco, CA USA.

For Troy Reese, Non-Party, Witness: Ann M. Finneran, George Castro Leal, Chan Doi & Leal LLP, San Francisco, CA USA.

Judges: JAMES WARE, United States District Judge.

Opinion by: JAMES WARE

Opinion

ORDER RE: FINAL ROUND OF DISPOSITIVE MOTIONS

Presently before the Court are the final round of dispositive Motions in preparation for the September 2010 trial:

(1) Plaintiffs' Motion to Vacate or Modify Court's Order **[*4]** Granting Norman Wright's Partial Summary Judgment Re Lack of Standing to Assert Price-Fixing or Bid-Rigging Claims; or Alternatively, Motion to Reinstate Plaintiffs' Per Se Illegal Bid Rigging Claim Against Norman S. Wright ("NSW"), Tempco, Inc., AMEC, Inc., and F.W. Spencer & Son, Inc. ("FWS");[1]

(2) Defendant NSW's Motion for Partial Summary Judgment Against Plaintiffs for Claims of Monopolization, Attempted Monopolization, Exclusive Dealing and Tying;[2]

(3) Defendant FWS' Motion for Summary Judgment or in the Alternative Summary Adjudication;[3]

(4) Plaintiffs' Motion for Order Regarding Defendants' Claims of Indemnity or Contribution;[4]

[1] (hereafter, "Plaintiffs' Motion to Vacate Order Re Price-Fixing and Bid-Rigging Claims," filed under seal, Docket Item Nos. 1418, 1559.)

[2] (hereafter, "NSW's Motion for Summary Judgment Re Antitrust Claims," Docket Item No. 1431.) Defendant NSW's Motion to Seal Portions of this Motion is GRANTED. (Docket Item No. 1426.) In additional, all of Plaintiffs' Administrative Motions to Seal their Oppositions to Defendants' various Motions are GRANTED. (Docket Item Nos. 1476, 1483, 1536, 1542.)

[3] (hereafter, "FWS' Motion for Summary Judgment," Docket Item No. 1458.) Defendant FWS's *Ex Parte* Application Re Calendar Hearing Date for its Motion for Summary Judgment is denied as moot. (Docket Item No. 1412.)

[4] (hereafter, "Plaintiffs' Motion Re Indemnity," Docket Item No. 1455.) Plaintiffs' Motion for Oral Hearing on this Motion is DENIED. (Docket Item No. 1457.)

(5) Plaintiffs' Motion for Partial Summary Judgment Re Commercial Bribery Against both Defendants NSW and FWS;[5]

(6) Defendant NSW's Motion for Partial Summary Judgment against Plaintiffs' Claims Under *15 U.S.C. § 13(c)* and *Cal. Bus. & Prof. Code § 17045*;[6]

(7) Defendant NSW's Motion to Sever the Claims Against Defendant FWS;[7]

(8) Defendant NSW's Motion to Exclude Plaintiffs' Expert Richard Sexton's Opinion and Testimony Based on Payroll Methodology;[8]

(9) Defendant NSW's Motion to Exclude Plaintiffs' Expert Victor Neuman's Fifth Opinion and Testimony Re his Survey;[9] and

(10) Defendant NSW's *Ex Parte* Application for **[*5]** Leave to File a Motion for Terminating Sanctions.[10]

The Court conducted a hearing on June 28, 2010. Pursuant to the Court's June 18, 2010 Order,[11] the Court heard oral argument only on the following motions: (1) Defendant NSW's Motion for Summary Judgment Re Antitrust Claims, and (2) Defendant NSW's Motion Re Richard Sexton. The Court took all other motions under submission without oral argument. (See id. at 2-3.) On the same day, the Court conducted an evidentiary hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc.[12] in connection with Plaintiffs' proffered expert, Richard Sexton, and his opinion regarding market share based on his payroll methodology and data. (See id. at 1.)

Based on the papers submitted to date and oral argument, the Court GRANTS in part and DENIES in part Defendant NSW's Motion for Summary Judgment Re Antitrust Claims, GRANTS Defendant NSW's Motion to Exclude Plaintiffs' Expert Richard Sexton's Opinion Re market share based on payroll methodology, GRANTS Defendant NSW's Motion to Exclude Plaintiffs' Expert Victor Neuman's Opinion, and DENIES all other Motions.

A. Standards

1. Motion for Partial Summary Judgment

Although motions for partial summary judgment are common, **[*6]** *Rule 56 of the Federal Rules of Civil Procedure*, which governs summary judgment, does not contain an explicit procedure entitled "partial summary judgment." However, partial summary judgment is inherent in that *Rule 56(a)* provided for summary judgment on "all or part of

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[5] (hereafter, "Plaintiffs' MSJ Re Bribery," Docket Item Nos. 1450, 1560.)

[6] (hereafter, "NSW's MSJ Re Bribery," Docket Item No. 1426.) Defendant NSW's related Motion to Seal Portions of this Motion is GRANTED. (Docket Item No. 1423.)

[7] (hereafter, "NSW's Motion to Sever," Docket Item No. 1421.)

[8] (hereafter, "NSW's Motion Re Richard Sexton," Docket Item No. 1438.) Defendant NSW's related Motion to Seal Portions of this Motion is GRANTED. (Docket Item No. 1435.)

[9] (hereafter, "NSW's Motion Re Victor Neuman," Docket Item No. 1442.)

[10] (hereafter, "NSW's Motion for Sanctions," Docket Item No. 1755.)

[11] (Order Setting Daubert Hearing for Plaintiffs' Proffered Expert, Richard Sexton; Setting the Scope of Oral Argument for the June 28 Hearing, Docket Item No. 1730.)

[12] *509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

the claim." Thus, a party may move for summary judgment on the liability issues in a claim, leaving the issue of damages, for example, for trial.

The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Thus, partial summary judgment may be used to dispose of a factually unsupported claim or affirmative defense.

As with a motion on the entire claim, under *Rule 56(c)*, partial summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment [on a part of the claim or an affirmative defense] as a matter of law." *Fed. R. Civ. P. 56(c)*. The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying the evidence which it believes demonstrates the absence of a genuine issue of material fact." *Celotex, 477 U.S. at 323*. The non-moving **[*7]** party must then identify specific facts "showing a genuine issue for trial." *Fed. R. Civ. P. 56(e)*.

When evaluating a motion for partial or full summary judgment, the court views the evidence through the prism of the evidentiary standard of proof that would pertain at trial. *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. The court draws all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight that particular evidence is accorded. See, e.g., *Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1992)*. The court determines whether the non-moving party's "specific facts," coupled with disputed background or contextual facts, are such that a reasonable jury might return a verdict for the non-moving party. *T.W. Elec. Serv. v. Pac. Elect. Contractors, 809 F.2d 626, 631 (9th Cir. 1987)*. In such a case, partial summary judgment is inappropriate. *Anderson, 477 U.S. at 248*. However, where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

2. *Fed. R. Evid. 702*

Federal Rule of Evidence 702 requires that a testifying expert be "qualified as an expert by knowledge, skill, experience, training, or education." *Fed. R. Evid. 702*. The threshold for qualification is low, a minimal foundation of knowledge, skill, and experience suffices. *Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1015-16 (9th Cir. 2004)*; see also *Thomas v. Newton Int'l Enterprises, 42 F.3d 1266, 1269 (9th Cir. 1994)*. When faced with a proffer of expert testimony, a district court must determine whether the testimony **[*8]** is both reliable and relevant. *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* ("Daubert I"). The court has broad discretion in assessing both requirements. See *United States v. Alatorre, 222 F.3d 1098, 1100 (9th Cir. 2000)*.

The reliability requirement ensures "that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. The offering party must show by a preponderance of the evidence (1) that the expert is qualified to render the opinion and (2) that the opinion offered has adequate support. *Daubert I, 509 U.S. at 588-90*. Expert testimony is not admissible if it is speculative. See *Gen. Elec. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)*. To satisfy the relevance requirement, the proffered expert testimony must assist the trier of fact in understanding or determining a fact in issue. *Daubert I, 509 U.S. at 591*. In assessing relevance, the court must look to the governing substantive legal standard. See *Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1320 (9th Cir. 1995)* ("Daubert II").

B. Discussion

The full factual background of this case has been laid out extensively in the Court's prior Orders.[13] The Court addresses the relevant facts and procedural history to the extent they implicate the present Motions below.

1. Plaintiffs' Motion to Vacate Order Re Price-Fixing and Bid-Rigging Claims

Plaintiffs move **[*9]** to vacate or modify the Court's October 15, 2009 Order. Plaintiffs contend that although they were not harmed by a conspiracy to fix high prices, they have standing to bring price-fixing claims because such conduct was the motive for other exclusionary acts aimed at eliminating independent competitors.[14]

In its October 15, 2009 Order, the Court held that "a competitor in the same market cannot have standing to assert a claim for a price-fixing scheme which results in artificially high prices." (October 15, 2009 Order at 4.) Even assuming Defendants colluded to drive up bidding prices, Plaintiffs would suffer no injury as a result, and thus Plaintiffs do not have standing to bring a claim arising from such conduct. (Id.) On November 13, 2009, the Court issued an Order Denying Plaintiffs' Motion for Leave to File a Motion for Reconsideration. (hereafter, "November 13 Order," Docket Item No. 1173.) In its November 13 Order, the Court considered two additional cases that Plaintiffs presented in support of their standing to bring price-fixing and bid-rigging claims,[15] but the Court found that neither case provided a sufficient basis for reconsidering the October 15 Order.

Despite the Court's **[*10]** denial of their previous request for leave to move for reconsideration, and without requesting further leave as required under Civ. *L.R. 7-9(a)*, Plaintiffs now ask the Court to vacate or modify its October 15, 2009 Order. Relying on Story Parchment Co., a case that the Court already addressed and found distinguishable in its November 13 Order, Plaintiffs contend that Defendants conspired to exclude them from the HVAC market so that Defendants could later fix artificially high prices. However, Plaintiffs fail to present the Court with any new evidence of predatory pricing, and instead merely assert a new theory of bid-rigging, contending that Defendants' bid-rigging practice was the motive for other exclusionary acts, supported only by the testimony of Defendants' expert stating that it would not be an "illogical assumption" that one motive of a bid-rigging conspiracy "might be to attempt to eliminate [a] competitor in order to return to bid-rigging."[16] Plaintiffs cannot meet their burden to show standing by putting forward a vague theory supported only by generalized evidence. Moreover, evidence, however tenuous, of Defendants' motive does not substitute for evidence that Defendants' alleged price-fixing **[*11]** or bid-rigging conduct caused Plaintiffs antitrust injury.

Accordingly, the Court DENIES Plaintiffs' Motion to Vacate Order Re Price-Fixing and Bid-Rigging Claims.

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[13] (See, e.g., Order Denying Defendant NSW's Motions for Summary Judgment; Denying Defendant NSW's Motions for Judgment on the Pleadings; Denying F.W. Spencer & Son's Motion for Summary Judgment; Denying all Motions to Strike and Objections Without Prejudice, hereafter, "September 25, 2008 Order," Docket Item No. 779; Order Granting Defendant NSW's Motion for Partial Summary Judgment Re Plaintiffs' Lack of Standing to Assert Price-Fixing Claims, hereafter, "October 15, 2009 Order," Docket Item No. 1136.)

[14] (Plaintiffs' Reply Brief in Support of Motion to Vacate or Modify Court's Order Granting Norman Wright's Partial Summary Judgment Motion Re Lack of Standing to Assert Price-Fixing or Bid-Rigging Claims; or, Alternatively, Motion to Reinstate Plaintiffs' Per Se Illegal Bid-Rigging Claim Against Norman S. Wright, Tempco, Inc., and F.W. Spencer & Son, Inc. at 3, hereafter, "Plaintiffs' Reply Re Price-Fixing" (filed under seal).)

[15] See *Radiant Burners, Inc. v. Peoples Gas Light and Coke Company, 364 U.S. 656, 658, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961)*; *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*.

[16] (Deposition of Lawrence Wu, Ph.D. at 116:22-120:18, Declaration of Russell Brasso in Support of Motion to Vacate or Modify Court's Order (Docket Item No. 1136) Granting Norman Wright's Partial Summary Judgment Motion Re Lack of Standing to Assert Price-Fixing or Bid-Rigging Claims; or Alternatively, Motion to Reinstate Plaintiffs' Per Se Illegal Bid-Rigging Claim Against NSW, Tempco, Inc., AMEC, Inc., and F.W. Spencer & Son, Inc. (filed under seal).)

2. Defendant NSW's Motion for Partial Summary Judgment Re Monopolization, Attempted Monopolization, Exclusive Dealing, and Tying Claims

a. Monopolization and Attempted Monopolization

Defendant NSW contends that Plaintiffs have not established that Defendant NSW has market or monopoly power in the relevant market, which is an essential element of all of their antitrust claims. (NSW's Motion for Summary Judgment Re Antitrust Claims at 2.)

The Ninth Circuit has defined the relevant market as the field in which meaningful competition exists, or "the group of sellers or producers who have the actual or potential ability to deprive each other of significant levels of business." *Image Technical Svcs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202-03 (9th Cir. 1997)* (internal quotation and citation omitted). "Ultimately, what constitutes a relevant market is a factual determination for the jury." *Id. at 1203*. Once the relevant market is defined, the court must determine whether the defendant has monopoly power in that market. "Monopoly power is the power to control prices or exclude competition." *Id. at 1202*. A plaintiff may prove monopoly **[*12]** power, otherwise referred to as market power, by either direct or circumstantial evidence. Id. When proving monopoly power by circumstantial evidence, a plaintiff must show (1) "that the defendant owns a dominant share of the market" and (2) "that there are significant barriers to entry and . . . existing competitors lack the capacity to increase their output in the short run." Id. The Ninth Circuit has recognized that "a market share of less than 50 percent is presumptively insufficient to establish market power" for a monopolization claim, while "a market share of 30 percent is presumptively insufficient to establish the power to control price" for an attempted monopolization claim. *Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995)*.

i. Relevant Market

Here, both of the parties' respective experts agree that the relevant geographic market is Northern California, although they disagree as to whether Fresno and Reno should be included.[17] Both of the experts also agree that the relevant product market is the distribution, sale, and service of HVAC equipment for commercial, industrial, and institutional projects (including hi-rise apartment buildings but not single family homes).[18] However, the experts disagree as to whether the relevant **[*13]** product market includes both "wet-side" and "dry-side" products, or if it is limited to dry-side products only.[19] In light of the differences in opinion between the two experts regarding the relevant product market, the Court finds that there is a genuine issue of material fact as to that issue.

ii. Market Power

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[17] (See Expert Report of Dr. Michael P. Akemann at 30-32, hereafter, "Akemann Report," Declaration of Michael P. Akemann in Support of Motion of Defendant Norman Wright Mechanical Equipment Corporation for Partial Summary Judgment Against Plaintiffs for Claims of Monopolization, Attempted Monopolization, Exclusive Dealing, and Tying, Ex. 3, Attachment A (filed under seal); Videotaped Deposition of Richard J. Sexton, Ph.D. at 52:7-55:16, hereafter, "Sexton Depo.," Declaration of John F. McLean in Support of Motion of Defendant Norman Wright Mechanical Equipment Corporation for Partial Summary Judgment Against Plaintiffs' Claims of Monopolization, Attempted Monopolization, Exclusive Dealing, and Tying, hereafter, "McLean Decl.," Ex. B (excluding Fresno and Reno from the relevant geographic market) (filed under seal).)

[18] (See Akemann Report at 33; Expert Report of Richard J. Sexton at 5-6, hereafter, "Sexton Report," McLean Decl., Ex. C.)

[19] (Compare Akemann Report at 34-35 (opining that the relevant product market includes both wet-side and dry-side products) with Sexton Report at 3-6 (opining that the relevant product market includes only dry-side products).) As the names would imply, wet-side refers to products that handle water, and dry-side refers to products that handle air. See, e.g., Akemann Report at 34.

The experts disagree even more strenuously as to the calculation of Defendant NSW's market share. Defendants' expert, Dr. Michael Akemann, concluded that Defendant NSW's market share averages between 22.1% and 23.2% for the period between 1997-2006, depending on whether Fresno is included in the geographic market. (Akemann Report at 35-42.) Plaintiffs' expert, Dr. Richard Sexton, on the other hand, concluded that Defendant NSW's market share rose steadily from 35.2% in 2002 to 88.1% in 2007. (Sexton Report at 7-14.) Defendant NSW moves to exclude Dr. Sexton's opinion and testimony based on his payroll methodology.[20]

Plaintiffs offer Dr. Sexton's opinion as to Defendant NSWs' market share from 2002 to 2007. One of two methods of computing market share offered by Dr. Sexton is based on payroll data. (Sexton Report at 7-8.) "Payroll data" includes "payments to employees **[*14]** and to company officers, as well as fringe benefits including medical and pension." (Id. at 12.) Dr. Sexton computes Defendant NSW's market share by comparing its payroll in the relevant time period to the total payroll (based on Census Bureau data) in Northern California for "warm air heating and air-conditioning equipment and supplies merchant wholesalers." (Id. at 8, 14.)

To establish the reliability of his payroll method of computing market share, Dr. Sexton relies on the following book: Scherer, F. M., Industrial Market Structure and Economic Performance 56 (1980). (See Sexton Report at 7 n.1.) Dr. Sexton acknowledges that the book uses the term "employment," not "payroll," as one proxy for computing market share. (Sexton Depo. at 91:19-92:1.) Dr. Sexton has never seen employment or payroll discussed as a proxy for sales in any other publication, and he has never used payroll as a proxy for sales in any other antitrust case on which he worked. (Sexton Depo. at 85:9-87:22, 90:1-14.) Dr. Sexton admitted that different business in the industry may have different business models that yield different correlations between a company's payroll and its market share. (Sexton Depo. at 94:9-95:16, 96:17-98:1.) **[*15]**

In support of its motion to exclude Dr. Sexton's opinion, Defendant NSW offers a declaration of Professor Scherer, the author of the textbook, as well as a declaration from its expert Michael Akemann.[21] Professor Scherer states that he used the term "employment" to mean headcount. (Scherer Decl. ¶¶ 1-3.) He did not intend the term "employment" to include "payroll" because payroll is not a good proxy for measuring market share of sales in a market. (Id. ¶ 5.) Both Professor Scherer and Dr. Akemann state that they have never seen payroll used to compute market share in any literature or conference. (Id. ¶ 4; Akemann Decl. ¶ 4.)

At the evidentiary hearing, Dr. Sexton testified that he used payroll data as a proxy for market share of sales because he did not have all the necessary sales data for years 2003 to 2007. He confirmed that he has never seen employment or payroll discussed as a proxy for sales in any publication other than the book on which he relies, and that he has never used payroll as a proxy for sales in any other antitrust case on which he worked. Dr. Sexton testified that payroll market share is a reliable way to show sales market share because an increase in payroll correlates **[*16]** with an increase in sales. However, when questioned by the Court, Dr. Sexton could not provide an exact method by which he would compute an actual percentage of sales market share based on payroll market share. Dr. Sexton also testified that he chose not to use an alternative source of sales data published by McGraw-Hill called the "Dodge Report," which was used by Defendant NSW's expert, Dr. Akemann, because, in Dr. Sexton's opinion, the Dodge Report was not sufficiently reliable. Dr. Sexton conceded that the Dodge Report was available for the time period at issue. Dr. Akemann testified that the Dodge Report is reliable and is used by the U.S. Census Bureau in compiling certain of its reports. For the reasons stated on the record, and in light of Dr. Sexton's failure to demonstrate that payroll market share is a reliable way to compute an actual amount of sales market share—as opposed to the general statement that the two statistics are correlated—the Court finds Dr. Sexton's payroll data method of computing market share insufficiently reliable.

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[20] (NSW's Motion Re Richard Sexton at 2.)

[21] (See Declaration of F.M. Scherer in Support of Defendant NSW's Motion to Exclude Plaintiffs' Expert Dr. Richard Sexton's Opinion Calculating Market Share by Payroll Methodology, Analysis, and Data in Connection with NSW's Motion for Partial Summary Judgment, and at Trial, hereafter, "Scherer Decl.," Docket Item No. 1441; Declaration of Michael P. Akemann in Support of Defendant NSW's Motion to Exclude Plaintiffs' Expert Dr. Richard Sexton's Opinion Calculating Market Share by Payroll Methodology, Analysis, and Data in Connection with NSW's Motion for Partial Summary Judgment, and at Trial, hereafter, "Akemann Decl.," filed under seal.)

Accordingly, the Court GRANTS Defendant NSW's Motion to Exclude Dr. Sexton's report and testimony to the extent he relies on the payroll methodology **[*17]** and data.[22] In light of the Court's finding that Dr. Sexton may not rely on his payroll methodology to calculate market share, the Court analyzes Plaintiffs' claims using only calculations of market share derived from sales data.

In his Report, Dr. Sexton provides a calculation of Defendant NSW's market share based on an analysis of sales data for the year 2002 only. (See Sexton Report at 8, Table 1.) In that year, Dr. Sexton estimates that Defendant NSW had a share in the relevant market of 35.2%. (See Sexton Report at 12, Table 1.) Dr. Akemann, on the other hand, provided calculations of Defendant NSW's market share for the years 1997-2006 ranging from 17.8% in 1997 to 22.1% in 2006, averaging 22.1% for the entire time span. (See Akemann Report at 35-42.) Plaintiffs and Defendant NSW each attack the sales-based market share calculations of the other's expert-Plaintiffs on the ground that Dr. Akemann included in his calculation products that are not part of the product market at issue in this case,[23] and Defendant NSW on the ground that Dr. Sexton erroneously included sales data for Defendant NSW's offices outside of the relevant geographic market.[24]

Even assuming Dr. Sexton's sales-based **[*18]** market share calculation for 2002 is accurate, Plaintiffs have failed to present any evidence that Defendant NSW's share of the relevant market exceeded the minimum threshold of 50% necessary for a monopolization claim. Since their own expert's calculation of 35.2% market share cannot overcome the presumption of insufficiency under Rebel Oil, the Court finds that there is no genuine issue of material fact as to an essential element of Plaintiffs' monopolization claim.[25]

As to Plaintiffs' attempted monopolization claim, Dr. Sexton's 35.2% market share calculation is a sufficient showing to meet the market power element under Rebel Oil. At his deposition, Dr. Sexton admitted that in calculating Defendant NSW's market share for 2002, he may have included sales data for Defendant NSW's offices in Los Angeles, the California Central Coast, Las Vegas, and the Pacific Islands.[26] Dr. Akemann recalculated Defendant NSW's market share using the same data as Dr. Sexton, but took out any sales associated with offices outside of the relevant geographic market, and reduced Dr. Sexton's market share figure to 28.2%.[27] Dr. Sexton stated in a

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[22] On July 1, 2010, after the hearing, Plaintiffs filed a Supplemental Declaration of Dr. Sexton purporting to conduct a new analysis of market share in sales based on 2007 census data discussed at the hearing. (hereafter, "Supplemental Declaration," Docket Item Nos. 1735-1736.) The Court STRIKES the Supplemental Declaration as inappropriately filed without leave of the Court. Although Plaintiffs suggested at the hearing that discovery should be reopened for a limited purpose of allowing each expert to use the new 2007 census data to supplement their reports, the Court did not permit it because discovery has been closed and trial has been set for September. Moreover, both sides' experts conceded that the 2007 census data is not granular enough to provide sales data for the relevant market because it provides data only for the entire California market. Finally, as previously stated, the Court finds that Dr. Sexton's election, without sufficient cause, to not rely on an already available source of sales data, namely, the Dodge Report, is detrimental to his own report and opinion. In light of the Court's striking Dr. Sexton's Supplemental Declaration, the Court DENIES as moot Defendant NSW's Objections and Motion to Strike Dr. Sexton's Supplemental Declaration. (Docket Item No. 1743.)

[23] (Plaintiffs' Opposition to Motion by Norman Wright Mechanical Equipment Corp. For Partial Summary Judgment Against Claims of Monopolization, Exclusive Dealing and Tying at 16-17, hereafter, "Plaintiffs' Opposition to NSW's Motion for Summary Judgment Re Antitrust Claims," Docket Item No. 1524.)

[24] (NSW's Motion for Summary Judgment Re Antitrust Claims at 9.)

[25] Plaintiffs also fail to present any direct evidence of market power. To show market power through direct proof, a plaintiff must put forth "evidence of restricted output and supracompetitive prices, that is direct proof of the injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power." *Rebel Oil, 51 F.3d at 1421*. Here, Plaintiffs have not provided any evidence that Defendant NSW has restricted output, causing prices to rise. To the contrary, Plaintiffs failed to rebut Dr. Akemann's expert opinion that the barriers into entry into the market are low, which would effective prevent Defendant NSW from reducing output. (See Akemann Report at 37-38.)

[26] (Sexton Depo. at 99:2-101:14, 151:6-153:6.)

[27] (Akemann Decl. ¶ 3, Ex. 1.)

subsequent declaration that he did not agree with Dr. Akemann's **[*19]** recalculation of Dr. Sexton's market share figure.[28]

The Court finds that the disagreement between the two experts as to whether Defendant NSW's market share exceeded 30% creates a genuine issue of material fact as to whether Plaintiffs have demonstrated sufficient market power to support an attempted monopolization claim. Furthermore, Dr. Akemann's own calculations of Defendant NSW's market share come exceedingly close to the 30% threshold-reaching 29.9% in 2004 when excluding Fresno from the geographic market. (Akemann Report, Ex. 1.) Since the 30% baseline for an attempted monopolization claim is not absolute, and only creates a presumption of insufficient market power,[29] the Court finds that summary adjudication of Plaintiffs' attempted monopolization claim is inappropriate on the basis of insufficient market share.

Accordingly, the Court DENIES Defendant NSW's Motion for Summary Judgment Re Antitrust Claims as to Plaintiffs' attempted monopolization claims on the ground that there is an insufficient showing of market share.

iii. Barriers to Entry

Defendant NSW contends that there are no significant barriers to entry for the HVAC distribution market in Northern California. (NSW's **[*20]** Motion for Summary Judgment Re Antitrust Claims at 9.) Plaintiffs respond that Defendant NSW's exclusive contracts to distribute certain HVAC products combined with evidence of flat spec'ing practices on HVAC projects are sufficient to create a genuine issue of material fact as to whether there are significant barriers to entry.[30]

As the Ninth Circuit has explained,

> A § 2 plaintiff, establishing monopoly power by circumstantial evidence, must establish more than just market share. Even a 100% monopolist may not exploit its monopoly power in a market without entry barriers. A § 2 plaintiff must show that new competitors face high market barriers to entry and that current competitors lack the ability to expand their output to challenge a monopolist's high prices. Barriers to entry "must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting." Common entry barriers include: patents or other legal licenses, control of essential or superior resources, entrenched buyer preferences, high capital entry costs and economies of scale.

Image Technical Servs., 125 F.3d 1195, 1208 (9th Cir. 1997).

Although Defendant NSW's expert opines that there are no significant barriers to entry for the HVAC **[*21]** distribution market in Northern California,[31] the Court finds that the evidence of Defendant NSW's exclusive contracts to distribute certain HVAC products and flat spec'ing practices on HVAC projects is sufficient to create a genuine issue of material fact as to whether there are significant barriers to entry.

In sum, the Court finds that Plaintiffs' evidence of Defendant NSW's market share is insufficient to support Plaintiffs' monopolization claims, but sufficient to support Plaintiffs' attempted monopolization claims. Accordingly, the Court GRANTS Defendant NSW's Motion for Summary Judgment Re Antitrust Claims as to Plaintiffs' monopolization claims, but DENIES Defendant NSW's Motion for Summary Judgment Re Antitrust Claims as to Plaintiffs' attempted monopolization claims.

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[28] (See Declaration of Attorney in Support of Plaintiffs' Opposition to Motion by Norman Wright Mechanical Equipment Corp. For Partial Summary Judgment Against Claims of Monopolization, Attempted Monopolization, Exclusive Dealing and Tying, Ex. J ¶ 6, Docket Item No. 1525.)

[29] See *Rebel Oil, 51 F.3d at 1438*.

[30] (Plaintiffs' Opposition to NSW's Motion for Summary Judgment Re Antitrust Claims at 21-23.)

[31] (Akemann Report at 37-38.)

b. Tying

Defendant NSW moves for summary judgment as to Plaintiffs' tying claims on the ground that Plaintiffs failed to define the relevant tying product market or demonstrate that Defendant NSW has market power in the tying product market. (NSW's Motion for Summary Judgment Re Antitrust Claims at 19-21.) Plaintiffs respond that Defendant NSW's coercion of engineers to flat-spec products represented exclusively by **[*22]** Defendant NSW functioned in each instance to create infinite market power with respect to each flat-spec'ed product. (Plaintiffs' Opposition to NSW's Motion for Summary Judgment Re Antitrust Claims at 11-12.)

A tying arrangement is an "agreement by a party to sell one product but only on the condition that the buyer also purchases a different product, or at least agrees that he will not purchase that product from any other supplier." *Eastman Kodak Co. v. Image Technical Services, Inc., 405 U.S. 438, 461, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1992)*. Such arrangements are proscribed by both *Section 1* of the Sherman Act and *Section 3* of the Clayton Act. *15 U.S.C. §§ 1*, *14*. The analysis of a tying arrangement under both provisions are virtually the same. *Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1189 n.2 (9th Cir. 1984)*. The "essential characteristic" of an unlawful tying arrangement is the "seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have purchased elsewhere on different terms." *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*.

The Supreme Court has held that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. As discussed in relation to Plaintiffs' monopolization claims, market power can only be demonstrated once the relevant market has been defined. **[*23]** See *Rebel Oil, 51 F.3d at 1434*.

Here, Plaintiffs do not allege a tying market in their pleadings, but assert two alternative definitions of the tying market in their Opposition brief. First, Plaintiffs contend that the tying product market is defined by the design specifications for each individual project on which flat spec'ing occurs. (Plaintiffs' Opposition to NSW's Motion for Summary Judgment Re Antitrust Claims at 11-12.) Plaintiffs contend that by definition, Defendant NSW has a 100% share of the market for a tying product where that product has been flat-spec'ed for a particular project and Defendant NSW is the exclusive distributor of that product. The Court finds that Plaintiffs define the tying market far too narrowly. While Defendant NSW's exclusive ability to distribute a flat spec'ed product may prevent competitors from participating in one particular project, it does not follow that competition is harmed as to any other project that involves HVAC products. Plaintiffs have simply failed to provide any evidence whatsoever that a single project where flat spec'ing occurs is a relevant market.

Plaintiffs second theory, although not stated explicitly, is that the tying product market is the broader market **[*24]** for HVAC product distribution. In fact, Plaintiffs themselves define the relevant market in this case as warm-air HVAC equipment sold to commercial, industrial, and institutional users or their agents. (*Id. at 15*.) Defining the market in this manner is equally problematic, however, for the opposite reason. The market for HVAC products generally includes both the alleged tying product and the tied products. Since by definition, tying can only occur between products in two distinct markets, a tying claim cannot be maintained where the market is defined to encompass both products.

Since Plaintiffs have failed to define an adequate tying market, it is impossible for Plaintiffs to demonstrate that Defendants have sufficient market power to sustain their tying claim. Accordingly, the Court GRANTS Defendant NSW's Motion for Summary Judgment Re Antitrust Claims as to Plaintiffs' tying claims.

c. Exclusive Dealing

Defendant NSW moves for summary judgment on Plaintiffs' exclusive dealing claim on the grounds that (1) any contracts between Defendant NSW and manufacturers of HVAC parts did not foreclose competition in the relevant market, and (2) Plaintiffs have not adequately defined the relevant market. **[*25]** (NSW's Motion for Summary

Judgment Re Antitrust Claims at 21-23.) Plaintiffs contend that each of the allegedly unlawful tying relationships inherently constitutes an exclusive deal under Section 3 of the Clayton Act.[32]

Under Section 3 of the Clayton Act, it is "unlawful for any person . . . make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly." *15 U.S.C. § 14*. ***Antitrust law*** places this limit on exclusive dealing contracts, in which a buyer is obligated to deal only with a particular seller of a product or service, due to their "tendency to foreclose existing competitors or new entrants from competition in the covered portion of the relevant market during the term of the agreement." *Omega Envtl. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)*.

Unlike tying arrangements, however, exclusive dealing contracts are analyzed under the rule of reason. This is because, in addition to the potential competition-enhancing effects of exclusive dealing arrangements, "virtually every contract to buy forecloses or excludes alternative **[*26]** sellers from some portion of the market, namely the portion consisting of what was bought." Id. (citing *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236 (1st Cir. 1983)*. Accordingly, "only those arrangements whose probable effect is to foreclose competition in a substantial share of the line of commerce affected" violate Section 3 of the Clayton Act. Id. (citing *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

Here, Plaintiffs have produced evidence that for projects on which one part sold by Defendant NSW was flat spec'ed (*i.e.*, determined to have no known equal and was therefore required for that project), Defendant NSW would submit a "bundled" bid in which the project owner would be required to purchase a bundle of parts from Defendant NSW.[33] Project owners understood that they had no choice but to accept the bundled bid, because if they did not, then Defendant NSW would simply refuse to sell the flat spec'ed part individually.[34] Defendant NSW's "bundling" gave it the power to charge supra-competitive prices.[35]

Plaintiffs also offer the opinion of their expert, Dr. Sexton, that the relevant product market is the dry-side HVAC equipment market for sale to commercial, industrial, and institutional users. (See Sexton Report at ¶¶ 1-2.) To show that the alleged exclusive dealing "substantially **[*27]** lessen[ed] competition or tend[ed] to create a monopoly," Plaintiffs offer the same evidence as offered for their other anti-trust claims. Since the Court has already found Plaintiffs' evidence sufficient to support a claim of attempted monopolization, the Court finds it sufficient to show that Defendant NSW's alleged exclusive dealing "tend[ed] to create a monopoly." Thus, the Court finds that Plaintiffs have presented sufficient evidence to create a triable issue of fact as to their claim for exclusive dealing.

Accordingly, the Court DENIES Defendant NSW's Motion for Summary Judgment Re Antitrust Claims as to exclusive dealing.

3. Defendant FWS' Motion for Summary Judgment

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[32] (Plaintiffs' Opposition to Defendant NSW's Motion for Partial Summary Judgment Against Claims of Monopolization, Attempted Monopolization, Exclusive Dealing, and Tying at 14, hereafter, "Opp'n to Motion for Summary Judgment Re Antitrust Claims," Docket Item No. 1524.) Thus, by Plaintiffs' own contention, their exclusive dealing claim is apparently not based on a theory involving contracts between Defendant NSW and manufacturers of HVAC parts.

[33] (See Declaration of Zane D. Negrych in Support of Plaintiffs' Opposition to Defendant NSW's Motion for Partial Summary Judgment Against Claims of Monopolization, Attempted Monopolization, Exclusive Dealing, and Tying, hereafter, "Negrych Decl.," Ex. D (Declaration of Michael Sabbaghian) at 27:14-30:6, Ex. E (Declaration of Mike Reppas) ¶ 10, Ex. G (Declaration of Grady Shirley) at 15:14-17:14, Ex. H (Deposition of John Stultz) at 283:11-285:25, Docket Item No. 1525.)

[34] (See, e.g., Negrych Decl., Ex. E ¶ 10.)

[35] (See Sexton Report ¶¶ 7, 10; Negrych Decl., Ex. D at 27:14-30:6, Ex. E ¶ 11.)

Defendant FWS moves for summary judgment as to all claims against it on the grounds, *inter alia*, that (1) Plaintiffs and Defendant FWS are not participants in the same market, and (2) Plaintiffs have not produced sufficient evidence that Defendant FWS conspired with Defendant NSW to exclude Plaintiffs from the HVAC market to create a triable issue of fact. (Defendant FWS' Motion for Summary Judgment at 1.)

To have antitrust standing, "the injured party [must] be a participant in the same market as the alleged malefactors." **[*28]** *Amarel v. Connell, 102 F.3d 1494, 1508 (9th Cir. 1996)* (internal quotations and citations omitted). However, antitrust standing is not strictly limited to competitors and consumers. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1054 (9th Cir. 1999)*. "While consumers and competitors are most likely to suffer antitrust injury, there are situations in which other market participants can suffer antitrust injury. Not surprisingly, courts routinely recognize the antitrust claims of market participants other than consumers or competitors."[36]

Here, as previously discussed, it is undisputed that the relevant product market is the distribution, sale, and service of HVAC equipment for commercial, industrial, and institutional projects.[37] By Plaintiffs' own admission, Defendant FWS is a mechanical engineering contractor and sub-contractor, which specializes in the design and installation of HVAC systems, while Plaintiffs are representatives of manufacturers of HVAC **[*29]** systems.[38] Thus, it is clear that Defendant FWS is not a direct competitor of Plaintiffs. However, the fact that Defendant FWS does not directly distribute, sell, or service HVAC systems[39] does not mean they do not participate in the same market as Plaintiffs. In fact, Defendant FWS admits that as a mechanical engineering contractor, it is a customer of mechanical equipment representatives such as Plaintiffs and Defendant NSW.[40] The Court finds that as a customer of HVAC systems, Defendant FWS participates in the same market as Plaintiffs, who distribute and sell HVAC systems on behalf of the manufacturers.

In support of their contention that Defendant FWS conspired with Defendant NSW to exclude Plaintiffs from the relevant market, Plaintiffs present evidence that, among other things, (1) Defendant FWS earned abnormally high profits on the eight projects that it worked on with Defendant NSW,[41] and (2) contrary to its own policy, Defendant

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[36] *Id. at 1057*; see also, e.g., *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 345, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (recognizing that gasoline dealers may bring antitrust suit against oil company); *Adaptive Power Solutions, LLC v. Hughes Missile Sys. Co., 141 F.3d 947 (9th Cir. 1998)* (analyzing supplier's antitrust injury). As the Supreme Court has recognized,

> The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize outlawed acts because they were done by any of these. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948).

[37] (See supra Part 2.)

[38] (Third Amended Complaint for Injunction and Treble Damages ¶¶ 1, 12, hereafter, "TAC" (filed under seal).)

[39] Plaintiffs represent in their Opposition that in design-build projects, Defendant FWS does sell HVAC products directly to owners, placing them in direct competition with Plaintiffs. (Plaintiffs' Opposition to F.W. Spencer's Motion for Summary Judgment or in the Alternative Summary Adjudication at 5 (filed under seal).) However, Plaintiffs do not present any evidence to support this contention. Thus, standing alone, this representation cannot create a triable issue of fact as to Defendant FWS' participation in the same market as Plaintiffs.

[40] (Reply of F.W. Spencer, Inc. in Support of Motion for Summary Judgment or in the Alternative Summary Adjudication at 3, hereafter, "FWS' Reply Re Summary Judgment," Docket Item No. 1547.)

[41] (Declaration of Russell Brasso in Support of Plaintiffs' Opposition to F.W. Spencer's Motion for Summary Judgment or in the Alternative Summary Adjudication ¶ 9, hereafter, "Brasso Decl.," Ex. 7 (filed under seal) (table attached to Plaintiffs' Expert Report showing that average contractor earning on a construction project is 2%, while Defendant FWS realized much higher earnings on the projects at issue here).)

FWS accepted Defendant NSW's high bid over Plaintiffs' lower bid on the Moscone Center Project.[42] When Plaintiffs' counsel confronted Defendant FWS principal William Spencer at deposition regarding Defendant FWS accepting Defendant NSW's higher bid over Plaintiffs' **[*30]** lower bid, Mr. Spencer responded, "I'm surprised-this must not be all-inclusive. That's all I could think of. Or maybe it wasn't-I don't know. But I know that we would normally use the lowest price." (Id. at 455:6-9.) The Court finds that Mr. Spencer's explanation, especially when viewed in connection with the evidence of Defendant FWS' abnormally-high profits, leaves open significant questions regarding the nature of the dealings between Defendant FWS and Defendant NSW that could lead a reasonable jury to infer that the two companies conspired to exclude Plaintiffs from the commercial HVAC market.

Accordingly, the Court DENIES Defendant FWS' Motion for Summary Judgment.[43]

4. Plaintiffs' and Defendant NSW's Motions Re Commercial Bribery

Plaintiffs and Defendant NSW each move for summary judgment as to Plaintiffs' claims for commercial bribery. Plaintiffs' Motion relies solely on *Cal. Bus. & Prof. Code § 17045*, while Defendant NSW's Motion relies on both *Cal. Bus. & Prof. Code § 17045* and the Robinson-Patman Act *Section 2(c)*, *15 U.S.C. § 13(c)*.

Plaintiffs contend that the evidence conclusively shows that both Defendants engaged in a scheme in which they bribed project owners to specify and purchase Defendant NSW's products rather than those of its competitors, such as **[*31]** Plaintiffs. (Plaintiffs' MSJ Re Bribery at 1.) Defendants contend that (1) the operative complaint does not contain a cause of action for commercial bribery under *§ 17045*, (2) mechanical engineering firms and employees are not customers of Defendant NSW and therefore the alleged bribery is not within the scope of *15 U.S.C. § 13(c)*, (3) Plaintiffs have not shown the requisite flow of relevant persons or activities in interstate or international commerce, and (4) Plaintiffs have presented no evidence of harm to competition or any other damages.[44]

Section 2(c) of the Robinson-Patman Act states:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other

[42] (Deposition of William D. Spencer, Vol. III at 433:7-19, 452:25-455:9, Brasso Decl., Ex. 3.) Defendant FWS objects to the admission of Mr. Spencer's deposition testimony on the grounds that (1) counsel objected to the form of the question and as to lack of personal knowledge at the time of the deposition, and (2) the testimony is irrelevant to the issue of Defendant FWS' involvement in causing antitrust injury to Plaintiffs. (Defendant FWS' Objections to Evidence Submitted by Plaintiffs in Support of Plaintiffs' Opposition to F.W. Spencer's & Son, Inc.'s Motion for Summary Judgment at 7, Docket Item No. 1548.) Upon review of the deposition transcript, the Court finds that Mr. Spencer's answer is responsive and does not exhibit any confusion as to what was being asked. Furthermore, as the company principal, the Court finds that Mr. Spencer is likely to have personal knowledge of Defendant FWS' bidding practices. Finally, the Court finds that the testimony is relevant to establish that Defendant FWS' acceptance of Defendant NSW's higher bid was an aberration from regular company policy, which could lead a reasonable juror to infer anticompetitive conduct. Accordingly, the Court OVERRULES Defendant FWS' objection with regard to Mr. Spencer's deposition testimony.

[43] Defendant FWS contends that since it was only involved in 17 out of 154 projects at issue in this action, Defendant FWS cannot be held jointly and severally liable as a co-conspirator on the projects with which it had no involvement. (FWS' Motion for Summary Judgment at 10; FWS' Reply Re Summary Judgment at 6.) The Court finds that it is unnecessary for purposes of this Motion to make determinations as to Defendant FWS' potential co-conspirator liability for particular projects. To the extent that it seeks to limit the jury's consideration of its alleged liability to particular projects, Defendant FWS shall do so through motions *in limine* at the appropriate time.

[44] (NSW's MSJ Re Bribery at 1-2; see also Defendant FWS' Opposition to Partial Summary Judgment Re Commercial Bribery against both NSW and FWS, Docket Item No. 1523.)

> intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation **[*32]** is so granted or paid.

15 U.S.C. § 13(c). "The reach of *section 2(c)* extends only to persons and activities which are themselves within the flow of commerce among the states or with foreign nations, but does not extend to all activities which affect such commerce." *Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116, 1122 (9th Cir. 2003)*. "This interstate commerce requirement has been treated as a threshold jurisdictional question." *May Dept. Store v. Graphic Process Co., 637 F.2d 1211, 1216 (9th Cir. 1980)*.

Although *Section 2(c)* does not explicitly cover commercial bribery, the Ninth Circuit has held that it "encompasses cases of commercial bribery tending to undermine the fiduciary relationship between a buyer and its agent, representative, or other intermediary in a transaction involving the sale or purchase of goods, wares or merchandise." See *Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965)*. "Agency is the fiduciary relationship that arises when one person, the principal, manifests assent to the agent for the agent to act on the principal's behalf and subject to the principal's control, and the agent agrees or otherwise consents." *U.S. v. Bonds, 608 F.3d 495, 2010 WL 2331456, at *18 (9th Cir. June 11, 2010)*. "[A]gency requires (a) the principal's assent; (b) the principal's right to control; (c) the agent acting on the principal's behalf or benefit; and (d) the agent's consent." Id. The existence of an agency relationship is normally a question of fact, but it "becomes a question of law **[*33]** when the facts can be viewed in only one way." *J. L. v. Children's Institute, Inc., 177 Cal. App. 4th 388, 403, 99 Cal. Rptr. 3d 5 (Cal. Ct. App. 2009)*.

Cal. Bus. & Prof. Code § 17045 "closely parallels the federal Robinson-Patman Antidiscrimination Act." *Diesel Electric Sales & Serv., Inc. v. Marco Marine San Diego, Inc., 16 Cal. App. 4th 202, 212, 20 Cal. Rptr. 2d 62 (Cal. Ct. App. May 5, 1993)*. *Section 17045*, entitled "Secret Payments or Allowances," is part of California's Unfair Practices Act ("UPA"). The purpose of the UPA is "to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented." *ABC Int'l Traders, Inc. v. Matsushita Electric Corp., 14 Cal. 4th 1247, 1256, 61 Cal. Rptr. 2d 112, 931 P.2d 290 (Cal. 1997)*. To that end, *§ 17045* provides:

> The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

A violation of *§ 17045* requires (1) a "secret" allowance of an "unearned" discount, (2) "injury" to a competitor, and (3) the allowance must tend to destroy competition. *Diesel Electric Sales, 16 Cal. App. 4th at 212*. While competitive injury is an element of a claim under *§ 17045*, it is not an element of a prima facie **[*34]** violation of *§ 2(c)* of the Robinson-Patman Act. See *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 220 (2d Cir. 2004)*.

As an initial matter, the Court finds that Plaintiffs have included a claim for commercial bribery under *§ 17045* in their Third Amended Complaint. (See Docket Item No. 42 ¶¶ 78-94.) In support of their commercial bribery claims under both the Robinson-Patman Act and *§ 17045*, Plaintiffs offer evidence that Defendant NSW purchased various gifts, some exceeding $10,000, hotel accommodations, fishing trips, and other travel for various of its customers and to mechanical engineers that worked with Defendant NSW's customers.[45] While some of the gifts appear to bear a connection (if only loosely) to goods purchased by the customers, other gifts appear to have no connection to any particular sale or purchase of goods.[46] Plaintiffs offer evidence that Defendant FWS, acting in concert with

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[45] (See Declaration of Russell Brasso in Support of Motion for Partial Summary Judgment Re Commercial Bribery, Exs. 1-9, hereafter, "Brasso Decl. ISO Plaintiffs' MSJ Re Bribery," Docket Item No. 1453, filed under seal.)

[46] (Compare Brasso Decl. ISO Plaintiffs' MSJ Re Bribery, Ex. 1 with Brasso Decl. ISO Plaintiffs' MSJ Re Bribery, Ex. 3.)

Defendant NSW, paid a $25,000 "kickback" to one of Defendant NSW's customers.[47] Further, Plaintiffs present evidence that at least one of the alleged bribes was made directly to one of Defendant NSW's customers.[48] The issue becomes whether the alleged bribery occurred within the flow of commerce, whether the mechanical engineer firms acted as agents of Defendant NSW's customers, and **[*35]** whether Plaintiffs have been damaged by Defendants' alleged acts of bribery.

a. Bribery Activities Within the Flow of Commerce

Plaintiffs have presented evidence that at least one of the alleged bribes satisfies the Robinson-Patman Act's requirement that the alleged activity be "within the flow of commerce among the states or with foreign nations." *Rotec Indus., 348 F.3d at 1122*. Specifically, in at least one instance, evidence shows that goods were purchased by Defendant NSW as a gift in California for delivery to a mechanical engineer in Mexico.[49] This evidence establishes a triable issue of fact as to fulfillment of the interstate commerce requirement, since the evidence implies that the goods crossed the border from California to Mexico.

b. Mechanical Engineering Firms as Agents of Defendant NSW

To show that the mechanical engineering firms acted as agents of Defendant NSW's customers, Plaintiffs offer the opinion of their expert, Victor Neuman, that mechanical engineers generally act as agents of the owners of public projects (*i.e.*, Defendant NSW's customers).[50] Mr. Neuman opines that as a result of bribing by Defendant NSW, "the content of the specifications prepared by mechanical design engineers **[*36]** favoring [Defendant NSW] strongly coerced customers of [Defendant NSW] to purchase [Defendant NSW's] bundled packages of products even when other less expensive substitutes like those sold by Plaintiffs were available."[51] In this manner, the mechanical engineers as agents allegedly acted contrary to the fiduciary duty owed to their principals—Defendant NSW's customers.

c. Damage and Competitive Injury

To show damage and competitive injury, Plaintiffs offer the opinion of their damages expert, Dr. Stephen Degnan, that Plaintiffs were damaged under several alternative damages models as a result of the allegedly anticompetitive conduct.[52] One of Dr. Degnan's opinions relies on the opinion of another of Plaintiffs' experts, Mr. Victor Neuman, that Plaintiffs would have won approximately 37% more projects on which they bid in the absence of Defendants'

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[47] (Brasso Decl. ISO Plaintiffs' Opp'n, Ex. 25, Deposition of Steven R. Burns at 309:21-314:22.)

[48] (See Brasso Decl. ISO Plaintiffs' MSJ Re Bribery, Ex. 7.) To the extent that *§ 17045* requires that the alleged bribes be "secret," the Court finds that Plaintiffs have presented sufficient evidence to raise a triable issue of fact as to the secrecy of the alleged bribes. (See Declaration of John Karamanos in Support of Plaintiffs' Motion for Partial Summary Judgment against Norman Wright for Commercial Bribery ¶¶ 4-5, Docket Item No. 1451.)

[49] (Brasso Decl. ISO Plaintiffs' MSJ Re Bribery, Ex. 3.)

[50] (See Declaration of Russell Brasso in Support of Plaintiffs' Opposition to Norman Wright's Motion for Partial Summary Judgment against Plaintiffs' Claims Under *15 U.S.C. § 13(c)* and *Cal. Bus. & Prof. Code § 17045*, hereafter, "Brasso Decl. ISO Plaintiffs' Opp'n," Ex. 1, Expert Witness Report of Victor Neuman at 6, hereafter, "Neuman Report," Docket Item No. 1514, filed under seal.)

[51] (Neuman Report at 7.)

[52] (See id., Ex. 2, Expert Report of Dr. Steven Degnan at 15-19.)

allegedly anticompetitive conduct.[53] Since this opinion by Mr. Neuman is the subject of Defendant NSW's motion to exclude, the Court addresses it as a preliminary matter.[54]

Plaintiffs contend that Mr. Neuman's opinion is based on a reliable methodology and data, and that Defendant NSW's motion goes to the weight of the testimony, not admissibility. **[*37]** [55] Although Mr. Neuman claims that he based his opinion on a "nationwide survey" that he conducted,[56] Mr. Neuman's survey was actually based on "eleven responses from mechanical sales representatives" who represented one company, Tek-Air Systems (a customer of Defendant NSW) in 2010. (*Id. at 17-18*.) Mr. Neuman also attempted to survey 29 other mechanical sales representatives, but received no response.[57] Mr. Neuman conceded at his deposition that the eleven representatives who returned his phone calls were those with whom he had the closest personal relationship. (Id. at 99:7-18.)

Moreover, Mr. Newman report does not disclose his methodology (*i.e.*, why he chose to survey those representatives as opposed to others), error rate, or whether the sample that he obtained was representative of the relevant industry or market. The report also does not explain why a nationwide survey bears on the issue of bid-win percentages in the Northern California market. In short, Mr. Neuman's report provides no explanation as to why his method of survey is reliable. The Court finds that Mr. Neuman's opinion based on survey evidence falls far short of meeting the reliability requirement of *Rule 702*. Thus, the Court finds that **[*38]** Mr. Neuman's opinion as to his survey is inadmissible.

However, although one model offered by Dr. Degnan is based on the inadmissible opinion testimony of Victor Neuman, Dr. Degnan has offered several alternative damages models.[58] The Court finds Dr. Degnan's other damages models, such as a "market forecast" model of Plaintiffs' sales in the absence of the anticompetitive conduct, sufficient to raise a triable issue of fact as to damages under Plaintiffs' commercial bribery claims.

In sum, the Court finds that both sides have presented sufficient evidence to raise a triable issue of fact under both the Robinson-Patman Act and *§ 17045* as to the existence of payments or commissions made by Defendants to Defendant NSW's customers for an improper purpose. Accordingly, the Court DENIES Plaintiffs' Motion for Partial Summary Judgment Re Bribery and DENIES Defendant NSW's Motion for Partial Summary Judgment Re Bribery.[59] The Court GRANTS Defendant NSW's Motion to Strike the expert opinion and testimony of Victor Neuman based on his survey.

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[53] (See Declaration of Howard I. Miller in Support of Motion of Defendant NSW to Exclude Plaintiffs' Expert Victor Neuman's Fifth Opinion and any Testimony on his Survey in Connection with Motion for Partial Summary Judgment, and at Trial, hereafter, "Miller Decl.," Ex. A, Expert Witness Report of Victor Neuman, hereafter, "Neuman Report," Docket Item No. 1443.)

[54] (NSW's Motion Re Victor Neuman at 1.)

[55] (Plaintiffs' Opposition to Defendant NSW's Motion to Exclude Plaintiffs' Expert Victor Neuman's Fifth Opinion and any Testimony on his Survey in Connection with Motion for Partial Summary Judgment, and at Trial at 1-2, Docket Item No. 1510, filed under seal.)

[56] (See Neuman Report at 17-18.) Mr. Neuman is an engineer and Plaintiffs offer him as an expert in mechanical engineering. (Id. at 1-2.)

[57] (Miller Decl., Ex. B, Deposition of Victor Neuman at 95:9-19, hereafter, "Neuman Depo.")

[58] (See id., Ex. 2, Expert Report of Dr. Steven Degnan at 15-19.) Defendant NSW's motion to exclude is not directed to these other damages models.

[59] The Court DENIES Defendants' Objections and Motion to Strike Plaintiffs' evidence offered in support of Plaintiffs' MSJ Re Bribery, since the Court did not rely on the declarations of John Karamanos on the issue of damages and David Norman. The exhibits to the Brasso Declarations relied on by the Court are emails and invoices, which may constitute business records, and deposition transcripts. (See Docket Item Nos. 1489, 1522.)

5. Plaintiffs' Motion for Order Regarding Defendants' Claims of Indemnity or Contribution

Plaintiffs move for an Order finding void any agreement between Defendant **[*39]** NSW and Defendant FWS which purports to create any obligations of indemnity or contribution between them arising from Plaintiffs' antitrust claims. (Plaintiffs' Motion Re Indemnity at 1.) Plaintiffs contend that any such agreement is invalid because there is no right to contribution for claims brought under the Sherman Act or Clayton Act. (*Id. at 2*.) Defendant FWS responds that Plaintiffs lack constitutional standing to challenge any agreement between Defendants creating obligations of indemnity or contribution because Plaintiffs cannot show that they have suffered any injury as a result of such an agreement and because no claim for contribution or indemnity is before the Court.[60]

The Court finds that Plaintiffs' Motion is not ripe for adjudication. First, there are no claims for contribution or indemnity before the Court. Second, it appears that to the extent Defendants FWS and NSW have such an agreement, they have initiated state court proceedings to resolve any contribution or indemnity claims.[61] Finally, Plaintiffs contend that absent the Court's intervention, Defendant NSW will be less likely to settle since they could still be held responsible for any judgment imposed against Defendant FWS. **[*40]** However, Plaintiffs' contention that the Defendants' agreement is interfering with their settlement efforts is purely speculative. Plaintiffs do not provide any evidence indicating that either Defendant has been less amenable to settlement because of the possibility of a claim for indemnity or contribution in the event of a finding of liability.

Accordingly, the Court DENIES Plaintiffs' Motion for Order Regarding Defendants' Claims of Indemnity or Contribution.

6. Defendant NSW's Motion to Sever Claims Against Defendant FWS

Defendant NSW moves to sever Plaintiffs' claims against Defendant FWS on the ground that the claims against Defendant FWS do not pertain to antitrust violations, but to Defendant FWS' allegedly improper receipt of monetary benefits under a certain San Francisco ordinance that pertains to bid discounts for minority businesses. (NSW's Motion to Sever at 2-3.) Plaintiffs contend that its antitrust claims are based on a conspiracy perpetrated by both Defendants and that there is no separate cause of action in the operative complaint.[62]

The Court finds no basis for severing claims at this time. Plaintiffs allege a conspiracy by both Defendants to commit the various anti-trust **[*41]** and commercial bribery violations. There is no separate cause of action based on "minority contracting." To the extent that Defendant NSW seeks to exclude testimony regarding "minority contracting" as unduly prejudicial to the jury, it may move *in limine* before trial to exclude such evidence.

Accordingly, the Court DENIES Defendant NSW's Motion to Sever.

7. Defendant NSW's *Ex Parte* Application for Leave to File Motion for Terminating Sanctions

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[60] (FWS' Opposition to Plaintiffs' Motion for Order Regarding Defendants' Claims of Indemnity or Contribution at 2, hereafter, "FWS' Opposition Re Indemnity," Docket Item No. 1500.) Defendant NSW did not oppose Plaintiffs' Motion Re Indemnity. (Statement of Non-Opposition by Defendant NSW to Plaintiffs' Motion for Order Regarding Defendants' Claims of Indemnity or Contribution, Docket Item No. 1501.)

[61] In its Opposition, Defendant FWS represents that in November 2008, it filed suit in San Mateo Superior Court against Defendant NSW on the indemnity provision of a purchaser order implicated in the present case. (FWS' Opposition to Plaintiff's Motion for Order Regarding Defendants' Claims of Indemnity or Contribution at 2, Docket Item No. 1500.) Defendant FWS further represents that in or about November 2009, it voluntarily dismissed the indemnity lawsuit against Defendant NSW subject to a "standstill agreement." (*Id. at 2-3*.)

[62] (Plaintiffs' Opposition to Defendant NSW's Motion for an Order for Severance of the Claims Against Defendant FWS or, at a Minimum, Severance of Minority Contracting Claims at 1 4, Docket Item No. 1503.)

Defendant NSW moves *ex parte* for an application for leave to file a Motion for Terminating Sanctions against Plaintiffs on the ground that Plaintiffs have failed to produce, as ordered by the Court, settlement agreements between Plaintiffs and former co-Defendants. (NSW's Motion for Sanctions at 2.)

Upon review of Defendant NSW's Application, the Court finds that Plaintiffs' alleged failure to turn over the documents does not warrant terminating sanctions at this time. However, to the extent that to date, Plaintiffs have failed to turn over these documents, Defendant NSW may make a motion before the Magistrate Judge for a contempt order and related monetary sanctions for attorney fees as a result of having to seek yet another Court order for compliance. **[*42]** It is worth noting that the Ninth Circuit has denied Plaintiffs' motion to stay the Court's March 17, 2010 Order pending its writ of mandamus on this issue. (See Docket Item No. 1729.) Thus, there is no good cause for Plaintiffs not to comply with the Court's Order.

Accordingly, the Court ORDERS that on or before **July 28, 2010**, Plaintiffs shall comply with the discovery orders regarding these settlement agreements, namely, to deliver these documents to Defendants' counsel's office.[63] Failure to comply with this Order will provide further basis for the Court to award appropriate monetary sanctions against Plaintiffs.

C. Conclusion

In summary, the Court:

(1) DENIES Plaintiffs' Motion to Vacate Order Re Price-Fixing and Bid-Rigging Claims;
(2) GRANTS in part and DENIES in part Defendant NSW's Motion for Summary Judgment Re Antitrust Claims;
(3) DENIES Defendant FWS' Motion for Summary Judgment;
(4) DENIES Plaintiffs' Motion for Partial Summary Judgment Re Commercial Bribery Against Defendants;

(5) DENIES Defendant NSW's Motion for Partial Summary Judgment against Plaintiffs' Claims Under *15 U.S.C. § 13(c)* and *Cal. Bus. & Prof. Code § 17045*;
(6) DENIES Plaintiffs' Motion Re Indemnity;

(7) DENIES Defendant NSW's Motion to Sever the Claims Against **[*43]** Defendant FWS;
(8) GRANTS Defendant NSW's Motion to Exclude Plaintiffs' Expert Richard Sexton's Opinion and Testimony based on payroll methodology,
(9) GRANTS Defendant NSW's Motion to Exclude Plaintiffs' Expert Victor Neuman's Fifth Opinion and Testimony Re his Survey; and

(10) DENIES Defendant NSW's *Ex Parte* Application for Leave to File Motion for Terminating Sanctions. However, on or before **July 28, 2010**, Plaintiffs shall comply with the discovery orders regarding the settlement agreements, namely, to deliver the documents to Defendants' counsel's office.

In light of this Order and prior dispositive orders, only the following causes of action remain for trial:

(1) First Cause of Action for Breach of Statutes in Restraint of Trade as to the UCSF Project;[64]
(2) Second Cause of Action for Breach of Statutes in Restraint of Trade as to the Davis Projects;
(3) Third Cause of Action for Breach of Statutes in Restraint of Trade as to Other Construction Projects;
(4) Fourth Cause of Action for Violation of the False Claims Act;
(5) Tenth, Eleventh, Twelfth, and Thirteenth Causes of Action for Interference with Business Relationship; and
(6) Fifteenth Cause of Action for Injunctive Relief.

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[63] The documents are: Arup (Bates No. Settlement Agreement 00001-00021); Tempco, Inc. (Bates No. Settlement Agreement 00022-00027); Affiliated Engineers, Inc. (AEI) (Bates No. Settlement Agreement 00035-00041); and AMEC (produced redacted, unexecuted and without Bates Stamp).

[64] Under the First, Second and Third antitrust causes of action, Plaintiffs may try their claims for attempted monopolization and exclusive dealing.

Plaintiffs **[*44]** may not rely on theories of price-fixing or bid-rigging arrangements to support any of their causes of action.

Finally, in light of this Order, the parties shall meet and confer, in preparation for the **August 23, 2010** Final Pretrial Conference, and file a Joint List of pending Motions *in Limine*. The parties shall withdraw any current pending *in limines* that are moot in light of this Order. The Joint List shall set out each Motion, its related docket entry, and the ground(s) on which the Motion is based. The Joint List shall be filed on or before **August 6, 2010**.

Dated: July 21, 2010

/s/ James Ware

JAMES WARE

United States District Judge

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Baker v. Aegis Wholesale Corp.

United States District Court for the Northern District of California

July 21, 2010, Decided; July 21, 2010, Filed

No. C 09-5280 PJH

Reporter
2010 U.S. Dist. LEXIS 73760 *; 2010 WL 2853915

VIRGIL BAKER, et al., Plaintiffs, v. AEGIS WHOLESALE CORPORATION, et al., Defendants.

Core Terms

plaintiffs', fraudulent, omissions, defendants', disclosure, loans, motion to dismiss, tolling, monthly payment, unfair, violations, amended complaint, disclose, teaser, terms, loan documents, interest rate, class action, allegations, documents, preempts, amortization, Mortgage, unfair competition, safe harbor, state law, time-barred, equitable, reasons, prongs

Counsel: **[*1]** For Virgil A. Baker, individually and on behalf of all others similarly situated, Charles B. Lowery, individually and on behalf of all others similarly situated, Elizabete Lowery, individually and on behalf of all others similarly situated, Ellanore Largent, individually and on behalf of all others similarly situated, David Largent, Plaintiffs: Eric Marc George, LEAD ATTORNEY, Marcy Railsback, Michael A. Bowse, Browne Woods George LLP, Los Angeles, CA; Lee Weiss, Rebecca Tingey, LEAD ATTORNEYS, Browne Woods George LLP, New York, NY; David M. Arbogast, Jeffrey K Berns, Arbogast & Berns LLP, Woodland Hills, CA; Lee A. Weiss, Rebecca Tingey, PRO HAC VICE, Browne Woods George LLP, New York, NY.

For Residential Funding Company, LLC, Defendant: Regina Jill McClendon, Esq., LEAD ATTORNEY, Severson & Werson, San Francisco, CA.

For Countrywide Home Loans Inc., Defendant: Brooks Russell Brown, Goodwin Procter LLP, Los Angeles, CA; Phillip Russell Perdew, Locke Lord Bissell & Liddell LLP, Chicago, IL; Robert Bader, Goodwin Procter LLP, San Francisco, CA.

Judges: PHYLLIS J. HAMILTON, United States District Judge.

Opinion by: PHYLLIS J. HAMILTON

Opinion

ORDER GRANTING MOTION TO DISMISS IN PART AND DENYING IT IN PART

Defendants' **[*2]** motion to dismiss plaintiffs' fourth amended complaint came on for hearing on January 20, 2010 before this court. Plaintiffs Virgil A. Baker, Charles B. Lowery, Elizabete Lowery, Ellanore Largent, and David Largent ("plaintiffs"), appeared through their counsel, Michael A. Bowse. Defendants Residential Funding Company LLC ("RFC") and Countrywide Home Loans ("Countrywide"), appeared through their respective counsel, Jan T. Chilton and Robert Bader. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendants' motion in part and DENIES it in part, for the reasons stated at the hearing, and as follows.

BACKGROUND

This is an action alleging common law fraud, and violations of California's Unfair Competition Law ("UCL").

The complaint arises from defendants' alleged involvement in the issuance of what are known as Option Adjustable Rate Mortgage ("ARM") Loans. Plaintiffs Virgil A. Baker, Charles B. Lowery, Elizabete Lowery, Ellanore Largent, and David Largent (collectively "plaintiffs") all entered into Option Arm Loans with defendant Aegis Wholesale Corporation ("Aegis"), [1] which loans were subsequently sold to either defendant **[*3]** Residential Funding Company LLC ("RFC") or defendant Countrywide Home Loans ("Countrywide").

The terms of the mortgages that all plaintiffs entered into with Aegis are similar. Plaintiffs generally allege that these Option ARM loans worked as follows:

The loans were all notable for having initial low "teaser" rates (ranging from 1% to 3%). These rates were subject to a quick and early rate adjustment, as follows: initially, the loans offered the low teaser interest rate, which resulted in an initial minimum monthly payment that was low. However, the interest rate on the loan was pegged to a variable index that changed over time. After only one month, the teaser rate adjusted to a new indexed rate, which increased the rate substantially from the low initial teaser rate to a higher index-based rate, which was and continues to be calculated by adding a "margin" (for e.g., 3%) to an indexed figure.

Despite the almost immediate rise in the applicable interest rate, however, plaintiffs' minimum monthly payment remained the same as that initially disclosed to the buyer upon closing, because the **[*4]** loan terms permit only one annual increase to the minimum monthly payment. Thus, because the initial monthly payment was based on a teaser interest rate and did not rise with the actual interest rate that soon thereafter was charged, plaintiffs' mortgages began to accrue interest each month in an amount greater than the amount of plaintiffs' monthly payments. The remaining interest not paid down each month was then added to the balance of unpaid principal and itself began accumulating interest. Consequently, the principal balance of plaintiffs' loans increased, even as plaintiffs made/make the minimum monthly payment disclosed on the loan documents. This situation is known as negative amortization, the result of which is an ultimate reduction in the borrower's equity.

In addition, the loan terms imposed a "payment cap" on the amount of each annual increase to the minimum monthly payment, limiting that increase to 7.5% (i.e., usually a small fraction of the new higher interest rate that was immediately adjusted 30 days after the loan closing). However, the terms also provided that, if the loan's overall unpaid principal balance reaches 115% of its original value, the payment cap no longer **[*5]** applied and the remaining principal would be paid off in equal monthly payments over the remaining term of the loan (i.e., is fully amortized).

Based on these facts, plaintiffs allege that the Option ARM loans, as disclosed in the Option ARM mortgage notes ("ARM Notes") and the Truth in Lending Disclosure Statements ("TILDS") issued to plaintiffs at closing, failed to materially disclose: (a) that the low teaser rate set forth in the ARM Note was only available for thirty days, if at all; (b) that the monthly payment amounts for the first three to five years provided to plaintiffs in the TILDS were insufficient to pay both the accrued interest and principal on the loans; (c) that negative amortization was absolutely certain to occur if plaintiffs made payments according to the schedule of monthly payments provided in the TILDS; and (d) that loss of equity and/or loss of plaintiffs' residences was also certain to occur if plaintiffs made payments according to the schedule set forth in the TILDS. See generally Fourth Amended Complaint ("FAC"), P 1.

On October 17, 2008, plaintiff Baker filed the instant action in Contra Costa County Superior Court, on behalf of himself and a national putative **[*6]** class similarly situated. Plaintiff named Aegis as a defendant. After the filing of a first and second amended complaint, plaintiff filed a third amended complaint on September 25, 2009. The third amended complaint added the Lowerys and Largents as named plaintiffs, and furthermore added Countrywide and RFC as named defendants. The third amended complaint collectively alleged two causes of action against

[1] Aegis declared bankruptcy, and it was dismissed from the case on December 15, 2009 (Docket No. 22).

defendants: fraudulent omissions; and violations of the California's Unfair Competition Law ("UCL"), codified at *Bus. & Prof. Code § 17200*.

On November 5, 2009, defendants removed the action to federal court, asserting jurisdiction under the Class Action Fairness Act ("CAFA").

In December 2009, defendants moved to dismiss the third amended complaint. On February 22, 2010, after a hearing on the motion, the court granted defendants' motion to dismiss. Specifically, the court (1) dismissed the first claim for fraudulent omissions for failure to plead fraud with particularity pursuant to *FRCP 9(b)*; and (2) dismissed the second claim under California's UCL for failure to plead fraud with particularity under *9(b)* (to the extent based on fraud), and for failure to allege the provisions of **[*7]** the Federal Trade Commissions Act that were violated (to the extent a FTCA claim was pled). In addition, to the extent the UCL claim was predicated on violations of the Truth in Lending Act ("TILA"), that portion of the claim was dismissed with prejudice, since it was time-barred. See generally Order Granting Defendants' Motions to Dismiss ("Dismissal Order"). Plaintiffs were given leave to once again amend their pleading.

On March 12, 2010, plaintiffs duly filed the operative fourth amended complaint. The complaint continues to allege the same two claims against defendants, stated by way of four causes of action: (1) fraudulent omissions (Largent plaintiffs against Countrywide); (2) fraudulent omissions (Baker and Lowery plaintiffs against RFC); (3) UCL violations (Largent plaintiffs against Countrywide); and (4) UCL violations (Baker and Lowery plaintiffs against RFC). See generally FAC.

Defendants again move to dismiss the fourth amended complaint.

DISCUSSION

A. Legal Standard

A motion to dismiss under *Rule 12(b)(6)* tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003)*. Review is limited to the contents **[*8]** of the complaint. *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995)*. To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of *Federal Rule of Civil Procedure 8*.

Rule 8(a)(2) requires only that the complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. Specific facts are unnecessary - the statement need only give the defendant "fair notice of the claim and the grounds upon which it rests. *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081* (citing *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. All allegations of material fact are taken as true. *Id. at 94*. However, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (citations and quotations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level. Id.

A motion to dismiss should be granted if the complaint **[*9]** does not proffer enough facts to state a claim for relief that is plausible on its face. See *id. at 558-59*. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not show[n] that the pleader is entitled to relief. *Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*.

In addition, when resolving a motion to dismiss for failure to state a claim, the court may not generally consider materials outside the pleadings. *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. There are several exceptions to this rule. The court may consider a matter that is properly the subject of judicial notice, such as matters of public record. *Id. at 689*; see also *Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986)* (on a motion to dismiss, a court may properly look beyond the complaint to matters of public record and doing so does not convert a *Rule 12(b)(6)* motion to one for summary judgment). Additionally, the court may consider exhibits attached to the complaint, see *Hal Roach Studios, Inc. V. Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989)*, and documents **[*10]** referenced by the complaint and accepted by all parties as authentic. See *Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002)*.

Finally, in actions alleging fraud, "the circumstances constituting fraud or mistake shall be stated with particularity." *Fed. R. Civ. P. 9(b)*. Under *Rule 9(b)*, the complaint must allege specific facts regarding the fraudulent activity, such as the time, date, place, and content of the alleged fraudulent representation, how or why the representation was false or misleading, and in some cases, the identity of the person engaged in the fraud. *In re GlenFed Sec. Litig., 42 F.3d 1541, 1547-49 (9th Cir.1994)*.

B. Legal Analysis

The gravamen of plaintiffs' complaint is rooted in the disclosures contained in the ARM Note and the TILDS handed to plaintiffs at the closing of their loans with Aegis. Defendants' dismissal motion raises four issues for resolution: (1) whether the Largent plaintiffs' fraudulent omissions claim against Countrywide is time-barred; (2) whether TILA preempts plaintiffs' state law claims; (3) whether plaintiffs have adequately alleged their claim for fraudulent omissions; and (4) whether plaintiffs have adequately alleged **[*11]** their UCL claim.

As a preliminary matter, when ruling on a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the court takes judicial notice. See *Parrino v. FHP, Inc., 146 F.3d 699, 705-706 (9th Cir.1988)*. Here, plaintiffs have attached each plaintiffs' ARM Note and TILDS as exhibits to the complaint, and all parties make reference to these documents in their arguments. Thus they may properly be considered by the court.

1. Whether the Largents' Claim Against Countrywide is Time-Barred

Defendants contend that the Largents' fraudulent omissions claim against Countrywide is time-barred. Plaintiffs, who acknowledge that a three year statute of limitations applies to the claim and would normally bar the Largents' claim (since the Largents' loan closed on February 8, 2006, and they filed their complaint on September 25, 2009), assert that equitable tolling is applicable to save the claim. Plaintiffs base this argument on the Ninth Circuit's recent decision in *Hatfield v. Halifax, 564 F.3d 1177 (9th Cir. 2009)*; and *Cal. Code of Civ. Proc. §§ 474* **[*12]** and *583.210(a)*.

Neither the former nor the latter are sufficient to toll the Largents' claim. By virtue of the former, plaintiffs seek to invoke what is known as the class tolling doctrine. The class tolling doctrine provides that the commencement of a class action stops the running of the statute of limitation as to all claims that might be asserted by all members of the class. See *Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."); see also *Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)*; see also *Tosti v. City of Los Angeles, 754 F.2d 1485 (9th Cir. 1985)*. Hatfield embraces this rule, and held that a plaintiff's individual claims against defendants were equitably tolled by the timely filing of her nearly identical class action against the same defendants filed earlier in New Jersey state court. See *Hatfield, 564 F.3d at 1184-85* (noting that California law permits equitable tolling and also, that "California courts have permitted **[*13]** a plaintiff to take advantage of tolling based on the filing of a prior class action," even where the plaintiff was only a putative class member in the earlier action).

Here, plaintiffs invoke the class tolling rule by claiming that the filing of a prior unrelated class action - Velazquez v. GMAC Mortgage et al., pending and then voluntarily dismissed in the Central District of California - tolls the statute of limitations on the Largents' claim, since the Largents were members of the putative class in Velazquez. However, as defendants point out, this argument contains a major flaw: Countrywide was never a named defendant in the Velazquez action. And nothing in the foregoing cases suggests that equitable tolling should be applied to a plaintiff's subsequent claims based on the pendency of an earlier filed action that was never brought against the later defendant.

Nor does reliance on the latter of plaintiff's cited authorities - *Cal. Code of Civ. Proc. §§ 474* and *583.210(a)* - help plaintiffs. *Section 474* allows plaintiffs to name DOE defendants in an action, and *section 583.210(a)* provides that the summons and complaint may be served upon a defendant within three years after an action **[*14]** against the defendant is commenced. Plaintiffs appear to suggest that Countrywide was still within the three year limitation to be served as a DOE defendant in the Velazquez action, and that this worked to preserve plaintiffs' ability to apply tolling to claims against Countrywide in the present action, even though Countrywide was not officially named previously.

While creative, this argument is ultimately unpersuasive. Plaintiffs present no controlling authority that stands for the proposition that a plaintiff's claim against a named defendant in a subsequent action may have equitable tolling principles applied, based on the argument that the defendant *might have been* timely named as a DOE defendant in the prior action.

In the absence of any applicable tolling doctrine, the Largents' claim against Countrywide is untimely. Thus, the Largents' fraudulent omissions claim against Countrywide is DISMISSED.

2. Whether TILA Preempts State Law Claims

Defendants assert that TILA preempts plaintiffs' fraudulent omissions and UCL claims, because these state law claims are primarily premised on alleged misrepresentations contained in the TILDS - a disclosure document mandated by TILA. Furthermore, **[*15]** to the extent plaintiffs seek to impose disclosure obligations on defendants that are not contained in the TILDS, these obligations are in addition to and inconsistent with TILA, and thus preempted on that basis, too. As a corollary argument, defendants also contend that because the disclosures in the TILDS necessarily complied with TILA's disclosure requirements, such compliance also generally provides a safe harbor from plaintiffs' state law challenges to the TILDS disclosures under the UCL or fraudulent omissions causes of action.

TILA preempts state law claims pursuant to *15 U.S.C. § 1610*. However, the preemption provisions of TILA do not preempt state law unless the state law is actually inconsistent with TILA. See *Silvas v. E*Trade Mortg. Corp., 514 F.3d 1001, 1007 (9th Cir. 2008)*; see also *Yang v. Home Loan Funding, Inc., 2010 U.S. Dist. LEXIS 21837, 2010 WL 670958, * 10 (E.D. Cal. 2010)*. Different courts in the northern district have come to differing conclusions as to whether claims alleging UCL violations or fraudulent omissions are inconsistent with TILA, thereby triggering preemption. See, e.g., *Plascencia v. Lending 1st Mortg., 583 F. Supp. 2d 1090, 1099 (N.D. Cal. 2008)*(J. Wilken)(no TILA preemption **[*16]** of UCL claims because UCL "does not, on its face, relate to the disclosure of information in connection with credit transactions, let alone impose disclosure requirements that are different than TILA's in any way"); see also *Amparan v. Plaza Home Mortg., Inc., 678 F. Supp. 2d 961, 976 (N.D. Cal. 2008)*(J. Fogel)(same); cf. *Kajitani v. Downey Sav. & Loan Ass'n, 647 F. Supp. 2d 1208, 1220 (D. Haw. 2008)*(plaintiffs' common law fraud claim preempted to the extent it alleged misrepresentations in the disclosure documents required under TILA); *Yang, 2010 U.S. Dist. LEXIS 21837, 2010 WL 670958, * 10*.

The court agrees with the reasoning expressed in *Plascencia* and *Amparan*. On their face, neither plaintiffs' fraudulent omissions claim nor the UCL claim conflict with TILA's provisions regarding the disclosure of information in connection with credit transactions. Nor do plaintiffs allegations contend that defendants were in fact required to make disclosures that contradict TILA's requirements. And while defendants raise the argument that it is the imposition of possible additional disclosures that plaintiffs argue should have been made that engender an actual conflict with TILA, the court is unpersuaded. See also *Brooks v. ComUnity Lending, Inc., 2010 U.S. Dist. LEXIS 67116, 2010 WL 2680265, *5 (N.D. Cal. 2010)*. **[*17]** Finally, plaintiffs' claims are distinct from those advanced in the cases relied on by defendants here, because they are premised on defendants' alleged violation of an independent common law duty to disclose material information - not TILA violations per se. See FAC, PP 72-77, 89-94, 111, 135. All of which compels the conclusion that no preemption results. [2]

Defendants' safe harbor arguments under TILA raise similar issues. The California Supreme Court has explained that conduct affirmatively authorized by another statute may provide a defendant with a safe harbor from UCL liability: "Although the unfair competition law's scope is sweeping, it is not unlimited…. When specific legislation provides a 'safe harbor,' **[*18]** plaintiffs may not use the general unfair competition law to assault that harbor." *Cal-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*(to forestall an action under the unfair competition law, another provision must actually 'bar' the action or clearly permit the conduct"). However, as the state supreme court noted, there must be an actual conflict between TILA and the conduct alleged under the UCL in order for the safe harbor provision to kick in.

Again, the court is not persuaded that TILA clearly conflicts at this juncture with the claims asserted by plaintiffs, including plaintiffs' UCL claim. Thus, the court is also not persuaded that defendants' apparent compliance with certain TILA disclosure requirements - as reflected by either the TILDS or the ARM Notes - automatically provides a safe harbor from plaintiffs' state law challenges to nature of defendants' disclosures contained therein.

3. Whether the Fraudulent Omissions Claim is Properly Alleged

To state a claim for fraudulent concealment, a plaintiff must allege (1) concealment or suppression of a material fact; (2) a duty to disclose; (3) intentional concealment with the intent to defraud; (4) actual, justifiable **[*19]** reliance; and (5) resulting damages. *Blickman Turkus, LP v. MF Downtown Sunnyvale LLC, 162 Cal. App. 4th 858, 868, 76 Cal. Rptr. 3d 325 (2008)*(citing *Mktg. West, Inc. v. Sanyo Fisher (USA) Corp., 6 Cal. App. 4th 603, 612-13, 7 Cal. Rptr. 2d 859 (1992))*. Defendants here make several arguments against plaintiffs' ability to state a claim for fraudulent omissions against RFC, including: [3] that the loan documents clearly set forth the terms of plaintiffs' loans and even the omissions that plaintiffs now claim are actionable; that defendants had no duty to disclose; that defendants cannot be held liable on the basis of Aegis' failure to disclose; and that plaintiffs fail to plead facts necessary to support a plausible claim that RFC aided and abetted Aegis' alleged misconduct.

The gist of plaintiffs' allegations are: that the loan documents in question, which include the ARM Note and the TILDS, failed to disclose that the initial teaser **[*20]** rate would increase dramatically after a month; that the monthly payment amounts listed in the TILDS for the first three to five years were insufficient to pay both principal and interest; that negative amortization was certain to occur if plaintiffs made payments according to the payment schedule; that the loan terms disclosed to plaintiffs in the documents were all underwritten and dictated by defendants; and that defendants were in the business of purchasing and securitizing Option ARM loans and purchased plaintiffs' loans pursuant to longstanding mortgage loan purchase agreements between defendants and Aegis; and that defendants knew that the terms disclosed to plaintiffs in the loan documents did not paint the whole picture of plaintiffs' liability for payments under the disclosed payment schedule. See FAC, PP 19-26, 28, 34-35, 50, 54, 55-56, 72-77, 90-94.

On balance, these allegations are sufficient to withstand defendants' motion to dismiss plaintiffs' claim against RFC. First, while defendants are correct that the loan documents expressly disclosed certain items which form a part of plaintiffs' claim - i.e., the loan interest rate, the fact that plaintiffs' minimum payment could **[*21]** be lower than the actual interest being charged on a monthly basis, and the options for different payment structures that would allow plaintiffs to pay amortized payments - defendants do not dispute that the loan documents do not disclose that the

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[2] It should also be noted that, even if preemption were to result, TILA only preempts state claims based on required written information, i.e. on deficient or false TILDS. See, e.g., *Kajitani, 647 F. Supp. 2d at 1220*. Thus, to the extent that plaintiffs' claims for fraud and under the UCL are based on false or misleading *oral* representations, or false or misleading written representations contained in the ARM Note, such claims would not be preempted by TILA at any rate. See id.

[3] Defendants also target plaintiffs' ability to state a fraudulent omissions claim against Countrywide. However, since the Largents' claim against Countrywide is being dismissed as time-barred, the only fraudulent omissions claim that remains is asserted by the Baker and Lowery plaintiffs against RFC.

payment schedule set forth is based on the initial teaser rate, or that, because of the immediately adjustable interest rate, combined with the limited yearly adjustments to the monthly minimum payment, plaintiffs would necessarily be entering into negatively amortizing loans if they continued to pay the minimum monthly payment initially disclosed. And while plaintiffs may not ultimately be able to prove that defendants' purported omissions render defendants liable here, plaintiffs are nonetheless entitled to have *all* the information provided to them in connection with their Option ARM loans considered collectively, in assessing whether the disclosures were clear, conspicuous, and complete. See, e.g., *Brooks, 2010 U.S. Dist. LEXIS 67116, 2010 WL 2680265 at * 7*.

Second, the court agrees with plaintiffs that, for purposes of the present motion to dismiss, plaintiffs have adequately alleged a duty to disclose, premised on California common law doctrine regarding the duty **[*22]** to disclose all material facts, once partial disclosure of material facts is undertaken. See FAC, P 89.

Finally, defendants overlook the fact that plaintiffs have alleged that RFC (and Countrywide) were involved in a scheme by which they expressly underwrote and approved all loan terms provided in the documents handed to plaintiffs, and that RFC had a contract with Aegis whereby it had both the financial incentive and a contractual basis on which to use Aegis as its intermediary in providing loans to consumers. Plaintiffs also plead that RFC pre-approved the Option ARM Notes, that it knew that the loan documents disclosed low payments in the TILDS that were predicated on an interest rate which would not exist after the first thirty days, that RFC was in fact aware of the material omissions contained in the loan disclosure statements, and that RFC even provided a stream of funding to Aegis that enabled Aegis to originate the subject Option ARM Notes. See, e.g., FAC, PP 94-95. This is sufficient to adequately plead defendant's liability for fraudulent omissions, as part of a common course of conduct, together with Aegis. It is also sufficient at this juncture as a basis from which to **[*23]** reasonably and at least plausibly infer that RFC aided and abetted Aegis' misconduct. See *In re First Alliance Mortg. Co., 471 F.3d 977, 993 (9th Cir. 2006)*(recognizing California's rule that aider and abettor liability may be imposed on "one who aids and abets the commission of an intentional tort if the person knows the other's conduct constitutes a breach of a duty and gives substantial assistance or encouragement to the other to so act").

The court accordingly DENIES defendants' motion to dismiss plaintiffs' fraudulent omissions claim against defendant RFC.

4. Whether UCL Claim is Properly Alleged

Finally, defendants target plaintiffs' ability to state a valid UCL claim under any of the three prongs available under the UCL: the unfair, unlawful, or fraudulent prongs. See *Cal. Bus. & Prof. Code § 17200* (to state a claim pursuant to *§ 17200*, a plaintiff must allege that a defendant engaged in an "unlawful, unfair, or fraudulent business act or practice" or in "unfair, deceptive, untrue or misleading advertising"). Because the statute is written in the disjunctive, it applies separately to business practices that are (1) unlawful, (2) unfair, or (3) fraudulent. See *Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490, 1496, 6 Cal. Rptr. 3d 148 (2003)*.

The **[*24]** court finds that plaintiffs have adequately alleged a claim under the UCL, at least with respect to the unlawful and unfair prongs specifically. An act is "unlawful" under *section 17200* if it violates an underlying state or federal statute or common law. See *Cel-Tech. Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*; *Chabner v. United Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000)*(the UCL also incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law); *Saunders v. Super. Ct., 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*. Here, plaintiffs allege that defendants have violated the Federal Trade Commission Act, *15 U.S.C. § 45*. See FAC, PP 119-20, 143-44. Under the FTC Act, a practice is unfair if it causes substantial injury; which injury is not outweighed by any countervailing benefits to consumers or competition; and the injury is one that consumers themselves could not reasonably have avoided. See *15 U.S.C. § 45(n)*. The court finds that, for the reasons detailed above in connection with plaintiffs' fraudulent omissions claim, these allegations are sufficient to adequately plead "unfair" conduct **[*25]** under the FTC Act, and therefor, "unlawful" conduct under the UCL.

Turning to the "unfair" prong, an act has been defined as "unfair" under the UCL if the act "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law." *Cel-Tech, 20 Cal. 4th at 187*. Notwithstanding this pronouncement, the law is unsettled as to what constitutes an unfair business practice in consumer cases, and California appellate courts have also noted that "unfairness" under the UCL should be judged by the same standard used by the Federal Trade Commission in *15 U.S.C. § 45(n)*. See *Camacho v. Auto. Club of South. Cal., 142 Cal. App. 4th 1394, 1403, 48 Cal. Rptr. 3d 770 (2006)*; *Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 584, 101 Cal. Rptr. 3d 697 (2009)*.

On balance, and taking the state courts' collective guidance into account, the court finds that plaintiffs have adequately alleged defendants' participation in an "unfair" practice, for the same reasons as those just identified in connection with the "unlawful" prong. As such, defendants' motion to dismiss on this ground must be denied.

Third, the court notes that with respect **[*26]** to the parties' remaining arguments regarding plaintiffs' ability to sufficiently plead "fraudulent" practices under the UCL, whether a practice is deceptive or fraudulent "cannot be mechanistically determined under the relatively rigid legal rules applicable to the sustaining or overruling of a demurrer." *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)*. Rather, the determination is a question of fact, requiring consideration and weighing of evidence from both sides before it can be resolved. See *Gregory v. Albertson's, Inc., 104 Cal. App. 4th 845, 857, 128 Cal. Rptr. 2d 389 (2002)*; *Schnall, supra, at 1167*. The court finds that plaintiffs' allegations are sufficient - for the reasons described herein in connection with the plaintiffs' various UCL and fraudulent omissions claims against defendants, and consistent with the heightened pleading requirements that apply to specific allegations of fraud - to defeat defendants' motion.

Finally, to the extent that plaintiffs' UCL claim is premised on the Largent plaintiffs' proof that Countrywide is liable for fraudulent omissions against these plaintiffs, this claim is barred for the reasons explained above in connection with the Largents' fraudulent omissions **[*27]** claim specifically.

C. Conclusion

For all the foregoing reasons, the court hereby GRANTS defendants' motion to dismiss with prejudice, to the extent they argue that the Largent plaintiffs' fraudulent omissions claim against Countrywide is time-barred; and DENIES defendants' motion, with respect to the remaining plaintiffs' fraudulent omissions claim against RFC, and all plaintiffs' UCL claims against both RFC and Countrywide. A case management conference will be held on August 19, 2010, at 2:00 p.m.

IT IS SO ORDERED.

Dated: July 21, 2010

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON

United States District Judge

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Championsworld LLC v. United States Soccer Fedn., Inc.

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

July 21, 2010, Decided; July 21, 2010, Filed

Case No. 06 C 5724

Reporter

726 F. Supp. 2d 961 *; 2010 U.S. Dist. LEXIS 73253 **; 2010-2 Trade Cas. (CCH) P77,141

CHAMPIONSWORLD LLC, Plaintiff, v. UNITED STATES SOCCER FEDERATION, INC., MAJOR LEAGUE SOCCER, L.L.C. and DOES 1 through 10, Inclusive, Defendants.

Subsequent History: Sanctions allowed by, in part, Sanctions disallowed by, in part, Motion granted by, in part, Motion denied by, in part *Championsworld, LLC v. United States Soccer Fed'n, 2011 U.S. Dist. LEXIS 91883 (N.D. Ill., Aug. 17, 2011)*

Prior History: *Championsworld LLC v. United States Soccer Fed'n, Inc., 2008 U.S. Dist. LEXIS 90661 (N.D. Ill., Nov. 7, 2008)*

Core Terms

soccer, alleges, amateur, players, exemption, amateur sports, anti trust law, Federation, sports, Games, sanctioning, pleadings, argues, matches, Counts, athlete, unconscionability, motion for judgment, unjust enrichment, economic duress, restitution, basketball, antitrust, League, racketeering activity, related event, competitors, eligibility, eligibility standards, necessary extent

LexisNexis® Headnotes

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

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN1[] **Motions to Dismiss, Failure to State Claim**

Under *Fed. R. Civ. P. 12(c)*, a party may move for judgment on the pleadings after the pleadings are closed but early enough not to delay trial. A court reviews the motion by using the same standard that applies when reviewing a motion to dismiss for failure to state a claim under R. 12(b)(6). The court views the facts in the complaint in the light most favorable to the nonmoving party and will grant the motion only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief. But the court need not ignore facts set forth in the complaint that undermine the plaintiff's claim nor give weight to unsupported conclusions of law.

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN2[] **Adjudicative Facts, Public Records**

Where there are public documents whose accuracy is easily verifiable and not subject to reasonable dispute, a request to take judicial notice will be granted. *Fed. R. Evid. 201(b)*.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN3[] **Regulated Industries, Sports**

The United States Soccer Federation (USSF) has the authority to govern amateur, though not necessarily professional, soccer in the United States. This authority over amateur sports derives from the Ted Stevens Olympic and Amateur Sports Act (ASA), *36 U.S.C.S. § 220501 et seq.* Congress enacted the ASA in 1978 to create a vertical structure for the management of certain amateur sports in the United States and to rectify the factional nature of amateur sports organizations in the United States at that time. Congress placed the U.S. Olympic Committee (the USOC) at the head of this vertical structure as a coordinating body for amateur sports in which Americans compete internationally. Immediately below the USOC in the chain of command are National Governing Bodies (the NGBs) for each sport included in the Olympic Games or Pan-American Games. The USOC recognizes one, and only one, amateur sports organization to act as NGB for each sport. *36 U.S.C.S. § 220521(a)*

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN4[] **Regulated Industries, Sports**

The United States Soccer Federation (USSF) is the National Governing Body (NGB) for soccer in the United States. As such, the USSF establishes national goals for soccer, is the coordinating body for amateur soccer in the United States, and represents the United States in the international soccer federation known as the Federation Internationale de Football Association (FIFA). *36 U.S.C.S. § 220523(a)*. In its role as NGB, USSF sets standards for eligibility and exercises jurisdiction over amateur soccer activities in the United States and American soccer teams in the Olympic, Paralympic, and Pan-American Games.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN5[] **Regulated Industries, Sports**

The Ted Stevens Olympic and Amateur Sports Act was revised to prohibit National Governing Bodies from having eligibility criteria related to amateur status or to participation in the Olympic Games, the Paralympic Games, or the Pan-American Games that are more restrictive than those of the appropriate international sports federation. *36 U.S.C.S. § 220522(a)(14)*.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN6[] **Scope, Exemptions**

The Ted Stevens Olympic and Amateur Sports Act (ASA) gives National Governing Bodies (NGBs) what has been called monolithic control over the amateur sports that they govern. This type of control would normally violate the antitrust laws. Sherman Act, *15 U.S.C.S. §§ 1* and *2*. Congress may, however, explicitly exempt an organization from the antitrust laws. *15 U.S.C.S. § 1291* exempts certain sports telecasts from antitrust laws. The ASA does not expressly state that NGBs have such an exemption in the governing of amateur sports, but courts have consistently found that Congress implicitly exempted NGBs, in the oversight of amateur sports, from the antitrust laws.

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN7[] **Regulated Industries, Sports**

Where Congress defines amateur athlete as an athlete who meets the National Governing Bodies' (NGBs) eligibility standards, *36 U.S.C.S. § 220501(b)(1)*, and insists that the NGBs' standards may not be more restrictive than those of its international federation, *36 U.S.C.S. § 220522(a)(14)*, the United States Soccer Federation's and Federation Internationale de Football Association's definitions are highly relevant.

Antitrust & Trade Law > General Overview

HN8[] **Antitrust & Trade Law**

Antitrust laws serve to protect freedom to compete unhindered by group actions of others.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN9[] **Scope, Exemptions**

Federation Internationale de Football Association (FIFA) has no power to grant the United States Soccer Federation an exemption, either express or implied, from the antitrust laws. Only Congress may do this. Similarly, FIFA does not have, or claim to have, authority to interpret acts of Congress.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN10[] **Scope, Exemptions**

Antitrust exemptions are the exception, not the rule.

Governments > Legislation > Expiration, Repeal & Suspension

HN11[] **Legislation, Expiration, Repeal & Suspension**

It is a cardinal principle of construction that repeals by implication are not favored.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN12[] **Sports, Baseball**

Baseball is the only professional sport that is exempt from antitrust laws, and other professional sports operating interstate are not so exempt.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN13[] **Scope, Exemptions**

The Ted Stevens Olympic and Amateur Sports Act does not give the United States Soccer Federation (USSF) authority to govern professional soccer in the United States, except to the extent necessary for USSF to govern the participation of professional players in the Olympics and related events. USSF is not entitled to an exemption from the antitrust laws regarding professional soccer, except to the extent necessary for USSF to oversee Olympic and related events. USSF has no clear mandate from Congress to govern the whole of professional soccer in the United States.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN14[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

An enterprise includes any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN15[] **Types of Contracts, Quasi Contracts**

Unjust enrichment is a quasi-contract theory that allows a court to infer the existence of a contract where none exists in order to prevent unjust results. To state a claim for unjust enrichment, a plaintiff must allege that the defendant retained a benefit to the plaintiff's detriment, and that the retention of that benefit violates fundamental principles of justice, equity, and good conscience. When the parties' relationship is governed by a valid contract, a plaintiff may not bring a claim of unjust enrichment unless the claim falls outside the contract or the plaintiff challenges the validity of the contract.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Illusory Promises

HN16[] **Standards of Performance, Illusory Promises**

An illusory promise is one that, on closer examination, reveals that the promisor has not promised to do anything. An illusory promise is not sufficient consideration to support a contract.

Contracts Law > Remedies > Rescission & Redhibition > General Overview

HN17[] **Remedies, Rescission & Redhibition**

Whether a rescission is timely, depends on the facts of the case.

Contracts Law > Defenses > Unconscionability > General Overview

HN18[] Defenses, Unconscionability

Under Illinois law, a finding of unconscionablilty may be based on either procedural or substantive unconscionability or a combination of the two. Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice. Procedural unconscionability could turn on acts of bad faith such as misrepresentation.

Contracts Law > Defenses > Unconscionability > General Overview

HN19[] Defenses, Unconscionability

The issue of substantive unconscionability concerns whether the terms themselves are commercially reasonable.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > Economic Duress

HN20[] Coercion & Duress, Economic Duress

Economic duress is not generally treated as a cause of action in tort, but rather as a defense to the enforceability of a contract or a basis for restitution or rescission. Economic duress occurs where undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making the agreement. There is no economic duress unless the defendant applies wrongful or unlawful pressure.

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > Economic Duress

HN21[] Coercion & Duress, Economic Duress

It is difficult for a party to claim that its will was overborne by economic duress when it has had time for inquiry, examination, and reflection.

Counsel: [1]** For Championsworld L.L.C., Plaintiff: Ronald Hanley Balson, LEAD ATTORNEY, Carrie A. Hall, Michael Best & Friedrich, Chicago, IL; Jamie M. Brickell, William Laurence Charron, Pryor Cashman LLP, New York, NY; Jolanda B Krawczyk, Michael Best & Friedrich LLP, Chicago, IL; Maryaneh Simonian, PRO HAC VICE, Pryor Cashman LLP, New York, NY.

For United States Soccer Federation, Inc., Defendant: Casandra Leann Thomson, LEAD ATTORNEY, Latham & Watkins LLP, Los Angeles, CA; Adam Wright, Michael Elisofon, PRO HAC VICE, Latham & Watkins Llp, Los Angeles, CA; Livia McCammon Kiser, Timothy Bunker Hardwicke, Latham & Watkins LLP (IL), Chicago, IL; Russell F. Sauer, Jr., Latham & Watkins, L.L.P., Los Angeles, CA; Terrence Joseph Connolly, Latham & Watkins, LLP, New York, NY.

For Major League Soccer, L.L.C., Defendant: Bradley I. Ruskin, Jennifer R. Scullion, Scott Arthur Eggers, Proskauer Rose LLP (New York), New York, NY; Jason D. Gerstein, PRO HAC VICE, Proskauer Rose LLP, New York, NY; Jordan B. Leader, Proskauer Rose, New York, NY; Sheri D. Davis, Steven Ross Gilford, Proskauer Rose LLP (70W), Chicago, IL.

Judges: Hon. Harry D. Leinenweber, United States District Judge.

Opinion by: Harry D. Leinenweber

Opinion

[*964] MEMORANDUM OPINION [2] AND ORDER**

Before the Court are Motions for Judgment on the Pleadings under *Federal Rule of Civil Procedure 12(c)* by Defendants United States Soccer Federation (the "USSF") and Major League Soccer ("MLS"). For the reasons stated below, the motions are granted in part and denied in part.

Also before the Court are USSF's Request for Judicial Notice and its Motion entitled "Objections and Request to Strike Portions of Plaintiff's Declaration." For the reasons stated below, the Request for Judicial Notice is granted. The motion "Objections and Request to Strike Portions of Plaintiff's Declaration" is denied.

I. BACKGROUND

Plaintiff ChampionsWorld, LLC is a now-defunct business entity which, from 2001 to 2005, sponsored professional, first-division soccer exhibitions in the United States involving international teams. Although ChampionsWorld filed for bankruptcy and ceased operations in 2005, its reorganization plan provides for the commencement and prosecution of this lawsuit as its only remaining material asset, to be liquidated and distributed among its creditors.

Defendant United States Soccer Federation ("USSF") is the National Governing Body for amateur soccer in the United States. Defendant **[**3]** Major League Soccer ("MLS") is a first-division professional soccer league in the United States.

At the heart of the controversy is the question of whether the USSF has the **[*965]** authority to oversee professional, as well as amateur, soccer in the United States. The USSF claims that it has this power. ChampionsWorld argues that USSF improperly arrogated this power to itself and used it to unreasonably restrain trade and to extract over $ 3 million in arbitrary and "back-breaking" fees from ChampionsWorld and to cause it many millions more in damages, substantially contributing to ChampionsWorld's demise.

ChampionsWorld alleges that USSF's actions were part of an anticompetitive scheme to create a window of exclusivity for MLS by preventing other soccer entities or leagues from applying for first-division status in the United States. ChampionsWorld claims that USSF saw ChampionsWorld as a competitor to MLS because ChampionsWorld's matches between 2003 and 2005 had triple the attendance of MLS's matches. ChampionsWorld alleges that USSF organized MLS and underwrote its operations with $ 5 million in seed money, which was never repaid. ChampionsWorld alleges that USSF and MLS have significant **[**4]** overlapping officers and board members and that the two entities have a "historically close and anticompetitive association."

Plaintiff's claims against Defendants sound in antitrust (Counts 1 through 3), the Racketeering Influenced and Corrupt Organizations Act ("RICO") (Counts 4 and 5), and contract (Counts 6 through 10). Defendants move for judgment on the pleadings on all counts.

II. LEGAL STANDARD

HN1[] Under *Federal Rule of Civil Procedure 12(c)*, a party may move for judgment on the pleadings "[a]fter the pleadings are closed -- but early enough not to delay trial." A court reviews the motion by using the same standard that applies when reviewing a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*. *Buchanan-Moore v.*

County of Milwaukee, 570 F.3d 824, 827 (7th Cir. 2009). The Court views the facts in the complaint in the light most favorable to the nonmoving party and will grant the motion "only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Id.* But the Court need not ignore facts set forth in the complaint that undermine the plaintiff's claim nor give weight to unsupported conclusions of law. *Id*

III. DISCUSSION

A. [5] Judicial Notice**

As a preliminary matter, USSF asks the Court to take judicial notice of certain public documents, such as excerpts of the Olympic Charter; statutes and regulations of the Federation Internationale de Football Association ("FIFA"); Constitution and Bylaws of the U.S. Olympic Committee ("USOC"); and a decision by the Bureau of the Players' Status Committee of FIFA. ***HN2***[] Because these are public documents whose accuracy is easily verifiable and not subject to reasonable dispute, the request is granted. *See, FED. R. EVID. 201(b)*; *Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998)*.

Also, before the Court are USSF's objections and motion to strike portions of the declaration and exhibits attached to ChampionsWorld's brief in opposition to USSF's motion on the pleadings. USSF's objections and motion do not appear to have been properly noticed under *Local Rule 5.3(b)* and are therefore denied. The Court notes, however, that none of the materials that USSF has asked to strike had any bearing on the decision the Court issues today.

[*966] B. United States Soccer Federation's Authority to Govern Professional Soccer in the United States

Because the issue of USSF's **[**6]** authority, or lack thereof, to govern professional soccer in the United States, is central to most of the claims and defenses in this case, the Court will address this issue before dealing with the motions for judgment on the pleadings on ChampionsWorld's separate claims.

1. Olympic and Amateur Sports Act

It is undisputed that ***HN3***[] USSF has the authority to govern *amateur,* though not necessarily professional, soccer in the United States. This authority over amateur sports derives from the Ted Stevens Olympic and Amateur Sports Act, *36 U.S.C. §§ 220501 et seq.* (the "ASA"). Congress enacted the ASA in 1978 to create a vertical structure for the management of certain amateur sports in the United States and to "rectify the factional nature of amateur sports organizations in this country at that time." *Behagen v. Amateur Basketball Ass'n, 884 F.2d 524, 527 (10th Cir. 1988)*. Congress placed the U.S. Olympic Committee (the "USOC") at the head of this vertical structure as a coordinating body for amateur sports in which Americans compete internationally. *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc., 213 F.3d 198, 203 (5th Cir. 2000)*. Immediately below the USOC in the chain of command are **[**7]** National Governing Bodies (the "NGBs") for each sport included in the Olympic Games or Pan-American Games. *Id.* The USOC recognizes one, and only one, amateur sports organization to act as NGB for each sport. *36 U.S.C. § 220521(a)*; *Behagen, 884 F.2d at 528*.

HN4[] USSF is the NGB for soccer in the United States. As such, the USSF establishes national goals for soccer, is the coordinating body for amateur soccer in the United States, and represents the United States in the international soccer federation known as the "Federation Internationale de Football Association" ("FIFA"). *See, 36 U.S.C. § 220523(a)*. USSF has been a member of FIFA since 1913. In its role as NGB, USSF sets standards for eligibility and exercises jurisdiction over amateur soccer activities in the United States and American soccer teams in the Olympic, Paralympic, and Pan-American Games. *See id.*

In 1998, the ASA was amended to reflect changes in the conduct of Olympic events. ***HN5***[] The statute was revised to prohibit NGBs from having "eligibility criteria related to amateur status or to participation in the Olympic Games, the Paralympic Games, or the Pan-American Games that are more restrictive than those of the appropriate international **[**8]** sports federation." *36 U.S.C. § 220522(a)(14)*. Senator Ted Stevens, for whom the act is named, said, "The addition of the word 'Olympic' to the popularly used title 'Amateur Sports Act' is meant to take into account the participation of professional and quasi-amateur athletes in some of the sports of the Olympic Games and Pan-American Games, but at the same time continue to reflect the unique role the USOC and national governing bodies have in the national framework of truly amateur sports activities." 144 Cong. Rec. S5434-02, 1998 WL 259708, at *S5450.

HN6[] The ASA gives NGBs what has been called "monolithic control" over the amateur sports that they govern. *Behagen, 884 F.2d at 529*. This type of control would normally violate the antitrust laws. *See,* Sherman Act, *15 U.S.C. §§ 1* and *2*. Congress may, however, explicitly exempt an organization from the antitrust laws. *See, e.g., 15 U.S.C. § 1291* (exempting certain sports telecasts from antitrust laws). The ASA does not expressly state that NGBs have such an exemption in the governing **[*967]** of amateur sports, but courts have consistently found that Congress implicitly exempted NGBs, in the oversight of *amateur* sports, from the antitrust laws. *See,* ***[**9]*** *Behagen, 884 F.2d at 529-30*; *Eleven Line, 213 F.3d at 203-04*; *JES Properties, Inc. v. USA Equestrian, Inc., 458 F.3d 1224, 1230-31 (11th Cir. 2006)*.

2. Defining "Amateur" and "Professional"

USSF claims, however, that it also has monolithic control over *professional* soccer in the United States. USSF argues that it derives this power from, surprisingly, the very same ASA that gives it power over amateur sports. At first glance, this argument seems counterintuitive, as the ASA (known as the "Olympic *and Amateur* Sports Act") repeatedly uses the word "amateur" to qualify such terms as "athlete," "competition," and "sports organization." *See, e.g., 36 U.S.C. § 220501(b)*. The entire statute is, in fact, peppered with the word "amateur," while the word "professional" hardly, if ever, appears. *See, e.g., 36 U.S.C. §§ 220523* and *220524* (defining authority and duties of NGBs).

USSF argues that "amateur" is a term of art and must not be read in its ordinary sense. *Cf. Behagen, 884 F.2d at 526 n.1*. USSF reaches the conclusion that it has authority over professional U.S. Soccer through the following line of reasoning:

(1) The International Olympic Committee ("IOC") rules provide that the international **[**10]** federation for each sport has responsibility for determining eligibility requirements for its sport in the Olympic games.
(2) FIFA, the international federation for soccer, has allowed paid professionals to participate in Olympic soccer teams since 1984.

(3) Under the ASA, an "amateur athlete" is one who meets the eligibility standards of his or her sport's NGB. *36 U.S.C. § 220501(b)(1)*.
(4) As the NGB for soccer in the U.S., USSF must establish the eligibility criteria for amateur athletes.

(5) But USSF may not maintain eligibility standards more restrictive than FIFA's. *See, 36 U.S.C. § 220522(a)(14)*.
(6) Since FIFA permits paid professional players to participate in the Olympics and related competitions, so must USSF.
(7) Since paid professional soccer players are eligible to participate in the Olympics, paid professional soccer players are amateur athletes under the ASA.

The Court cannot accept USSF's reasoning in the last step. Just because FIFA allows professionals to play in the Olympics, it does not necessarily follow that all professional soccer players are now "amateur" players *for all* *purposes;* nor that USSF has authority over all professional soccer players and, by extension, **[**11]** all professional soccer matches because they are now "amateur" events.

If USSF's reasoning were correct, then it would also follow that because the Federation Internationale de Basketball Amateur ("FIBA"), the international association for amateur basketball, allows professional players in the Olympics, then the Amateur Basketball Association of the United States of America ("ABA/USA"), the NGB for amateur basketball in the United States, would have monolithic control over all professional basketball in the United States, including the National Basketball Association. It is extremely difficult to conclude from a reading of the plain text of the ASA or its legislative history that Congress intended such a result.

[*968] Indeed, the legislative summary of the amended *Section 220522(a)(14)* explains that this provision "would prohibit NGBs from having eligibility criteria that [are] more restrictive than its international sports federation for participation in events at the Olympic Games, Paralympic Games, and Pan-American Games." 144 Cong. Rec. S5434-02, 1998 WL 259708, at *S5451. Congress's intent in revising the ASA therefore appears to be to make a limited exception for the Olympics and related **[**12]** competitions (*i.e.,* Pan-American Games, Paralympics) that would recognize the entry of professional players into these events and still allow the USOC and its NGBs to maintain control over this narrow class of competitions.

Moreover, FIFA does not classify all professional soccer players as amateurs, so there is no requirement, even under FIFA's rules, for USSF to do so. FIFA's rules provide that a "professional" is "a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively incurs. All other players are considered to be amateurs." FIFA's Regulations on the Status and Transfer of Players, § 2, art. 2. USSF's rules define a "professional player" as "a person who receives or has received payment for playing or who signs a professional form of this Federation. . . . An amateur player is any person other than a professional player." USSF Policy Manual, § 601-1. Thus, both FIFA and USSF define amateurs and professionals as separate, mutually exclusive categories.

USSF argues that these definitions are irrelevant because all that matters is how Congress defined "amateur," not how USSF and FIFA define it. But ***HN7***[] where Congress **[**13]** defines "amateur athlete" as an athlete who meets the NGB's eligibility standards, *§ 220501(b)(1)*, and insists that the NGB's standards may not be more restrictive than those of its international federation, *§ 220522(a)(14)*, USSF's and FIFA's definitions are highly relevant. USSF claims that the cited definitions are inapplicable because they relate to athlete registration requirements, not eligibility standards. Yet USSF cites no FIFA or USSF rule that provides "eligibility standards" that are different from the above definitions, except to say that FIFA and USSF allow professionals to participate in the Olympics.

3. USSF's Authority Under FIFA Rules

But USSF has still another argument. USSF claims that FIFA requires all games played in the U.S. by foreign teams to be approved by USSF. USSF argues, therefore, that it is legally obligated to exercise authority over professional soccer matches or risk discipline or expulsion from FIFA, which could result in the exclusion of U.S. teams from the Olympics and other international events. For this reason, USSF claims implied immunity from the antitrust laws regarding its oversight of professional soccer. *See, Behagen, 884 F.2d at 529-30* (holding **[**14]** NGB's seemingly anticompetitive conduct regarding amateur basketball exempt from antitrust laws because it was necessary to implement clear intent of Congress).

In support of its argument, USSF cites the recent arbitration decision by the FIFA Players' Status Committee regarding this controversy, which finds that

(1) FIFA's statutes give USSF authority to sanction professional soccer matches in the United States;

(2) Under this authority, USSF has the right to charge sanctioning fees and require the posting of a bond securing those fees; and

(3) USSF has the right to notify FIFA in the event that a FIFA-licensed match agent refuses to pay a sanctioning **[*969]** fee or post a performance bond.

The exercise of the above-named rights would arguably constitute unreasonable restraints of trade under the Sherman Act. *See, Silver v. N.Y. Stock Exchange, 373 U.S. 341, 359-60, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)* (holding ***HN8***[] antitrust laws serve to protect freedom to compete unhindered by group actions of others), which is why USSF claims the antitrust exemption. But the FIFA arbitration rulings are of limited help to USSF because the Court of Arbitration for Sport ("CAS") has held that the FIFA Players' Status Committee "may consider disputes **[**15]** only to the extent that they implicate FIFA's statutes and regulations." *Stillitano v. USSF & FIFA,* CAS 2009/A/1812, at 10.9. Indeed, it is clear that ***HN9***[] FIFA has no power to grant USSF an exemption, either express or implied, from the antitrust laws. Only Congress may do this. Similarly, FIFA does not have, or claim to have, authority to interpret acts of Congress. Furthermore, it seems far-fetched to believe that FIFA would discipline USSF for obeying the antitrust laws of the United States.

4. Antitrust Exemption

USSF argues that, in enacting the ASA, Congress gave great deference to the Olympic movement as it already existed and expected international federations ("IFs") and NGBs to behave much as they were already doing. "Congress was not only aware," argues USSF, "but expected that the NGBs appointed under the Act would be subject to the rules and regulations of their respective IFs, and yet Congress chose not to limit or interfere with those obligations." Thus, argues USSF, Congress can be assumed to have approved USSF's authority over professional soccer, absent an express statement to the contrary.

This is turning the presumption upside down. ***HN10***[] Antitrust exemptions are the exception, **[**16]** not the rule. Surely, Congress expected NGBs generally to follow the rules of their international federations. But that does not mean that Congress intended for IFs to be able to unilaterally authorize their NGBs to violate the antitrust laws of the United States without Congressional approval of any kind. Furthermore, USSF offers no reason why Congress would have known of (and therefore tacitly approved) USSF's practice of sanctioning professional soccer matches at the time it passed or amended the ASA. It seems unlikely that this practice could have been apparent to Congress when it is only this year, after a lengthy arbitration process, that FIFA has clarified that it condones such a practice.

The fundamental issue before the Court is whether the ASA has so clearly granted monolithic control to NGBs over their respective *professional* sports that the ASA acts as an implied repealer of the antitrust laws, thereby exempting NGBs from liability under those laws. *Cf. Silver, 373 U.S. at 347*. ***HN11***[] It is, however, "a cardinal principle of construction that repeals by implication are not favored." *Id. at 357*. Repeal by implication will be found only to the extent that there is a "plain repugnancy" **[**17]** between the ASA and the antitrust laws; therefore, repeal by implication will be found only as necessary to make the ASA work, and even then only to the minimum extent necessary. *See, Gordon v. N.Y. Stock Exchange, Inc., 422 U.S. 659, 682-83, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)*.

The Court finds that repeal by implication is necessary to make the ASA work only to the extent that it applies to amateur sports and to the Olympics and related events. To the extent that the Olympics allow professional athletes to participate, the ASA cannot work unless its antitrust exemption is extended to the **[*970]** NGBs' authority over those athletes, *but only as it pertains to their participation in the Olympics and related events.* To say that the ASA authorizes an NGB to exercise authority over the whole of a sport's professional activities is to read far more into the statute than its text and history can bear.

USSF does not cite any court decision that has held that an NGB has authority to govern an entire *professional* sport. In fact, it is well established that ***HN12***[] baseball is the only professional sport that is exempt from antitrust laws and that "[o]ther professional sports operating interstate . . . are not so exempt." *Flood v. Kuhn, 407 U.S. 258, 282-83, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)*. **[**18]** The Supreme Court has expressed its view that the cases that led to baseball's exemption were an "aberration." *Id. at 282*. *See also, American Needle, Inc. v. National*

Football League, 130 S.Ct. 2201, 176 L. Ed. 2d 947 (2010) (applying ***antitrust law*** to National Football League). It would seem unwise for this Court or any other to establish a new aberration.

The Court therefore holds that, as a matter of law, ***HN13***[] the ASA does not give USSF authority to govern professional soccer in the United States, except to the extent necessary for USSF to govern the participation of professional players in the Olympics and related events. USSF is not entitled to an exemption from the antitrust laws regarding professional soccer, except to the extent necessary for USSF to oversee Olympic and related events. USSF has no clear mandate from Congress to govern the whole of professional soccer in the U.S.

C. ChampionsWorld's Antitrust Claims (Counts 1 through 3)

In Counts 1 through 3 of its Complaint, ChampionsWorld makes claims against USSF and MLS for (1) vertical conspiracy to restrain competition under the Sherman Act, *15 U.S.C. § 1*, (2) conspiracy to monopolize under the Sherman Act, *15 U.S.C. § 2*, and (3) attempt to monopolize, **[**19]** also under *Section 2*.

ChampionsWorld alleges that USSF and MLS conspired together to damage ChampionsWorld's ability to compete by charging excessive sanctioning fees and requiring unreasonable performance bonds, all under color of an authority to govern professional soccer that USSF did not possess. ChampionsWorld alleges that USSF and MLS conspired to bring ChampionsWorld down in order to enhance MLS's position as the premier professional soccer league in the United States. The Court finds that these allegations sufficiently state causes of action under the Sherman Act for conspiracy to restrain trade (*§ 1*) and conspiracy and attempt to monopolize (*§ 2*). USSF, of course, counters that it had the authority to impose its fees and bonds based on its power under the ASA and its antitrust exemption. The Court has rejected this argument, as explained above. The Motions for Judgment on the Pleadings regarding Counts 1 through 3 are therefore denied.

D. ChampionsWorld's RICO Claims (Counts 4 and 5)

1. Count 4

MLS, but not USSF, is named as a Defendant in Count 4, which alleges RICO violations under *18 U.S.C. § 1962(c)*. ChampionsWorld alleges that under RICO, MLS is the "person" that used the **[**20]** "enterprise" of USSF to engage in racketeering activities. *See, 18 U.S.C. §§ 1961(3)* and *1961(4)*. ChampionsWorld alleges that since about 1993, MLS has exerted control over USSF and sought to perpetuate the **[*971]** false premise that USSF has legal authority to govern U.S. professional soccer.

MLS officials allegedly drafted the USSF policy of charging sanctioning fees and performance bonds of MLS's competitors, such as ChampionsWorld. ChampionsWorld alleges that MLS committed extortion under the Hobbs Act, *18 U.S.C. § 1951*, obtaining money from ChampionsWorld on at least two dozen occasions by the wrongful use of fear through economic threats and the color of official right. *See, Evans v. United States, 504 U.S. 255, 261, 112 S. Ct. 1881, 119 L. Ed. 2d 57 (1992)* (holding that Congress has expanded common-law definition of extortion to include acts by private individuals). ChampionsWorld also alleges mail and wire fraud under *18 U.S.C. §§ 1341* and *1343*. The Complaint specifies numerous instances of extortionate acts by USSF, too numerous to repeat in detail, allegedly done at the behest of MLS, which used interstate communications to wring money from ChampionsWorld, all based on USSF's purported power to govern professional **[**21]** soccer.

USSF allegedly threatened, for example, to report ChampionsWorld to FIFA as a "promoter in bad standing," thereby damaging ChampionsWorld's standing in the international soccer community, if ChampionsWorld declined to pay its sanctioning fees. ChampionsWorld's allegations state the identity of persons falsely misrepresenting USSF's authority and, in many cases, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to ChampionsWorld. *See, Sears v. Likens, 912 F.2d 889, 893 (7th Cir. 1990)*.

MLS objects on the grounds that the alleged acts of wrongdoing emanated from USSF, not MLS. MLS also argues that the acts of mail and wire fraud are not pled with the specificity required by *Rule 9(b)*. But ChampionsWorld alleges that certain fraudulent actions that emanated from USSF's office bore the signatures of MLS personnel who expressly signed in such capacities. Sunil Gulati, President of USSF and a board member of both USSF and MLS, was the alleged architect of USSF's sanctioning fee policy. ChampionsWorld specifically names at least five overlapping board members or officers of USSF and MLS who are alleged to have been **[**22]** operating USSF for MLS's benefit by using USSF sanctioning fees to drive MLS's competitors out of business.

The Court finds that ChampionsWorld has sufficiently alleged a pattern of racketeering activities by MLS for Count 4 to survive a motion to dismiss under *Rules 12(c)* and *9(b)*. The cases that MLS cites to support its *Rule 9(b)* argument involve far less detailed allegations than ChampionsWorld provides. *See*, *Photofile, Inc. v. Graphicomp Sys., 1993 U.S. Dist. LEXIS 13177, 1993 WL 375769, *4 (N.D. Ill. 1993)*; *DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1248-49 (2d Cir. 1987)*. Furthermore, MLS's argument that ChampionsWorld has suggested no rational motive for MLS's alleged racketeering activities does not stand up. Surely, the demise of a business competitor would be beneficial to MLS. The Motion for Judgment on the Pleadings regarding Count 4 is denied.

2. Count 5

In Count 5, ChampionsWorld sets forth an alternative RICO claim that USSF and MLS and "DOES 1 through 10" (as-yet-unknown defendants) formed an "association-in-fact" and operated as a single unit to carry out the extortionate and fraudulent scheme described in Count 4, using their managers and employees. Under this theory, the association-in-fact **[**23]** was the "person" and the employees were the "enterprise" used to carry out the pattern of racketeering activities on ChampionsWorld and other victims. ChampionsWorld alleges, plausibly, that if not restrained **[*972]** by this Court, Defendants will continue this pattern of extortionate and fraudulent behavior against other competitors.

USSF argues that this claim fails because ChampionsWorld has not pled sufficient facts to establish the existence of an association-in-fact or a pattern of racketeering activity. The Court has already found in its analysis of Count 4 that ChampionsWorld has sufficiently pled a pattern of racketeering activity.

As to whether ChampionsWorld has pled an association-in-fact, ***HN14***[] an "enterprise" includes "any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. ChampionsWorld alleges that USSF and MLS had legitimate purposes of promoting soccer in the U.S., but that the two had an additional, nefarious purpose to monopolize all professional U.S. soccer matches. ChampionsWorld alleges that the two organizations had a common purpose, with overlapping officers and an organizational structure that provided for continuity with differentiated **[**24]** roles between the two entities. USSF allegedly founded MLS with $ 5 million in seed money, which MLS never paid back. DOES 1 through 10 allegedly dictated USSF's sanctioning fees with the purpose of harming MLS's competitors. These allegations sufficiently plead an "association-in-fact." The Motion for Judgment on the Pleadings regarding Count 5 is denied.

E. ChampionsWorld's Contract Claims (Counts 6 through 10)

1. Fraudulent Inducement Against USSF Only (Count 6)

ChampionsWorld alleges that USSF induced ChampionsWorld to pay unreasonable fees by falsely stating that USSF had the authority to govern U.S. professional soccer. ChampionsWorld alleges that USSF knew this claim was false and intended for ChampionsWorld to rely on it, that ChampionsWorld reasonably relied on the claim, and that this reliance proximately caused monetary loss to ChampionsWorld. This sufficiently states a claim under Illinois law. *See*, *Dloogatch v. Brincat, 396 Ill. App. 3d 842, 920 N.E.2d 1161, 1166, 336 Ill. Dec. 571 (Ill. App. Ct. 2009)*.

2. Unjust Enrichment against USSF and MLS (Count 7)

HN15[] Unjust enrichment is a "quasi-contract" theory that allows a court to infer the existence of a contract where none exists in order to prevent unjust results. To state **[**25]** a claim for unjust enrichment, a plaintiff must allege "that the defendant retained a benefit to the plaintiff's detriment, and that the retention of that benefit violates fundamental principles of justice, equity, and good conscience." *Wooley v. Jackson Hewitt, Inc., 540 F.Supp.2d 964, 978 (N.D. Ill. 2008)*. When the parties' relationship is governed by a valid contract, a plaintiff may not bring a claim of unjust enrichment unless the claim falls outside the contract or the plaintiff challenges the validity of the contract. *Id.*

ChampionsWorld alleges that USSF and MLS were unjustly enriched by the fees illegally imposed on it by USSF. Because ChampionsWorld also challenges the validity of the contracts under which these fees were imposed, it may plead unjust enrichment. Its claim is sufficiently pled against USSF.

MLS argues that there can be no claim of unjust enrichment against MLS because USSF alone is alleged to have received the fees. But ChampionsWorld alleges that USSF's sanctioning fee scheme also allowed MLS to demand fees from ChampionsWorld when the two groups put on doubleheader soccer matches. For example, in July 2003, USSF allegedly gave ChampionsWorld a **[*973]** discount for **[**26]** sponsoring a doubleheader match with MLS. ChampionsWorld was then compelled to pay a $ 50,000 fee to MLS on the basis that MLS had conferred a benefit on ChampionsWorld by deigning to be a co-sponsor. This sufficiently states an unjust enrichment claim against MLS.

3. Restitution for Invalidity of Contracts Due to Lack of Consideration Against USSF Only (Count 8)

ChampionsWorld alleges that, in exchange for the sanctioning fees it paid to USSF, it received no goods or services of any kind -- nothing except USSF's promise to sanction ChampionsWorld's events. Since USSF had no authority to sanction professional events, that promise was illusory. Therefore, argues ChampionsWorld, the contracts were invalid due to lack of consideration.

HN16[] An illusory promise is one that, on closer examination, reveals that the promisor has not promised to do anything. An illusory promise is not sufficient consideration to support a contract. *W.E. Erickson Const., Inc. v. Chicago Title Ins. Co., 266 Ill. App. 3d 905, 641 N.E.2d 861, 864, 204 Ill. Dec. 431 (Ill. App. Ct. 1994)*. ChampionsWorld has therefore sufficiently stated a claim for restitution based on lack of consideration.

4. Restitution for Unconscionability of Contracts (Count 9) and for Unenforceability [**27] Due to Economic Duress (Count 10) Against USSF Only

a. Timeliness (Counts 9 and 10)

USSF argues that ChampionsWorld may not seek restitution because (1) this action usually calls for rescission of the contract and (2) a party who seeks rescission due to unconscionability or duress must do so promptly. *See, McBaldwin Fin. Co. v. DiMaggio, Rosario & Veraja, LLC, 364 Ill. App. 3d 6, 845 N.E.2d 22, 33, 300 Ill. Dec. 601 (Ill. App. Ct. 2006)*; *P.S. & E. West, Inc. v. Essex Group, Inc., 1987 U.S. Dist. LEXIS 6725, 1987 WL 14609, *7 (N.D. Ill. 1987)*.

HN17[] Whether a rescission is timely, depends on the facts of the case. *Brandt v. Phipps, 398 Ill. 296, 75 N.E.2d 757, 767 (Ill. 1947)*. ChampionsWorld's pleadings state that it paid the exorbitant fees demanded by USSF from 2001 to 2004, then found out around fall 2004 that USSF did not have the authority to charge sanctioning fees. ChampionsWorld prepared to commence a lawsuit at that time seeking injunctive relief, but its financial situation had deteriorated to the point that it was unable to do so. ChampionsWorld filed for bankruptcy in January 2005 and ceased operations in May 2005. In March 2006, the Bankruptcy Court confirmed the plan under which this lawsuit was authorized. The Complaint was filed May 2, 2006. These circumstances **[**28]** raise an issue for the trier of fact as to whether ChampionsWorld's restitution claims are timely. *See id.* (finding five year delay reasonable under facts of the case).

It could be argued that if ChampionsWorld had consulted an attorney regarding USSF's authority in 2001, it would have discovered USSF's fraud at that time and demanded rescission then. ChampionsWorld argues that it reasonably believed USSF's claims of authority. Whether its belief was reasonable and any delay therefore excusable is, in this case, a question for the trier of fact. The reasonableness of ChampionsWorld's reliance will depend on the precise facts giving rise to the reliance. *See,* *Rest. 2d Torts § 545* (misrepresentation of law). Therefore, the restitution claims will not be dismissed for untimeliness.

b. Unconscionability (Count 9)

HN18[] Under Illinois law, a finding of unconscionablilty may be based on either procedural or substantive unconscionability or a combination of the two. *Kinkel v. **[*974]** Cingular Wireless LLC, 223 Ill. 2d 1, 857 N.E.2d 250, 263, 306 Ill. Dec. 157 (Ill. 2006)*. "Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice." *Id. at 264*. Here, where **[**29]** USSF is alleged to have misrepresented its authority over professional soccer and used its artificially enhanced bargaining power to compel ChampionsWorld to pay exorbitant fees, Plaintiff has sufficiently stated a claim for procedural unconscionability. *See,* *Levey v. CitiMortgage, Inc., 2009 U.S. Dist. LEXIS 70210, 2009 WL 2475222, *4 (N.D. Ill. 2009)* (finding procedural unconscionability could turn on acts of bad faith such as misrepresentation).

HN19[] The issue of substantive unconscionability concerns whether the terms themselves are commercially reasonable. *Frank's Maint. & Eng'g, Inc v. C.A. Roberts Co., 86 Ill. App. 3d 980, 408 N.E.2d 403, 410, 42 Ill. Dec. 25 (Ill. App. Ct. 1980)*. ChampionsWorld alleges that USSF charged sanctioning fees between 9% and 20% of ChampionsWorld's gross (not net) receipts. ChampionsWorld alleges that FIFA, for example, charges at most a 2% sanctioning fee, while some European federations charge a nominal fee or none at all. ChampionsWorld alleges that the exorbitant fees largely contributed to its demise. This is adequate to state a claim for substantive unconscionability. USSF's Motion for Judgment on the Pleadings for Count 9 is denied.

c. Economic Duress (Count 10)

HN20[] Economic duress is not generally treated as a cause **[**30]** of action in tort, but rather as a defense to the enforceability of a contract or a basis for restitution or rescission. *Lawless v. Central Prod. Credit Ass'n, 228 Ill. App. 3d 500, 592 N.E.2d 1210, 1217, 170 Ill. Dec. 530 (Ill. App. Ct. 1992)*. Here, ChampionsWorld pleads economic duress as a basis for restitution. "Economic duress occurs where undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making the agreement." *Rubin v. Laser, 301 Ill. App. 3d 60, 703 N.E.2d 453, 459, 234 Ill. Dec. 592 (Ill. App. Ct. 1998)*. There is no economic duress unless the defendant applies wrongful or unlawful pressure. *Hurd v. Wildman, Harrold, Allen & Dixon, 303 Ill. App. 3d 84, 707 N.E.2d 609, 614, 236 Ill. Dec. 482 (Ill. App. Ct. 1999)*.

ChampionsWorld alleges that, even if USSF does have the authority to sanction professional U.S. soccer events, USSF took oppressive and undue advantage of its authority from the very beginning in negotiating sanctioning fees with ChampionsWorld. But ***HN21***[] it is difficult for a party to claim that its will was overborne by economic duress when it has had time for "inquiry, examination, and reflection." *J.D. Alexander v. Standard Oil Co., 97 Ill. App. 3d 809, 423 N.E.2d 578, 583, 53 Ill. Dec. 194 (Ill. App. Ct. 1981)*. ChampionsWorld alleges that it contracted with USSF from 2001 **[**31]** to 2004 to put on soccer matches under USSF's auspices. Thus, ChampionsWorld was in a position from the beginning to reject USSF's terms and do business elsewhere. This is inconsistent with the idea that ChampionsWorld was in economic distress and that USSF took advantage of it. ChampionsWorld's allegations are insufficient to support its economic duress claim. USSF's Motion for Judgment on the Pleadings as to Count 10 is granted.

IV. CONCLUSION

For the reasons stated herein, the Court rules as follows:

1. The United States Soccer Federation's and Major League Soccer's Motions for Judgment on the pleadings are denied as to Counts 1 through 9 of the Complaint.

[*975] 2. USSF's Motion to Dismiss Count 10 is granted; Count 10 is dismissed without prejudice.

3. The Court holds that, as a matter of law, the Olympic and Amateur Sports Act, *36 U.S.C. §§ 220501 et seq.*, does not give the United States Soccer Federation authority to govern professional soccer in the United States, except to the extent necessary for USSF to govern the participation of professional players in the Olympic Games and related events, such as Paralympics and Pan-American Games. USSF is not entitled to an exemption from the antitrust **[**32]** laws regarding professional soccer, except to the extent necessary for USSF to oversee Olympic and related events.

4. USSF's Motion for Judicial Notice is granted.

5. USSF's Motion to Strike certain portions of ChampionsWorld's declaration and exhibits accompanying its brief is denied.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber

Harry D. Leinenweber, Judge

United States District Court

DATE: July 21, 2010

[Fleischman v. Albany Med. Ctr.](#)

United States District Court for the Northern District of New York

July 21, 2010, Decided; July 21, 2010, Filed

06-CV-0765

Reporter

2010 U.S. Dist. LEXIS 73220 *; 188 L.R.R.M. 3373; 2010-2 Trade Cas. (CCH) P77,176

WENDY FLEISCHMAN and CINDY CULLEN, on behalf of themselves and all others similarly situated, Plaintiffs, v. ALBANY MEDICAL CENTER; ELLIS HOSPITAL; NORTHEAST HEALTH; SETON HEALTH SYSTEM; ST. PETER'S HEALTH CARE SERVICE, Defendants.

Subsequent History: Motions ruled upon by *Fleischman v. Albany Med. Ctr., 728 F. Supp. 2d 130, 2010 U.S. Dist. LEXIS 73625 (N.D.N.Y, 2010)*

Prior History: *Fleischman v. Albany Med. Ctr., 2010 U.S. Dist. LEXIS 23727 (N.D.N.Y, Feb. 13, 2010)*

Core Terms

summary judgment, exemption, nonstatutory, wages, collective bargaining, renew a motion, confidential, collective bargaining agreement, rate of wages, Sherman Act, antitrust, nurses, registered nurse, class period, exchanges, anti trust law, material fact, negotiations, bargaining, shielded, depress, bargaining unit, anticompetitive, Plaintiffs', conspiracy, non-public, undisputed, alleges, genuine, argues

Counsel: **[*1]** For Marjory Unger, on behalf of herself and all others similarly situated, Plaintiff: Arnold Levin, Charles E. Schaffer, LEAD ATTORNEYS, Levin, Fishbein Law Firm, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen, Milstein Law Firm - Washington Office, Washington, DC; David P. Dean, LEAD ATTORNEY, James, Hoffman Law Firm, Washington, DC; Mark A. Griffin, Raymond J. Farrow, LEAD ATTORNEYS, Keller, Rohrback Law Firm - Seattle Office, Seattle, WA; William P. Butterfield, LEAD ATTORNEY, Hausfeld LLP, Washington, DC; Michael Rhodes-Devey, Towne, Bartkowski Law Firm - Albany Office, Albany, NY.

For Wendy Fleischman, Cindy Cullen, Plaintiffs: Besrat Gebrewold, LEAD ATTORNEY, David A. Young, Kit A. Pierson, PRO HAC VICE, Cohen, Milstein Law Firm - Washington Office, Washington, DC; Daniel M. Cohen, LEAD ATTORNEY, PRO HAC VICE, Cuneo, Gilbert Law Firm - VA Office, Alexandria, VA; Daniel A. Small, LEAD ATTORNEY, Kalpana Kotagal, Cohen, Milstein Law Firm - Washington Office, Washington, DC; David P. Dean, LEAD ATTORNEY, James, Hoffman Law Firm, Washington, DC; Emilie S. Kraft, LEAD ATTORNEY, PRO HAC VICE, James, Hoffman Law Firm, Washington, DC; Mark A. Griffin, Raymond J. Farrow, LEAD ATTORNEYS, **[*2]** Keller, Rohrback Law Firm - Seattle Office, Seattle, WA; Sharon K. Robertson, LEAD ATTORNEY, Cohen, Milstein Law Firm - New York Office, New York, NY; Susan F. Bartkowski, LEAD ATTORNEY, Michael Rhodes-Devey, Towne, Bartkowski Law Firm - Albany Office, Albany, NY; Charles E. Schaffer, Levin, Fishbein Law Firm, Philadelphia, PA.

For Albany Medical Center, Defendant: David Marx, LEAD ATTORNEY, McDermott, Will Law Firm - Chicago Office, Chicago, IL; Nicholas J. D'Ambrosio, Sanjeeve K. DeSoyza, William E. Reynolds, LEAD ATTORNEYS, Bond, Schoeneck Law Firm - Albany, Albany, NY; Richard L. Weisz, Hodgson, Russ Law Firm - Albany Office, Albany, NY.

For Ascension Health, Inc., Defendant: Michael R. Shumaker, Toby G. Singer, LEAD ATTORNEYS, Jones, Day Law Firm - DC Office, Washington, DC; Mark Thomas, Wilson, Elser Law Firm - Albany, Albany, NY.

For Catholic Health East, Defendant: Steven E. Bizar, LEAD ATTORNEY, Christopher M. Hapka, Buchanan, Ingersoll Law Firm - Philadelphia Office, Philadelphia, PA; Wendelynne J. Newton, LEAD ATTORNEY, Buchanan, Ingersoll Law Firm - Pittsburgh Office, Pittsburgh, PA.

For Ellis Hospital, Defendant: David Marx, LEAD ATTORNEY, McDermott, Will Law Firm - Chicago **[*3]** Office, Chicago, IL; Nicholas J. D'Ambrosio, Jr., William E. Reynolds, LEAD ATTORNEYS, Sanjeeve K. DeSoyza, Bond, Schoeneck Law Firm - Albany, Albany, NY; Richard L. Weisz, LEAD ATTORNEY, Hodgson, Russ Law Firm - Albany Office, Albany, NY.

For Northeast Health, Defendant: Daniel J. Hurteau, LEAD ATTORNEY, Nixon, Peabody Law Firm - Albany Office, Albany, NY; Gordon L. Lang, LEAD ATTORNEY, Nixon, Peabody Law Firm - DC Office, Washington, DC.

For Seton Health System, Defendant: Michael R. Shumaker, LEAD ATTORNEY, Jones, Day Law Firm - DC Office, Washington, DC; Mark Thomas, Wilson, Elser Law Firm - Albany, Albany, NY.

For St. Peter's Health Care Service, Defendant: Robert H. Iseman, LEAD ATTORNEY, Brian M. Culnan, John F. Queenan, Iseman, Cunningham Law Firm - Albany Office, Albany, NY.

Judges: Thomas J. McAvoy, Senior United States District Judge.

Opinion by: Thomas J. McAvoy

Opinion

THOMAS J. McAVOY

Senior United States District Judge

DECISION and ORDER

Plaintiffs commenced the instant action against Defendants claiming that they conspired amongst themselves to depress the wages of registered nurses in the Albany area in violation of antitrust laws. Presently before the Court is Defendant Ellis Hospital's ("Ellis") Renewed **[*4]** Motion for Summary Judgment.

I. FACTS

Plaintiffs are registered nurses ("RNs") who allege Defendant Hospitals entered into at least two restraints of trade in violation of the Sherman Act during the class period of June 20, 2002 through June 20, 2006. Count I alleges that Defendants engaged in a continuing conspiracy in restraint of trade to depress the compensation of RNs employed at hospitals in the Albany area. Count II alleges that Defendants have engaged in a continuing agreement to regularly exchange detailed and non-public information about compensation being paid or to be paid to their RN employees, which not only facilitated the enforcement of the wage suppression conspiracy but unreasonably restrained competition on RN compensation in its own right. Plaintiffs maintain that the alleged conspiracy had the effect of depressing compensation for hospital RNs in the Albany-Schenectady-Troy metropolitan area despite a nursing shortage.

In a Decision and Order dated July 28, 2008, the Court certified a class of registered nurses with respect to two issues: "whether there has been a violation of ***antitrust law*** and whether there has been injury to the class that the Sherman Act was designed **[*5]** to prevent." *Fleischman v. Albany Medical Center, 2008 U.S. Dist. LEXIS 57188, 2008 WL 2945993, at *7 (N.D.N.Y. July 28, 2008)*. Following merits discovery, Plaintiffs moved the Court to amend the prior certification order to additionally certify the issues of impact and damages as to a narrower class of registered nurses. The Court denied Plaintiff's motion.

The following facts are undisputed. Ellis is a not-for-profit hospital located in Schenectady, New York. Ellis is the only defendant in this case whose nurses are represented by a labor union. Specifically, the New York State Nurses Association (NYSNA) has represented the Registered Nurses and Assistant Instructors employed by Ellis for the past forty years. Ellis and NYSNA have negotiated and entered into three collective bargaining agreements (CBAs) which cover the entire class period at issue. [1] These CBAs result from negotiations between Ellis and the NYSNA, during which Ellis and NYSNA exchanged a series of proposals and counter proposals regarding RN wages. The class period CBAs include Ellis's and NYSNA's agreements on all aspects of RN compensation for registered nurses at Ellis who are part of the bargaining unit represented by NYSNA.

It is similarly undisputed that Ellis participated in information exchanges with the other Defendants during the class period and collected RN wage data from the other Defendants. The parties dispute the extent and purpose of these exchanges and the role the collected data played in Ellis negotiations.

The parties also dispute the confidentiality of Ellis's CBAs. The parties agree that: (1) the Class Period CBAs were printed by NYSNA and distributed to hundreds of Ellis RN bargaining unit members; (2) no restrictions were placed on the RN's use or further dissemination of these agreements; and (3) RNs were not asked to return the agreements if they left employment with Ellis. Plaintiffs maintain that the NYSNA considered the CBAs to be confidential. They contend that the NYSNA "[g]enerally, . . . has not and does not, provide copies of its CBAs [to] Ellis management or nurses at other hospitals" and "[w]hile NYSNA provides the Department of **[*7]** Labor a copy of its contracts at the agency's request, it asks that the DOL keep the CBAs confidential." Furthermore, Plaintiffs argue that because no other hospital produced a copy of the CBAs during the course of litigation, the other Defendants did not possess the CBAs. Ellis, on the other hand, contends that the CBAs "between itself and NYSNA constitute non-confidential, publicly available information." They point to the fact that "[i]n some instances, local news outlets publicly reported the agreed-upon wage increases in the CBAs just days after ratification." Interestingly, however, Ellis attorneys designated the 2002, 2004, and 2006 CBAs as "highly confidential" under the Court's protective order. [2]

Presently before the Court is Ellis's "renewed motion for summary judgment based on its unique status **[*8]** as the lone defendant in this action whose [RNs] are unionized" and the nonstatutory labor exemption. See Mem. of Law in Support of Def. Ellis Hospital's Renewed Motion for Summary Judgment. "On December 11, 2006, this Court denied a motion for summary judgment by Ellis Hospital that was based on the same nonstatutory labor exemption to the antitrust laws that Ellis raises in its 'renewed' motion." See Plaintiffs' Mem. in Opp. to Def. Ellis Hospital's Renewed Motion for Summary Judgment.

In Ellis's renewed motion for summary judgment, it argues that: (1) "the undisputed evidence shows that the wage rates for Ellis RNs during the class period were established exclusively through federally-mandated collective bargaining between Ellis and the [NYSNA] and that these agreed upon wage rates are therefore shielded from plaintiff's antitrust attack by the nonstatutory labor exemption;" and (2) "because the wage rates contained in the collective bargaining agreements between itself and NYSNA constitute non-confidential, publicly available information, it did not violate the Sherman Act by occasionally sharing such information with other hospitals." See Mem. of Law in Support of Def. Ellis Hospital's **[*9]** Renewed Motion for Summary Judgment. Ellis argues that "[f]or these reasons, . . . it is entitled to summary judgment as against plaintiffs' claims that it violated the Sherman Act by '(i) allegedly participating in a conspiracy to depress the compensation of registered nurses in the Albany-Schenectady-Troy Metropolitan Statistical Area; and (ii) allegedly participating in a continuing agreement to exchange detailed and non-public RN compensation information that reduced compensation and depressed RN compensation.'"

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[1] The CBA agreements **[*6]** at issue ("Class Period CBAs") are: (1) the "2002 CBA" covering March 1, 2002 through February 29, 2004; (2) the "2004 CBA" covering March 1, 2004 through February 29, 2006; and (3) the "2006 CBA" covering March 1, 2006 through February 28, 2010.

[2] Under the terms of the protective order, for a party to designate a document "confidential," it must have a good faith belief that the document "reflects or discloses its confidential or proprietary information." To designate something "highly confidential," the producing party must believe that the document contains "extremely sensitive confidential and/or proprietary information."

Plaintiffs oppose this motion, arguing that: (1) the nonstatutory labor exception does not protect Ellis from "anti-competitive activity . . . engaged in outside of and separate from the collective bargaining process with the nurses' union;" and (2) "aside from the challenged exchanges with other hospitals' human resource personnel, the CBAs and the included wage information were not shared with other hospitals' managements, competing unions, or nurses at other hospitals."

II. STANDARD OF REVIEW

Summary judgment, pursuant to *Fed. R. Civ. P. 56(c)*, is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, **[*10]** if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment bears the initial burden of showing, through the production of admissible evidence, that no genuine issue of material fact exists. *Major League Baseball Properties, Inc. v. Salvino, 542 F.3d 290, 309 (2d Cir. 2008)*. Only after the moving party has met this burden is the non-moving party required to produce evidence demonstrating that genuine issues of material fact exist. *Salahuddin v. Goord, 467 F.3d 263, 272-73 (2d Cir. 2006)*. The nonmoving party must do more than "rest upon the mere allegations … of the [plaintiff's] pleading" or "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; see also *Fed. R. Civ. P. 56(e)* ("When a motion for summary judgment is made [by a defendant] and supported as provided in this rule, the [plaintiff] may not rest upon the mere allegations ? of the [plaintiff's] pleading …."). Rather, "[a] dispute regarding **[*11]** a material fact is *genuine* if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ross v. McGinnis, 00-CV-0275, 2008 U.S. Dist. LEXIS 57188, 2004 WL 1125177, at *8 (W.D.N.Y. Mar. 29, 2004)* [internal quotations omitted] [emphasis added]. It must be apparent that no rational finder of fact could find in favor of the non-moving party for a court to grant a motion for summary judgment. *Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223-24 (2d Cir. 1994)*; *Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988)*. In determining whether a genuine issue of material fact exists, the Court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997)* [citation omitted]; *Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990)* [citation omitted].

III. DISCUSSION

Ellis argues that it is entitled to summary judgment because: (1) the nonstatutory labor exemption shields it from Plaintiffs' antitrust attack; and (2) occasionally exchanging non-confidential, publically available information with other hospitals does not violate the Sherman Act. The Court will address these claims seriatim.

*1. Whether the **[*12]** Non-Statutory Labor Exemption Applies*

Ellis argues that "the undisputed evidence shows that the wage rates for Ellis RNs during the class period were established exclusively through federally-mandated collective bargaining between Ellis and the New York State Nurses Association (NYSNA) and that these agreed-upon wage rates are therefore shielded from Plaintiffs' antitrust attack by the nonstatutory labor exemption." See Docket No. 348. Plaintiffs counter that the non-statutory exemption does not apply because they do not challenge Ellis' collective bargaining activities or agreements with NYSNA and challenge only Ellis' conspiracies with other, non-unionized hospitals. See Plaintiffs' Mem. in Opp. to Def. Ellis Hospital's Renewed Motion for Summary Judgment, at 12 ("Plaintiffs claim only that Ellis violated the antitrust laws by conspiring with other hospitals to suppress wages and share wage data outside of any collective bargaining relationship."). **[*13]** Ellis responds that by claiming the Ellis RNs have been underpaid as a result of alleged collusion between Ellis and other hospitals, Plaintiffs are in effect challenging the CBAs or the bargaining relationship between Ellis and the NYSNA.

"The non-statutory exemption has been inferred 'from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rule making and interpretive authority to the National Labor Relations Board.'" *Clarett v. National Football League, 369 F.3d 124, 130 (2d Cir. 2004)* (quoting *Brown v. Pro Football, Inc., 518 U.S. 231, 236, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996))*. "The purpose of the nonstatutory exemption is to "reconcile [the] conflicting national policies [inherent in the labor and antitrust laws] - one protecting business competition, the other encouraging collective bargaining." *Local 210, Laborers' International Union of North America v. Labor Relations Division Associated General Contractors of America, N.Y.S. Chapter, Inc., 844 F.2d 69, 79 (2d Cir. 1987)*.

In Local 201 the Second Circuit stated:

> [a]greements between a union **[*14]** and an employer are exempt from antitrust scrutiny if they are so intimately related to wages, hours and working conditions that the union's successful attempt to obtain the provisions through bona fide arm's length bargaining in pursuant of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and therefore is exempt from the Sherman Act.

Local 210, 844 F.2d at 79 (quoting *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 689-90, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*. The Second Circuit went on to articulate a two part test to determine whether the nonstatutory exemption applies:

> First, the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining. Second, the agreement must not impose a "direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions [that results from collective bargaining **[*15]** agreements].

Local 210, 844 F.2d at 79-80 (2d Cir. 1987) (internal citations omitted).

In the bench decision denying Ellis's original summary judgment motion this Court engaged in extensive discussion of the relevant case law and found that although "there is little doubt that the collective bargaining agreements between Ellis and the nurse's union fall within the scope of the nonstatutory antitrust exemption". . . "Ellis cannot use its collective bargaining agreement with the nurse's union to insulate any anticompetitive activity it may have engaged in outside of, and separate from, the collective bargaining process with the nurse's union." In sum, the Court stated that because "the Complaint alleges conduct that goes beyond the collective bargaining process between Ellis and the nurses' union," and "there is no evidence before the Court that sharing non-public compensation information with other hospitals was part of the give and take of a negotiation process" necessary to the collective-bargaining process, "it cannot be said that Ellis's activity falls within the nonstatutory labor exemption." As an example of behavior that would not be protected by the exemption, the Court explained **[*16]** that Ellis could have "negotiated its wages with the union and then engaged in compensation sharing with other hospitals to ensure that those other hospitals kept their wages down."

In a factually analogous case, *Reed v. Advocate Health Care, 2007 U.S. Dist. LEXIS 22816, 2007 WL 967932, at * 2 (N.D.Ill. March 28, 2007)*, the defendant hospital maintained that "because the wages it pays its RNs are the result of a collective bargaining agreement ("CBA"), the nonstatutory exemption makes the labor laws exclusive and antitrust-related determinations 'inappropriate.'" The plaintiffs responded that "because they do not challenge [defendants'] collective bargaining activities or agreements with the [labor union] but rather certain agreements and collusion among [defendant] and various non-unionized hospitals, the nonstatutory exemption is inapplicable." *2007 U.S. Dist. LEXIS 22816, [WL] at *3*. The Court in Reed held that the nonstatutory labor exemption does not apply, and that no authorities cited "stand for the proposition that an employer is immune from suit under the antitrust laws merely because it happens to be a party to a CBA, particularly a CBA to which none of its alleged co-conspirator employers is a party." Id. The Court in Reed extensively **[*17]** quoted and concurred with the analysis of this Court's bench decision in which this Court denied Ellis' original motion for summary judgement.

Ellis's renewed motion for summary judgment again argues that because its wage rates were established exclusively through collective bargaining, they are shielded from anti-trust attack. This argument ignores the previous decision by the Court which holds that any alleged anticompetitive agreements with non-unionized hospitals to depress RN wages are not protected by the nonstatutory exemption. The fact that it is undisputed that "wage rates for Ellis RNs during the class period were established exclusively through federally mandated collective bargaining between Ellis and the [NYSNA]" does not shield Ellis from liability for these alleged anticompetitive agreements.

In this case, Ellis explains in its memorandum in support of summary judgment that it collected "some RN wage data from local hospitals" in preparation for negotiations "as part of its effort to stay ahead of the market." Plaintiffs dispute the purpose of these exchanges arguing that the evidence shows that "despite a severe, ongoing shortage of nurses in the market that caused both **[*18]** high nurse vacancies and high agency costs, Ellis had an agreement to exchange, and did exchange, detailed, nonpublic nurse wage information with its competitors in blatant violation of Department of Justice antitrust guidelines, leading to softened competition in the market and markedly suppressed wages." The nature and purpose of the information exchanges are questions of fact which the Court will not address on summary judgment. Thus, the nonstatutory antitrust exemption does not shield Ellis from liability.

2. Whether Ellis Hospital Violated the Sherman Act

Ellis maintains that "because the wage rates contained in the collective bargaining agreements between itself and NYSNA constitute non-confidential, publicly available information, it did not violate the Sherman Act by occasionally sharing some information with other hospitals." See Docket No. 348. The parties dispute the confidentiality of the CBAs. Plaintiffs argue that the CBAs, although distributed to the nurses in the bargaining unit, "contained nonpublic compensation information." Plaintiffs cite to the fact that no other hospital had a copy of the Ellis CBA as evidence that they were not public information. They also point **[*19]** out that Defendants requested that papers be filed under seal as "highly confidential." Ellis maintains that because the CBAs were distributed to all nurses in the bargaining unit and did not have to be returned if a nurse were to leave employment at Ellis hospital, the CBAs cannot be classified as confidential. In support of its argument, Ellis attaches the deposition of NYSNA Labor relations representative Strominger. See Strominger Dep., 69:1-10 (Defendants' Exhibit M).

> Q: Is there anything in those four collective bargaining agreements that are in front of you that the union considered confidential information?
>
> Mr. Tillou: Objection to the form of the question. Broad.
>
> A: Any, we know that anything in these documents is distributed to bargaining unit members, employer representatives, so - -
>
> Q: So its not confidential?
>
> A: No.

Thus, whether or not the CBAs at issue are confidential is a question of fact properly left to the finder of fact and not to be decided on summary judgment.

IV. CONCLUSION

For the foregoing reasons Defendant Ellis Hospital's Renewed Motion for Summary Judgment is DENIED.

Dated: July 21, 2010

/s/ Thomas J. McAvoy

Thomas J. McAvoy

Senior, U.S. District Judge

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[Trailer Bridge, Inc. v. Ill. Nat'l Ins. Co.](#)

United States District Court for the Middle District of Florida, Jacksonville Division

July 21, 2010, Decided; July 22, 2010, Filed

Case No.: 3:09-cv-1135-J-20MCR

Reporter

2010 U.S. Dist. LEXIS 73970 *; 2010-2 Trade Cas. (CCH) P77,126; 2010 WL 2927424

TRAILER BRIDGE, INC., a Delaware corporation, Plaintiff, vs. ILLINOIS NATIONAL INSURANCE COMPANY, an Illinois corporation, Defendant.

Subsequent History: Affirmed by, Request denied by *Trailer Bridge, Inc. v. Ill. Nat'l Ins. Co., 2011 U.S. App. LEXIS 19230 (11th Cir. Fla., Sept. 19, 2011)*

Core Terms

Antitrust, advertising, insured, duty to defend, advertising injury, coverage, allegations, damages, summary judgment, surcharges, customers, prices, indemnify, purported, Partial, courts, rates

Counsel: **[*1]** For Trailer Bridge, Inc., a Delaware corporation, Plaintiff: Alan S. Wachs, LEAD ATTORNEY, Volpe, Bajalia, Wickes, Rogerson & Wachs, Jacksonville, FL; Andrew M. Sussman, David A. Gauntlett, LEAD ATTORNEYS, PRO HAC VICE, Gauntlett & Associates, Irvine, CA.

For Illinois National Insurance Company, an Illinois corporation, Defendant: Bradley R. Johnson, Latasha Garrison-Fullwood, LEAD ATTORNEYS, Taylor, Day, Currie, Boyd & Johnson, PA, Jacksonville, FL; Daniel I. Graham , Jr., James F. Baffa, Mary F. Licari, LEAD ATTORNEYS, PRO HAC VICE, Bates & Carey, LLP, Chicago, IL; Laura A. McArdle, Richard H. Nicolaides , Jr., LEAD ATTORNEYS, Bates & Carey, LLP, Chicago, IL.

Judges: HARVEY E. SCHLESINGER, United States District Judge.

Opinion by: HARVEY E. SCHLESINGER

Opinion

ORDER

Before this Court is Plaintiff Trailer Bridge, Inc.'s Motion for Partial Summary Judgment Re Illinois National Insurance Company's Duty to Defend (Doc. 11, filed December 15, 2009); Defendant Illinois National Insurance Company's Motion for Summary Judgment and Response in Opposition to Plaintiff Trailer Bridge's Motion for Partial Summary Judgment (Doc. 21, filed January 25, 2010); and Plaintiff Trailer Bridge, Inc.'s Opposition to Defendant Illinois **[*2]** National Insurance Company's Motion for Summary Judgment (Doc. 25, filed February 4, 2010).

I. Statement of Facts [1]

Plaintiff, Trailer Bridge, Inc. ("Trailer Bridge"), is a Delaware corporation with its principal place of business in Jacksonville, Florida. Trailer Bridge offers integrated freight shipping services between the continental United States and Puerto Rico. At issue in this case is whether its insurer, Illinois National Insurance Company ("Illinois National"), has a duty to defend or indemnify Trailer Bridge in a separate action.

Illinois National issued Commercial General Liability Policy No. TGL 989-58-40 ("the Policy") to Trailer Bridge for the policy period July 1, 2004, to July 1, 2005. (Doc. 1-1, Exhibit 1, filed November 19, 2009). Subject to certain conditions, Illinois National agreed to pay any damages Trailer Bridge became legally obligated to pay because of "personal and advertising injury," and defend against any suit seeking those damages. *Id.* at 12. "Personal and advertising injury" is defined **[*3]** by the Policy as:

> injury . . . arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
>
> f. The use of another's advertising idea in your "advertisement"; or
>
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement"[.]

Id. at 21.

In 2008, various entities filed class action lawsuits against Trailer Bridge and other parties in different U.S. district courts. The actions shared factual questions relating to allegations that Trailer Bridge and others conspired to fix prices of cabotage services to and from Puerto Rico, in violation of the Sherman Antitrust Act. On August 13, 2008, the Judicial Panel on Multidistrict **[*4]** Litigation consolidated and transferred those cases, along with all related future actions, to the United States District Court for the District of Puerto Rico for pre-trial administration. The underlying consolidated action is captioned *In Re Puerto Rican Cabotage Antitrust Litigation, 571 F. Supp. 2d 1378* ("Antitrust Litigation").

On April 29, 2008, through May 7, 2008, Trailer Bridge provided Illinois National with copies of the initial class action complaints and requested that the company provide a defense to the suits. By letter dated August 19, 2008, Illinois National notified Trailer Bridge that the actions did not implicate coverage under the Policy. However, on May 18, 2009, Trailer Bridge retendered the individual complaints and the consolidated second amended complaint. After reviewing the pleadings, Illinois National again found that no coverage existed under the Policy. Thereafter, Illinois National also denied a defense to the Antitrust Litigation upon receipt of the consolidated third and fourth amended complaints.

On November 19, 2009, Trailer Bridge filed its Complaint in this Court for breach of contract and declaratory judgment. (Doc. 1). The two-count **[*5]** Complaint asserts that the complaint filed in the Antitrust Litigation alleges a personal and advertising injury offense, and thus, Illinois National 1) owes Trailer Bridge a duty to defend, and 2) breached the insurance contract by failing to provide a defense.

II. Discussion

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[1] This Court's use of the word "facts" is solely for purposes of deciding the Motions before it. *Kelly v. Curtis, 21 F.3d 1544, 1546 (11th Cir. 1994)* (citation omitted).

Trailer Bridge moved for summary judgment on the specific issue of whether Illinois National owes a duty to defend in the Antitrust Litigation. Illinois National submitted its memorandum in opposition and its cross motion for summary judgment on the issues of whether it owes Trailer Bridge a duty to defend and whether it has an obligation to indemnify.

a. Standard of Review

Summary judgment is proper if, following discovery, the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file show that there is no genuine issue as to any material fact in dispute and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Fed. R. Civ. P. 56*. Further, when the essential facts of the case are not in dispute, it is appropriate for a district court to interpret an insurance contract to determine whether any ambiguities exist as a matter of **[*6]** law. *Gulf Tampa Drydock Co. v. Great Atl. Ins. Co., 757 F.2d 1172, 1174 (11th Cir. 1985)*.

b. Choice of Law and Contract Construction

This case is before this Court on diversity jurisdiction. In diversity actions, the federal court must apply the substantive law of the state in which it sits, "except in matters governed by the Federal Constitution or by act of Congress." *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*. Because the insurance contract was issued in Florida and the questions before this Court are ones of contract construction, it is undisputed that Florida law governs the meaning of the Policy and its application to the facts of this case. In the absence of precedents from Florida's courts, however, the case law of other jurisdictions that have examined similar policy provisions may be considered to determine the issues of state law as this Court believes the Florida Supreme Court would. *State Farm Fire and Cas. Co. v. Steinberg, 393 F.3d 1226, 1231 (11th Cir. 2004)*.

"In insurance coverage cases under Florida law, courts look at the insurance policy as a whole and give every provision its 'full meaning and operative effect.'" *State Farm Fire and Cas. Co., 393 F.3d at 1230* (quoting **[*7]** *Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1186 (11th Cir. 2002))*. "[I]nsurance contracts are construed according to their plain meaning. Ambiguities are construed against the insurer and in favor of coverage." *Taurus Holdings, Inc. v. U.S. Fidelity and Guar. Co., 913 So.2d 528, 532 (Fla. 2005)*. "Although ambiguous provisions are construed in favor of coverage, to allow for such a construction the provision must actually be ambiguous." *Id.* Courts are not permitted to "rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Id.* (internal quotation marks omitted).

c. Duty to Defend

In Florida, "the general rule is that an insurance company's duty to defend an insured is determined solely from the allegations in the complaint against the insured, not by the true facts of the cause of action against the insured, the insured's version of the facts or the insured's defenses." *State Farm Fire and Cas. Co., 393 F.3d at 1230* (citing *Amerisure Ins. Co. v. Gold Coast Marine Distribs., Inc., 771 So.2d 579, 580-81 (Fla. 4th DCA 2000))*. The insurer must provide a defense in the underlying action if the complaint states **[*8]** facts that bring the injury within the policy's coverage. *Id.* "If the complaint alleges facts partially within and partially outside the scope of coverage, the insurer is obligated to defend the entire suit." *Lazzara Oil Co. v. Columbia Cas. Co., 683 F. Supp. 777, 779 (M.D. Fla. 1988)*. The merits of the underlying suit have no bearing on whether the duty is owed. *State Farm Fire and Cas. Co., 393 F.3d at 1230*. "Furthermore, any doubt about the duty to defend must be resolved in favor of the insured. Coverage is determined from examining the most recent amended pleading, not the original pleading." *Id.* (citation omitted).

The parties agree that no material facts are in dispute. Illinois National's duty to defend depends entirely on interpretation of the Policy and its application to the allegations of the underlying complaint. Since these issues are matters of law, this question is appropriate for summary judgment.

The parties filed a Joint Notice to Court (Doc. 43, filed June 2, 2010) representing that Trailer Bridge was dismissed with prejudice from the Antitrust Litigation on April 30, 2010. Thus, the Fourth Amended Class Action Complaint

(Doc. S-1, filed May 12, 2010) ("Antitrust **[*9]** Complaint") is the most recent pleading in which Trailer Bridge is named as a party. The Antitrust Complaint alleges violations of the Sherman Antitrust Act, *15 U.S.C. §§ 1*, *3*. [2] It claims the underlying defendants restricted competition through a continuing agreement to allocate customers, rig bids, and fix rates, surcharges, and other fees. (Doc. S-1 at 59-61). The Antitrust Complaint further alleges the underlying defendants attempted to conceal their scheme, in part, by making false and misleading public statements about the reasons for rate and surcharge increases. *Id.* at 54-57. As an example, it points to a portion of an interview given by Trailer Bridge's CEO in 2005. *Id.* at 56. He is quoted as stating "that customer decisions were driven by '[p]rice in an all-inclusive sense, which starts with the freight rate[.]'" *Id.*

The plaintiffs in the Antitrust Litigation took these statements to imply the underlying "Defendants could not rig bids or set and increase rates, surcharges or fees, and therefore were not doing so[.]" *Id.* They allegedly "lulled [the underlying] Plaintiffs and members of the class into believing that the price increases were the normal result of competitive market forces rather than the product of [the underlying] Defendants' anti-competitive efforts." *Id.*

Trailer Bridge argues that the above allegations against it "potentially evidence 'use of another's advertising idea in [its] advertisement' so as to fall within the potential coverage for offense section" of the Policy. (Doc. 11 at 2). It claims an implication of market driven pricing constitutes an advertising idea, *id.* at 13, and the Antitrust Complaint indicates the idea was already used by its co-defendants in the underlying action, thus making it an idea of another's. *Id.* at 10. [3]

i. Advertising Injury

Illinois National takes issue with Trailer Bridge's interpretation of the Policy. According to Illinois National, the Antitrust Complaint does not allege wrongful acts were committed in Trailer Bridge's "advertisement," or that Trailer Bridge used "another's advertising idea." Because the Antitrust Complaint fails to contain allegations comprising an advertising injury offense, it argues coverage is not implicated under the Policy.

The Policy states Illinois National has a duty to defend against any cases seeking damages because of personal and advertising injury. (Doc. 1-1, Exhibit 1, at 12). "Personal and advertising injury" is defined as injury arising out of specific, enumerated offenses, including "[t]he use of another's advertising idea in your 'advertisement[.]'" *Id.* at 21. The Policy defines "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services **[*12]** for the purpose of attracting customers or supporters." *Id.* at 19.

The disputed quotation derives from an article published by The Wall Street Transcript ("Periodical"). (Doc. 1-1, Exhibit 5, filed November 19, 2009). The article, based on an interview of Trailer Bridge's past CEO, covers multiple topics, ranging from what types of assets the company owns and descriptions of its services, to the CEO's general outlook on the relevant market. While it could conceivably lead to additional customers or supporters for Trailer Bridge, that in no way appears to be the article's purpose. Its purpose, instead, seems to be purely informational. The Periodical questioned the CEO so that it could provide a summary of the company and market to its readership. No representation is made that Trailer Bridge paid the Periodical to publish the article or directed its content in any way. Including quotes from Trailer Bridge's CEO, which happen to be beneficial to the company, does not transform the article into an advertisement of the company's. Notwithstanding, even if the Antitrust Complaint identified a relevant advertisement, it still fails to allege facts showing use of "another's advertising idea."

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[2] This Court notes that sections of the Antitrust Complaint, which is currently filed under seal, are quoted within this Order. *See* Order (Doc. 40, signed April 22, 2010). All material discussed or quoted, however, is substantially similar to the allegations contained in the complaint filed in the public record. *See* Second Consolidated Amended Class Action Complaint **[*10]** (Doc. 1-2, Exhibit 4, filed November 19, 2009).

[3] Trailer Bridge argues that multiple Policy exclusions, including the exclusion for injury arising out of criminal acts, do not apply in this case. *Id.* at 19-25; *see* Doc. 1-1, Exhibit 1, at 13. Illinois **[*11]** National fails to oppose the arguments, and merely claims that this Court need not consider their applicability at this time. (Doc. 21 at 31). Thus, for the purposes of this Motion, Illinois National has conceded the issue.

The **[*13]** Policy does not define "advertising idea." Yet, the Eleventh Circuit, applying Florida law, has construed the term to mean "any idea or concept related to the promotion of a product to the public." *Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1188 (11th Cir. 2002)*. Put another way, "[a]n advertising idea is a concept about the *manner* a product is promoted to the public." *Gemini Ins. Co. v. The Andy Boyd Co., Civil Action No. H-05-1861, 2006 U.S. Dist. LEXIS 28394, 2006 WL 1195639, at *2 (S.D. Tex. May 3, 2006)* (citing *Hyman, 304 F.3d at 1188*).

It is merely asserted that Trailer Bridge made misleading statements about the reasons for increased prices, specifically, representing "that customer decisions were driven by '[p]rice in an all-inclusive sense, which starts with the freight rate.'" (Doc. S-1 at 56). No effort was made to differentiate or promote any aspect of Trailer Bridge's products or services. Instead, the statement provided a brief explanation of the factors affecting price in the entire Puerto Rican cabotage market. *Cf. American Simmental Ass'n v. Coregis Ins. Co., 282 F.3d 582, 587 (8th Cir. 2002)* ("The plain and ordinary meaning of 'advertising idea' generally encompasses an idea for calling **[*14]** public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage." (internal quotation marks omitted)); *Proxima Corp. v. Federal Ins. Co., 26 F.3d 132, at *1* [published in full-text format at *1994 U.S. App. LEXIS 14843*] (9th Cir. 1994) (unpublished table decision) (holding that the shape of a product was not an advertising idea because there was no allegation in the complaint "that the design itself [was] a trademark, or [was] intended to distinguish the product from others that might enter the market." (citation omitted)). Regardless of whether the statement lulled customers into believing rates were controlled by the free market, its purpose does not appear related to promoting Trailer Bridge's product.

Even assuming, however, the explanation amounted to an advertising idea, the Antitrust Complaint fails to allege it belonged to another. Under the Policy, the advertising idea used must be "another's" to meet the definition of the claimed offense. (Doc. 1-1, Exhibit 1, at 21). According to Trailer Bridge, the Antitrust Complaint implies the idea was used by its co-conspirators prior to the date of the CEO's interview. (Doc. 11 at 10; Doc. 25 at 9). It argues this, paired with the pleading's **[*15]** failure to allege or imply Trailer Bridge created the idea, "raise[s] the unavoidable inference that the subject 'advertising idea' originated with an entity other than Trailer Bridge." (Doc. 25 at 9).

Trailer Bridge asks this Court to infer too much. "[C]ourts need not stretch the allegations beyond reason to impose a duty on the insurer." *Holloway Sportswear, Inc. v. Transp. Ins. Co., 58 F. App'x 172, 175 (6th Cir. 2003)*. Contrary to Trailer Bridge's argument, the broad assertion, "[f]rom 2002 through April 2008, Defendants . . . affirmatively and wrongfully concealed their unlawful conduct" through "misrepresentations . . . concerning the reasons for increases in rates, surcharges and other fees[,]" does not imply another individual originated or used the purported advertising idea prior to Trailer Bridge. (Doc. S-1 at 54-55; *see* Doc. 25 at 9).

As an alternative argument, Trailer Bridge contends that airlines routinely cite fuel surcharges as an explanation for the increase in their prices, which establishes it was another's idea. (Doc. 11 at 10). Notwithstanding, courts must look to the underlying complaint to determine the duty to defend, not the true facts of the cause of action **[*16]** against the insured or the insured's version of the facts. *State Farm Fire and Cas. Co., 393 F.3d at 1230*. Just as there is no mention of the purported advertising idea belonging to a co-conspirator, nowhere in the Antitrust Complaint is it implied that the idea was ever used by or belonged to an airline. The Antitrust Complaint simply fails to allege an advertising idea belonged in any way to another entity.

Having determined the Antitrust Complaint does not contain allegations supporting a qualifying offense, there can be no advertising injury arising therefrom. This alone is enough to relieve Illinois National of a duty to defend Trailer Bridge under the asserted Policy section. Nevertheless, for the sake of completeness, this Court will address Illinois National's additional arguments.

ii. Causation

Illinois National contends that even if the Court were to find the Antitrust Complaint contained allegations of an advertising injury, no causal connection lies between the damages sought by the underlying plaintiffs and an advertising injury. (Doc. 21 at 8, 27). "It was the inflated costs of [the underlying] defendants' cabotage services, and not the 'cover-up' or explanation for the **[*17]** surcharge, which gave rise to the underlying plaintiffs' damages." *Id.* at 8.

According to Trailer Bridge, though, "[i]t is of no moment that the asserted *Ocean Shipping Antitrust Litigation* claims alleged violations of ***antitrust law***." (Doc. 11 at 7). All that is required is the Antitrust Complaint plead some injury arose out of the "use of another's advertising idea" offense. *Id.* at 16. This Court must construe the Policy language liberally in favor of the insured and strictly against the insurer. *Id.* at 8. To limit coverage to the situations described by Illinois National would be to rewrite the contract. *Id.*

The rule that an insurance policy should be interpreted liberally in favor of the insured applies only when there is more than one reasonable interpretation. *See* *State Farm Fire and Cas. Co., 393 F.3d at 1230*; *Taurus Holdings, Inc., 913 So.2d at 532*. The Policy specifically states Illinois National must provide a defense only to cases seeking sums that the insured would become legally obligated to pay as damages "because of" personal and advertising injury. (Doc. 1-1, Exhibit 1, at 12).

The Antitrust Complaint asserts the underlying defendants,

> restrict[ed] competition by allocating **[*18]** customers, rigging bids, and fixing the prices of rates, surcharges and other fees for Puerto Rican cabotage . . . . Defendants' unlawful conduct resulted in artificially high, supra-competitive prices charged by Defendants and their co-conspirators to Plaintiffs . . . . Plaintiffs and members of the class seek to recover three times their overcharge damages plus interest, attorneys' fees and costs of litigation.

(Doc. S-1 at 60-61). Thus, it is apparent the underlying plaintiffs allege their injuries were caused by higher prices arising from price-fixing, not from the use of another's advertising idea in Trailer Bridge's advertisement. None of the damages sought by the underlying plaintiffs in the Antitrust Complaint are payments requested "because of" an advertising injury, but instead were strictly for antitrust injuries. *Cf.* *Great Am. Ins. Co. v. Riso, Inc., 479 F.3d 158, 162 (1st Cir. 2007)* (finding that the insurer did not have a duty to defend based, in part, on the fact "the damages to the . . . plaintiffs, if any occurred, were due to the higher costs caused by [the defendant's] higher prices, rather than any injury to the plaintiffs' reputations"); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Alticor, Inc., Nos. 05-2479, 06-2538, 2007 U.S. App. LEXIS 22585, 2007 WL 2733336, at *6 (6th Cir. Sept. 19, 2007)* **[*19]** ("Because the policies at issue in this matter do not purport to cover antitrust injuries, and because the damages sought by the [underlying] plaintiffs were only for such antitrust injuries, the policies issued by the plaintiff-insurers do not apply in this instance, and there was no duty to defend.").

"[T]he theories advanced and labels used in a complaint are subordinate to the facts alleged for the purpose of determining the duty to defend." *Harris Corp. v. Travelers Indem. Co., No. 96-166-CIV-ORL-19A, 1998 U.S. Dist. LEXIS 23678, 1998 WL 1657171, at *2 (M.D. Fla. Mar. 19, 1998)* (citing *Lime Tree Vill. Cmty. Club Ass'n, Inc. v. State Farm Gen. Ins. Co., 980 F.2d 1402, 1405-06 (11th Cir. 1993))*. Therefore, the mere inclusion of the term "marketing" within the Antitrust Complaint is not enough to bring the claim within the Policy's coverage. *Cf.* *Nat'l Union Fire Ins. Co. of Pittsburgh, 2007 U.S. App. LEXIS 22585, 2007 WL 2733336, at *6*. It appears the allegations regarding the purported use of the advertising idea were included simply to exemplify the efforts undertaken to hide the price-fixing scheme, an antitrust offense, so that the statute of limitations could be equitably tolled. (Doc. S-1 at 56-57). The relationship between the purported **[*20]** advertising injury and the damages claimed in the underlying action is too remote to say it is seeking damages "because of" the injury. This Court finds it very unlikely that the insured or the insurer intended coverage for the type of conduct alleged in the Antitrust Complaint.

d. Duty to Indemnify

The above analysis establishes that the allegations in the Antitrust Complaint are not covered by the Policy. Thus, Illinois National was not in breach for failing to provide a defense and holds no duty to indemnify Trailer Bridge. *See, e.g., Philadelphia Indem. Ins. Co v. Yachtsman's Inn Condo Ass'n, Inc., 595 F. Supp.2d 1319, 1322 (S.D. Fla. 2009)* ("[A] court's determination that the insurer has no duty to defend requires a finding that there is no duty to indemnify."); *Fun Spree Vacations, Inc. v. Orion Ins. Co., 659 So.2d 419, 422 (Fla. 3d DCA 1995)*.

Accordingly, it is **ORDERED** and **ADJUDGED:**

1. Plaintiff Trailer Bridge, Inc.'s Motion for Partial Summary Judgment Re Illinois National Insurance Company's Duty to Defend (Doc. 11, filed December 15, 2009) is **DENIED.**

2. Defendant Illinois National Insurance Company's Motion for Summary Judgment (Doc. 21, filed January 25, 2010) is **GRANTED.**

3. **[*21]** The Clerk is directed to enter judgment in favor of Defendant that it does not owe a duty to defend or indemnify for the underlying action, and **CLOSE** the file.

4. The Show Cause Order (Doc. 36, signed March 31, 2010) is **DISCHARGED.**

DONE AND ENTERED in Jacksonville, Florida, this 21st day of July, 2010.

/s/ Harvey E. Schlesinger

HARVEY E. SCHLESINGER

United States District Judge

Fleischman v. Albany Med. Ctr.

United States District Court for the Northern District of New York

July 22, 2010, Decided; July 22, 2010, Filed

06-CV-0765

Reporter

728 F. Supp. 2d 130 *; 2010 U.S. Dist. LEXIS 73625 **; 2010-2 Trade Cas. (CCH) P77,177

WENDY FLEISCHMAN and CINDY CULLEN, on behalf of themselves and all others similarly situated, Plaintiffs, v. ALBANY MEDICAL CENTER; ELLIS HOSPITAL; NORTHEAST HEALTH; SETON HEALTH SYSTEM; ST. PETER'S HEALTH CARE SERVICE, Defendants.

Prior History: Fleischman v. Albany Med. Ctr., 2010 U.S. Dist. LEXIS 73220 (N.D.N.Y, July 21, 2010)

Core Terms

Defendants', wages, nurses, exchanges, conspiracy, Plaintiffs', methodology, staff, reliable, expert testimony, budget, rivals, prices, anticompetitive, antitrust, benchmark, softened, damages, decisions, unreliable, suppress, factors, opines, motion to exclude, utilization, alleged conspiracy, principles, effects, circumstantial evidence, summary judgment

Counsel: **[**1]** For Marjory Unger, on behalf of herself and all others similarly situated, Plaintiff: Arnold Levin, Charles E. Schaffer, LEAD ATTORNEYS, Levin, Fishbein Law Firm, Philadelphia, PA; Daniel A. Small, LEAD ATTORNEY, Cohen, Milstein Law Firm - Washington Office, Washington, DC; David P. Dean, LEAD ATTORNEY, James, Hoffman Law Firm, Washington, DC; Mark A. Griffin, Raymond J. Farrow, LEAD ATTORNEYS, Keller, Rohrback Law Firm - Seattle Office, Seattle, WA; William P. Butterfield, LEAD ATTORNEY, Hausfeld LLP, Washington, DC; Michael Rhodes-Devey, Towne, Bartkowski Law Firm - Albany Office, Albany, NY.

For Wendy Fleischman, Plaintiff: Besrat Gebrewold, LEAD ATTORNEY, PRO HAC VICE, Cohen, Milstein Law Firm - Washington Office, Washington, DC; Daniel M. Cohen, LEAD ATTORNEY, PRO HAC VICE, Cuneo, Gilbert Law Firm - VA Office, Alexandria, VA; Daniel A. Small, LEAD ATTORNEY, Kalpana Kotagal, Cohen, Milstein Law Firm - Washington Office, Washington, DC; David P. Dean, LEAD ATTORNEY, James, Hoffman Law Firm, Washington, DC; Emilie S. Kraft, LEAD ATTORNEY, PRO HAC VICE, James, Hoffman Law Firm, Washington, DC; Mark A. Griffin, Raymond J. Farrow, LEAD ATTORNEYS, Keller, Rohrback Law Firm - Seattle Office, **[**2]** Seattle, WA; Sharon K. Robertson, LEAD ATTORNEY, Cohen, Milstein Law Firm - New York Office, New York, NY; Susan F. Bartkowski, LEAD ATTORNEY, Michael Rhodes-Devey, Towne, Bartkowski Law Firm - Albany Office, Albany, NY; Charles E. Schaffer, Levin, Fishbein Law Firm, Philadelphia, PA; David A. Young, Kit A. Pierson, PRO HAC VICE, Cohen, Milstein Law Firm - Washington Office, Washington, DC.

For Cindy Cullen, Plaintiff: Besrat Gebrewold, LEAD ATTORNEY, PRO HAC VICE, Cohen, Milstein Law Firm - Washington Office, Washington, DC; Daniel M. Cohen, LEAD ATTORNEY, PRO HAC VICE, Cuneo, Gilbert Law Firm - VA Office, Alexandria, VA; Daniel A. Small, LEAD ATTORNEY, Kalpana Kotagal, Cohen, Milstein Law Firm - Washington Office, Washington, DC; David P. Dean, LEAD ATTORNEY, James, Hoffman Law Firm, Washington, DC; Emilie S. Kraft, LEAD ATTORNEY, PRO HAC VICE, James, Hoffman Law Firm, Washington, DC; Mark A. Griffin, Raymond J. Farrow, LEAD ATTORNEYS, Keller, Rohrback Law Firm - Seattle Office, Seattle, WA; Michael Rhodes-Devey, Towne, Bartkowski Law Firm - Albany Office, Albany, NY; Sharon K. Robertson, LEAD ATTORNEY, Cohen, Milstein Law Firm - New York Office, New York, NY; Susan F. Bartkowski, **[**3]** LEAD ATTORNEY, Towne, Bartkowski Law Firm - Albany Office, Albany, NY; Charles E. Schaffer, Levin, Fishbein Law

Firm, Philadelphia, PA; David A. Young, Kit A. Pierson, PRO HAC VICE, Cohen, Milstein Law Firm - Washington Office, Washington, DC.

For Albany Medical Center, Defendant: David Marx, LEAD ATTORNEY, McDermott, Will Law Firm - Chicago Office, Chicago, IL; Nicholas J. D'Ambrosio, Sanjeeve K. DeSoyza, William E. Reynolds, LEAD ATTORNEYS, Bond, Schoeneck Law Firm - Albany, Albany, NY; Richard L. Weisz, Hodgson, Russ Law Firm - Albany Office, Albany, NY.

For Ascension Health, Inc., Defendant: Michael R. Shumaker, Toby G. Singer, LEAD ATTORNEYS, Jones, Day Law Firm - DC Office, Washington, DC; Mark Thomas, Wilson, Elser Law Firm - Albany, Albany, NY.

For Catholic Health East, Defendant: Steven E. Bizar, LEAD ATTORNEY, Christopher M. Hapka, Buchanan, Ingersoll Law Firm - Philadelphia Office, Philadelphia, PA; Wendelynne J. Newton, LEAD ATTORNEY, Buchanan, Ingersoll Law Firm - Pittsburgh Office, Pittsburgh, PA.

For Ellis Hospital, Defendant: David Marx, LEAD ATTORNEY, McDermott, Will Law Firm - Chicago Office, Chicago, IL; Nicholas J. D'Ambrosio, Jr., William E. Reynolds, LEAD ATTORNEYS, **[**4]** Sanjeeve K. DeSoyza, Bond, Schoeneck Law Firm - Albany, Albany, NY; Richard L. Weisz, LEAD ATTORNEY, Hodgson, Russ Law Firm - Albany Office, Albany, NY.

For Northeast Health, Defendant: Daniel J. Hurteau, LEAD ATTORNEY, Nixon, Peabody Law Firm - Albany Office, Albany, NY; Gordon L. Lang, LEAD ATTORNEY, Nixon, Peabody Law Firm - DC Office, Washington, DC.

For Seton Health System, Defendant: Michael R. Shumaker, LEAD ATTORNEY, Jones, Day Law Firm - DC Office, Washington, DC; Mark Thomas, Wilson, Elser Law Firm - Albany, Albany, NY.

For St. Peter's Health Care Service, Defendant: Robert H. Iseman, LEAD ATTORNEY, Brian M. Culnan, John F. Queenan, Iseman, Cunningham Law Firm - Albany Office, Albany, NY.

Judges: THOMAS J. McAVOY, Senior United States District Judge.

Opinion by: THOMAS J. McAVOY

Opinion

[*137] THOMAS J. McAVOY

Senior United States District Judge

DECISION and ORDER

Plaintiffs commenced the instant action against Defendants claiming that they conspired amongst themselves to keep down the wages of registered nurses in the Albany area. Presently before the Court are: (1) Defendants' Joint Motion to Exclude Expert Testimony of Orley Ashenfelter [Docket No. 355/358]; (2) Defendants' Joint Motion to Exclude Expert Testimony **[**5]** of Gregory Vistnes [Docket No. 344/356]; (3) Defendants' Joint Motion for Summary Judgment [Docket No. 345]; and (4) Plaintiffs' Motion to Exclude Portions of Expert Testimony of Robert Willig [Docket No. 342/343].

I. BACKGROUND

Plaintiffs allege that during the class period, June 20, 2002 to June 20, 2006, Defendants entered into at least two restraints of trade in violation of the Sherman Act. Count I alleges that Defendants engaged in a continuing conspiracy in restraint of trade to depress the compensation of RNs employed at hospitals in the Albany area. See Docket No. 1. Count II alleges that Defendants have engaged in a continuing agreement to regularly exchange detailed and non-public information about compensation being paid or to be paid to their RN employees, which not only facilitated the enforcement of the wage suppression conspiracy but unreasonably restrained competition on RN compensation in its own right. Id.

In a Decision and Order dated July 28, 2008, the Court certified a class of registered nurses with respect to two issues: "whether there has been a violation of ***antitrust law*** and whether there has been injury to the class that the Sherman Act was designed to prevent." **[**6]** *Fleischman v. Albany Medical Center, 2008 U.S. Dist. LEXIS 57188, 2008 WL 2945993, at *7 (N.D.N.Y. July 28, 2008)*. Following merits discovery, Plaintiffs moved the Court to amend the prior certification order **[*138]** to additionally certify the issues of impact and damages as to a narrower class of registered nurses. The Court denied Plaintiffs' motion. All Defendants have settled with Plaintiffs except Albany Medical Center and Ellis Hospital.

Presently before the Court are: (1) Defendants' Joint Motion to Exclude Expert Testimony of Orley Ashenfelter; (2) Defendants' Joint Motion to Exclude Expert Testimony of Gregory Vistnes; (3) Defendants' Joint Motion for Summary Judgment; and (4) Plaintiffs' Motion to Exclude Portions of Expert Testimony of Robert Willig. The facts as pertinent to each motion are set forth as follows.

a. Defendants Ellis and Albany Medical Center's Joint Motion to Exclude Expert Testimony of Orley Ashenfelter

Defendants move to exclude Orley Ashenfelter, who will testify concerning anticompetitive effect, injury-in-fact, and damages. Ashenfelter "currently serves as the Joseph Douglas Green Professor of Economics at Princeton, where he specializes in labor economics, and was recently elected to serve **[**7]** as President of the American Economic Association." See Plaintiffs' Opposition Memo. at 3. He has previously served "as the director of the Office of Evaluation of the U.S. Department of Labor and had testified for the Federal Trade Commission in a variety of antitrust matters." Id. at 4.

Ashenfelter opines "the fees that Defendants paid for agency nurses, when appropriately adjusted, are equal to or less than competitive staff nurse wages because in a competitive market employees are paid what they are worth." Plaintiffs' Opposition Memo. at 5. Ashenfelter selects agency nurses as a benchmark because they are used as a substitute for staff nurses in the workplace and their wages are not set by the Defendant hospitals.

Ashenfelter first determined the rates paid to agency nurses by Defendants during the class period. He then estimated separate competitive wages by hospital and year and for specialty and non-specialty jobs, shift differentials and on-call status because agency nurse wage rates were separately set for each of these variables. Next, these rates were adjusted so as to account for the flexibility offered by agency nurses and the additional costs incurred to employ staff nurses **[**8]** such as payroll taxes, workers compensation, human resources costs, and recruitment costs. Ashenfelter then compared this agency nurse wage benchmark to actual earnings of staff nurses, as reflected in payroll records. The analysis purports to take into account straight-time, overtime, shift differentials, on-call status, bonuses, and tuition. Ashenfelter concluded that Plaintiffs and most other staff nurses should have, on average, earned 21% more than they were actually paid.

Ashenfelter also opines that in a competitive market more RNs would have been employed. Ashenfelter's report explains that underutilization is an anticompetitive effect of the conspiracy to depress RN wages.

Defendants challenge the reliability of Ashenfelter's methodology arguing that it is inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and should be excluded from consideration both on summary judgment and at trial. Specifically, Defendants argue that Ashenfelter's methodology should be excluded because: (1) it is based on an assumption that contradicts his claims of anticompetitive effect, impact, and damages; (2) the "but for wages" do not vary by the experience of the **[**9]** nurse; (3) it is premised on the **[*139]** idea that Defendants made extensive long term use of agency nurses; (4) the "but for wages" are not credible; (5) the rate of employment of nurses in the Albany area is no different from the rate in New York state as a whole; (6) Ashenfelter did not assess whether there was a conspiracy or whether the anticompetitive effects resulted from a conspiracy or some other cause; (7) it applies only to the smaller subclass that the Court rejected; and (8) it is not reliable to prove impact and damages for the two named plaintiffs.[1]

Plaintiffs maintain that Defendants' criticisms are unfounded or go to the weight of the evidence, rather than its admissibility. Specifically, Plaintiffs respond that Ashenfelter's methodology is reliable and admissible because: (1) he employed widely acceptable and reliable methods; (2) he properly relied on widely accepted economic principles and peer reviewed materials; (3) his benchmark comparisons reliably show impact and measure damages; **[**10]** (4) Defendants challenge results and not methodology; (5) agency bill rates allow reasonable estimation of competitive staff nurse wages; and (6) the validity of Ashenfelter's benchmark does not depend on whether the use of agency nurses was excessive.

b. Defendants Ellis and Albany Medical Center's Joint Motion to Exclude Expert Testimony of Gregory Vistnes

Defendants also move to exclude Gregory Vistnes, who will testify that Defendants conspired to suppress nurse compensation or agreed to exchange confidential information for the purpose, or with the effect, of doing so. "Dr. Vistnes is a Vice President at Charles River Associates, an international economics and business consulting firm." See Plaintiffs' Opposition Memo. at 1. He has also "served as Deputy Director for Antitrust in the Federal Trade Commission's Bureau of Economics" and "held several positions in the Economic Analysis Group of the U.S. Department of Justice's Antitrust Division, including Assistant Chief of the Economic Regulatory Section." Id. at 1-2.

Although Defendants seek to exclude all of the expert testimony of Vistnes, Defendants specifically dispute the reliability of two opinions; his facilitation opinion **[**11]** and his softened competition opinion.

Vistnes' "facilitation opinion" asserts that "Defendants' information sharing made it easier [for Defendants] to form and maintain a wage-fixing agreement." See Plaintiffs' Opposition Memo. at 6. Specifically, it concludes "that direct, regular exchanges of detailed compensation information made it easier for Defendants to coordinate on nurse compensation." Id. Plaintiffs contend that this opinion is based "on a thorough understanding of the economics literature on information exchange, . . . and a full examination of the discovery record regarding Defendants' 60+ information exchanges." Id. at 9.

Vistnes' "softened competition opinion" asserts that "the information exchanges in this case . . . reduced Defendants' incentive to compete." See Plaintiffs' Opposition Memo. at 10. According to Vistnes, a softening of competition "means that competition is reduced, such that Defendants would raise nurse wages less often and in smaller amounts, causing them to hire less often and in smaller numbers." Id. at 13. The theory purports to contemplate and **[*140]** allow for disparities in pay and employment levels across hospitals. It contends that softening reduces the **[**12]** hospitals' incentive to raise wages to gain a competitive advantage even if "rivals do not on all occasions immediately or exactly match that hospital's wage increase." Id. It theorizes that the incentive to increase wages may decrease because a hospital anticipates that the other hospitals will match the increased wages. This opinion "is based on a careful study of the details of those exchanges and the principles found in the economics literature regarding the competitive effect of information exchanges." See Plaintiffs' Opposition Memo. at 14-15.

Defendants argue that Vistnes' opinions are neither reliable nor relevant. Specifically, Defendants argue that Vistnes' facilitation argument is unreliable because: (1) his methodology is not related to the facts of the case; (2) his opinion is connected to the facts of the case only through ipse dixits; and (3) his reliance on the analysis and opinions of Ashenfelter, does not provide a reliable foundation for his conclusion. See Defendants' Memo. at 7-13. Defendants argue that Vistnes' softened competition opinion is unreliable because: (1) the opinion is contradicted by the facts; and (2) he failed to link Defendants' information exchanges **[**13]** and any harmful effect on competition. See Defendants' Memo. at 13-20.

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[1] "But-for wages" are the wages which, according to Ashenfelter, staff nurses would have been paid but-for the alleged conspiracy. The but-for wages were computed using his benchmark methodology.

Plaintiffs responds that Vistnes is a highly qualified expert and his opinions are admissible. Alternatively, Plaintiffs argue that because Defendants challenge only two of Vistnes' numerous opinions, the unchallenged opinions should be admitted even if the Court finds the challenged opinions inadmissible.

c. Defendants' Joint Motion for Summary Judgment

Defendants Ellis Hospital ("Ellis") and Albany Medical Center ("AMC") have also filed a joint motion for summary judgment arguing that Plaintiffs "have no evidence of any agreement by Defendants to fix registered nurse compensation, no evidence of parallel wage movements, and no evidence to support Plaintiffs' claim that Defendants' conduct harmed competition or injured the Plaintiffs." [2] See Defendants' Memo. at 1.

Following extensive merits discovery, the following facts are undisputed. Albany Medical Center (AMC) is the largest Defendant. Although there is no formal policy preventing AMC from altering **[**14]** the timing or procedure for setting compensation, RN compensation has traditionally been set in the following way: (1) "AMC establishes the amount of money available to compensate all AMC employees . . . during its annual budget process;" (2) "[i]n approximately August of each year, AMC's human resources department prepares a compensation proposal for the President's Council, a group comprised of AMC's President and CEO and its executive and senior vice presidents;" (3) "AMC's annual compensation proposal addresses all aspects of AMC's compensation for all employees;" (4) "AMC's annual compensation proposal reflects the human resources department's best estimate as to what AMC should budget for compensation for all AMC employees in the coming year"; (5) "AMC's President's Council may request additional information and make recommendations, which may result in modifications to the initial proposal, typically in September;" (6) "AMC's President's Cabinet can request additional modifications to **[*141]** the proposal as it shapes an annual budget;" (7) "[i]n October or November of each year, AMC's President's Cabinet meets with AMC's CEO to discuss the final budget document to be presented to the **[**15]** Board of Directors;" (8) "[t]he final budget is submitted to the Finance Committee and then to the full Board of Directors for approval in early December of each year;" and (9) "AMC approves the market adjustments and merit increases in December, and they are effective in May of the following year. <u>See</u> Plaintiffs' Response to Defendants' Statement of Undisputed Facts at 3-10.

Ellis hospital is the only Defendant whose nurses are unionized and whose nurse wages are established, at least as to the bargaining unit, through a collective bargaining process with the New York State Nurses Association (NYSNA). <u>See</u> Plaintiffs' Response to Defendants' Statement of Undisputed Facts at 21. When Ellis prepares to negotiate a new collective bargaining agreement, its bargaining objectives and proposals are determined, at least in part, by human resources (HR), the finance department, nursing management, legal counsel, the CEO, and the COO. <u>Id</u>. at 24. The NYSNA and Ellis negotiate until they reach an agreement. <u>Id</u>. at 24-25.

Northeast Health (Northeast) operates two hospitals, Samaritan Hospital in Troy and Albany Memorial Hospital in Albany. <u>Id</u>. at 33. Although there is no formal policy preventing **[**16]** Northeast from altering the timing or procedure for setting nurses compensation, it has traditionally been set as part of an annual budget process in the following way: (1) "[i]In August of each year, each department submits a budget request, which includes a compensation component, to the finance department;" (2) "[i]n September and early October, department administrators and the finance and human resources departments refine the budget requests;" (3) [i]n mid-October, Northeast's executive vice presidents consider the budget recommendations and decide on the need for a market adjustment;" (4) "[i]n mid-October, Northeast's human resources committee of the board reviews the budget recommendations;" and (5) "Northeast's finance committee of the board reviews and makes a final recommendation on the overall budget to the board of directors, and the board approved the budget in late November or early December." <u>Id</u>. at 33-36.

Seton Health System (Seton) is a member of Ascension Health, the nation's largest not-for-profit health care system and is the smallest Defendant. <u>Id</u>. at 41. "Each year as part of the budget planning process, Seton budgets a certain amount of funds for possible market **[**17]** adjustments." <u>Id</u>. at 43. "Seton's budget process changed

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[2] In addition to joining Defendants' Joint Motion for Summary Judgment, Ellis has also separately moved for Summary Judgment on alternate grounds. [Docket No. 347/348].

midway through the class period - in 2002 and 2003, Seton's fiscal year began January 1, and it established the budget the summer before; in 2004, Seton changed its fiscal year to begin July 1, and it reviewed employee compensation twice, in the summer of 2003 and in January 2004; and from 2005 forward, Seton's fiscal year began July 1, and its budget process began in January." Id. 43-44. Establishing RN compensation involves the human resources department, department directors, and nursing administrators as well as other executives. Id. at 44. The budget committee must approve all market adjustment proposals. Id. at 46.

St. Peter's Hospital (St. Peter's) has been recognized twice as one of the top 100 hospitals in the nation. Id. at 56. Although there is no formal policy preventing St. Peters from altering the timing or procedure for making market adjustments, they have traditionally been set in the following way: (1) "St. Peter's sets its **[*142]** budget for market adjustments in September or October and makes market adjustments in the spring;" (2) "[d]uring the annual budget process, St. Peter's sets aside a pool of money to use for **[**18]** market adjustments and divides the pool among those job titles where an adjustment is required;" (3) "St. Peter's human resources department makes a recommendation to the director and vice president of human resources regarding the amount St. Peter's should budget for market adjustments;" (4) "[t]he director and vice president of human resources then make a recommendation to the finance committee, which determines the amount of money to be given for the market adjustment." Id. at 57-60.

It is also undisputed that from 2003 through 2006 Defendants engaged in information exchanges regarding the compensation they paid to RNs. See Plaintiffs' Opposition Memo. at 3 n. 6 (Plaintiffs point to 60 documented instances but contend that based on the many surveys produced in discovery there were many more undocumented information exchanges conducted by telephone or in person. Furthermore, incomplete e-mail trails evidence that custodians deleted e-mails.) The parties dispute the purpose and scope that these exchanges played and the role they played in setting nurses wages. The record shows that the hospitals extensively shared information through group communications, e-mails, telephone calls, **[**19]** and in person conversations with the other defendants. See e.g. Plaintiffs' Response to Defendants' Statement of Undisputed Facts at paragraphs 8, 18, 21, 23, 25, 49, 71, 72, 97, 103, 106, 130, 137; see also Ex. 23 (in March 2005, John Barnett of Ellis shares Ellis' current and future new graduate rate with Cathy Halakan of AMC) (a June 2005 e-mail from Sandra Castilla of AMC to Louise Franz of Ellis asking for and obtaining updated information on Ellis' wage and compensation practices including RN new hire and per diem rates) (in May 2004 Louise Franz of AMC sent an internal e-mail reporting that she receiving information from St. Peter's about St. Peter's current wage structure and its plan to move to a different model in June). These communications also included one-to-one email communications and one-to-one verbal discussions. Id.; see e.g. Ex. 25 (Louise Franz of AMC asked Kathleen Occhiogrosso for Seton for Seton's new RN rate and also provides AMC's new rate). Defendant collected the information on compensation and benefits gathered from other hospitals and complied reports and surveys which were shared with other defendant hospitals. Id. Additionally, "if a request for compensation **[**20]** information was sent out to a group of hospital HR representatives via e-mail, some of them simply replied to the entire group . . . to share their hospitals current compensation information with the other hospitals." Id. There are also evidence of information sharing regarding merit and recruitment bonuses, tuition assistance, merit pay, health insurance co-payments, length of workweek, and loan forgiveness programs. Id.; see e.g. Ex. 25 (Erin Baker of St. Peter's provides Sandra Castilla of AMC with RN new hire, RN per diem rates, and merit increase information after Castilla stated that she needed updated information for AMC's 2006 Compensation and Benefits Budget).

Plaintiffs' argument is as follows. See Plaintiffs' Opposition Memo. at 1-2. During the class period, Defendants faced a serious nursing shortage. A nursing shortage should have led to intense competition for nurses. Instead, Defendants avoided competing by regularly sharing their most sensitive information about their nurse pay structure. Defendants would not have shared this information if **[*143]** their competitors used the information competitively to identify low paying hospitals and outbid them to attract more and better **[**21]** qualified nurses. Plaintiffs, therefore, maintain that the practice continued only because it was accompanied by an agreement and recognition that the exchanged information would not be used as a strategic asset to compete for nurses, but rather to coordinate on wages and ensure that any incentive to compete was eliminated.

Defendants respond as follows. The process for setting compensation was based on a review of published survey data and internal analysis of compensation and employee needs. During the class period, nurse compensation was steadily increased and as a result, employment levels also increased. Defendants argue that they are entitled to summary judgment because Plaintiffs: (1) cannot show an agreement to fix nurse pay; (2) cannot establish that Defendants' exchange of compensation information unreasonably restrained competition; (3) have no evidence of harm to competition or injury; and (4) cannot show a causal link between Defendants' information exchange and either the alleged anticompetitive effects or their alleged injury. Plaintiffs oppose Defendants' motion arguing that: (1) no formal agreement is required and there is extensive evidence for circumstantial proof **[**22]** of a per se claim; (2) they have produced evidence of an actual adverse effect on competition resulting from the information exchanges; and (3) their expert Ashenfelter has presented a legally appropriate benchmark analysis.

d. Plaintiffs' Motion to Exclude Portions of Expert Testimony of Robert Willig

Plaintiffs also move to exclude portions of the expert testimony of Robert Willig. They argue that "Willig should be limited to testifying as to matters where his expert knowledge can assist the jury in understanding the evidence" and the Court should prohibit Willig from offering any opinion concerning: (1) "[w]hether the fact discovery record in this case is probative or not of the alleged conspiracy; and (2) "[t]he information the Defendants did or did not consider in making their compensation decisions, and the effect or lack of effect particular information had on such decisions." See Plaintiffs' Memo. at 6-7. Defendants oppose this motion. They maintain that Willig's testimony satisfies the requirements of admissibility under *Rule 702 of the Fed. R. Evidence* and, thus, should not be excluded. See Defendants' Opposition Memo. at 1.

II. STANDARD OF REVIEW

a. Admissibility of an Expert

Rule 702 of the Federal Rules of Evidence, **[**23]** which governs the admissibility of expert and other scientific or technical expert testimony, provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Supreme Court interpreted the District Court's function under *Rule 702* in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. The Second Circuit reiterated this function in *Amorgianos v.* ***[*144]*** *National R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002)* stating:

> [t]he Supreme Court has made clear that the district court has a "gatekeeping" function under *Rule 702* - it is charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id. at 597, 113 S. Ct. 2786*; accord *Campbell, 239 F.3d at 184*; **[**24]** Federal Judicial Center, Reference Manual on Scientific Evidence 11 (2d ed.2000). In fulfilling this gatekeeping role, the trial court should look to the standards of *Rule 401* in analyzing whether proffered expert testimony is relevant, i.e., whether it "'ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Campbell, 239 F.3d at 184* (quoting *Fed. R. Evid. 401*) (alteration in original). Next, the district court must determine "whether the proffered testimony has a sufficiently 'reliable foundation' to permit it to be considered." Id. (quoting *Daubert, 509 U.S. at 597, 113 S. Ct. 2786*). In this inquiry, the district court should consider the indicia of reliability identified in *Rule 702*, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony "is the product of reliable principles and methods"; and (3) that "the witness has applied the principles and methods reliably to the facts of the case." *Fed. R. Evid. 702*. In short, the district court must "make certain that an expert, whether basing testimony upon professional **[**25]** studies or personal experience, employs in the courtroom the same

level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire, 526 U.S. at 152, 119 S. Ct. 1167.

District courts consider various factors in determining reliability: (1) "whether a theory or technique can be (and has been) tested;" (2) "whether the theory or technique has been subjected to peer review and publication;" (3) a technique's "known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation;" and (4) whether a particular technique or theory has gained "general acceptance" in the relevant scientific community. See Amorgianos, 303 F.3d at 266. "These factors do not constitute a . . . definitive checklist or test, [r]ather, '[t]he inquiry envisioned by Rule 702 is . . . a flexible one, . . . and the gatekeeping inquiry must be tied to the facts of a particular case.'" Amorgianos, 303 F.3d at 266 (citing Kumho Tire, 526 U.S. at 150); see also Daubert, 509 U.S. at 593. "In undertaking this flexible inquiry, the district court must focus on the principles and methodology employed by the expert, without regard to **[**26]** the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." Amorgianos, 303 F.3d at 266; see Daubert, 509 U.S. at 595. That being said, "conclusions and methodology are not entirely distinct from one another" and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Amorgianos, 303 F.3d at 266 (quoting General Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)); see Heller v. Shaw Indus., Inc., 167 F.3d 146, 153 (3d Cir. 1999) ("[A] district court must examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology **[*145]** used."). "Once the district court has deemed the evidence sufficiently reliable so as to be admissible, it is "bound to consider the evidence in the light most favorable to plaintiff" when deciding motions for summary judgment or judgment as a matter of law." In re Joint Eastern & Southern Dist, Asbestos Litigation, 52 F.3d 1124, 1135 (2d Cir. 1995).

b. Summary Judgment

Summary judgment, pursuant to Fed. R. Civ. P. 56(c), is warranted if "the pleadings, depositions, answers to interrogatories, **[**27]** and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment bears the initial burden of showing, through the production of admissible evidence, that no genuine issue of material fact exists. Major League Baseball Properties, Inc. v. Salvino, 542 F.3d 290, 309 (2d Cir. 2008). Only after the moving party has met this burden is the non-moving party required to produce evidence demonstrating that genuine issues of material fact exist. Salahuddin v. Goord, 467 F.3d 263, 272-73 (2d Cir. 2006). The nonmoving party must do more than "rest upon the mere allegations … of the [plaintiff's] pleading" or "simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); see also Fed. R. Civ .P. 56(e) ("When a motion for summary judgment is made [by a defendant] and supported as provided in this rule, the [plaintiff] may not rest upon the mere allegations … of the [plaintiff's] **[**28]** pleading ….")‌. Rather, "[a] dispute regarding a material fact is *genuine* if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Ross v. McGinnis, 00-CV-0275, 2004 U.S. Dist. LEXIS 9367, 2004 WL 1125177, at *8 (W.D.N.Y. Mar. 29, 2004) [internal quotations omitted] [emphasis added]. It must be apparent that no rational finder of fact could find in favor of the non-moving party for a Court to grant a motion for summary judgment. Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223-24 (2d Cir. 1994); Graham v. Lewinski, 848 F.2d 342, 344 (2d Cir. 1988). In determining whether a genuine issue of material fact exists, the Court must resolve all ambiguities and draw all reasonable inferences against the moving party. Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) [citation omitted]; Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990) [citation omitted].

III. DISCUSSION

a. Defendants' Ellis and Albany Medical Center's Joint Motion to Exclude Expert Testimony of Orley Ashenfelter

Plaintiffs employed Orley Ashenfelter to use "standard economic tools to study whether staff nurses in this action suffered impact and damages as a result of Defendants' alleged conspiracy." **[**29]** See Plaintiffs' Opposition Memo. at 4. Ashenfelter compared actual wages paid to staff nurses by the Defendant hospitals during the alleged conspiracy with wages that would be paid "but-for" the alleged conspiracy. Ashenfelter computed the "but-for" wages of staff nurses by using bill rates for agency nurses as a benchmark with which to compare staff nurse wages during the same period. He maintains that agency nurses "are an appropriate benchmark because: (1) agency nurses, as literal substitutes for staff nurses, perform the work that would otherwise be done by a staff nurse;" and **[*146]** (2) their bill rates, set by a national market, would not have been affected by the alleged conspiracy. Plaintiffs' Opposition Memo. at 2. Ashenfelter determined that "Plaintiffs, and most other staff nurses, had indeed suffered injury as a result of Defendants' alleged collusive wage suppression." Id. at 2-3. He concluded "that, on average, staff nurses had earned $ 28.11 per hour during the class period, but that in a competitive market, they would have earned an average of at least $ 35.74 per hour." Id. at 7.

Defendants argue that Ashenfelter's testimony should be excluded because it is unreliable as **[**30]** a matter of law. They do not challenge Ashenfelter's qualifications or the relevance of his testimony. Defendants instead challenge the reliability of his opinions, arguing that: (1) his benchmark theory is based on assumptions and is disconnected from the facts; (2) he failed to address whether a conspiracy existed and whether that conspiracy caused the wage suppression; and (3) his utilization theory does not take into consideration New York state specific conditions. The Court will address these arguments seriatim.

1. Whether the Methodology Used by Prof. Ashenfelter in Forming his Benchmark Theory is Reliable

The methodology used by Ashenfelter to determine that agency nurse bill rates and staff nurse wages should be comparable is based on the widely accepted economic concept of marginal revenue product (MRP). MRP is the "value that an employee creates for his or her employer." The concept promulgates that an employer will not "incur costs to employ a staff nurse or hire an agency nurse that, in total, exceed a nurses' [MRP]." In other words, according to economic theory, Ashenfelter opines that because agency nurses "are interchangeable with staff nurses, working instead of, and **[**31]** alongside, staff nurses at the exact same hospitals performing the exact same tasks on the same day" the two types of nurses are worth the same to the hospitals.

Ashenfelter explains that agency nurse bill rates and staff nurse wages differ because agency bill rates "pay for all the costs of employing an agency nurse, not just her wages, and include an amount to compensate the agency nurse for scheduling flexibility." Staff nurse wages are usually lower than agency nurse bill rates because they do not include this flexibility premium and fail to account for fringe benefits and other costs of employing a full time employee. Ashenfelter's methodology purports to adjust the competitive agency bill rate to account for these variables. He opines that the "but-for" wages of staff nurses will equal the MRP of the agency nurse minus the value of the flexibility. [3] Conversely, the competitive wage of a staff nurses equals the MRP of the staff nurse minus the "non-earning costs of employing that nurse." From these economic computations, Ashenfelter opines that he is able to determine the extent to which Defendants' alleged conspiracy affected the wages of staff nurses during the class period.

The validity of the economic concept MRP is not challenged by the Defendants. Ashenfelter based his methodology on this accepted economic principle. His methodology took into consideration the flexibility premiums offered by agency nurses, staff nurse fringe benefits, and the costs of employing full time staff nurses and he took the necessary logical steps from agency **[*147]** bill rates to estimate the competitive wage of individual staff nurses.

Similarly, Defendants do not challenge the data used by Ashenfelter to compute the "but-for" wages. The but-for wages are computed using wage and pay-roll data and differences in pay grade depending on on-call status and

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[3] "But-for **[**32]** wages" are the wages that Ashenfelter opines the staff nurses would expect to be paid in the absence of the alleged conspiracy.

specialty placements at each of the Defendant hospitals during each year of the class period. The underlying data applied to the methodology to compute "but-for" wages is undisputed.

Defendants argue that Prof. Ashenfelter's methodology is unreliable because: (1) it assumes that agency nurse rates are set in a national market; (2) it does not account for differences in experience; (3) it is based on the assumption **[**33]** that Defendants made extensive long term use of Agency nurses; (4) the but-for wages created by his methodology are not credible; (5) the but-for wages barely change over the class period; (6) the methodology can only be applied to a subset of the nurses; and (7) the methodology cannot prove impact and damages for the two named plaintiffs.

a. **Agency Nurse Wages are Set in a National Market**

Defendants argue that Ashenfelter has "no basis to believe that there is any connection between the adjusted bill rates for agency nurses and the competitive wages of staff nurses." Defendants' Memo. at 7-8. Defendants contend that wages for the two groups must be set in the same market for agency nurses to be properly used as a benchmark. They argue that because (1) Ashenfelter's methodology assumes that wages for agency nurses are set in a national market; and (2) Ashenfelter has stated that the Defendant hospitals would have little influence over the national market for staff nurse wages, he in effect acknowledges either that there is no link between agency nurse's and staff nurse's wages or that Defendants have no power to suppress wages. [4]

Plaintiffs argue that the MRP theory does not require that staff nurse wages be set in the same market as agency nurse bill rates because "what matters is that the bill rate is equal to or less than the marginal revenue product of an agency nurse." See Plaintiffs' Opposition Memo. at 14. They further claim that after proper adjustments, his methodology computes the actual competitive wage of the staff nurse based on the staff nurses' economic worth to the hospital. The fact that Defendants dispute Ashenfelter's methodology does not render the methodology unreliable. Experts are entitled to differing opinions as to the validity of the methodology, so long as the challenged methodology is grounded in reliable scientific principles and facts. See *McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995)*, ("[d]isputes as to . . . faults in [expert's] use of [particular scientific analysis] as a methodology . . . go to the weight, not the admissibility, of his testimony."). Because the Court has already concluded that Ashenfelter's methodology is based on a well accepted economic principle and uses undisputed **[**35]** data, exclusion is not warranted.

b. **Methodology does not take into account Experience**

Defendants argue that work experience is not accounted for in Ashenfelter's methodology because agency nurse bill rates do not vary by experience and, therefore, "but-for" wages do not vary. They allege this overcompensates starting nurses and **[*148]** under compensates the most experienced nurses, rendering the methodology unreliable. See Defendants Memo. at 11-12.

Plaintiffs respond that "Ashenfelter took into account all available data, which allowed him to account for differences in competitive wages based on job type, hospital, year, shift differential, and on-call status." Plaintiffs' Memo. at 17. "The benchmark does not account for experience because the data [is] not available." Id. They maintain that the available data allows for a "conservative estimate of impact and damages based on a customized and highly comparable benchmark methodology." Id.

"Damages in antitrust cases 'are rarely susceptible to the kind of concrete, detailed proof of injury which is available in other contexts.'" *Litton Systems, Inc. v. American Tel . and Tel. Co., 700 F.2d 785, 823 (2d. Cir. 1983)*(quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969))*. **[**36]** In *Litton Systems, Inc., 700 F.2d at 823-24*, the Second Circuit determined that "where there is a basis on which a jury can reasonably infer significant antitrust injury, [the court] should be very hesitant before determining that damages cannot be awarded." In *Litton Systems, Inc., 700 F.2d at 823-24*, the Second Circuit upheld the

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[4] Ashenfelter acknowledges that Defendant Hospitals are **[**34]** too small to have any influence over staff nurse wages in the national market.

consideration of expert testimony which was based on assumptions about the size of the market and a company's share in that market. The court found that the estimates were based upon analysis of the industry data and a review of other studies and that the projections made were conservative. Id. "An antitrust plaintiff must provide only sufficient evidence to support a 'just and reasonable estimate' of damages." *U.S. Football League v. National Football League, 842 F.2d 1335, 1378 (2d Cir. 1988)* (quoting *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946)*); see also *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)* (proof of antitrust damages sufficient "if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."). A benchmark need not be perfect **[**37]** to allow for this reasonable estimate of damages. See *McDonough v. Toys R Us, Inc., 638 F. Supp.2d 461, 491 (E.D. Pa. 2009)* ("His proposed benchmarks are not perfect, but they will give a reasonable estimate of damages." (internal citations omitted)).

Here, only the named Plaintiffs are pursuing damage claims and both named Plaintiffs are experienced nurses. Therefore, the critique that Ashenfelter's methodology may overcompensate inexperienced nurses is irrelevant. Ashenfelter's methodology is reliable for reasonably estimating the damages for the two named plaintiffs based on a variety of variables specific to those Plaintiffs.

c. No Evidence of Extensive Agency Use

Defendants next argue that "although Prof. Ashenfelter's [methodology] is premised on the idea that the Defendants made extensive long term use of agency nurses, he admits that he cannot distinguish between appropriate long term agency use and inappropriate agency use" and therefore his opinions are unreliable. Defendants' Memo. at 13.

Plaintiffs respond that Ashenfelter's methodology is not premised on the fact that Defendants made extensive use of agency nurses. They contend that excessive agency use is merely additional **[**38]** evidence of wage suppression. Therefore, whether agency usage is considered excessive has no effect on the reliability of Ashenfelter's benchmark analysis. Furthermore, **[*149]** Plaintiffs argue that Defendants' business documents provide evidence that support the conclusion that agency use was excessive.

d. The But-For Wages are not Credible

Defendants also argue that Ashenfelter's methodology should be excluded as unreliable because the but-for wages are not credible and barely change over time. The Supreme Court in *Daubert, 509 U.S. at 595*, stated that "the district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." The district court however must still "examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used." *Heller v. Shaw Indus., Inc., 167 F.3d 146, 153 (3d Cir. 1999)*; See *Joiner, 522 U.S. at 146* ("[C]onclusions and methodology are not entirely distinct from one another. . . [N]othing in either Daubert or the Federal Rules of Evidence requires **[**39]** a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

As previously stated, Ashenfelter's methodology is based on sound economic principles and applies undisputed facts. Defendants will have the opportunity to cross-examine Ashenfelter at trial as to the credibility of his results and the jury will be able to assign the appropriate weight to the expert's opinions. The methodology requires a step-by-step application of undisputed pay roll information into a methodology which this Court finds to be reliable. There is no analytical gap between this application and the results found by Ashenfelter.

2. Whether Ashenfelter's Opinions are Unreliable because he did not Study Whether a Conspiracy Existed and Whether the Conspiracy Caused the Wage Suppression

Next, Defendants argue that Ashenfelter's opinions are unreliable because he "simply assumed, upon direction from plaintiff's counsel, that the defendants unlawfully conspired either to exchange nurse wage information or suppress nurse wages" and never investigated **[**40]** whether that assumption had merit. Defendants' Memo. at 20. They contend that "[t]he Court should not feel comfortable allowing Professor Ashenfelter to offer opinions on anticompetitive effect, impact, and damages flowing from the conspiracy when he did not even investigate whether the conspiracy even existed, or whether, even assuming it did exist, it was the cause of the effects he claims to have found." Id. at 20-21.

Ashenfelter's opinions focus exclusively on the issues of whether staff nurses suffered impact and damages and he offers no opinions as to liability. Plaintiffs admit that "[f]or the purposes of his report, Prof. Ashenfelter was asked to assume that Defendants conspired to suppress wages and exchanged wage-related information." Plaintiffs' Memo. at 4 n. 2. Ashenfelter does not rely on the assumption of liability in determining whether the staff nurses' wages were depressed. Ashenfelter's methodology focused on undisputed data and facts and was based on well accepted economic theory. The fact that he did not address whether a conspiracy existed or whether a conspiracy caused the wage suppression does not render his opinions, as to impact and damages, unreliable.

[*150] 3. Whether [41] Ashenfelter's Underutilization Opinions are Unreliable**

Ashenfelter also studied underutilization in Albany hospitals. Plaintiffs describe underutilization as an "anticompetitive effect of Defendants' conspiracy" and offer it as evidence of Defendants' market power. To determine whether underutilization was present at Defendant Hospitals, Ashenfelter applied a formula for measuring utilization developed by Kevin Grumbach and others and published in a peer reviewed journal. When applying this formula:

> Prof. Ashenfelter gathered data on the number of full-time nurses, the average number of inpatient beds filled per day, the volume of outpatient services, and the complexity of services provided. He found nurse utilization in Albany to be a full 14% lower than in other cities nationwide. Notably, this estimate is conservative because the utilization measure for Albany includes hospitals that did and did not participate in the conspiracy to suppress wages.

Plaintiffs' Memo. at 7-8. Professor Ashenfelter's methodology to determine whether Albany nurses were underutilized compared Albany-area utilization of nurses to average nurse utilization in the country as a whole. Defendants argue that Ashenfelter's **[**42]** nurse utilization analysis is unreliable because it does not take into account state specific factors that affect utilization from one state to another, such as budgetary or funding issues and laws and regulations. Defendant's expert "re-ran [the utilization] analysis using cities in New York state as a benchmark and found no significant difference between Albany's utilization rate and that of other New York cities." Defendants' Memo. at 19.

Defendants do not attack the methodology Plaintiffs use to determine the utilization rate of nurses or the data used to determine Albany's utilization rate. On the contrary, Defendants apply the same methodology and Albany-specific data when comparing the rate of utilization in Albany to a New York state benchmark. Defendants here challenge only Ashenfelter's decision to compare utilization in Albany to a national benchmark, as opposed to a New York state benchmark. Differences in expert opinion as to which benchmark is more reliable does not render Ashenfelter's opinions unreliable. Instead Defendants will have the opportunity to cross-examine Ashenfelter at trial as to the effects of state specific factors and the jury will be able to assign the **[**43]** appropriate weight to the expert's opinions. Because the Defendants fail to challenge the methodology underlying the utilization theory, Ashenfelter's opinion that hospitals in Albany have a lower nurse utilization rate than hospitals nationwide is admissible.

Accordingly, Ashenfelter's opinions regarding impact and damages are admissible.

b. Defendants Ellis and Albany Medical Center's Joint Motion to Exclude Expert Testimony of Gregory Vistnes

Plaintiffs have offered Dr. Vistnes to testify in support of their claims that Defendants conspired to suppress nurse compensation or agreed to exchange confidential information for the purpose, or with the effect of, doing so. Vistnes opines that Defendants' exchange of compensation information facilitated coordination among them and softened competition. Defendants argue that Dr. Vistnes' opinions should be excluded because they are unreliable, unsupported, and contradicted by the facts and evidence produced during discovery. Although Defendants take issue only with the softened competition and **[*151]** facilitation opinions they contend that all of his opinions should be excluded. Because Defendants advance no arguments relating to the other opinions **[**44]** they are admissible.

1. **Vistnes' facilitation opinion**

Dr. Vistnes' facilitation opinion asserts that "the scope of the information that Defendant Hospitals shared, the frequency with which they shared their information, and the nature of the information that they shared, significantly increase[d] Defendant Hospitals' ability to establish and maintain an agreement to reduce competition for RNs." Expert Report of Gregory S. Vistnes at 2. Plaintiffs contend that Vistnes' opinion is based on "a thorough understanding of the economics literature on information exchange and a full examination of the discovery record regarding the exchanges." Plaintiffs' Opposition Memo. at 9. He explains that because information exchanges can both benefit and harm competition, expert testimony is necessary to help a jury understand the impact of the particular information exchanges in this case. Plaintiff's maintain that Vistnes' testimony will explain why his "detailed review of the record led him to conclude that the information exchanges in this case in fact reduced incentives to compete." Plaintiffs' Opposition Memo. at 10.

Defendants argue that this opinion should be excluded as unreliable and unsupported **[**45]** because: (1) the conclusions are related to the facts only through ipse dixit; and (2) Vistnes relied on the analysis and opinions of Plaintiff's other expert in coming up with his own opinion. See Defendants' Memo. at 7, 10 and 12.

a. Whether the Conclusions are Related to the Facts

Defendants contend that Vistnes' conclusion - that information exchanges facilitated coordination of nurse compensation - is unreliable because Vistnes offered the opinion without understanding what role the information exchanges played in setting nurse compensation. Defendants allege Vistnes: (1) reached his conclusions without opining as to whether an agreement existed, what such an agreement would contain, and whether coordination actually occurred; (2) failed to distinguish between lawful and unlawful behavior; (3) "failed to examine the processes through which Defendants set their nurse compensation, and did not consider the reality of how, when, and why Defendants made their decisions regarding nurse compensation;" and (4) did not rely upon any data produced in discovery such as payroll or human resources data. See Defendants' Memo. at 7-11. Therefore, Defendants argue that Vistnes "reached his opinions **[**46]** based upon an analysis that he conducted in a vacuum" and "jumped to his conclusions." Defendants' Memo. at 7-8.

(1) Opinion does not Address: Whether an Agreement Existed, What it Contained, or Whether Coordination Occurred

Plaintiffs argue that Vistnes is entitled to offer limited opinions and is not required to opine as to the ultimate issue in the case. They argue that Vistnes was not required to testify as to whether a conspiracy existed or whether coordination actually occurred for his opinions to be admissible. Vistnes' testimony is offered only to opine that the nature, frequency and scope with which Defendants shared information would make it easier for Defendants to establish and maintain an agreement to reduce RN competition. As a general matter this type of opinion testimony may be helpful to the trier of fact. See *City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 565 (11th Cir. 1998)* ("data and testimony need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that **[*152]** the plaintiffs endeavor to assemble before the jury.").

In *U.S. Information Systems, Inc. v. International Broth. of Electrical Workers Local Union Number 3, AFL-CIO, 313 F. Supp.2d 213, 240 (S.D.N.Y. 2004)*, **[**47]** the Court explained that "an expert is permitted to testify that the 'climate' of a specific market was consistent with a conspiracy." See *In re Polypropylene Carpet Antitrust Litigation, 93 F. Supp.2d. 1348, 1355 (N.D. Ga. 2000)* (denying in part defendants' motion to exclude plaintiffs' expert testimony because the expert's proposed testimony "that the climate of the polypropylene market during the relevant time period was consistent with a finding that Defendants engaged in a conspiracy to fix prices" would be "helpful to the trier of fact."). In *U.S. Information Systems, Inc, 313 F. Supp.2d at 240*, defendants claimed that the expert's reports and testimony were impermissibly "replete with conclusions about the existence of a conspiracy based upon conclusions of law." The court held that although the expert could not testify as to his legal conclusion:

> [h]e could . . . point to factors that would tend to show anticompetitive conduct in a market. He could not indicate whether he believed those factors existed here, and what the economic significance of those factors would be. He could also explain how certain conduct could affect a market through the use of hypothetical statements. **[**48]** . .[the expert] could hypothesize that if certain conduct did occur, economists would expect the market to react in a particular way.

Id.

In this case, Vistnes seeks to testify that the information exchanges, engaged in by the Defendant hospitals, made it easier for Defendants to form and maintain a wage agreement. This type of opinion maybe helpful to the jury and is admissible.

(2) **Opinion fails to Distinguish between Lawful and Unlawful Behavior**

Defendants contend that "Vistnes' conclusions . . . will not assist the jury to understand the evidence because his opinions are as consistent with lawful behavior as unlawful behavior." Defendants' Memo. at 9. Plaintiffs argue that Vistnes' opinion is offered as evidence probative of a per-se unlawful wage fixing conspiracy and cannot be probative of lawful conduct. See Plaintiffs' Opposition Memo. at 8.

In *Williamson Oil Co. v. Phillip Morris U.S.A., 346 F.3d 1287, 1322 (11th Cir. 2003)*, the court excluded some of the expert's testimony because "he did not differentiate between legal and illegal pricing behavior." The expert's conclusion was "that plaintiffs participated in an illegal price fixing conspiracy, and he expressed this opinion . **[**49]** . . by saying that the manufacturer's participation in the MSA information sharing system created an inference of collusion." *Id at 1323*. The expert defined collusion to include conscious parallelism, which is legal behavior. Id. The court excluded the testimony as unhelpful to the jury because the expert did not differentiate between legal and illegal pricing behavior. Id.

Here, Vistnes does not define wage fixing to include legal activities. Vistnes does not suggest that any legitimate wage surveys facilitated a wage fixing agreement. Although he recognizes that information exchanges can in some situations increase competition, he testifies and opines that the information exchanges in this case do no such thing. Accordingly, his opinion would be helpful to the jury.

[*153] (3) Opinion not Related to the Facts of the Case because Vistnes failed to Examine Processes for Setting Nurse Compensation and did not Rely on Data Produced During Discovery

Defendants contend that Vistnes' opinions are unreliable because he failed to examine the process by which Defendant Hospitals set their nurse compensation and failed to rely on any data produced during discovery, such as payroll or human resource data. **[**50]** They argue that "Dr. Vistnes cannot reliably conclude that the information exchanges made it easier for Defendants to coordinate if Dr. Vistnes himself did not understand how Defendants set nurse compensation - and what role the information exchanges played in those decisions - in the first instance." Defendants' Reply Memo. at 4. Plaintiffs respond that "Vistnes does not analyze data to determine whether the data [is] consistent with the existence of a conspiracy" because he "does not opine on the existence of the conspiracy." Plaintiffs' Opposition Memo. at 7. They maintain that Vistnes' opinion is supported by substantial economic literature and the record and does not require information on how compensation was set.

"An expert's testimony is admissible under *Rule 702* as long as the processes or techniques that he used to formulate his opinions are reliable." *Daubert, 509 U.S. at 594-95*. In his report, Vistnes opines that:

> Information exchanges can facilitate coordination among rivals in two ways: they can provide a means by which rivals can monitor each other's conduct and ensure compliance with agreements to restrict competition; and they can provide rivals with a means by which **[**51]** they can more readily reach agreement.

He explains that "anticompetitive agreements among rivals are more likely to endure over time if firms have a means by which they can monitor each other's conduct to ensure compliance with the terms of the agreement." According to Vistnes, "[i]nformation exchanges provide a mechanism to conduct such monitoring" because:

> rivals could monitor whether there is any cheating on an agreement to restrict competition for employees by sharing information about the wages they offer, the size of employees' annual salary increases, or the conditions under which employees qualify for overtime payments. The more readily that firms can use an information exchange to identify when a rival has cheated on an anticompetitive agreement, and which rival(s) cheated, the greater the risk that rivals can use the information exchange to monitor and enforce an anticompetitive agreement to restrict competition. Information exchanges that increase rivals' ability to monitor each other's conduct can also reduce the expected costs associated with punishment; these reduced costs can, in turn, facilitate coordination by increasing the profitability of sustaining an anticompetitive **[**52]** agreement.

Additionally:

> Information exchanges that involve future terms of competition (e.g., prices or wages) can allow firms to communicate their plans for future prices or wages to their rivals and create a means by which rivals can communicate back how they will respond. Thus, information exchanges involving future or planned terms of competition can provide a means by which rivals can reach agreement.

See Expert Report of Gregory S. Vistnes at 4. In forming this opinions, Vistnes relied on economic theories published in various economic journals. See e.g. Per Baltzar **[*154]** Overgaard and H. Peter Mollgaard, "Information Exchange, Market Transparency and Dynamic Oligopoly," in Wayne Dale Collins (Ed.), *Issues in Competition Law and Policy*, American Bar Association (2008), at 1254; Michele Grillo, "Collusion and Facilitating Practices: A New Perspective in Antitrust Analysis," *European Journal of Law and Economics*, (September 2002) Vol. 14, N.2, pp. 151-169; Edward J. Green and Robert H. Porter, "Noncooperative Collusion under Imperfect Price Information," *Econometrica*, Vol. 52, No 1 (January 1984).

Armed with this background understanding, Vistnes then analyzed the communications between **[**53]** Defendant hospitals and determined, among other things, that: (1) "[a]ll Defendants shared information, and they did so frequently throughout the time period at issue"; (2) "Defendants shared information over a wide range of terms, thus allowing them to monitor a wide range of variables over which they might compete for RNs and expanding the scope of variables over which competition was softened;" (3) shared data without ensuring anonymity, thus allowing Defendants to monitor compliance; and (4) collected and shared information without the benefit or safeguards of a third party administrator. See Expert Report of Gregory S. Vistnes, Ph.D at 7. Vistnes also opined from this analysis that he sees "no evidence suggesting that Defendant Hospitals' sharing of information regarding the terms by which they were competing, and planned to compete in the future, for RNs yielded any pro-competitive benefits that might offset the competitive harm associated with that information sharing." Id. at 8.

Defendants do not take issue with the economic theories or the literature used by Vistnes as a basis for his opinions. Similarly, they do not take issue with the communications which Vistnes analyzed. **[**54]** Defendants do not dispute the validity of the communications or allege that Vistnes misunderstood the communications. Instead Defendants take issue with the fact that Vistnes failed to examine the process by which Plaintiff hospitals set their nurse compensation and, therefore, failed to test whether his economic theories applied in this case.

Vistnes' opinion is reliable pursuant to the standard articulated in *Daubert, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* (In this inquiry, the district court should consider the indicia of reliability identified in *Rule 702*, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony "is the product of reliable principles and methods"; and (3) that "the witness has applied the principles and methods reliably to the facts of the case."). Vistnes' lack of knowledge as to how the Defendant Hospitals set nurse compensation does not render his opinion unreliable because, following a full examination of the information exchanges at issue in this case, his opinion is limited to: (1) an explanation of how information exchanges increase the ability to establish and maintain an agreement to reduce competition for RNs when certain variables and **[**55]** factors are present; and (2) his opinion that these variables were present in the information exchanges between Defendant Hospitals. Vistnes' facilitation opinion is supported by established economic theory and the undisputed facts surrounding the information exchanges. Accordingly, Vistnes' facilitation opinion is admissible.

b. Whether Vistnes Relied on Ashenfelter's Opinion

Defendants allege that "Dr. Vistnes attempted to bridge [the] gap in his analysis by relying on the analysis and conclusions of Plaintiff's other expert, Professor Orley **[*155]** C. Ashenfelter" as part of his analysis "of balancing the costs and gains of any conspiracy among the Defendants." Defendants' Memo. at 12. Defendants contend that Ashenfelter's opinions are not a reliable basis for Vistnes conclusions and that Vistnes failed to "independently verify any of Ashenfelter's findings." Id. Because this Court has already found that Vistnes' conclusions are independently reliable, Defendants' argument is without merit.

2. Vistnes' Opinion that the Information Exchanges Softened Competition

Defendants argue that Vistnes' softened competition opinion should be excluded because: (1) the conclusion is contradicted by the facts; **[**56]** and (2) he failed to link Defendants' information exchanges and any harmful effect on competition.

a. Whether Vistnes' Opinion is Contradicted by the Facts

Defendants do not challenge the factual or economic underpinnings of Vistnes' opinion. Instead, Defendants allege that the facts necessary for any softening of competition as described by Vistnes are contradicted by the facts of the case; specifically that: (1) Defendants continued to raise compensation throughout the class period at different levels and rates; and (2) Defendants increased the number of nurses employed.

Vistnes softened competition opinion explains that:

> [a]n agreement to share information about future wages (or prices) can further magnify competitive problems associated with softening competition. If firms offer increased wages as a means of gaining a competitive advantage in labor markets, then providing advance notification to rivals about a firm's plans for future wages precludes that firm from using higher wages as a means of gaining an unanticipated competitive advantage over rivals. Thus, just by sharing information about historical wages can soften competition by reducing the lag between when one rival raises **[**57]** wages and other rivals detect and can respond to those higher wages, sharing information about future wages can further reduce competition by completely eliminating any lag between when higher wages are offered and when rivals can detect and respond to those higher wages.

See Expert Report of Gregory S. Vistnes, Ph. D, June 22, 2009 at 6-7.

Therefore, Vistnes' opinion is not contradicted by the fact that hospitals continued to raise compensation and hire workers. Vistnes' opinion on its face does not require that all differences between hospitals be eliminated, the opinion merely states that competition will be reduced, raises will occur less often, and raises will be for smaller amounts. See Reply Report of Gregory S. Vistnes, Ph.D, December 4, 2009, at page 70 ("In a world with differentiation, however, there is no clear basis on which to assume that hospitals should all be paying their nurses the same amount, or that hospitals should be increasing wages by the same amount. Rather what is important is whether the information exchange led hospitals to offer lower wages than they otherwise would, and this outcome can occur even if hospitals do not eliminate all wage differentials."). **[**58]** Therefore, Defendants criticisms are an insufficient basis to warrant precluding the testimony.

b. Whether Vistnes' Opinion Linked Information Exchanges to any Harm or Causation

Secondly, Defendants allege that Plaintiffs failed to link the information exchanges to any harm or causation. Specifically, they point out that Vistnes did not trace the timing and content of the information **[*156]** exchanges to the timing and content of Defendants' nurse compensation setting decisions.

Plaintiffs contend that "Dr. Vistnes' opinion that the information exchanges softened competition is based on a careful study of the details of those exchanges and the principles found in the economics literature regarding the competitive effect of information exchanges." Plaintiffs' Opposition Memo. at 14-15. They claim that, therefore, "[t]here is a solid basis from which to conclude that the particular exchanges under the particular circumstances of this case reduced Defendants' incentive to increase wages to gain a competitive advantage" which in and of itself is a reduction in competition. Plaintiffs' Opposition Memo. at 15.

In *McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995)*, the Second Circuit held **[**59]** that "[d]isputes as to . . . faults in [expert's] use of [particular scientific analysis] as a methodology . . . go to the weight, not the admissibility, of his testimony." Here, Defendants do not dispute the economic literature on which Vistnes bases his opinion, they only dispute that he fails to compare the timing of the exchanges to the changes in compensation. Defendants will have the opportunity to cross-examine Vistnes at trial as to his decision not to apply his conclusions to the timing of exchanges and compensation decisions, and the jury will be able to assign the appropriate weight to the expert's opinions. Furthermore, Vistnes' theory of softened competition purportedly does not lend itself to the sort of "tracing" promulgated by the Defendants. Individual information exchanges cannot be linked to particular compensation decisions because Vistnes' theory describes a cumulative effect on competition resulting from the timing, scope and nature of the information exchanges.

Accordingly, Vistnes opinions are admissible.

c. Defendants Ellis and Albany Medical Center's Joint Motion for Summary Judgment

Defendants move for summary judgment as to Counts I and II of Plaintiffs' Complaint. **[**60]** Count I alleges that Defendants engaged in a continuing conspiracy to depress wages of RNs employed by Defendants in violation of *Section 1* of Sherman Antitrust Act. Count II alleges that Defendants engaged in a continuing agreement to regularly exchange detailed and nonpublic information about the compensation being paid or to be paid to their RN employees in violation of *Section 1* of the Sherman Antitrust Act.

Defendants maintain they are entitled to summary judgment as to: (1) Count I because there is no direct evidence of a compensation fixing conspiracy or evidence of parallel movement of Defendants' wages; and (2) Count II because Plaintiffs cannot establish market definition or causation. Additionally, Defendants maintain they are entitled to summary judgment as to both Counts because Plaintiffs cannot show harm to competition, injury in fact, or causation. Plaintiffs oppose the motion.

Section 1 of the Sherman Antitrust Act states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. Specifically, this provision prohibits **[**61]** "only unreasonable restraints of trade." *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. "To establish a § 1 violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted **[*157]** action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason. *Top Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 95-96 (2d Cir. 1998)*; see *Capital Imaging Associated, P.C. v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 542 (2d Cir. 1993)*. In determining whether certain concerted action amounts to an unreasonable restraint, the action "is either analyzed (1) through the per se standard, which presumes that the questionable conduct has anticompetitive effects without comprehensive inquiry into whether the concerted actions produced adverse anticompetitive effects, or (2) through the so called rule of reason, a case- by-case method that involves consideration of all of the circumstances of a case to decide whether certain concerted action should be prohibited because it amounts to an anti-competitive practice." *In re Baby Food Antitrust Litigation, 166 F.3d 112, 117-118 (3d Cir. 1999)*.

"To **[**62]** survive [Defendants'] motion for summary judgment, [Plaintiffs] must establish that there is a genuine issue of material fact as to whether [Defendants] entered into an illegal conspiracy that caused [Plaintiffs] to suffer a cognizable injury." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. This showing has two components: (1) "[Plaintiffs] must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct;" and (2) "the issue of fact must be genuine." Id. Plaintiffs "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id.

1. Count I - Per Se Claim

Defendants allege that they are entitled to summary judgment as to Count 1 because Plaintiffs cannot show an agreement to fix wages. Plaintiffs contend that they have "extensive evidence meeting the Matsushita standard for circumstantial proof of a per se claim." See Plaintiffs' Opposition Memo. at 9.

"Generally, price-fixing [or in this case wage-fixing] agreements are considered a per se violation of the Sherman Act." *In re Baby Food, 166 F.3d at 118* (citing *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S. Ct. 811, 84 L. Ed. 1129 (1940))*. **[**63]** "Per se violations include those types of restraints on competition that are in and of themselves considered unreasonable because 'their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable.'" Id. (quoting *United States v. Cargo Service Stations, Inc., 657 F.2d 676, 682 n. 4 (5th Cir. Unit B 1981))*; see *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. "Although the Sherman Act's language is arguably broad enough to include a 'purely tacit agreement to fix prices,' most courts agree 'that an express, manifested agreement, and thus an agreement involving actual verbalized communication, must be proved in order for a price-fixing conspiracy to be actionable under the Sherman Act.'" *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 681 F. Supp.2d 141, 165 (D. Conn. 2009)* (citing *In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 654 (7th Cir. 2002))*. "To prove the existence of an express, manifested agreement, the antitrust plaintiff should present 'direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment **[*158]** to **[**64]** a common scheme designed to achieve an unlawful objective.'" Id. (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)* (internal quotation omitted)); see also *Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987)* (holding that, "at a minimum," a jury must be able to conclude that "conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement" (quotation omitted)). ***Antitrust law***, however, "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita, 475 U.S. at 588*. "Thus in *Monsanto Co. v. Spray-Rite Serv. Corp.., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, [the Supreme Court] held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing along, support an inference of antitrust conspiracy." Id. Therefore, "a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Id. (citing *Monsanto Co., 465 U.S. at 764*).

Defendants contend that Plaintiffs do not have any direct evidence of an agreement to depress nurse pay and contend that "in order **[**65]** to rely on circumstantial evidence to prove a Section 1 conspiracy claim [Plaintiffs] 'must first demonstrate that the defendants' actions were parallel.'" See Defendants' Memo. at 17-18 (quoting *In re Beef Indus. Antitrust Litig., 907 F.2d 510, 514 (5th Cir. 1990))*. Here, Plaintiffs do not purport to have direct evidence of a conspiracy, but instead argue they have extensive circumstantial proof of a per se claim.

As a preliminary matter, Plaintiffs contend that they do not have to prove parallel conduct. The Supreme Court has made clear that under *Section 1* of the Sherman Act "'the crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Bell Atlantic Corp. v. Trombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*. "While a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement,' it falls short of 'conclusively establishing agreement or . . . itself constituting a Sherman Act offense.'" Id. (quoting

Theatre Enterprises, 346 U.S. at 540-541). Defendants **[**66]** cite to *In re Beef Indus. Antitrust Litig., 907 F.2d 510, 514 (1993)*, for the proposition that Plaintiffs must demonstrate that the defendants' actions were parallel to prove a Section 1 conspiracy claim. In this case, the Fifth Circuit held only that "[w]hen an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendant's actions were parallel." Defendants cite to no case law that stands for the requirement that, to prevail, Plaintiffs must prove parallel pricing if they are not relying on conscious parallelism. Parallel pricing is merely "one such form of circumstantial evidence." *In re Ethylene, 681 F. Supp.2d at 166*. Accordingly, Plaintiffs need not prove parallel pricing in order to prevail on per-se claim based on circumstantial evidence. The issue, therefore, becomes whether Plaintiffs have alleged sufficient evidence to meet the Matsushita standard for circumstantial proof of a per se claim.

In *Matsushita, 475 U.S. at 593-98*, the Supreme Court held that a conspiracy case based on circumstantial **[*159]** evidence must be economically plausible and must exclude the possibility that the alleged conspirators **[**67]** acted independently.

a. Whether economically plausible

A conspiracy may be economically plausible if the defendants had a motive to engage in the conspiracy. In *Matsushita, 475 U.S. at 592*, the Court found that defendants had no motive to engage in a predatory pricing scheme absent some strong likelihood that the alleged conspiracy would eventually pay off. Because the Court did not find evidence that any alleged predatory pricing scheme was successful "petitioners had every incentive not to engage in the conduct with which they are charged, for its likely effect would be to generate losses . . . with no corresponding gains." *Id. at 595*. The Court held:

> [t]hat being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists . . . Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Matsushita, 475 U.S. at 596-97.

Courts have also found circumstantial evidence **[**68]** of an agreement through evidence of parallel pricing coupled with other "'plus factors' tending to establish that the defendants were not engaging merely in oligopolistic price maintenance or price leadership but rather in a collusive agreement to fix prices or otherwise restrain trade." *City of Tuscaloosa v. Harcos Chemicals, Inc., 158 F.3d 548, 570 (11th Cir. 1998)* (citing to *Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1583 (11th Cir. 1988)*; *Gainsville Util. Dep't v. Fla. Power & Light Co., 573 F.2d 292, 300-02 (5th Cir. 1978))*; see *In re Ethylene Propylene Diene Monomer Antitrust Litigation, 681 F. Supp. 2d 141 (D. Conn. 2009)* ("[T]herefore, in addition to submitting evidence of parallel price increases, the plaintiffs must establish certain so-called 'plus' factors, 'which when viewed in conjunction with the parallel acts, can serve to allow a fact finder to infer a conspiracy.'") (quoting *Apex Oil Co. v. DiMauro, 822 F.2d 246 (2d Cir. 1987))*.

The Court has already held that evidence of parallel pricing is not a prerequisite to a finding of an agreement based on circumstantial evidence. Plaintiffs argue that in a case involving wage fixing, as opposed to price fixing, parallel pricing would **[**69]** be unexpected because the factors in employment decisions permit a conspiracy to operate without highly coordinated prices changes. A conspiracy to depress wages can continue to exist despite slight temporary differences in pay scales because these differences will not result in large scale employee movement. This is so because the costs associated with changing jobs may outweigh slight differences in pay. Secondly, Plaintiffs allege the conspiracy to depress wages is accomplished, not by coordinating wages, but instead, through the economic theory of softened competition. This theory posits that because the hospitals knew that any increase they made in wages would be known to the other hospitals, there was no incentive to increase wages so as to be more competitive than the others.

The "plus factors," however, are relevant to the determination of whether circumstantial evidence points to a conspiracy. Such "plus factors" include: (1) a motive to conspire, which can be evidence that the industry is susceptible to price-fixing; (2) noncompetitive behavior, i.e., **[*160]** evidence that the defendants acted contrary to their economic self interest; and (3) evidence of a traditional conspiracy, **[**70]** such as a high level of inter-firm communications that would suggest that the defendants consciously agreed not to compete. *In re Ethylene, 681 F. Supp.2d at 166* (citing to *Apex Oil, 822 F.2d at 253*; *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360 (3d Cir. 2004))*.

Plaintiffs allege they have "strong circumstantial proof of the existence of the conspiracy. This proof includes the fact that: (1) Defendants' actions would be contrary to their economic interest if no conspiracy existed; (2) the structural characteristics of the market show that Plaintiff's allegations make economic sense; (3) the high degree of cooperation among Defendants created relationships conducive to reaching and maintaining a wage agreement; and (4) Defendants exchanged current prices.

(1) Contrary to Economic Interest

First, Plaintiffs argue that the information exchanges would be contrary to the Defendant's economic interest if no conspiracy existed. They argue that: (1) "no **[**71]** hospital, facing a shortage of nurses, would directly disclose its pay structure to a competitor absent an agreement among those hospitals that the recipient will not use the information as a genuine competitor would do - to bid away nurses;" (2) "it is equally contrary to a hospital's independent self interest to operate short of critical staff without using the information it obtains from rivals to try and fill its vacancies from lower paying hospitals in the area;" and (3) "it makes no sense to freely give valuable market intelligence gained from one rival to another rather that use it to one's own advantage." See Plaintiffs' Opposition Memo. at 9-12.

(2) Structure of the Market shows agreement makes economic sense

Second, Plaintiffs contend that the "structural characteristics of this market show that Plaintiffs' allegations made economic sense." See Plaintiffs' Opposition Memo. at 13. They point to factors in the market such as: (1) the high cost of switching jobs; (2) the frequency of information exchanges; and (3) the potential for enormous gains because nurses represent the "largest single cost for the hospitals." See Plaintiffs' Opposition Memo. at 13-14.

(3) High [72] Degree of Cooperation**

Third, Plaintiffs allege that circumstantial evidence is particularly shown by the Defendants' continual and pervasive direct hospital-to-hospital exchanges of proprietary information about the amount they pay their nurses in the face of endemic shortages of nurses. In *In re Ethylene, 681 F. Supp.2d at 173* the court explained:

> [w]ithout doubt, the key plus factor at summary judgment is the plaintiffs' evidence of an actual manifest agreement, i.e., evidence that includes 'customary indications of traditional conspiracy,' or 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.' The plaintiffs have submitted documents memorializing meetings and discussions about prices and capacity issues they contend give rise to an inference of illegal collusion. Those documents indicate that the defendants were extremely chummy and treated each other more like colleagues than traditional competitors, and that the defendants' executives often communicated immediately before or after a . . . price increase.

[*161] The court held that "the plaintiffs' evidence **[**73]** of the frequent and friendly communications between the defendants and the secrecy of their meetings [was] sufficient to allow a reasonable jury to infer that the defendants participated in an unlawful price-fixing conspiracy."

In this case, Defendant Hospitals exchanged wage information "through numerous e-mails, telephone calls, and in-person conversations at job fairs and professional association meetings." Plaintiffs' Opposition Memo. at 2; see Plaintiff's Response to Defendants' Statement of Undisputed Facts at paragraphs 8, 18, 23, 25, 49, 71, 72, 97, 103, 106, 130, 137. These communications discussed, among other things, staff RN pay ranges, RN new graduate rates, and shift differentials. Id. Plaintiffs maintain that "Defendants typically collected this information prior to budgeting and implementing RN pay adjustments." Id. Most significantly, these information exchanges contained current and future RN compensation information. Id.; see *Todd v. Exxon Corp., 275 F.3d 191, 211 (2d Cir. 2001)*

("The Supreme Court has made clear that '[e]xchanges of current price information, of course, have the greatest potential for generating anti-competitive effects and although not per se unlawful **[**74]** have consistently been held to violate the Sherman Act.'" (quoting *Gypsum, 438 U.S. at 441 n. 16*)).

Plaintiffs also argue that certain features of the information exchanges make it impossible for Defendants to yield pro-competitive results. These include: (1) the information exchange occurred "in the face of an acknowledged local shortage of nurses;" (2) "the information exchange is not public, that is, not shared with participants on both sides of the market;" and (3) "the information is shared directly with competitors, not through third parties who protect the anonymity of the shared data." Plaintiffs' Opposition Memo. at 11-12.

Considering the circumstantial evidence as a whole and construing it in the light most favorable to Plaintiff's, a reasonable jury could conclude that Defendants were engaged in collusive behavior.

b. Whether the Evidence Excludes the Possibility that the Alleged Conspirators Acted Independently

"Establishing an antitrust case on the basis of circumstantial evidence necessarily means that the evidence . . . is susceptible to differing inferences - the inference that, on the one hand, the defendants were engaged in illegally collusive behavior or that, on the **[**75]** other hand, they were merely engaged in lawful, independent [wage setting]." *In re Ethylene, 681 F. Supp.2d at 167*. Therefore, pursuant to *Monsanto, 465 U.S. at 764*, and *Matsushita, 475 U.S. at 586*, Plaintiffs "must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." "Important facts to evaluate in this analysis include: (1) whether the Defendants' actions, if taken independently, would be contrary to their economic self-interest; (2) whether the defendants have been uniform in their actions; and (3) whether the defendants have exchanged or have had the opportunity to exchange information relative to the alleged conspiracy; and (4) whether the defendants have a common motive to conspire." *Re/Max Intern., Inc. v. Realty One, Inc., 173 F.3d 995, 1009 (6th Cir. 1999)*; see *Wallace v. Bank of Bartlett, 55 F.3d 1166, 1168 (6th Cir. 1995)*. "Ordinarily, an affirmative answer to the first of these factors will consistently tend to exclude the likelihood of independent conduct." Id.

[*162] Here, Plaintiffs argue that if Defendants set compensation independently, their actions would have been contrary to their economic self interest. They maintain **[**76]** that during a nursing shortage it would be against Defendants' best interests to exchange wage information because, absent an agreement, rivals would use the information to "poach" nurses and compete against each other. A rival would not be likely to exchange current and future wage information without entering into a prior agreement protecting it from competitors. The fact that but-for a wage agreement, Defendants would be acting against economic self interest is persuasive evidence that Defendants did not act independently. Accordingly, Plaintiffs have provided sufficient evidence of an agreement to with withstand summary judgment as to Count I.

2. Count 2 - Rule of Reason Claim

Defendants contend they are entitled to summary judgment as to Count II because Plaintiffs cannot show that Defendants' information exchanges harmed competition. Count II of Plaintiffs' Complaint alleges that "defendants and their co-conspirators have engaged in a continuing agreement to regularly exchange detailed and non-public information about the compensation being paid or to be paid to their RN employees" and that "[t]his agreement is an unreasonable restraint of trade in violation of Section 1 of the **[**77]** Sherman Act, *15 U.S.C. § 1*." In *United States v. Citizens & Southern National Bank, 422 U.S. 86, 113, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*, the Supreme Court held that "the dissemination of price information is not itself a per se violation of the Sherman Act." "Where the violation lies in the information exchange itself - as opposed to merely using the information exchange as evidence upon which to infer a price-fixing agreement . . . [the] exchange can be found unlawful under a rule of reason analysis." *Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001)*; see *Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 174-75 (2d Cir. 1984)*. Under the rule of reason analysis, the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *F.T.C. v. Indiana Federation of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (2009)* (quoting *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242,* 62 L. Ed. 683 (1918)). "Before a factfinder may consider the harms and benefits of the challenged behavior, a plaintiff initially must show that 'the challenged action had an *actual* adverse effect on competition as a whole in the relevant **[**78]** market; to prove it has been harmed as an individual competitor will not suffice.'" Top Markets, Inc., 142 F.3d at 96 (quoting Capital Imaging, 996 F.2d at 543 (emphasis in original)). To satisfy this burden, Plaintiff must either: (1) show an actual adverse effect on competition; or (2) establish that Defendants had sufficient market power to cause an adverse effect on competition. See Top Markets, Inc., 142 F.3d at 96; see K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co., 61 F.3d 123, 128-129 (2d Cir. 1995); Capital Imaging, 996 F.2d at 546 ("The plaintiffs may satisfy this burden without detailed market analysis by offering proof of actual detrimental effects, such as reduction of output. Yet, where the plaintiff is unable to demonstrate actual effects, it must at least establish that defendants possess the requisite market power so that their arrangement has the potential for genuine adverse effects on competition.")(internal citation omitted). "If plaintiff satisfies this burden, the burden then shifts to defendant to offer evidence **[*163]** that its conduct had pro-competitive effects." Arkansas Carpenters Health and Welfare Fund v. Bayer AG, 604 F.3d 98, 104 (2d Cir. 2010). "If **[**79]** defendant is able to offer such proof, the burden shifts back to plaintiff, who must prove that any legitimate competitive effects could have been achieved through less restrictive alternatives." Id.

Here Defendants argue that Plaintiffs cannot establish "a relevant market" or "that Defendants' information exchanges actually caused any anticompetitive suppression of nurse compensation." See Defendants' Memo. at 23.

a. Actual Adverse Effect on Competition

"In order to fulfill this requirement, the plaintiff must show more than just that he was harmed by defendants' conduct." K.M.B. Warehouse, 61 F.3d at 127; see Borger v. Yamaha Int'l Corp., 625 F.2d 390, 397 (2d Cir. 1980). "The overarching standard is whether defendants' actions 'diminish overall competition, and hence consumer welfare.'" Id. (quoting Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1560, 1571, 1573 (11th Cir. 1983). An actual adverse effect can be shown "by examining factors like reduced output, increased prices and decreased quality." Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001).

In this case, Plaintiffs argue that they "have presented evidence of adverse effects on competition **[**80]** arising from Defendants' agreement to trade nurse compensation data" by producing "both evidence that the Albany hospital nurse market is characterized by significant and persistent shortage of nurses . . . and evidence of depressed wages." Plaintiffs' Opposition Memo. at 19. Plaintiffs have introduced the expert testimony of Prof. Ashenfelter who employs economic methodology to show that RN wages were depressed during the class period and that nurses were underutilized in the Albany area. Ashenfelter compared the actual wages paid to staff nurses in the Defendant hospitals with actual wages paid to agency nurses to determine how much staff nurses should have been paid. He also used actual employment data in the Albany area and nationwide when determining utilization rates. This evidence, if believed, shows an actual adverse effect on all RNs in the defendants hospitals; that their wages were depressed and that hospitals were underutilizing staff nurses. C.f. Top Markets, Inc., 142 F.3d at 96 (unable to satisfy burden because "failed to demonstrate an actual detrimental effect on competition" because "[i]t relied almost entirely on the [an affidavit], which discussed potentially higher **[**81]** prices but failed to allege prices were actually higher, failed to provide proof that the plaintiff's exclusion from the market had resulting in any decrease in quality of service to area shoppers, and failed to allege that other supermarkets were excluded from the market."); Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 264 (unable to satisfy burden because plaintiff does not provide any hard data to support their expert's calculations and expert testimony rooted in hypothetical assumptions cannot substitute for actual market data"). Plaintiffs have likewise offered the expert testimony of Prof. Vistnes to explain the mechanism by which information exchanges lead to suppressed wages through the economic theory of softened competition. Evidence of suppressed wages and underutilization in conjunction with an explanation of how these information exchanges can lead to softened competition is sufficient to satisfy Plaintiffs' burden on summary judgment. Because Plaintiff' have demonstrated actual adverse effects they do not have to **[*164]** make a showing of sufficient market power. See Capital Imaging, 996 F.2d at 546 ("The plaintiffs may satisfy this burden without detailed **[**82]** market analysis by offering proof of actual detrimental effects, such as reduction of output."). Accordingly, Plaintiffs have provided sufficient evidence of anticompetitive effect to with withstand summary judgment as to Count II.

3. Whether Plaintiffs have Evidence to Prove Harm to Competition or Injury-in-Fact

Defendants contend they are entitled to summary judgment because Plaintiffs have failed to provide evidence of harm to competition or injury in fact. They allege that because Ashenfelter's benchmark methodology and analysis is speculative and lacks factual support it fails to prove anticompetitive effects and injury to the class. Defendants reargue the same points made in their joint motion to exclude the expert testimony Orley Ashenfelter. For the reasons stated previously in this opinion, the methodology is admissible for proving harm to competition and injury in fact. Accordingly, Plaintiffs have provided sufficient evidence of harm to competition or injury in fact to withstand summary judgment.

4. Whether Plaintiffs have Evidence to Prove Causation

Defendants argue that Plaintiffs cannot prove the alleged anti-trust injury was caused by Defendants' alleged violation of the **[**83]** antitrust laws. They allege that the only way causation can be shown is to "'conduct an empirical inquiry into the effect of the information exchange on compensation decisions and resulting compensation outcomes' which 'requires a close examination of the scope, nature, and timing, of information exchanges juxtaposed against outcomes captured by actual compensation data.'" Defendants' Mem. at 33 (quoting Willig Report paragraph 76). Defendants submit that their own expert, Prof. Willig, "reviewed the information exchanges in painstaking detail - exchange by exchange - and evaluated their effects on Defendants' actual compensation decisions" finding no "systemic or causal link between RN compensation and the information exchanges." Id. at 35. Accordingly, Defendants contend that "Plaintiffs present[ed] no evidence that, in the absence of the direct information exchanges" would nurses have made more money. Id.

"The requirement that an antitrust plaintiff demonstrate that the alleged illegal acts were the cause of its damages is well established." *Sound Ship Bldg. Corp. v. Bethlehem Steel Co. (Inc.), 533 F.2d 96, 98 (1976)*; See *Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. **[**84]** This can be satisfied by setting forth "a theory or . . . set of facts in the depositions and other documents . . . [to] show a causal link." See *Sound Ship Bldg., 533 F.2d at 98*.

In this case Plaintiffs have set forth a theory of causation supported by expert testimony and economic theory. Plaintiffs' expert, Prof. Vistnes, is offered to explain how the theory of softening of competition and how information exchanges of current information can lead to depressed wages. Plaintiffs also offer the testimony of Ashenfelter to provide evidence that the wages were indeed suppressed. Plaintiffs argue that Dr. Vistnes' analysis does not allow for "evidence linking specific exchange of pay data to some specific pay decision, because that is not how the theory of softening competition works."

For purposes of summary judgment, the Court finds Plaintiffs' theory persuasive for inferring causation. Accordingly, **[*165]** Plaintiffs' evidence is sufficient to withstand Defendants' joint motion for summary judgment.

d. Plaintiff's Motion to Exclude Portions of Expert Testimony of Robert Willig

Robert Willig is Defendants' expert witness retained to: (1) "assess the collusion and information exchange claims and **[**85]** their alleged effect on the compensation of members of the class"; (2) "opine on whether conditions in the Albany area have been conducive to the alleged coordination and conspiracy;" and (3) "to examine and respond to the analysis and opinion on these issues set forth by Plaintiffs' experts." See Defendants' Opposition Memo. at 1.

Plaintiffs argue that "the Court should prohibit Prof. Willig from offering any opinion in this case concerning: (1) [w]hether the fact discovery record in this case is probative or not of the alleged conspiracy; and (2) [t]he information the Defendants did or did not consider in making their compensation decisions, and the effect or lack of effect particular information had on such decisions." See Plaintiffs' Memo. at 6-7. Plaintiffs argue these opinions "supplant the role of the jury" because "[t]he jury is fully capable of reading the same lay documents and lay deposition testimony as Prof. Willig and deciding whether they contain evidence of the conspiracy and what they show about the basis of Defendants' compensation decisions." Id. at 1. Accordingly, Plaintiffs contend that "Willig's interpretation of the meaning and significance of such documents and **[**86]** deposition testimony on pure factual questions is inadmissible under the Federal Rules of Evidence." Id. Defendants oppose this motion arguing that "Prof. Willig's testimony satisfies the requirements for admissibility of expert testimony under *Fed. Rule of Evidence 702*." See Defendants' Opposition Memo. at 1.

Fed. R. Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto." "For an expert's testimony to be admissible under this Rule, however, it must be directed to matters within the witness' scientific, technical, or specialized knowledge and not to lay matters which a jury is capable of understanding and deciding without the expert's help." *Andrews v. Metro North Commuter R. Co., 882 F.2d 705, 708 (1989)*; see *McGowan v. Cooper Indus., Inc., 863 F.2d 1266, 1272 (6th Cir. 1988)*; *Scott v. Sears, Roebuck & Co., 789 F.2d 1052, 1055-56 (4th Cir. 1986)*; *United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985)*; *Strong v. E.I. DuPont de Nemours Co., 667 F.2d 682, 685-86 (8th Cir. 1981)*. Furthermore, the testimony **[**87]** must "assist the trier of fact." *Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir. 2005)*. "Expert testimony that 'usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it,' by definition does not 'aid the jury in making a decision'; rather, it 'undertakes to tell the jury what result to reach,' and this 'attempts to substitute the expert's judgment for the jury's.'" *Nimely, 414 F.3d at 397* (quoting *Bilzerian, 926 F.2d at 1294*; *United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994))*.

1. Whether Willig can Testify as to the Absence of Conspiracy Evidence

Plaintiffs' argue that Willig makes overly broad statements concerning the absence **[*166]** of conspiracy evidence. [5] They argue that these statements "offer *factual* conclusions based *solely* on [Willig's] *lay* understanding of *fact* evidence" and are, thus, inadmissible. Plaintiffs' Reply Memo. at 1. Defendants counter that experts are entitled to offer testimony that "embraces an ultimate issue to be decided by the trier of fact." *Fed. R. Evid. 704 (a)*; see *United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991)* (an expert witness **[**88]** may "opine on an issue of fact within the jury's province" and "factual conclusions may be included in an expert's testimony" as long as the expert does not state "ultimate legal conclusions based on those facts.").

Defendants contend that Willig's testimony "was informed by economic principles . . . regarding the importance of 'focal points', the economic incentives for hospitals to cheat on an alleged agreement to suppress RN wages, and the factors that make monitoring and enforcing such an agreement **[**89]** more difficult in this market." Defendants' Opposition Memo. at 6. Therefore, they contend, Willig is not "offering his lay understanding of purely factual evidence, but interpreting that evidence in light of economic principles with which the average juror will be unfamiliar." Id.

In this case, Prof. Willig is not, as Plaintiffs suggest, merely looking at the evidence and determining that he does not think the evidence indicates the existence of a conspiracy. Instead, he is looking at the evidence and interpreting the likelihood of a conspiracy based on certain well accepted economic factors. "Economic literature recognizes three elements required for collusion to have sustained impact on a market: the parties to the alleged agreement must be able to '(1) reach consensus on the terms or focal point of an agreement, (2) detect cheating on

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[5] The specific statements to which Plaintiffs object are: (1) "I have seen *no evidence* suggesting that such an agreement [to suppress nurse wages] existed;" (2) "there is no evidence to indicate that non-base wages, much less base wages, were the focal point of any alleged conspiracy;" (3) "[a]fter reviewing these information exchange documents, I have not found any evidence that suggests the presence of an agreement to fix wages or any evidence that rivals punished deviators that implemented significant rate increases of the type shown by AMC and NEH;" and (4) "[t]here is no evidence that a conspiracy was particularly directed at nurses in speciality departments." Plaintiffs' Memo. at 2.

the agreement, and (3) push deviations from the agreement.'" Defendants' Opposition Memo. at 7 (quoting Expert Report of Robert D. Willig at paragraph 9). Based on these elements Willig opines that: (1) "without 'focal point corresponding to the actual terms of the alleged agreement, a Defendants could not know how to comply with the alleged conspiracy, **[**90]** monitor adherence to it by its rivals, or effectively enforce it;'" and (2) "'[m]arket conditions and the characteristics of the . . . services offered' affect the likelihood that collusion will lead to anticompetitive outcomes." Id. (quoting Expert Report of Robert D. Willig at paragraphs 11 and 9). He further opines that the type of agreement suggested by the Plaintiffs is unlikely based on the economic state of the market and the way in which the information exchanges took place. These opinions are informed by his background knowledge in economics and his ability to apply the facts to this information. A juror would not have this expertise or the ability to apply the factual information to Willig's background knowledge. Accordingly, his opinions maybe helpful to the jury and are admissible.

[*167] 2. Whether Willig can Testify as to the Information Defendants Considered in Making their Compensation Decisions, and the Effect of that Information on their Decisions

Plaintiffs argue that Willig's opinions regarding statements about Defendants' use of each other's compensation information are "outside the scope of his expertise, and invade[] the jury's province" because they are factual conclusions **[**91]** based on "nothing more than his reading of the factual record." [6] Plaintiffs' Memo. at 3. They contend that "Prof. Willig has absolutely no economic principle or method of analysis for divining what factored into Defendants' compensation decisions." Id.

According to Defendants, Willig conducted an "economic analysis of whether there [was] a causal link between the levels and changes in RN compensation and the [] information exchanges." Defendants' Opposition Memo. at 10. In order to complete this analysis, Willig examined the "scope, nature, and timing of information exchange juxtaposed against outcomes captured by actual compensation data." Id. He determined that evidence was lacking to prove a causal connection. Defendants contend that the proposed testimony "will help the jury by showing them there is no connection between the alleged conduct and actual compensation decisions." Id. at 11.

In addition to testifying regarding these findings, Defendants also seek to allow Willig to "opine at trial regarding both Defendants' [use of information exchanges] in the compensation setting process and the ultimate effect they had on RN compensation." Defendants' Opposition **[**94]** Memo. at 10. They argue that "Willig's analysis of the payroll data makes him especially qualified to render an opinion regarding the effect the information exchanges had

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[6] The specific statements to which Defendants object include: (1) "The evidence supports the position that the information received by Ellis from other hospitals did not form the basis of compensation decisions or negotiation strategies. Nor does it appear to have had an incremental impact on such decisions to the detriment of Ellis nurses;" (2) "Based on these facts, it seems likely that knowledge gained from this informal salary survey led to wage changes [at Ellis] that were higher than would otherwise have been negotiated;" (3) "Dr. Vistnes has not shown, and I have not found, instances where these information exchanges led to Ellis negotiating wages with the NYSNA below that which would have existed but for these exchanges;" (4) "The information received by St. Peter's was not the basis of compensation decisions, although St. Peter's considered certain information received. Nor does the information disclosed in these exchanges indicate **[**92]** that it had an incremental impact on compensation decisions that inured to the detriment of St. Peter's RNs;" (5) "There is no evidence or testimony indicating that St. Peter's used this information to modify its own shift differential practices in a manner that would have made its nurses worse off than without the information received by St. Peter's;" (6) "The information received by Seton was not the basis of compensation decisions, although Seton considered certain information from these exchanges. I find no evidence to suggest that the information subject to these exchanges had an incremental impact on compensation decisions that inured to the detriment of Seton RNs;" (7) "The information obtained from other hospitals appears to have contributed to Seton's decision to increase RN wages to remain market competitive;" (8) "Dr. Vistnes has not shown, and I have not found, instances where Seton set RN compensation at levels below that which would have existed but for these information exchanges;" and (9) "The information received by NEH does not appear to have been the basis for any compensation decision other than determining that its wages were not at competitive levels and required **[**93]** significant increases. I find no evidence to suggest that the information shared through these exchanges had an incremental impact on compensation decisions which made NEH's RNs worse off than they would have been but for these information exchanges." Plaintiffs' Memo. at 3-4.

on compensation decisions. **[*168]** Id. Expert witnesses are not permitted to testify as to the "knowledge, motivations, intent, state of mind, or purposes" of others. See *In re Fosamaz Products Liability Litigation, 645 F. Supp.2d 164, 192 (S.D.N.Y. 2009)*; *In re Rezulin Products Liability Litigation, 309 F. Supp.2d 531, 546 (S.D.N.Y. 2004)* ("[T]he opinions of these witnesses on the intent, motives, or states of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise."); *Taylor v. Evans, 1997 U.S. Dist. LEXIS 3907, 1997 WL 154010, at * 2 (S.D.N.Y. 1997)* ("[M]usings as to defendants' motivations would not be admissible if given by any witness - lay or expert."). Willig's expertise as an economist does not give him any specialized knowledge to discern the thought processes of those setting compensation at Defendant Hospitals. Id. ("regulatory expertise does not give her the ability to read minds.") Likewise, his expertise does not allow him to discern the effect the information learned in the information **[**95]** exchanges had on others' compensation-setting decisions.

Accordingly, Willig is permitted to testify to his economic analysis comparing the timing of the information exchanges with the timing of compensation decisions and his opinion that he finds no connection or correlation between the two. Conversely, Willig will not be permitted to testify as to what information Defendants considered and the weight that information played in setting nurse compensation.

IV. CONCLUSION

For the foregoing reasons Defendants' Joint Motion to Exclude Expert Testimony of Orley Ashenfelter [Docket No. 355/358] is DENIED; Defendants' Joint Motion to Exclude Expert Testimony of Gregory Vistnes [Docket No. 344/356] is DENIED; Defendants' Joint Motion for Summary Judgment [Docket No. 345] is DENIED; and Plaintiffs' Motion to Exclude Portions of Expert Testimony of Robert Willig is GRANTED IN PART.

IT IS SO ORDERED

Dated: July 22, 2010

/s/ Thomas J. McAvoy

Thomas J. McAvoy

Senior, U.S. District Judge

Race Tires Am., Inc. v. Hoosier Racing Tire Corp

United States Court of Appeals for the Third Circuit

April 14, 2010, Argued; July 23, 2010, Filed

No. 09-3989

Reporter

614 F.3d 57 *; 2010 U.S. App. LEXIS 15233 **; 2010-2 Trade Cas. (CCH) P77,111

RACE TIRES AMERICA, INC., a Division of Specialty Tires of America, Inc.; SPECIALTY TIRES OF AMERICA, INC.; SPECIALTY TIRES OF AMERICA (PENNSYLVANIA), INC.; SPECIALTY TIRES OF AMERICA (TENNESSEE), LLC, Appellants v. HOOSIER RACING TIRE CORP; DIRT MOTOR SPORTS INC, d/b/a World Racing Group

Subsequent History: As Amended August 3, 2010.

Motions ruled upon by *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 2011 U.S. Dist. LEXIS 48847 (W.D. Pa., May 6, 2011)*

Prior History: [1]** On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civil No. 2-07-cv-01294). District Judge: Hon. Terrence F. McVerry.

Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 660 F. Supp. 2d 590, 2009 U.S. Dist. LEXIS 84081 (W.D. Pa., 2009)

Core Terms

tire, sanctioning, bodies, supplier, track, racing, racers, antitrust, drivers, exclusive contract, dirt, sprint, promoters, manufacturer, contracts, competitor, bid, coercion, benefits, appears, sport, summary judgment, sprint car, renewal, oval, compete, amend, anti trust law, circumstances, monopolize

LexisNexis® Headnotes

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

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

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

The court of appeals exercises plenary review over a district court's grant of summary judgment.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

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

HN2[] **Antitrust & Trade Law**

Summary judgment is not disfavored in the antitrust context. The entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces. Furthermore, ***antitrust law*** limits the range of permissible inferences that can be drawn from ambiguous evidence. To avoid summary judgment, an antitrust plaintiff must come forward with economically plausible evidence supporting the elements of its claim. When the evidence in the record is as consistent with permissible competition as it is with an illegal conspiracy, such evidence, standing alone, fails to support an inference of an illegal conspiracy. In the end, the plaintiff in an antitrust case responding to a summary judgment motion must overcome a "higher threshold," which is imposed in order to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition.

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

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN3[] **Standards of Review, Abuse of Discretion**

The court of appeals reviews the denial of a motion to amend under an abuse of discretion standard of review.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN4[] **Sherman Act, Scope**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is declared to be illegal. *15 U.S.C.S. § 1*. It is well established that this provision prohibits only "unreasonable" restraints of trade. The "rule of reason" standard applies in this context.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

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

HN5[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

In order to survive summary judgment where the rule of reason applies, the plaintiff must show concerted action, antitrust injury, evidence that the conspiracy produced adverse, anticompetitive effects within the relevant product and geographic markets, and evidence that the objects of and the conduct pursuant to the conspiracy were illegal.

The plaintiff may satisfy its burden by showing either actual anticompetitive effects or proof of the defendant's market power. The notion of "market power" in this context is defined as the ability to raise prices above those that would exist in a competitive market. The burden then shifts to the defendant to show a sufficient pro-competitive justification or objective for the challenged conduct. A restraint cannot be justified solely on the basis of social welfare considerations. The plaintiff then must demonstrate that the restraint itself is not reasonably necessary to achieve the stated objective. In other words, even if an anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act targets persons who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce. *15 U.S.C.S. § 2*. This offense of monopolization has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. As to the second element, a monopolist willfully acquires or maintains monopoly power when it competes on some basis other than the merits. In turn, the offense of attempted monopolization has the following three elements: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. The final element requires an inquiry into the relevant product and geographic market as well as the defendant's economic power in that market. In turn, market share, while crucial, may not always be determinative. Once the plaintiff demonstrates harm to competition, the defendant then has to show that it is actually promoting a pro-competitive or legitimate business objective.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] **Regulated Practices, Monopolies & Monopolization**

Ultimately, *§ 2* of the Sherman Act is directed against conduct that unfairly tends to destroy competition itself, as opposed to even "severe" competition.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN8[] **Sherman Act, Scope**

"Tying" is defined as selling one good (the tying product) on the condition that the buyer also purchase another separate good (the tied product).

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] Sherman Act, Claims

A private antitrust plaintiff must establish that it suffered an "antitrust injury" as a result of the misconduct and therefore possesses the standing necessary to seek relief. The antitrust laws were enacted for the protection of competition not competitors. Therefore, the injury prong requires: (1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN10[] Exclusive & Reciprocal Dealing, Exclusive Dealing

It is widely recognized that in many circumstances exclusive dealing arrangements may be highly efficient, to assure supply, price stability, outlets, investment, best efforts or the like, and pose no competitive threat at all. The competition to be an exclusive supplier may constitute a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN11[] Exclusive & Reciprocal Dealing, Exclusive Dealing

The United States Court of Appeals for the Third Circuit adopts the following general rule: the Sherman Act does not forbid sanctioning bodies and other sports-related organizations from freely (i.e., without any coercion or improper interference) adopting exclusive equipment requirements, so long as such organizations otherwise possess, in good faith, sufficient pro-competitive or business justifications for their actions. At the same time, the Third Circuit is not granting any kind of antitrust immunity.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN12[] Sherman Act, Claims

To establish antitrust injury, a plaintiff must show harm to competition, not just harm to the plaintiff competitor.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN13[] **Sherman Act, Claims**

When one exclusive dealer is replaced by another exclusive dealer, the victim of the competition does not state an antitrust injury.

Civil Procedure > Pretrial Matters > Conferences > Pretrial Orders

HN14[] **Conferences, Pretrial Orders**

Fed. R. Civ. P. 16(b)(4) provides that a schedule set forth in a scheduling order may be modified only for good cause and with the judge's consent.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN15[] **Amendment of Pleadings, Leave of Court**

Fed. R. Civ. P. 15(a)(2) provides that the court should freely give leave when justice so requires.

Counsel: For Appellants: Mark K. Dausch, Esq., Joseph Decker, Esq., (Argued), Alan B. Rosenthal, Esq., Mark D. Shepard, Esq., Babst, Calland, Clements & Zomnir, Pittsburgh, PA; Thomas M. Schultz, Esq., Polymer Enterprises, Greensburg, PA.

For Hoosier Racing Tire Corp., Appellee: Reed Smith, Pittsburgh, PA; Donald E. Knebel, Esq. (Argued), Kendall Millard, Esq., Deborah E. Pollack-Milgate, Esq., Aaron M. Staser, Esq., Barnes and Thornburg, Indianapolis, IN.

For Dirt Motor Sports, Inc., d/b/a World Racing Group, Appellee: John R. Gotaskie, Jr., Esq., Fox Rothschild, Pittsburgh, PA; Theodore H. Jobes, Esq. (Argued), Christine Soares, Esq., Fox Rothschild, Philadelphia, PA.

For Grand-Am Road Racing and National Association for Stock Car Auto Racing, Inc., Amicus-Curiae: Helen M. Maher, Esq., Boies, Schiller & Flexner, Armonk, NY.

For United States Auto Club, Inc., Amicus-Curiae: Robert W. Powell, Esq., Dickinson, Wright, Moon, Van Dusen & Freeman, Detroit, MI.

Judges: BEFORE: FISHER, and COWEN, Circuit Judges and DITTER [*], District Judge.

Opinion by: COWEN

Opinion

[*62] COWEN, Circuit Judge

The Plaintiff in this antitrust matter, a tire supplier, appeals from the order of the United States District Court for the Western District of Pennsylvania granting the respective motions for summary judgment filed by the Defendants, a tire supplier competitor and a motorsports sanctioning body. Plaintiff's claims arise out of the adoption of the so-called "single tire rule" by various sanctioning bodies in the sport of dirt oval track racing as well as the related

[*] Honorable **[**2]** J. William Ditter, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation. Donna M. Doblick, Esq.

exclusive supply contracts between these sanctioning bodies and the Defendant tire supplier. Plaintiff further challenges the District Court's denial of its motion for leave to amend its complaint. We will affirm.

I.

A.The Parties

We refer to the four companies listed as the Plaintiffs in the current matter by the name of the parent company, "STA." [1] STA manufactures and sells speciality tires for a variety of vehicles, such as aircraft, farming equipment, and racing cars. It specifically manufactures and sells a "house brand" known as "American Racer." This **[**3]** American Racer line includes dirt track racing tires, asphalt track racing tires, ATV ("all terrain vehicle") racing tires, passenger performance tires, and race track equipment tires. Defendant Hoosier Racing Tire Corp. ("Hoosier") is a family-owned business, which focuses almost exclusively on the racing tire business (in contrast to STA, which sells a large variety of different kinds of speciality tires and is owned by a holding company named Polymer Enterprises, Inc.). Hoosier is the largest race tire manufacturer in the world that specializes in manufacturing racing tires.

STA, Hoosier, and the Goodyear Tire and Rubber Co. ("Goodyear") represent the three major competitors in the alleged market of tires for dirt oval track racing in the United States and Canada. There were at least five competitors in this market in the 1980s and the 1990s, namely, STA, which was previously known as McCreary, Hoosier, Goodyear, Firestone, and **[**4]** M & H.

The evidence in the record indicates that Hoosier's market share in the dirt oval track market grew from 59.6% in 1998 to 65% in 2000. In terms of sales revenue, Hoosier's market share for dirt track racing tires increased from 69% in 2003 to 79% in 2007. For dirt sprint car tires, Hoosier's market share increased from 87% in 2003 to 94% in 2007. On the other hand, STA's share of the dirt tire market dropped from 29% to 19% between 2003 and 2007, while Goodyear's share remained the same at approximately 2%. STA's dirt sprint tire share likewise fell from 10% in 2003 to 5% in 2007, and Goodyear's share similarly went from 3% in 2003 to 1% in 2007.

Defendant Dirt Motor Sports, Inc. d/b/a World Racing Group ("DMS") is a motorsports sanctioning body. As explained in more detail in Section I.B, *infra,* DMS and the other sanctioning bodies organize and promote races and, in turn, promulgate rules governing these races. DMS, in particular, owns such well-known touring series as the "World of Outlaw Sprint Car Series" and the "Late Model Series." It sanctions over 5,000 races per year at over 200 dirt oval tracks in twenty-one states. **[*63]** In 2005, DMS acquired another sanctioning body known **[**5]** as United Midwest Promoters ("UMP"). There are two other major sanctioning companies in the field of dirt oval track racing: (1) Amicus International Motor Contest Association ("IMCA") (sanctioning races at approximately 112 dirt oval tracks); and (2) WISSOTA Promotions, Inc. ("WISSOTA") (sanctioning races at approximately fifty-seven dirt oval tracks). Combined, DMS, IMCA, and WISSOTA sanction modified, late model, sprint, or stock car races at over 70% of the 636 weekly tracks in the United States.

B.The Role of Sanctioning Bodies and the "Single Tire Rule"

As the District Court recognized, the role played by sanctioning bodies in dirt oval track racing (and, in fact, in motorsports racing in general) is of special importance here. Track owners or promoters typically belong to a sanctioning body, which charges sanctioning fees in exchange for this privilege of membership. These bodies sanction races, and they formulate rules for such races. These sanctioning bodies (like the track owners and promoters) compete to attract car owners (generally known as "racers"), drivers, and fans to their respective races. Accordingly, the sanctioning bodies create various incentives in order to get **[**6]** the most racers, drivers, and fans.

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[1] The four Plaintiff companies are: (1) Race Tires America, Inc., a Division of Speciality Tires of America Inc.; (2) Speciality Tires of America, Inc.; (3) Speciality Tires of America (Pennsylvania), Inc.; and (4) Speciality Tires of America (Tennessee), LLC.

The record reveals that these sanctioning bodies often choose to adopt a "single tire rule." Such a rule generally requires that a specific tire type and brand be used on one or more wheel positions for one or more classes of cars for a series of races or racing seasons.

Significantly, the sanctioning bodies generally do not buy the tires themselves, and the tires are purchased by the participating racers and drivers. The organizations instead establish the tire parameters and requirements for the race. Some rules may define the permissible tire by merely a bead size or some other physical dimension. Other rules may require that the tires at one or more wheel locations be a particular type or brand. Tire rules that do not require a specific brand of tire are generally called "open tire rules."

Tires are not the only components of a race car subject to a single source or manufacturer rule. Sanctioning bodies make rules that may specify the appropriate carburetors, mufflers, chassis, or other kinds of equipment to be used. For example, Amicus United States Auto Club, Inc. ("USAC") has a "spec engine rule" for its Ford Focus Midget Series, which requires **[**7]** the use of Ford engines. United Racing Club ("URC") has a rule requiring a single brand of cylinder heads, manufactured by the sanctioning body's sponsor. The International Race of Champions Series mandates that the drivers actually use identical cars. Regardless of the kind of equipment at issue, the record indicates that a sanctioning body makes these fundamental determinations based on an assessment of its own self-interest.

C.Single Tire Rules and Exclusive Agreements

Evidence in the record further demonstrates that STA has, at least in the past, supported the single tire rule. In fact, its own website takes credit for the concept itself, stating that:

> In the 1970's [sic], Joe Jacobs, the developer of the race tire business that eventually became Race Tires America, proposed and encouraged race tracks and promoters to adopt spec tire or track tire rules. Under this concept, track owners and promoters adopted a manufacturer's tire for a particular class of races for the duration of a racing season. **[*64]** The purpose of the rule was to avoid the almost constant pace of tire changes that were particularly costly to racers, and to encourage racer parity by removing the "'hot'" tire setups. **[**8]** With all racers competing on a single tire design and compound, the tire wars would be quelled and race results would be more related to a driver's skill and ability and not a more expensive "'state-of-the-art'" tire. The acceptance of spec tire rules contributed to the success and popularity of dirt track racing in America.

(A484.) STA's website goes on to attack the abuse of such "spec tire rules," claiming that such abuse has resulted, inter alia, in the concentration of market power in the hands of a single monopolistic tire supplier, the loss of true competition between the few remaining tire suppliers, and harm to STA, other suppliers, track owners, promoters, and the drivers themselves. In this litigation, STA attempts to distinguish its prior support for the single tire rule by claiming that it merely promoted the adoption of a track rule that would remain in effect for a single racing season, in contrast to Hoosier's practice of entering into a series of exclusive supply contracts with major sanctioning bodies that, in turn, encompass thousands of races and last for periods of up to seven years.

In fact, the above statement from the website actually comes from a proposal by **[**9]** STA for a "Declaration in Favor of Competition." The accompanying petition or "Declaration" expressly calls for: (1) the establishment of track tire rules based on various objective criteria; (2) the prohibition of "any rule, policy, or practice mandating or providing for the use of a single manufacturer's tire;" (3) the creation of "non-discriminatory compensation rates" to offset "the cost of driver point funds and driver amenities;" (4) the related prohibition against tire suppliers making "lump sum or flat fee" payments to the sanctioning bodies, promoters, and tracks, and (5) changes on the part of the tire suppliers in order to ensure adequate inventories and company representatives at all racing events. (Id.) The petition also goes on to condemn the fact that the single tire formula previously used to achieve competitive parity has since evolved into "a scheme allowing a single manufacturer to capture and monopolize the market for dirt race tires." (Id.) It appears that approximately 1300 racers, drivers, and other racing industry participants have actually signed STA's "Declaration in Favor of Competition."

Irish Saunders, the contract services manager for Hoosier, internally **[**10]** circulated a sarcastic e-mail dated September 14, 2007, in response to this "Declaration in Favor of Competition." This e-mail purportedly described Hoosier's "Declaration in Favor of Taking Over the Industry," as proposed by the tire supplier's general manager, "Smash."

The District Court also reviewed the process that sanctioning bodies may use to select a particular supplier under the applicable tire rule. In short, a sanctioning body may decide to send a formal Request for Proposal ("RFP") to the various tire suppliers. The organization usually requires the supplier to provide sponsorship contributions. In general, these contributions may be used as part of the sanctioning body's "point funds." These point funds are generally paid to winning drivers at the end of the racing season, and they represent one of the major incentives used by sanctioning bodies to attract racers and drivers. Nevertheless, the money received by the sanctioning body may actually be used in whatever manner the sanctioning body itself wants, such as to fund its general **[*65]** operations. A sanctioning body, in turn, is certainly free to request a less expensive tire instead of greater financial contributions. Furthermore, **[**11]** if a sanctioning body is satisfied with its current tire supplier, it may elect to remain with that supplier rather than solicit bids from the supplier's competitors.

According to STA, "[f]or the years 2003-2007, Hoosier knew of only seven instances (four of which were after RTA filed this suit) where sanctioning companies or tracks had requested competitive bids." (Appellants' Brief at 20 (citing A543-A544).) However, it still appears that the tire suppliers were generally aware when a contract exists and could seek to compete for the business if they wanted it. Tire suppliers have accordingly been successful in their efforts to take business away from their competitors over the years.

The record in this case indicates that STA itself has competed, often successfully, to become the exclusive supplier of tires to several sanctioning bodies. In fact, STA, either directly or through its distributors, has successfully procured single tire contracts to the exclusion of Hoosier. Its distributors are required by contract to "interact[] with track owners/promoters and Associations and to actively pursue track rule and other race tire business." (A1439.) Even after the filing of this lawsuit, **[**12]** STA's distributors have continued to bid on exclusive tire supplier contracts, with some success. Furthermore, STA has repeatedly offered to pay money to the sanctioning bodies in exchange for an American Racer-only arrangement. For instance, Lias Tire, an STA distributor, recently won an exclusive agreement with URC, agreeing, inter alia, to pay $ 14,500.00 to this sanctioning body for the right to provide the exclusive tire at approximately thirty events in 2008. STA likewise has not instructed its distributors to cease making such exclusive deals or to refrain from offering or providing financial support to the sanctioning bodies.

Nevertheless, STA claims that Hoosier's exclusive single tire contracts foreclose competition. STA claims that these exclusive contracts date as far back as 1997, when Hoosier allegedly began to implement its "form contract" strategy.

Hoosier's form contract specifically obligates the sanctioning bodies and tracks "to insure that Hoosier Racing Tires are the only tires sold or run" in all events. (A1578-A1579 (emphasis omitted).) The form further provides that Hoosier would pay promotional money to the sanctioning body or track. These promotional fees are **[**13]** unrestricted and accordingly may be used either for general operations or for point funds. In turn, the form contains a continuous renewal requirement, providing that the arrangement would be automatically renewed for another year unless written notice of intention to terminate was given by August 1. Such "nullification" of the agreement would allegedly release Hoosier from its obligation to provide at least some of the promised financial support. According to STA, "there is a strong incentive to renew, because non-renewal would jeopardize the prospect of a November payment" of the promised money. (Appellants' Brief at 12.) Hoosier's "Negotiating Guidelines" document also indicates that Hoosier seeks longer contracts based on the respective profit margins. Finally, Saunders sent out a January 24, 2007 e-mail, which was entitled "American Racer Pricing" and addressed at some length the issue of competition between STA and Hoosier.

Hoosier identifies over seventy exclusive contracts that it or its distributors have entered into with sanctioning bodies since 2003. Although referring in its appellate brief to other sanctioning bodies, STA generally **[*66]** focuses on five sanctioning bodies that **[**14]** have selected Hoosier as their exclusive supplier: (1) IMCA; (2)

WISSOTA; (3) American Spring Car Series ("ASCS"); (4) USAC; and (5) DMS. In turn, the District Court itself considered at some length the practices of these five sanctioning bodies, and we will do so as well.

1.IMCA

IMCA sanctions races in the Midwest on both dirt and asphalt surfaces. It appears that, from the 1980s to approximately 2005, IMCA required its drivers to use the G-60 American Racer tire manufactured by STA. But this long-standing yet informal arrangement between STA and IMCA involved no set duration, no up-front money, no penalties, no automatic renewal, no enforcement mechanism, and was not even in writing. On the other hand, STA also evidently refused to disclose pricing information to IMCA or to explain a sharp increase in its tire prices.

In December 2003, IMCA sent an RFP to Goodyear, Hoosier, and STA for a three-year exclusive contract. Hoosier offered a five-year contract, informing the sanctioning body that this proposal was "very important to our overall business strategy." (A1418.) In addition, it evidently proposed substantial up-front money to IMCA, including a signing bonus, even though the sanctioning **[**15]** body did not request any such up-front payments. It further offered to pay IMCA money based on the number of tires ultimately sold. IMCA eventually entered into a five-year automatically renewable exclusive contract with Hoosier, which would, inter alia, purportedly limit price increases in the future. STA meanwhile has continued to sell its G-60 American Racer tire to non-IMCA tracks, including at least one track that chose to drop its IMCA sanction.

2.WISSOTA

WISSOTA has its principal place of business in Minnesota and sanctions races in Minnesota, North and South Dakota, Wisconsin, Wyoming, and Canada. It appears that WISSOTA has had a Hoosier-only rule since 1984. Hoosier extended the contract to 2007 in exchange for Hoosier making a significant payment of money to be used to pay off a court judgment obtained by an excluded transmission manufacturer against the sanctioning body.

In October 2006, WISSOTA sent out an RFP to Goodyear, Hoosier, and STA. The sanctioning body's president, Terry Voeltz, advised STA that its racers and drivers wanted a low tire price without point funds. STA offered (through a distributor) a lower tire price than Hoosier (at least at the beginning of the **[**16]** contract term). It also offered less financial support to the sanctioning body than Hoosier. On the other hand, Hoosier proposed a higher (initial) tire price, a higher annual payment to the sanctioning body, as well as additional payments to the individual WISSOTA track promoters themselves as part of a bonus program. In fact, these promoters (and WISSOTA board members) were already receiving bonus payments from Hoosier.

WISSOTA's board of directors then met in July 2007 to review the bids and select an exclusive tire supplier. WISSOTA's board decided to accept the Hoosier proposal. Voeltz testified at his deposition that STA essentially offered the same price as Hoosier after taking into account STA's higher price escalation over the course of the contract. The president indicated that he had expected to select American Racer tires but was surprised by STA's actual bid. In turn, STA informed WISSOTA in its own bid that "[t]he process that has led to this proposal has been open, honest and fair." (A1524.) STA's **[*67]** general manager, David Mateer, subsequently discussed the process with Voeltz, who indicated that STA could have gotten the contract if it had matched Hoosier's financial contribution. **[**17]** However, such a matching proposal would have evidently reduced or eliminated STA's own profit margin.

3.ASCS

ASCS, headquartered in Oklahoma, runs sprint car races in several regional series as well as a national series. Since 1999, Hoosier has had automatically renewing and exclusive contracts with this sanctioning body. In 2007, STA recognized an opportunity to become the exclusive right-rear tire supplier for ASCS's "360 sprint car series." ASCS did not circulate a formal RFP, but STA still met with the sanctioning body and submitted a bid. Its bid attempted to match Hoosier's proposal and included a financial contribution in exchange for exclusivity. Nevertheless, ASCS ultimately chose to retain its Hoosier-only rule for the right-rear wheel position.

4.USAC

USAC, headquartered in Indiana, sanctions sprint car races on both dirt and asphalt races, primarily in the Midwest and West. It appears that Hoosier has had long-term contracts with this sanctioning body since before 1998, despite some tension between the sanctioning body leadership and certain members regarding these arrangements. In 1998, the USAC president actually informed these members that the sanctioning body would remain **[**18]** under contract with Hoosier for only two more years, which evidently was an inaccurate assertion.

In 2003, USAC decided to implement a right-rear single tire rule for certain classes, and it accordingly sent out an RFP for a three-year contract. Goodyear, Hoosier, and STA submitted competing bids. STA proposed that, for two classes of cars (USAC midgets and sprint cars), the tire business would be split between various suppliers. STA likewise did not propose exclusivity for the "Silver Crown" series. Hoosier ultimately won the contract. Without sending out an RFP, USAC evidently renewed its exclusive contract with Hoosier for another three years in 2006. A USAC executive, Rolland Helmling, testified at his deposition that he was not aware of any particular reason for the length of the sanctioning body's contracts with Hoosier.

5.DMS

In 1994, STA, through its distributor, Lias Tire, won the bid to be the exclusive tire supplier for DMS's "Big-Block" and "358" modified races. Hoosier, however, successfully outbid STA in 1995. Since then, Lias Tire has not bid on another DMS contract.

Hoosier and DMS have evidently entered a series of exclusive contracts over an extended period of time. Hoosier's **[**19]** exclusive dealings with UMP actually predate the sanctioning body's 2005 acquisition by DMS. Furthermore, DMS's president, Thomas Deery, went so far as to characterize tires sales as the "fuel" of UMP. (A1716.) Accordingly, the relevant contracts have required Hoosier to make financial contributions to the sanctioning body based on the number of tires ultimately sold to the racers and drivers participating in the races sponsored by UMP.

The District Court specifically pointed to the following four tire contracts between Hoosier and DMS: (1) a 2007-2008 exclusive contract for "UMP Modifieds" and other classes; (2) a 2007-2008 exclusive contract for "DIRT Northeast Big Block Modified"; (3) a 2007-2009 exclusive contract **[*68]** for the "World of Outlaw National Sprint Series"; and (4) a 2008-2010 exclusive contract for "UMP Late Models."

It appears that, at least prior to the commencement of this litigation, DMS did not select its tire suppliers through a formal bidding process. In fact, it evidently did not possess any specific procedures or protocols for selecting a tire supplier. The sanctioning body accordingly did not send any RFPs to STA prior to October 2007, and it otherwise rejected STA's **[**20]** various inquires, stating at one point that Hoosier had more than doubled its financial support to DMS.

In October 2007, after the filing of this lawsuit, DMS sent out an RFP to seven different tire manufacturers. It specifically requested proposals for a one-year contract to be the exclusive tire supplier for "UMP DIRTcar Late Model Series." Only Goodyear, Hoosier, and STA responded. The Hoosier and Goodyear bids both contemplated an exclusive arrangement, but STA's own proposal contemplated "non-exclusivity." On the other hand, STA proposed a lower tire price than Hoosier. DMS ultimately deemed the STA bid to be non-responsive and awarded a three-year exclusive contract to Hoosier.

In a very similar process, DMS sent an RFP in October 2008 to seven tire manufacturers seeking proposals for a contract to be the exclusive tire supplier for the "UMP DIRTcar Modified (NE)" races. Yet again, the same three companies responded with bids, and, once again, DMS deemed STA's proposal as non-responsive because, unlike its competitors, it contemplated a non-exclusive relationship. DMS therefore ended up awarding Hoosier another exclusive contract for three years.

D. The Sprint Car Summit and Hoosier's [**21] National Sprint Spec Tire

In July 2006, DMS, competing sanctioning bodies, promoters, and track operators held a "Sprint Car Summit" to address the decline in car counts and fans at "410 sprint car" races. Such "sprint" races are more likely to occur as part of a "touring" series of races. Touring series, in turn, typically showcase well-known drivers and promote rivalry between these prominent drivers and their local challengers. While STA was not invited, Hoosier was initially asked to attend. However, its invitation was eventually withdrawn. At the Summit, the attendees discussed several options for regenerating interest in sprint car racing, including possible tire improvements. After the Summit, the president of DMS, Deery, and its executive vice president, Benjamin Geisler, approached Hoosier, requesting that the tire manufacturer supply a less aggressive sprint tire that would promote movement and passing. They further discussed the possibility of entering into a contract to make Hoosier the exclusive tire supplier for sprint car races. On December 15, 2006, Hoosier accordingly entered into an exclusive three-year deal to provide right-rear tires for DMS's "World of Outlaws" **[**22]** sprint touring series. On the same day, Hoosier issued a press release announcing that it had developed a "national sprint spec tire," which would be available in three different compounds.

As part of this December 15, 2006 contract, Hoosier promised to pay DMS to solicit competing sanctioning bodies and others to enter similar exclusive contracts with the tire supplier. Geisler contacted various sprint car tracks, asking them to adopt the "national sprint tire rule," and updated Hoosier itself as to which tracks and series were signing onto the rule. He specifically informed Hoosier that these "track/series deals" had to be completed quickly in order to "fend off any plans from American Racer." (A1603.) In particular, **[*69]** STA's per-tire price for its sprint product was approximately $ 20 less than the per-tire price offered by Hoosier for its new "national sprint tire."

Like DMS, other sanctioning bodies have entered into automatically renewable contracts with Hoosier, which require them to promulgate and enforce a Hoosier-only tire rule. For instance, USAC announced an open tire rule for certain sprint events in January 2007. When Tony Rose, an STA representative, heard about a meeting **[**23]** between USAC and Hoosier, he asked USAC if he could attend, but was turned down. However, USAC ultimately adopted a Hoosier-only rule for the sprint events. In addition, a subsequent call by STA's general manager, Mateer, to USAC was not returned. Accordingly, STA's sprint tire sales have drastically fallen, even though a sprint racer won in 2006 using its American Racer tire.

It appears that the sprint tire contract between Hoosier and DMS expired after the current appeal was filed. According to both Hoosier and DMS, DMS chose not to renew the contract with Hoosier and instead entered into an exclusive contract with Hoosier's competitor, Goodyear.

STA additionally claims that Hoosier and WISSOTA used their collective market power to defeat a new sanctioning body called DTRA ("Dirt Track Racing Association"), which attempted to sanction tracks in WISSOTA's territory. Specifically, DTRA racers and drivers would have used less expensive Goodyear tires. But Paul Menting from Hoosier wrote to WISSOTA, stating, inter alia, that "this is a sanctioning body war that involves Hoosier because we are partners with Wissota" and that Hoosier "would desire to attack common threats as partners." (A1599.) **[**24]** Hoosier declined to submit a proposal in response to DTRA's RFP, stating that, "[i]n order to continue properly servicing and supplying our existing contract business, we cannot at this time commit ourselves to fulfilling a Spec Tire contract." (A1600.) Hoosier, acting through a distributor, also purportedly refused to sell to another touring series known as Carolina Clash because the series allowed its racers and drivers to use what the series believed was the more popular, cheaper, and superior American Racer product.

E. The Alleged Costs and Benefits of the Single Tire Rule and Hoosier's Exclusive Contracts

The parties and the amici devote a great deal of attention to the alleged benefits and costs of, inter alia, the single tire rule and Hoosier's specific contractual arrangements with the various sanctioning bodies.

Mateer claimed that Hoosier's foreclosure rate in dirt late model racing is approximately 50%. According to STA, "Hoosier-only rules dictate tires in 76% of [the] late model touring series in the Midwest, 57% of the modified touring series, 60% of the late model 'crate' series, and 25 of 28 sprint car series." **[**25]** (Appellants' Brief at 18 (citing A1714-A1715, A1710-A1713).)

STA further claims that the alleged practices have caused harm to the real consumers, namely the race car owners and drivers who actually purchase the tires themselves, in the form of, among other things, higher prices and less choice. The evidence in the record does indicate that Hoosier generally charges more per tire than STA. Providing yet another example, STA points out that the sanctioning body for the "Crate Racin USA" series adopted a Hoosier-only rule, even though Hoosier offered a per-tire price $ 50.00 higher than STA. In the time period after the formal announcement of the rule change but before its implementation, 40-45% of the drivers in this series continued **[*70]** to use American Racer tires. More broadly, many drivers have evidently chosen STA's American Racer tires when given the choice to do so, based on such grounds as better durability and therefore lower tire costs over the long term. For instance, Victor Lee, the 2008 winning driver of the "Battle of the Bluegrass" racing series, actually switched from Hoosier to American Racer, and claimed he cut his tire bill in half because of the purported superior durability **[**26]** of the American Racer product. Similarly, race team owners complained to USAC that: "When USAC made Hoosier the spec tire, costs tripled." (A1481.)

On the other hand, STA's own expert, Dr. David Reitman, acknowledged the following:

> The sanctioning organization or promoter ultimately decides whether or not to enter into a contract with Hoosier requiring a Hoosier-only rule; however they make this decision in their own best interest, not necessarily in the interests of tire customers, taking into account the compensation offered by or negotiated with Hoosier. . . .

(A1921.)

Unsurprisingly, the amici, Hoosier, and (especially) DMS turn to the rather extensive evidentiary record in this case in an attempt to establish that the single tire rule and the related exclusive contracts result in significant pro-competitive or sports-related benefits. Simply put, the following justifications or benefits have been offered for the rule itself and the related contracts: (1) supplier concerns; (2) safety; (3) parity; (4) controlling prices and costs; and (5) increasing car counts and the number of fans. In turn, the record contains, inter alia, the deposition testimony or statements of the following individuals **[**27]** concerning these purported benefits: (1) Doug Bland, the owner of Springfield (Missouri) Raceway; (2) Kevin Coffey, the owner of Mountain Raceway; (3) Deery, president and chief operating officer of DMS; (4) Leonard ("Sam") Driggers, racing director of DMS; (5) Justin Fantozzi, Goodyear's marketing manager; (6) Helmling, a member of the board of directors of USAC; (7) Jacobs, the McCreary executive credited with developing the single tire rule; (8) Mateer, the general manager of STA; (9) Steve O'Donnell, vice president of racing operations for NASCAR; (10) Mooney Starr, the general manager of Batesville (Arkansas) Motor Speedway; and (11) Voeltz, WISSOTA's president. While acknowledging the extensive nature of the evidence presented, we focus on the statements made by the Plaintiff STA's own personnel as well as by DMS's employees, as the only sanctioning body actually named as a Defendant in this lawsuit.

STA's general manager agreed that limiting the number of tires bought by racers and drivers could be good for racing and that a single tire rule could reduce costs. Mateer explained that:

> If you showed up at the racetrack for the event with four tires that you had just purchased at **[**28]** your tire dealer shop, and there's another tire supplier at the track showing off their brand spanking new product, and its considerably faster than the tires you just bought, those four tires you just bought are no longer competitive on that racetrack.

(A842.) Acknowledging, like STA's own website, his company's role in pioneering the single tire rule, Mateer stated that STA promoted the rule in order "[t]o eliminate the constant in-season product development that was requiring the racers to buy every trick new tire that came along." (A833.)

In addition, Jacobs actually testified at some length about the various advantages of the single tire rule in a 1982 deposition **[*71]** conducted as part of an antitrust lawsuit filed in the United States District Court for the District of Massachusetts by M & H against both Hoosier and several tracks and driving clubs who had adopted the rule and entered into an exclusive arrangement with Hoosier. M & H's challenge to the rule itself was ultimately rejected by the First Circuit. See *M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984)*. According to Jacobs, McCreary supported the single tire rule because it was a "viable marketing procedure **[**29]** and method" and "a healthy way to sell race tires." (A411.) He further emphasized that the rule reduced tire costs because it countered the incentive for racers and drivers to get the newest and best tires for each and every race.

Driggers from DMS similarly testified that the car counts increased where a single tire rule is in effect:

> When you run an open tire rule in my race track area, which is primarily the midwest for the most part, you can run a World of Outlaw show or any of the high dollar sanction -- or series races around the country and your car count with open tire rule will be half of what it will be on my tire rule. Because of my tire rule, local guys can go run this race, pay the $ 100 entry fee, the pit pass or whatever else they have to pay and run this race and possibly go home with some money. If they have to go buy a four to six different tires to run this race to be competitive with an open tire rule and the best they are going to run is 18th or 19th and they are going to get 700 bucks, it cost them 1,200 bucks to make the 700 bucks so therefore, they go elsewhere. They go to a UMP sanctioned race where they don't have to buy anything.

(A159-60.)

According to Deery, **[**30]** "[r]ace car specifications have been the cornerstone of motorsports' development and have allowed the sport to mature into a fully organized and recognizable event." (A1931.) The president of DMS further noted that "[m]ost of the nationally recognized divisions of racing have a common set of rules and are usually governed by a single sanctioning body." (Id.) Such rules specifically promote continuity and consistency, thereby benefitting both the racing competitors and the fans. Defending single tire rules, Deery claimed that, among other things, "spec tires save money, provide a level field, are safe and make for a more successful show." (A1934.)

For its part, STA vigorously claims that, at the very least, there are factual disputes with respect to the various benefits offered by its adversaries to justify the single tire rule and the related exclusive Hoosier contracts.

With respect to "supplier concerns," Hoosier itself evidently has only one tire plant. Hoosier's own contracts also contain a "Force Majeure" clause, excusing it from performance where, for instance, there is a work stoppage or an act of God. The record demonstrates that these kinds of problems are not unprecedented. **[**31]** Specifically, the owner of the Fastrak dirt racing series allowed multiple tire suppliers to sell tires for its races after Goodyear was unable to fulfill its exclusive tire commitments due to labor issues.

DMS admitted that there has never been any specific concerns about tire safety in its open tire rule races. Similarly, Helmling from USAC was unaware of any safety issues when tire brands competed for business.

Turning to the concept of "parity," it appears that the Hoosier-only rule itself may permit the use of *different* kinds of **[*72]** Hoosier tires in the same race. For instance, UMP's rules evidently have allowed four different Hoosier tires to be used. In turn, some racers and drivers have requested, not less, but more tire choices, in order to have more options in the future. Helmling acknowledged at his deposition that the participants in USAC's open sprint races were in parity. Other witnesses testified that the whole concept of parity means having a different driver win every night. Nevertheless, there is evidence in the record indicating less variety of winners in Hoosier-only races.

According to STA, there is no evidence in the record showing that the failure to enter an exclusive **[**32]** contract with Hoosier would result in higher costs. It likewise claims that there is no evidence whatsoever establishing that the Hoosier contracts have any effect on car counts or fan attendance. In fact, they point to evidence purportedly showing the opposite.

STA further asserts that, even if the rule otherwise possessed the claimed benefits, the single tire rule as practiced here does not represent the least restrictive means to serve these purported goals. It offers the following alternative: the adoption of a "limited compound competition" rule, which would allow racers to select from a specified list of tires from the various manufacturers. Alternatively, STA proposes that the sanctioning bodies could choose to limit the number of tires used over the course of a season. According to STA, the single tire rule also gives racers and drivers an incentive to cheat by treating their tires with chemicals, thereby requiring tire inspections before each race.

F. Procedural History

STA filed its initial complaint in the District Court on September 25, 2007. Naming Hoosier as the sole Defendant, it alleged: (1) monopolization in violation of *Section 2* of the Sherman Act; (2) conspiracy to **[**33]** restrain trade in violation of *Section 1* of the Sherman Act; (3) attempted monopolization in violation of *Section 2* of the Sherman Act; (4) conspiracy to monopolize; and (5) a declaratory judgment claim. Less than a month later, STA filed an amended complaint adding DMS as the second Defendant.

On January 10, 2008, the District Court entered a scheduling order, which, among other things, established a deadline of May 30, 2008, for the amendment of pleadings. STA subsequently filed a second amended complaint to add two additional co-plaintiffs. On May 30, 2008, STA moved to amend the complaint a third time in order to add a new count alleging illegal tying under *Section 1* of the Sherman Act. The Court granted this unopposed request, and the third amended complaint was filed on June 23, 2008.

On November 19, 2008, STA once again sought leave to amend the complaint, this time wishing to add a count alleging a concerted refusal to deal or, in other words, a group boycott. This contested motion was denied by the District Court on December 16, 2008. According to the District Court, STA failed to demonstrate the requisite good cause, and the addition of yet another claim based on a new legal **[**34]** theory would also be prejudicial to the other parties.

Hoosier and DMS filed motions for summary judgment, and STA likewise moved for partial summary judgment as to the defenses of unclean hands and in pari delicto. On September 15, 2009, the District Court granted the motions for summary judgment filed by Hoosier and DMS (and denied STA's motion as moot). It provided an extensive explanation for its ruling in an accompanying memorandum opinion. Simply put, the District Court found that: (1) "where, as here, a sanctioning body **[*73]** freely decides to adopt a single tire rule, and then freely selects a supplier, no antitrust violation is present as a matter of law -- either under *Section 1* or *2* of the Sherman Act"; and (2) "STA has not suffered an 'Antitrust Injury' and thus, does not have standing to bring this action." (A41 (emphasis omitted).)

STA filed a timely notice of appeal. USAC, National Association for Stock Car Auto Racing, Inc. ("NASCAR"), IMCA, and Grand-Am Road Racing have filed an amicus curiae brief.

II.

The District Court possessed jurisdiction over this antitrust matter pursuant to *28 U.S.C. § 1331*, *28 U.S.C. § 1337*, and *15 U.S.C. § 15*. We have appellate jurisdiction under *28 U.S.C. § 1291*. **[**35]** ***HN1***[] We further exercise plenary review over a District Court's grant of summary judgment. See, e.g., *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380 (3d Cir. 2005)*.

As the District Court recognized, the resolution of a summary judgment motion is often an especially difficult task in the antitrust context, particularly in light of the inherent factual complexities typically involved as well as the paramount importance of motive and intent in the legal analysis. This case certainly is no exception.

Nevertheless, the District Court also properly acknowledged that ***HN2***[] summary judgment is not disfavored in the antitrust context. The entry of summary judgment in favor of an antitrust defendant may actually be required in order to prevent lengthy and drawn-out litigation, which may have a chilling effect on competitive market forces. See, e.g., *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 541 (2d Cir. 1993)*. Furthermore, "'***antitrust law*** limits the range of permissible inferences' that can be drawn 'from ambiguous evidence.'" *Harrison Aire, 423 F.3d at 380* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. To avoid **[**36]** summary judgment, an antitrust plaintiff must come forward with economically plausible evidence supporting the elements of its claim. See, e.g., *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468-69, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*; *Matsushita, 475 U.S. at 587*; *Harrison Aire, 423 F.3d at 380*. When the evidence in the record is as consistent with permissible competition as it is with an illegal conspiracy, such evidence, standing alone, fails to support an inference of an illegal conspiracy. See, e.g., *Matsushita, 475 U.S. at 588*. In the end, the plaintiff in an antitrust case responding to a summary judgment motion must overcome a "higher threshold," which is imposed in order "to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition." *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004)*.

The parties further agree that ***HN3***[] this Court reviews the denial of a motion to amend under an abuse of discretion standard of review. See, e.g., *E. Minerals & Chems. Co. v. Mahan, 225 F.3d 330, 339-40 (3d Cir. 2000)*.

III.

As highlighted by the extensive factual discussion in Section I, *supra,* this appeal presents the Court with an unusual and challenging set of circumstances. **[**37]** Simply put, this case involves a relatively large number of entities, specifically the various sanctioning bodies governing the sport of dirt oval track racing in the United States and Canada, which, over an extensive period of time dating back decades, have **[*74]** adopted the single tire rule for various races and, in turn, have entered exclusive contracts with the major tire suppliers. Furthermore, even though the parties and the amici cite to a large number of prior cases from this Court, our sister circuits, and other courts, very few of these decisions appear to be directly on point. In turn, the decisions that are, more or less, on point are often distinguishable on a variety of grounds (or otherwise are not binding on this Court). Finally, the importance of this case goes far beyond the tire suppliers and sanctioning body actually named as the Plaintiffs and Defendants. In fact, our result and reasoning could have an effect beyond the world of dirt oval track racing (or even motorsports racing in general).

Having fully considered the numerous arguments of the parties and the amici, the record on appeal, the District Court's thorough and carefully reasoned ruling, and the governing legal **[**38]** principles, we ultimately determine that the District Court properly ruled in favor of Hoosier and DMS. We reach this result based on the following considerations: (1) Hoosier clearly has not coerced, or otherwise improperly interfered with, the determinations of DMS and the other sanctioning bodies to adopt the single tire rule and to enter into the respective exclusive supply contracts; (2) the sanctioning bodies presented, in good faith, more than sufficient pro-competitive or business justifications for their actions; and (3) STA has otherwise not suffered any cognizable antitrust injury because it has had the opportunity to bid on exclusive supply deals and has in fact done so with some success.

A. Basic Principles of ***Antitrust Law***

This Court has never directly considered the legality of a practice like the single tire rule or the specific kind of exclusive contracts entered by the sanctioning bodies and Hoosier. Nevertheless, there are certain fundamental and well-established legal principles that must guide our analysis. The District Court itself accurately summarized at least some of these principles in its summary judgment ruling.

HN4[] Section 1 of the Sherman Act provides that "[e]very **[**39]** contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." *15 U.S.C. § 1*. It is well established that this provision prohibits only "unreasonable" restraints of trade. See, e.g., *NCAA v. Bd. of Regents, 468 U.S. 85, 98, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. STA appears to agree that the "rule of reason" standard applies in this context. See, e.g., *Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3d Cir. 1996)*.

HN5[] "In order to survive summary judgment in cases where [the rule of reason] applies, the plaintiff must show concerted action, antitrust injury, evidence that the conspiracy produced 'adverse, anti-competitive effects within the relevant product and geographic markets,' and evidence 'that the objects of and the conduct pursuant to the conspiracy were illegal.'" *InterVest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 159 (3d Cir. 2003)* (quoting *Rossi v. Standard Roofing, Inc., 156 F.3d 452, 465 (3d Cir. 1998))*. The plaintiff may satisfy its burden by showing either actual anti-competitive effects or proof of the defendant's market power. See, e.g., *Orson, 79 F.3d at 1367*. The notion of "market power" in this context is defined as **[**40]** the ability to raise prices above those that would exist in a competitive market. See, e.g., id.

The burden then shifts to the defendant to show a sufficient pro-competitive justification or objective for the challenged conduct. See, e.g., *id. at 1367-68*. **[*75]** A restraint cannot be justified solely on the basis of social welfare considerations. See, e.g., *United States v. Brown Univ., 5 F.3d 658, 678-79 (3d Cir. 1993)*. The plaintiff then must demonstrate that the restraint itself is not reasonably necessary to achieve the stated objective. See, e.g., *Orson, 79 F.3d at 1368*. In other words, "[e]ven if an anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant." *Brown Univ., 5 F.3d at 678-79* (citations omitted). "'The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'" *Orson, 79 F.3d at 1367* (quoting *Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*.

HN6[] Section 2 of the Sherman Act targets **[**41]** persons "who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of . . . trade or commerce." *15 U.S.C. § 2*. This offense of monopolization has two elements: "'(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Eastman Kodak, 504 U.S. at 481*(quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. As to the second element, "[a] monopolist willfully acquires or maintains monopoly power when it competes on some basis other than the merits." LePage's Inc. v. 3M, *324 F.3d 141, 147 (3d Cir. 2003)* (en banc) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*. In turn, the offense of attempted monopolization has the following three elements: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* **[**42]** (citation omitted). The final element requires an inquiry into the relevant product and geographic market as well as the defendant's economic power in that market. See, e.g., *id. at 459*. In turn, market share, while crucial, may not always be determinative. See, e.g., *United States v. Microsoft Corp., 253 F.3d 34, 54, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (en banc) (per curiam). Once the plaintiff demonstrates harm to competition, the defendant then has to show that it is actually promoting a pro-competitive or legitimate business objective. See, e.g., *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187, 196-97 (3d Cir. 2005)*. ***HN7***[] Ultimately, *Section 2* is directed against conduct that "unfairly tends to destroy competition itself," as opposed to even "severe" competition. *Spectrum Sports, 506 U.S. at 458* (citations omitted).

STA also claims that it has been the victim of unlawful "tying." ***HN8***[] "'Tying is defined as selling one good (the tying product) on the condition that the buyer also purchase another separate good (the tied product).'" *Harrison Aire, 423 F.3d at 385* (quoting *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 475 (3d Cir. 1992)* (en banc)).

HN9[] A private antitrust plaintiff **[**43]** must further establish that it suffered an "antitrust injury" as a result of the misconduct and therefore possesses the standing necessary to seek relief. The antitrust laws were enacted "'for the protection of **[*76]** competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. Therefore, the injury prong requires: "(1) harm of the type the antitrust laws were intended to prevent; and (2) an injury to the plaintiff which flows from that which makes defendant's acts unlawful." *Gulfstream III Assocs. Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993)* (citing *Int'l Raw Materials, Ltd. v. Stauffer Chem. Co., 978 F.2d 1318, 1327-28 (3d Cir. 1992))*.

The District Court correctly recognized that exclusive supply contracts or exclusive dealing agreements have been frequently upheld when challenged on antitrust grounds. See, e.g., *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 8 (1st Cir. 2004)* (stating that exclusive dealing contracts are not disfavored by antitrust laws and ordinarily pose threat to competition only in very discrete circumstances); **[**44]** *Barr Labs, Inc. v. Abbott Labs, 978 F.2d 98, 111 (3d Cir. 1992)* (recognizing that "existence of legitimate business justifications for the [exclusive dealing] contracts also supports the legality of the global contracts"). "Rather, ***HN10***[] it is widely recognized that in many circumstances [exclusive dealing arrangements] may be highly efficient -- to assure supply, price stability, outlets, investment, best efforts or the like -- and pose no competitive threat at all." *E. Food Servs., 357 F.3d at 8* (citation omitted). Expressly rejecting any assertion that exclusive deals are subject to a per se rule of illegality, the Seventh Circuit in *Menasha Corp. v. News America Marketing In-Store, Inc., 354 F.3d 661 (7th Cir. 2004)*, appropriately explained that the competition to be an exclusive supplier may constitute "a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress." *Id. at 663* (citing *Paddock Publ'ng, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996))*.

On the other hand, we agree with STA that such exclusive agreements are not exempt from antitrust scrutiny. In fact, the Third Circuit addressed exclusive dealing arrangements **[**45]** in its en banc ruling in LePage's Inc. v. 3M, *324 F.3d 141 (3d Cir. 2003)* (en banc), and, more recently, in *United States v. Dentsply International, Inc., 399 F.3d 181 (3d Cir. 2005)*. In the en banc case, the Court upheld a jury verdict under *Section 2* against 3M, a clearly dominant supplier in the transparent tape market that paid major retailers through a rebate program "designed to achieve sole-source supplier status" (and also entered exclusive dealing agreements with at least two retailers), *LePage's, 324 F.3d at 157*, and thereby cut off its plaintiff competitor from "key retail pipelines," *id. at 160*. In Dentsply, this Court reversed the trial court's judgment in favor of the defendant, ruling that an exclusivity policy imposed by an artificial teeth monopoly on its dealers violated *Section 2*. *Dentsply, 399 F.3d at 184*; see also, e.g., *E. Food Servs., 357 F.3d at 8* (providing as "best example" of possible threat to competition situation in which market itself is already heavily concentrated and long-term exclusive contracts then "foreclose so large a percentage of the available supply or outlets that entry into the concentrated market is unreasonably constricted").

B. Application [46] of Legal Principles**

We now come to the challenging task of applying these fundamental legal principles to the specific circumstances presented by this appeal. Like the District Court, we accept, for purposes of this Opinion, STA's definition of the relevant market, in short: the market for the sale of racing **[*77]** tires that race on dirt oval tracks in the United States and Canada. Further following the example set by the District Court (as well as the parties and the amici), our analysis focuses on the following components: (1) the fundamental if contested notion of "coercion"; (2) the various benefits and justifications offered in support of the single tire rule and the related exclusive contracts between Hoosier and the various sanctioning bodies; and (3) the antitrust standing requirement. At the outset, we acknowledge that these components overlap in practice, although they do represent rather distinct aspects of the antitrust inquiry. For the sake of clarity and to avoid unnecessary repetition, we accordingly: (1) in the coercion discussion, focus on the issue of whether the sanctioning bodies have been free to adopt the single tire rule and to enter into an exclusive supply agreement **[**47]** with the supplier of their choice and also address the specific terms contained in Hoosier's contracts; (2) in the justification discussion, obviously turn to the various justifications and benefits offered in support of the single tire rule itself as well as the appropriate degree of deference to be accorded the determinations of sanctioning bodies and similar sports-related organizations; and (3) in the antitrust injury analysis, consider whether STA has had a real opportunity to compete with Hoosier for single tire business in this market.

1. "Coercion"

The notion of "coercion" occupied an especially important role in the District Court's reasoning. Hoosier, DMS, and the amici likewise emphasize this concept on appeal. For its part, STA vigorously contests the role of the concept itself, and, in the alternative, it contends that there are genuine issues of material fact as to whether Hoosier has actually "coerced," or otherwise colluded with, the various sanctioning bodies.

We do acknowledge that the District Court did not cite to any specific case or any other authority in support of its assertion that coercion constitutes an essential element of a successful antitrust claim in the **[**48]** present circumstances. STA, among other things, quotes a leading antitrust commentator, who stated that "'it matters little whether one views exclusive dealing as "imposed" by the dominant firm or "agreed upon" by the dominant firm and its dealers.'" (Appellants' Brief at 35 (emphasis in quotation omitted) (quoting H. Hovenkamp, ***Antitrust Law*** P 1800c5, at 20 (Aspen 2005)).)

We note, however, that this concept has played a key, if sometimes unexplored, role in the relevant case law, especially in the Section 2 context. For instance, the Court in Dentsply expressly noted that, among other things, the exclusivity policy at issue was "imposed by a manufacturer on its dealers," Dentsply, 399 F.3d at 184, and that, "[w]hile the [customers] might prefer to sell the [products] of multiple manufacturers, if faced with an 'all or nothing' choice they may accede to the dominant firm's wish for exclusive dealing," id. at 195 (quoting Areeda & Hovencamp, ***Antitrust Law*** P 1802e3, at 78-79 (2d ed. 2002)). Likewise, the en banc Court in LePage's confronted a situation in which the seller, which had clear monopoly power over the market, induced retailers to purchase a full line of products from it, including **[**49]** products its competition did not make, with the intent of forcing any such competition from the market and then raising prices. LePage's, 324 F.3d at 157-63.

In Santana Products Inc. v. Bobrick Washroom Equipment, Inc., 401 F.3d 123 (3d Cir. 2005), the plaintiff toilet partition manufacturer brought claims under Sections 1 **[*78]** and 2 of the Sherman Act after the government selected its competitor's products based on the specifications chosen by the government's architects, alleging, inter alia, that the competitor and its representatives falsely claimed that the plaintiff's own products were a fire hazard. Id. at 125-28. This Court ultimately affirmed the summary judgment granted in favor of the competitor, rejecting the group boycott claim and instead concluding that there was no restraint where the decision to choose a product was in the hands of the decision-maker (i.e., the architects) for the consumer (i.e., the government). Id. at 133 ("Unlike cases where the alleged exclusionary conduct leaves the consumer with no input whatever, the decision to specify 'was always ultimately in the hands of the consumer.'" (quoting Stearns Airport Equip. Co., Inc. v. FMC Corp., 170 F.3d 518, 525 (5th Cir. 1999))). **[**50]** Because the plaintiff failed to allege that the defendants "engaged in coercive measures that prevented [the plaintiff] from selling its products to any willing buyer or prevented others from dealing with [the plaintiff]," id. at 132, it was never really "excluded from competition," id. at 133. "'Without a showing of some other factor, we can assume that a customer will make his decision only on the merits,'" and the appropriate response in such circumstances "'would seem to be an increase in the losing party's sales efforts on future potential bids, not an antitrust suit.'" Id. (quoting Stearns, 170 F.3d at 525).

In the end, although we do not hold that coercion is an essential element of every successful antitrust claim, we conclude that coercion is a fundamental consideration in the *present* circumstances, namely, where various sports sanctioning bodies have freely adopted their own equipment rules and then freely entered into exclusive contracts with the respective suppliers. However, we add that Hoosier and DMS are *not* entitled to summary judgment merely because there is an absence of coercion or interference on the part of Hoosier. On the contrary, the sanctioning bodies must still **[**51]** offer good faith justifications for the alleged conduct. As discussed in Section III.B.2, *infra,* DMS and the other sanctioning bodies do present more than adequate justifications for their actions.

STA, in turn, raises a variety of contentions in support of its theory that there are genuine issues of material fact with respect to the existence of either coercion on the part of Hoosier or, at the very least, collusion between Hoosier and the various sanctioning bodies, especially DMS. The District Court did acknowledge that Hoosier's standard form contract provides for payments to the sanctioning body, lasts for a lengthy period of time, contains an automatic renewal provision, and allegedly provides that, if the sanctioning body exercised its right not to renew, the remaining financial contribution to the sanctioning body would be forfeited. We likewise are particularly troubled by the so-called Sprint Summit and the resulting relationship between Hoosier and DMS. This Court nevertheless finds that the various contentions raised by STA fail to demonstrate the existence of a genuine issue of material fact as to whether its competitor has coerced or otherwise unduly interfered with the **[**52]** decision-making process of the various sanctioning bodies.

Initially, we must not overlook the crucial and undisputed fact that, in the words of STA's own expert, "[t]he sanctioning organization or promoter ultimately decides whether or not to enter into a contract with Hoosier requiring a Hoosier-only rule . . . in their own best interest." (A1921.) In fact, it appears clear that the major sanctioning bodies themselves generally prefer the single tire and, at least sometimes, desire a Hoosier-only rule. **[*79]** The present circumstances actually resemble the situation described by the Seventh Circuit in Menasha:

> That retailers and manufacturers *like* exclusive deals implies that they serve the interests of these, the consumers of couponing services [provided by the plaintiff and its competitor defendant]. When the consumers favor a product or practice, and only rivals squawk, the most natural inference is that the complained-of practice promotes rather than undermines competition, for what helps consumers often harms other producers such as [the plaintiff].

Menasha, 354 F.3d at 663.

Furthermore, it appears that it is a common and generally accepted practice for a supplier to provide a sports sanctioning **[**53]** body or similar sports-related organization financial support in exchange for a supply contract (although such practices, no matter how widely followed, cannot be characterized as totally innocuous). In fact, STA has actually engaged in such behavior and has specifically included offers of financial support in its various successful and unsuccessful proposals to the respective sanctioning bodies over the years. In turn, these financial contributions may be used as part of the sanctioning body's point funds, and such point funds constitute a crucial incentive offered by the sanctioning body to attract prospective racers and drivers to its own races. As to the amount and specific terms of the contributions, it is no more an act of coercion, collusion, or improper interference for Hoosier, STA, or any one else to offer more money to the sanctioning body than it is for such suppliers to offer the lowest tire prices. In any case, the sanctioning body itself remains free to pick the supplier that it believes will provide the best deal. Similarly, neither the lengthy duration of the Hoosier contracts nor their renewal terms represent real evidence of coercion or interference. The respective **[**54]** sanctioning body simply may enter a contract with the tire supplier of its choice. If anything, the actual terms contained in Hoosier's form contract appear to be completely consistent with what one would actually expect to find in an exclusive supply arrangement. [2]

[*80] 2. Benefits and Justifications of the Single Tire Rule

Initially, the Court agrees with the position of the amici that motorsports sanctioning bodies, as well as similar organizations **[**56]** in other sports, deserve a bright-line rule to follow so they can avoid potential antitrust liability as well as time-consuming and expensive antitrust litigation. In fact, this current lawsuit is the *second* federal antitrust case brought against Hoosier arising out of the single tire rule. In *M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir. 1984)*, the First Circuit rejected an antitrust challenge by a tire supplier, M & H, to the adoption of such a rule by several race tracks and driving clubs as well as their entry into an exclusive contract with Hoosier. *Id. at 974-89*. Likewise, there have been other antitrust lawsuits challenging the adoption of racing equipment rules of various kinds. See *Brookins v. Int'l Motor Contest Ass'n, 219 F.3d 849 (8th Cir. 2000)* (transmission rule); *STP v. U.S. Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968)* (engine specification rule). While the sanctioning body defendants ultimately prevailed in all three cases, see *Brookins, 219 F.3d at 852-55*; *STP, 286 F. Supp. at 171*, it has undoubtedly come at considerable expense. Contrary to the pro-competitive purposes of ***antitrust law***, this expense may have a very real anticompetitive **[**57]** effect, especially on the smaller sanctioning bodies. Furthermore, if the Court fails to adopt a relatively clear rule here, motorsports sanctioning bodies, in the apt words of the amici, "will have to chart a narrow, and perhaps unsustainable, course, between (1) the Scylla of anti-competitive, expensive, and unsafe rules and (2) the Charybdis of the optimum rules for the sport accompanied by potential antitrust litigation and exposure, including the crippling expense in defending their

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[2] We also do not overlook the fact that it is the racers and the drivers that ultimately purchase the racing tires. Unlike in Dentsply and LePage's, we accordingly are not dealing with the case of a supplier entering exclusive arrangements with retailers, which purchase the products at issue for resale to the ultimate customers. It is undeniably troubling that the evidence in the record indicates that the interests of at least some of the racers, drivers, and others have evidently diverged from the interests (and actions of) the governing sanctioning bodies. For instance, more than one thousand racers, drivers, and other industry participants have actually signed STA's "Declaration in Favor of Competition," attacking the single tire formula as a monopolistic practice and calling for its replacement. On an even more basic level, it appears clear that, the more a tire supplier offers a sanctioning body in terms of financial **[**55]** support, the more the racers and drivers have to pay for the tires themselves. At the very least, such circumstances further complicate this case, providing at least some support for STA's antitrust claims against Hoosier and DMS.

We, nevertheless find that such considerations ultimately do not assist STA. As already noted, the financial contributions do ultimately benefit the actual tire purchasers, either directly in the form of point funds or indirectly by providing the financial resources allowing the sanctioning bodies to function and hold the races in the first place. Furthermore (and as explained in more detail in Section III.B.3, *infra*), the purchasers otherwise remain free to "vote with their trailers" by not participating in a sanctioning body's races because of its adoption of a single tire rule or its entry into an exclusive deal with Hoosier. We further add that no racer or driver has actually joined STA as a Plaintiff in this litigation or otherwise filed an amicus curiae brief in its favor.

legitimate right to promulgate their own rules." (Amicus Brief at 9-10.) Nevertheless, we must be careful not to establish an overly broad rule detached from the specific facts now before us, especially in light of the highly fact-specific nature of the antitrust standards themselves.

Accordingly, sports-related bodies should be given leeway with respect to their adoption of equipment requirements as well as their related decision to enter exclusive contracts with the respective suppliers. As highlighted by the racing case law cited above, it appears that the courts have generally accorded sports organizations a certain degree of deference and freedom to act in similar circumstances. See, e.g., *Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 2010 WL 2025207 (2010)* **[**58]** (exclusive football headwear license); *McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988)* (NCAA football eligibility rules); *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n, Inc., 665 F.2d 222 (8th Cir. 1981)* (per curiam) (prohibition of double-strung tennis rackets); *Hatley v. Am. Quarter Horse Ass'n, 552 F.2d 646 (5th Cir. 1977)* (definition of "quarter horse"); *Deesen v. Prof'l Golfers Ass'n, 358 F.2d 165 (9th Cir. 1966)* (PGA eligibility rules); *Toscano v. PGA Tour, Inc., 201 F. Supp. 2d 1106 (E.D. Cal. 2002)* (same). Even STA appears to acknowledge that such organizations are entitled to some *deference.* However, the standard it offers, requiring, inter alia, that the rules be adopted by a neutral and unbiased body and that they do not result in any significant market foreclosure, does not seem very deferential. Among other things, such an approach would preclude sanctioning bodies from entering into an exclusive equipment contract with a supplier that already has a high share of the relevant geographic or product markets.

We further believe that a deferential approach is especially appropriate in light **[*81]** of the practical restraints faced by the sanctioning bodies in this **[**59]** case. Even though they may, among other things, receive significant financial support from the suppliers, DMS and the other sanctioning bodies do not have unfettered discretion in adopting rules, entering exclusive arrangements, or imposing higher equipment costs on the racers and drivers. It is well established that the sanctioning bodies compete for racers and drivers, and these racers and drivers in turn are more than able to, in the words of amici, "vote with their trailers." (Amicus Brief at 14.) Fewer racers and drivers mean less for the sanctioning body in terms of the entry fees charged to the participating racers and drivers themselves as well as a possible decrease in the number of tickets and revenues earned from concessions and other sources of money (at the very least because the friends and families of non-participating racers and drivers would be much less likely to attend). In turn, this can lead to a "death spiral" because lower gate receipts and other forms of revenue mean lower prize purses, which means less interest among racers and drivers, which results in even less revenue to the sanctioning body, and so on. Ultimately, the sanctioning bodies which consistently **[**60]** make the wrong business decisions face the prospect of going out of business. They, like other kinds of businesses, also have no long-term interest in the creation of a monopolist in their own supply chains. If Hoosier actually were a monopolist, not only could it charge racers and drivers whatever it wanted for tires, it could also reduce its monetary payments to the sanctioning body or eliminate such support altogether. See, e.g., *Menasha, 354 F.3d at 663* ("Why would these entities shoot themselves in the feet by signing (retailers) or favoring (manufacturers) exclusive contracts that entrench [the defendant] as a monopolist that then can apply the squeeze."). Finally, the fact that not all races are governed by single tire rules shows that the sanctioning bodies can and do recognize that not all forms of racing in all parts of the country are identical and that such bodies are more than able to adopt the rule that best advances the particular kind of racing at issue.

This Court therefore approaches the actions of DMS and the other sanctioning bodies with a degree of deference and ***HN11***[] we adopt the following general rule: the Sherman Act does *not* forbid sanctioning bodies and other sports-related **[**61]** organizations from freely (i.e., without any coercion or improper interference) adopting exclusive equipment requirements, so long as such organizations otherwise possess, in good faith, sufficient pro-competitive or business justifications for their actions. At the same time, we wish to make it clear that we are not granting any kind of antitrust immunity. Cf., e.g., *Am. Needle, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 2010 WL 2025207, at *11 n.7* (attacking Seventh Circuit concerted action ruling for, inter alia, "carv[ing] out a zone of antitrust immunity for conduct arguably related to [NFL] league operations by reasoning that coordinated team trademark sales are necessary to produce 'NFL football'"). For instance, we are not confronted with a situation in which the sanctioning body offers absolutely no justification whatsoever for its actions or its justifications are offered in bad faith or are otherwise nonsensical. Instead, we will affirm the District Court's ruling because there are several good faith justifications for the sanctioning bodies' single tire rule.

We acknowledge that STA vigorously attacks the single tire rule itself, arguing that there were less restrictive alternatives. According to **[**62]** STA, there are, at least, genuine issues of material fact **[*82]** with respect to each and every benefit and justification offered by Hoosier, DMS, and the amici in support of the rule itself. To a certain degree, such a vigorous if understandable attack actually serves to highlight our reluctance to second guess the decisions made by a sanctioning body regarding the basic rules and guidelines of its sport. In fact, STA's extensive challenge to the single tire rule constitutes an attack on the very raison d'etre of the sanctioning bodies, which exist in order to set certain ground rules and then run races in conformity with such rules. In any case, we agree with the District Court that the sanctioning bodies have properly adopted the single tire rule because they believe such a rule creates more exciting races, ensures equal access to a uniform product, leads to increased safety, and lowers the costs of tires by eliminating the so-called "tire wars."

In fact, STA's whole challenge to the single tire rule has a simple yet serious flaw. It was STA that actually pioneered and promoted the whole idea in the first place. STA's own website claimed credit for promoting "spec tire or track rules," **[**63]** in which "track owners and promoters adopted a manufacturer's tire for a particular class of races for the duration of a racing season." (A484.) In turn, it claimed that such a rule had several benefits, including the avoidance of constant and costly tire changes and the encouragement of parity between racers and drivers, and that its adoption even contributed "to the success and popularity of dirt track racing in America." (Id.) Jacobs actually defended the rule as part of the M & H litigation. More recently, STA's general manager, Mateer, testified at his deposition in this litigation that limiting the number of tires bought by racers could be good for the sport itself and that a single tire rule also could reduce costs. Further acknowledging STA's own role in developing the rule, Mateer added that it was created in order "[t]o eliminate the constant in-season product development that was requiring the racers to buy every trick new tire that came along." (A833.)

We recognize that STA has turned against the rule itself, at least as in its more recent form. In turn, it attempts to explain its prior support for the rule and how Hoosier has usurped and distorted the rule into an anti-competitive **[**64]** tool. STA certainly has a right to change its position, but the past support provided for the rule now challenged in this litigation cannot be overlooked so easily.

In any case, even setting aside STA's prior conduct, the record here clearly establishes that there are more than ample justifications for the single tire rule. DMS specifically discusses in some detail the statements made by *eleven* separate individuals regarding the various benefits arising out of a single tire rule. For instance, Driggers, who serves as the racing director for DMS, explained in some detail how the car counts increase under a single tire rule. Likewise, the sanctioning body's president, Deery, indicated that these equipment rules have long been recognized as a "cornerstone" of motor racing. (A1931.) Specifically defending the single tire rule, Deery asserted that "spec tires save money, provide a level field, are safe, and make for a more successful show." (A1934.)

In the end, we recognize that STA and others have serious issues with the single tire rule, at least in its current form. They otherwise remain free to argue that such a rule and the related exclusive contracts harm both the competitive process **[**65]** and the sport of dirt oval track racing. In fact, the racers and drivers themselves are free to "vote with their trailers" by not participating in races conducted under a **[*83]** single tire or Hoosier-only rule. Following the District Court, we nevertheless find that DMS and the other sanctioning bodies possess good faith justifications, amply supported in the record, for adopting a well-established rule actually developed and defended by STA itself. In such circumstances (and in the absence of any coercion or improper interference on the part of the respective suppliers), such sports-related organizations should have the right to determine for themselves the set of rules that they believe best advance their respective sport (and therefore their own business interests), without undue and costly interference on the part of courts and juries.

3. Antitrust Injury

We next come to the question of antitrust injury and standing. ***HN12***[] To establish antitrust injury, a plaintiff must show harm to competition, not just harm to the plaintiff competitor. See *Brunswick Corp., 429 U.S. at 488*. We agree with the District Court that STA does *not* satisfy this requirement.

It is well established that competition among **[**66]** businesses to serve as an exclusive supplier should actually be *encouraged.* See, e.g., *Menasha, 354 F.3d at 663* (recognizing that competition to become exclusive supplier "is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress" (citation omitted)). In Section III.B.1, supra, this Court explained in some detail how the sanctioning bodies are free to adopt a single tire rule and then contract with the supplier of their choice without any undue interference or coercion on the part of Hoosier. Our focus now shifts to whether STA has been able to compete for this business.

We acknowledge that the process used by the various sanctioning bodies has too often been less than perfect. The District Court partly recognized as much, noting that the sanctioning bodies may elect to dispense with sending out a formal RFP to the various tire suppliers. In fact, DMS did not select its tire suppliers through a formal bidding process prior to the start of this litigation, and it evidently did not possess specific procedures or protocols for selecting a tire supplier. We similarly continue to be troubled by certain other aspects of the process **[**67]** used to select a supplier, especially the fact that tire suppliers provide financial support to the sanctioning bodies, even though such bodies do not actually purchase the tires. See, supra, n.2.

Nevertheless, the record here clearly establishes the existence of *competition* on the part of the remaining suppliers for the valuable right to serve as an exclusive provider of tires. Accordingly, the District Court properly recognized that the suppliers themselves are generally well aware of what is going on in the marketplace, and they actually have been able to take business away from their competitors over the years. For instance, STA has continued to respond to RFPs from the various sanctioning bodies, and it has also attempted to win an exclusive contract even in the absence of a formal proposal from the sanctioning body itself. We note that STA evidently has had some success in this market, especially in the past. In fact, it has served as the exclusive tire supplier for a number of sanctioning bodies. [3]

[*84] In the end, STA never suffered the kind of injury that gives rise to an antitrust claim. On the contrary, it has had the clear **[**69]** opportunity to compete and did compete, sometimes successfully, for the exclusive tire contracts. See, e.g., *NicSand, Inc. v. 3M Co., 507 F.3d 442, 456 (6th Cir. 2007)* (en banc) (***HN13***[] "When one exclusive dealer is replaced by another exclusive dealer, the victim of the competition does not state an antitrust injury." (citation omitted)); *U.S. v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945)* (Hand, J.) ("The successful competitor, having been urged to compete, must not be turned upon when he wins."). Accordingly, the District Court was correct to grant summary judgment in favor of Hoosier and DMS because of this failure to meet the antitrust injury requirement. [4]

C.The Denial of the Motion for Leave to Amend

Finally, this Court must consider whether the District Court properly denied STA's request for leave to amend its complaint in order to add an express refusal to deal or group boycott claim to the five substantive causes of action it

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[3] We specifically note that: (1) from the 1980s to approximately 2005, IMCA required its cars to use the G-60 American Racer tire manufactured by STA; (2) in 2006-2007, STA responded, **[**68]** without success, to an RFP for an exclusive tire contract sent out by WISSOTA; (3) although there was no formal RFP, STA submitted a proposal to ASCS in 2007, in which it offered a financial contribution in exchange for exclusivity; (4) STA submitted a bid in response to USAC's RFP, although its bid, among other things, did not propose exclusivity; (5) an STA distributor won the bid to be UMP's exclusive tire supplier for certain races in 1994 but was then outbid by Hoosier in 1995; (6) after the filing of this lawsuit, STA responded with seemingly non-exclusive and ultimately unsuccessful bids to 2007 and 2008 RFPs from DMS; and (7) Lias Tire, an STA distributor, won an exclusive agreement with URC and further agreed to pay this sanctioning body $ 14,500.00 to be the single tire at approximately thirty (30) events.

Furthermore, Hoosier and DMS should not be held legally accountable for STA's recent pattern of submitting "non-exclusive" bids to the respective sanctioning bodies, even after the sanctioning bodies expressed a desire for an exclusive relationship.

[4] All six of STA's claims, including STA's illegal tying claim, were properly dismissed on this ground.

had already alleged. We find that the District Court did not abuse its discretion by rejecting a last-minute attempt to amend a pleading for the *fourth* **[**70]** time.

Given the fact that this motion was filed sometime after the expiration of the May 30, 2008 deadline stated in the District Court's own scheduling order, the District Court purportedly applied the "good cause" standard of ***HN14***[] *Federal Rule of Civil Procedure 16(b)(4)* (providing that "[a] schedule [set forth in a scheduling order] may be modified only for good cause and with the judge's consent"), as opposed to the more liberal approach to amendments established in ***HN15***[] *Federal Rule of Civil Procedure 15(a)(2)* (providing that "[t]he court should freely give leave when justice so requires"). It further stated that, unlike *Rule 15(a)(2)* and its focus on the question of prejudice to the non-moving party, *Rule 16(b)(4)* focuses on the moving party's burden to show due diligence. While the District Court indicated that we have yet to address this tension between *Rule 15(a)(2)* and *Rule 16(b)(4)*, STA acknowledges on appeal that it had the burden to demonstrate good cause and due diligence (and the District Court itself ultimately found that the proposed amendment would in fact prejudice the other parties).

The District Court properly denied leave to amend. According to STA, it could not have discovered **[**71]** the key facts supporting this new claim until it reviewed "hundreds of thousands of late-produced documents," which were not provided until after the deadline to amend had already passed. (Appellants' Brief at 57.) In turn, STA specifically takes issue with: (1) the District Court's statement that "'it is not easy **[*85]** for the Court to discern when Plaintiffs were, or should have been, aware of the basis for the group boycott claim;'" (2) the District Court's reliance on STA's failure to amend the scheduling order to seek more time for discovery (arguing that such a failure actually highlighted STA's own diligence); and (3) the District Court's finding of prejudice (on the grounds that STA never requested any additional discovery in its motion to amend). (Id. (citation omitted).) On the other hand, as a practical matter, it bears repeating that this was the fourth time that STA desired to amend its complaint in this already very complicated and highly contentious litigation, in which STA had already alleged multiple theories of relief. Furthermore, STA evidently informed the District Court that, "during an October 29, 2008 deposition of Hoosier's sales manager, Paul Mentink, Plaintiffs **[**72]** learned that the 'Hoosier-only' rules known as the 'national sprint tire' rule . . . . originated from a July 2006 Sprint Summit meeting in Pittsburgh arranged by [DMS]." (A7 (citation omitted).) The District Court then, quite reasonably, noted that: (1) the original complaint actually included an attached copy of the December 15, 2006 statement by Hoosier announcing the creation of a new sprint car tire at the request of several sanctioning bodies and tracks; and (2) the previous complaints expressly alleged that Hoosier agreed with multiple sanctioning bodies to develop a new sprint tire that the sanctioning bodies would use in their races. The District Court also understandably wanted this complicated case to move forward to its ultimate resolution. In any case, any attempt to add a new claim would be moot given our ruling on the merits of STA's existing claims. Therefore, we are unable to find that the District Court abused its discretion here.

IV.

For the foregoing reasons we will affirm the District Court's rulings in favor of Hoosier and DMS.

End of Document

Bodet v. Charter Communs. Inc.

United States District Court for the Eastern District of Louisiana

July 26, 2010, Decided; July 26, 2010, Filed

CIVIL ACTION NO. 09-3068 SECTION "F"

Reporter
2010 U.S. Dist. LEXIS 87088 *

GERALD PAUL BODET, JR. VERSUS CHARTER COMMUNICATIONS INC. ET AL.

Core Terms

cable, premium, box, set-top, customers, satellite, market power, renting, geographic, providers, channels, submits, cable service, insists, tied product, allegations, coercion, wireline, two-way, market share, programming, consumers, barriers, features, coerce, rental, motion to dismiss, tying product, pay-per-view, interactive

Counsel: **[*1]** For Gerald Paul Bodet, Jr., individually and on behalf of all others similarly situated, Plaintiff: Jeffrey P. Berniard, LEAD ATTORNEY, Berniard Law Firm, LLC, New Orleans, LA; Gregory Pius DiLeo, Gregory P. DiLeo, Attorney at Law, New Orleans, LA; Jennifer B. Eagan, Law Offices of Greg Di Leo, New Orleans, LA; Madro Bandaries, Madro Bandaries, PLC, New Orleans, LA.

For Charter Communications Inc., Charter Communications Holding Company, LLC, Charter Communications, LLC, Defendants: David George Radlauer, LEAD ATTORNEY, Tarak Anada, Jones Walker (New Orleans), New Orleans, LA; Daniel T. Donovan, Jeffrey S. Powell, PRO HAC VICE, Kirkland & Ellis, LLP (Chicago), Chicago, IL; John C. O'Quinn, PRO HAC VICE, Kirkland & Ellis, LLP (Washington), Washington, DC.

Judges: MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: MARTIN L. C. FELDMAN

Opinion

ORDER AND REASONS

Before the Court is the defendants' motion to dismiss. For the following reasons, the motion is DENIED.

Background

Gerald Paul Bodet, Jr. subscribes to premium cable television service through Charter Communications, Inc., and Charter Communications Holding Company LLC. [1] In this lawsuit, he submits that Charter forced him (and others similarly situated) **[*2]** to rent a cable set-top box as a condition of receiving premium cable service. This bundling of the set-top box rental and premium cable service, the plaintiff contends, creates a tying relationship in violation of the Sherman Act.

[1] The defendants are referred to jointly as Charter.

Charter is one of the five largest providers of cable multi-channel video programming distribution, providing service to customers in twenty-seven states. According to the FCC's 2009 Report, cable MPVD enjoys a nationawide market share of almost 70%. Like other cable MVPD providers, for a monthly fee, Charter offers two cable products: basic cable and premium cable. Basic cable consists of a relatively small number of networks or channels, including local channels. Premium cable includes a variety of additional programming and features, including an interactive programming guide, pay-per-view, on-demand, high definition channels, and a range of premium and speciality channels. Over three million people subscribe to premium cable through Charter. The tying product alleged here is premium cable.

The tied product is the set-top box, which performs two functions. It descrambles the cable signal so that a subscriber **[*3]** can access only those channels he has paid for. It also provides a two-way communication capability necessary for features like the interactive programming guide, pay-per-view, and on-demand. Charter does not manufacture set-top boxes, but instead purchases them from companies like Scientific Atlantic and Motorola before renting them to Charter customers. A set-top box can be purchased at a retail cost of about $110 and has a useful life of three to five years. The plaintiff insists that a customer who rents a set-top box soon pays more in rental fees than the worth of the box. Pursuant FCC regulations, Charter also provides customers with the option of renting a CableCARD that can be plugged into certain cable-ready televisions or non-Charter rented set-top boxes. The CableCARD performs the descrambling security function of the set-top box, but does not provide a customer with access to the two-way communication functions. The total number of Charter customers using a CableCARD is 30,165.

Bodet filed the present lawsuit on March 16, 2009, individually and on behalf of those similarly situated. He submits that in order to receive all of the premium cable functions, customers are forced **[*4]** by Charter, because of its market power, to rent set-top boxes from it. In May 2009, the case was dismissed pending a bankruptcy proceeding in which Charter was a debtor. The case was reopened on December 2009, and amended complaints were filed. Charter now moves to dismiss the plaintiff's third amended complaint.

Charter argues that the plaintiff has failed to state a claim for a Sherman Act tying violation. First, Charter submits that the plaintiff has failed to allege a plausible market. Charter points out that the plaintiff has excluded satellite MVPD and wireline MVPD from the premium cable product market although, Charter insists, these are reasonably interchangeable substitutes for Charter's premium cable service. Charter adds that the plaintiff fails to properly allege a product market because the plaintiff has made no allegations about the commercial realities of the industry within the relevant communities. Next, Charter submits that the plaintiff has failed to adequately allege Charter's market power in the tying market of premium cable. Charter insists that simply alleging that Charter has raised the price of its cable service or alleging that cable MVPD (including companies **[*5]** other than Charter) has a 69% nationwide market share is not enough to establish Charter's economic power. Finally, Charter submits that the plaintiff's complaint must fail because he has not properly alleged that Charter actually coerced its subscribers to rent set-top boxes in order to receive premium cable services. Charter points out that it provides a CableCARD, which allows customers to access premium and specialty channels without renting a set-top box and insists that, therefore, customers could not have been coerced into renting a set-top box.

The plaintiff responds first that satellite MVPD are not part of the relevant market because customers do not consider satellite MVPD interchangeable with cable MVPD. He points out that consumer surveys show that satellite customers are more satisfied with their service than cable users. He adds that satellite and cable cannot be interchangeable because they function optimally in different settings: Cable MVPD tends to operate best in more densely populated areas where its wires can reach a large number of people and justify the cost of the network, while satellite MVPD tends to operate best in rural areas, where there is more space to **[*6]** place dishes, fewer regulations prohibiting dishes, and more clear sight-lines for the dishes to access the satellite signal. Further, the plaintiff claims that cable MVPD offers premium services not offered by satellite, and satellite providers do not always carry local channels. Plaintiff adds that because cable MVPD and satellite require different equipment, a customer seeking to change its type of service will incur switching costs.

As to the inclusion of wireline providers, plaintiff insists that this type of service, including cable providers and fiberoptic telephone lines, do not dent Charter's market power for premium cable. Plaintiff submits that relatively few consumers have a wireline alternative. Plaintiff adds that even if wireline and satellite service were included in the relevant market, Charter would still have sufficient market power to illegally tie set-top box rental to its premium cable service.

Plaintiff submits that a tying claim is viable when a defendant possesses market power across approximately thirty percent of the market, see *In re Wireless Tel. Sys. Antitrust Litig., 385 F. Supp. 2d 403, 418 (S.D.N.Y. 2005))*, and insists that according to Charter's own **[*7]** press release, it has a penetration of services to forty percent of its potential customers. The plaintiff adds that Charter is one of the largest cable MVPD providers in the country and has repeatedly raised its prices for premium cable.

Plaintiff argues that Charter's market power is also demonstrated by the barriers to entry to the Premium Cable market. He points to the huge cost of building a wireline MVPD system and notes that cable MVPD providers have invested over $100 billion to construct advanced two-way fiberoptic networks. He adds that a tedious and costly franchising process in many localities creates a barrier to entry. For example, plaintiff claims that local franchising authorities often impose "build-out" requirements mandating that a new entrant overbuild all of the geographic area served by the incumbent cable MVPD provider and "level playing field" regulations requiring a new entrant to match all of the concessions provided by the incumbent. The plaintiff states that another entry barrier is created by incumbent cable MVPD providers offering valuable programming to which challengers do not have access. Additionally, the plaintiff points out that multiple dwelling **[*8]** units often have long term contracts with MVPDs with automatic renewal privileges that exclude challengers. These entry barriers, the plaintiff insists, prevent both satellite MVPD and other cable providers from competing with Charter.

Next, the plaintiff submits that he has properly defined the relevant geographic market as the areas in which Charter operates. This definition, plaintiff says, corresponds to the commercial realities because it defines the geographic market the same way the commercial realities have caused Charter to operate. Alternatively, the plaintiff submits that the geographic market is properly alleged as each of the local areas in which Charter operates: that is, certain communities in the twenty-seven states in which Charter operates.

Finally, the plaintiff insists that he has properly alleged coercion. He submits that the existence of the CableCARD does not prevent a finding of Charter's coercion. The plaintiff points out that Charter's website states that the CableCARD does not provide identical services to a set-top box. He adds that Charter's company representatives advise customers that they can only receive all premium cable services by renting a set-top **[*9]** box from Charter and that if the customers obtain a set-top box from any other source it will not work with Charter's cable MVPD system. Thus, the plaintiff insists, Charter explicitly conditions the sale of its premium cable on the rental of set-top boxes.

The plaintiff submits that CableCARDS are not substitutes for set-top boxes. CableCARDS do not provide access to the interactive programming guide, on-demand, or pay-per-view.

Law and Analysis

I.

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint for failure to state a claim upon which relief can be granted. Such a motion is rarely granted because it is viewed with disfavor. See *Lowrey v. Tex. A & M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997)* (quoting *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982))*. In considering a *Rule 12(b)(6)* motion, the Court "accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" See *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit, 369 F.3d 464 (5th Cir. 2004)* (quoting *Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999))*. But, in deciding whether **[*10]** dismissal is warranted, the Court will not accept conclusory allegations in the complaint as true. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)*. Indeed, the Court must first identify pleadings that are conclusory and, thus, not entitled to the assumption of truth. *Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. A corollary: legal conclusions "must be supported by factual allegations." *Id. at 1950*. Assuming the veracity of the well-pleaded factual allegations, the Court must then determine "whether they plausibly give rise to an entitlement to relief." Id.

"'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" Gonzalez v. Kay, 577 F.3d 600, 603 (5th Cir. 2009)(quoting Iqbal, 129 S.Ct. at 1949 (2009))(internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quotation marks, citations, and footnote **[*11]** omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."). This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id. (citing Twombly, 550 U.S. at 557) (internal quotations omitted).

In deciding a motion to dismiss, the Court may consider documents that are essentially "part of the pleadings" — that is, any documents attached to or incorporated in the plaintiffs' complaint that are central to the plaintiff's claim for relief. Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285, 288 (5th Cir. 2004) (citing Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000)). Also, the Court is permitted to **[*12]** consider matters of public records and other matters subject to judicial notice without converting a motion to dismiss into one for summary judgment. See United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375, 379 (5th Cir. 2003).

II.

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." Schlotzsky's, Ltd. v. Sterling Purchasing & Nat'l Distrib., 520 F.3d 393, 405 (5th Cir. 2008) (quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)). Not all tying arrangements constitute antitrust violations. See Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 36, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006). To state a claim for an illegal tying arrangement, the plaintiff must allege: "(1) two separate products, the tying product and the tied product; (2) sufficient market power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetetive effects in the tied market." Bob Maxfield, Inc. v. Am. Motors Corp., 637 F.2d 1033, 1037 (5th Cir. 1981).

The Court's analysis **[*13]** of a tying arrangement "must focus on the market or markets in which the two products are sold." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (abrogated on other grounds). The relevant market includes the characterization of the product itself and the geographic market in which the product is sold. R.D. Imports Ryno Indus., Inc. v. Mazda Distribs. (Gulf) Inc., 807 F.2d 1222, 1224-25 (5th Cir. 1987). "In ascertaining the relevant product market, courts consider the extent to which the seller's product is 'interchangeable in use' and the degree of 'cross-elasticity of demand between the product itself and substitutes for it.'" Apani Sw., Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 626 (5th Cir. 2002) (quoting C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1245 (5th Cir. 1985)). "The cross-elasticity of demand for substitutes measures consumers' propensity to switch from one product to another, similar product when relative prices change." United Farmers Agents Assoc. v. Farmers Ins. Exchange, 89 F.3d 233, 236 n.2 (5th Cir. 1996). The geographic market is the area of effective competition, and it "must correspond to the commercial realities of the industry **[*14]** and be economically significant." Apani Sw., 300 F.3d at 626. Thus, in determining the geographic market, courts consider the size and cumbersomeness of the product, constraints on the free flow of competing goods into the area, and whether the area contains an appreciable segment of the product market. Id. at 626-27.

Market power, an essential element of the plaintiff's illegal tying claim, is "the power to force the purchaser to do something that he would not do in a competitive market." Eastman Kodak, 504 U.S. at 464 (quoting Jefferson Parish, 466 U.S. at 14). It is "the ability to control prices or exclude competition." Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1386 (5th Cir. 1994). Market power can be inferred from "the seller's possession of a predominant share of the market." Id. Market power can also be demonstrated with evidence that a defendant has raised prices and driven out competition. See Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc., 21 F.3d 83, 87 n.3 (5th Cir. 1994) (quoting Eastman Kodak, 504 U.S. at 477); see also Wilson v. Mobil Oil Corp., 984 F. Supp. 450, 458 (E.D. La. 1996). Courts may consider factors like "the strength of competition, **[*15]** probable development of the industry, the barriers to entry, the nature of the anticompetetive conduct, and the elasticity of consumer demand." Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998, 1026 (S.D. Tex. 1997) (quoting Pastore v. Bell Tel. Co. of Penn., 24 F.3d 508, 513 (3d. Cir. 1994)); see Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1998). While the Supreme Court has explicitly found a thirty percent market share to be insufficient to show market power for a tying claim, Jefferson Parish, 466 U.S. at 26, there is some suggestion that thirty percent may serve as a required minimum. Breaux Bros., 21 F.3d at 87 ("Some circuit courts have used 30% as a rough benchmark for the minimum amount of market power necessary to give rise to a per se violation of ***antitrust law***."); see In re Wireless Tel. Servs. Antitrust Lit., 385 F. Supp. 2d 403, 417 (S.D.N.Y. 2005).

Actual coercion is an indispensable element of a claim of illegal tying. Bob Maxfield, 637 F.2d at 1037. While "strong persuasion, encouragement, or cajolery to the point of obnoxiousness" is permitted, an antitrust violation occurs when the seller "coerces or forces its customer to buy the **[*16]** tied product in order to obtain the tying product." Id.

III.

The defendants do not dispute that the plaintiffs have sufficiently pled that premium cable and set-top boxes are two separate products, the tying product and the tied product respectively. Premium cable is a service, and the set-top box is the hardware used to access that service. Charter does not manufacturer set-top boxes, and according to the plaintiff, set-top boxes are available for retail sale.

The main issue here is whether the plaintiff has adequately plead the second element, that Charter has sufficient market power in the tying market to coerce purchase of the tied product. See Bob Maxfield, 637 F.2d at 1037. The plaintiff must also allege actual coercion. Id.

The plaintiff has defined the product market for the tied product as "premium cable," which includes both premium channels and two-way communication features like the interactive guide, pay-per-view, and On-Demand. The plaintiff insists that satellite MPVD and other fiberoptic and wireline MPVD should not be included as part of the product market because they are not substitutes. But, as an alternative, the plaintiff argues that even if satellite and fiberoptic **[*17]** MPVD are considered part of the product market, he has shown that Charter has market power. The Court finds that the product market must include satellite and fiberoptic MPVD that provide the same premium cable channels and two-way communication services as Charter. Despite the hardware costs a customer must incur when switching from cable MPVD to satellite MPVD, it would be a stretch of the imagination to suggest that, to the extent both MPVDs provide the same premium cable services, they do not provide the customer with reasonable alternatives for video-programming.

The geographic market is vaguely defined as either one market encompassing all the areas in which Charter operates or each local area in which Charter operates. While the defendant challenges the plaintiff's geographic market definition, the Court notes that this is not a case where the plaintiff has tried to define the geographic market so narrowly so as to ignore the commercial realties of effective competition. See Apani Sw., 300 F.3d at 626 (finding the plaintiffs' definition of geographic market inadequate where the plaintiff included only city-owned facilities and not other facilities in the city where the product, **[*18]** bottled water, was sold). The geographic market, as defined by the plaintiff here, includes all areas where Charter operates.

Thus, using these definitions, the plaintiff must show that Charter has sufficient market power in every area in which it operates to coerce customers for premium cable into renting set-top boxes as a condition of receiving the full premium cable product. The plaintiff's complaint alleges that out of all MPVD available to consumers nation wide, cable MPVD penetrates 69% of the market (compared to about 27% market share for satellite MPVD). While this statistic applies generally to all cable MPVD providers, [2] the plaintiff points out that Charter is one of the five largest cable companies nationally. Recognizing that being one of the largest does not necessarily reflect a dominant market share, [3] the plaintiff clarifies that "relatively few consumers have a second wireline alternative." [4] The plaintiff adds that due to the difference in premium operating environment between cable (urban) and satellite (rural), the market penetration by Charter in the more urban areas in which it provides service is likely even higher. Notably, the plaintiff does not explicitly **[*19]** allege Charter's market share in the markets in which it operates. To buttress its allegation of market power, the plaintiff adds that average cable MPVD prices (again, generally) have increased over 90% during the last ten years. He points out that Charter is able to bundle its MPVD services with broadband internet access and phone service, added features that satellite MPVD cannot offer. Further, the plaintiff notes that a potential cable MPVD competitor faces significant barriers to entry including infrastructure costs and burdensome franchise regulations. Although the plaintiff may have some hurdles to cross in proving that Charter has market power, the allegations in the complaint are sufficient to make such a finding plausible.

The plaintiff must also allege actual coercion. While he defines premium cable as including both premium channels as well as two-way communication features like the interactive guide, pay-per-view, and on-Demand, the plaintiff's allegations of actual coercion, concern the two-way communication features specifically. That is, the plaintiffs allege, and the defendants do not disagree, that in order to receive the complete premium cable **[*21]** product, a customer must rent a set-top box from Charter. Without the set-top box, the customer can, at best, receive only part of the premium cable product. The defendants suggest that coercion only occurs when the entire product is unavailable without purchase or rental of the tied product. See *In re Time Warner Inc. Set-Top Cable Television Box Antitrust Litig., No. 08-MDL-1995(PKC), 2010 U.S. Dist. LEXIS 22369, 2010 WL 882989, at *8 (S.D.N.Y. 2010)* ("As a matter of law, plaintiffs have failed to allege actual coercion with respect to those Premium cable Services that are available through the use of a CableCARD because they have not alleged that Time Warner's sale of all Premium Services was conditioned on the lease of a cable box."). [5] The Court is unwilling to subscribe to such a broad rule. In this case, the plaintiffs allege that without the set-top box, a customer cannot "access valuable Premium cable services that they have purchased." Plaintiffs also allege that a customer choosing to receive only premium cable channels by use of a CableCARD is also required to pay a monthly rental fee for the CableCARD and an installation fee. It is at least not irrational that coercion possibly occurs where a seller **[*22]** ensures that a valuable part of a tying product can only be accessed if the customer also rents the tied product from the seller.

Accordingly, the motion to dismiss is DENIED.

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[2] If the FCC report, which is relied on in the plaintiff's complaint for the above allegations, is considered, Charter has a 6.2% share of the MPVD market nationwide. But, this statistic does little to clarify Charter's market share in the geographic markets in which it operates.

[3] Simply being one of the largest companies in a market "says nothing of a firm's ability to affect competition." *Dickson v. Microsoft Corp., 309 F.3d 193, 210 n.20 (4th Cir. 2002)*; **[*20]** see *Roy B. Taylor Sales, Inc. v. Hollymatic Corp., 28 F.3d 1379, 1387 (5th Cir. 1994)* (finding that without more, descriptions that the defendant had the "lead product" and was the "market leader" were insufficient to show substantial market power). If the five largest companies each have eight percent of the market share, and the remaining competitors six percent each, it cannot be concluded that any one of the five largest companies has a predominant market share. See *Dickson, 309 F.3d at 210 n.20*.

[4] The FCC Report heavily relied on by the plaintiff in his complaint seems to confirm that "[A]lmost all consumers are able to obtain programming through over-the-air broadcast television, a cable service, and at least two [direct broadcast satellite] providers."

[5] In In re Time Warner, the Southern District of New York dismissed the plaintiff's complaint but granted leave to amend noting that two-way communication services might form a separate product that could be classified as the tying product. *2010 U.S. Dist. LEXIS 22369, 2010 WL 882989, at *8*. In finding that the plaintiffs had not shown coercion, the court distinguished another case where a district court, on similar facts, had found that actual coercion had been alleged because the plaintiffs in that case had alleged that they were charged higher fees for CableCARDs than for set-top boxes and the defendant had informed customers that CableCARDS were only available through the defendant for a monthly fee. Id.

New Orleans, Louisiana, July 26, 2010.

/s/ Martin L. C. Feldman

MARTIN L. C. FELDMAN

UNITED STATES DISTRICT JUDGE